

BOSTON UNIVERSITY SCHOOL OF LAW

WORKING PAPER SERIES, PUBLIC LAW & LEGAL THEORY
WORKING PAPER NO. 01-21



THE COMMON LAW AND CYBERSPACE

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Abstract

The subject is about the common law under stress of change. The common law has continuously confronted stressful change. Internet conflicts raise the same value issues with which we are familiar. . . . The Internet environment poses unusual pressures on the common law system. It is a system that transcends boundaries and time as we never had before. By reducing significantly the cost of receiving and disseminating information the Internet has shifted benefits, costs, and disadvantages. The Internet touches almost all areas of life. To those who suggest that the common law has lost its vitality, Internet jurisprudence offers a powerful rebuttal. United States courts have demonstrated the viability and strength of the common law. Internet issues have also highlighted the common law's limitations, shown in part by the legislative initiatives in this area.

The questions are: First, are we witnessing the emergence of the "Law of the Internet" or "Cyberlaw?" I believe that we are not. But there are few exceptions, such as issues concerning domain names.. Second, how do the courts address Internet issues? I suggest that usually there is nothing new in their approach. They resort to precedents, and use somewhat different choices of analogies. Courts may err in how they view the Internet. While the technical aspects of the system – the code and protocols – are identical in all respects, the impact of the Internet on various aspects of our lives may differ greatly. A code-based rule may bring unacceptable consequences that must later be corrected. The paper contains a number of stories to illustrate these propositions.

Third, are there cases demonstrating the common law's limitation? I believe there are. These limitations appear, for example, in cases concerning domain names and trademarks. Fourth, under what conditions will Congress overrule the courts' decisions? Congress initiates legislation for a number of reasons. Among these reasons are the courts' decisions that have strayed away from the policies that power constituencies have agreed upon. Nonetheless, judicial decisions play a role in the legislation. They help narrow the issues that Congress will address and sometimes help to set the congressional agendas.

The sum and substance of this paper is in praise of common law and its interaction with legislation as an overall system of "muddling through." Law is evolving piecemeal, addressing particular conflicts, not always uniformly nor predictably. Specificity with respect to select issues. Generality to show overall direction and guide interpretations. This kind of lawmaking is for the risk-averse -- of which I am one. Piecemeal solutions reduce the risk of mistakes and the cost of correcting mistakes when they occur—as they are bound to occur. The price: higher learning costs and fewer clear, bright-line and predictable laws.

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D R A F T

THE COMMON LAW AND CYBERSPACE

Tamar Frankel*

“[W]e realize that attempting to apply established trademark law in the fast-developing world of the internet is somewhat like trying to board a moving bus.” Judge Van Graafeiland in *Bensusan Restaurant Corp. v. King*, 126 F.3d 25, 27 (2d Cir. 1997).

INTRODUCTION

My subject, the common law and cyberspace, may raise eyebrows. How are the two connected? I say that they are well connected. The subject is about the common law under stress of change.

A system reveals its true strengths and weaknesses under stress. The common law has continuously confronted stressful change. Courts have for centuries mediated among new and novel conflicting interests and values. This is their job.

Internet conflicts raise the same value issues with which we are familiar. The criteria for good and evil have remained virtually unchanged, perhaps with the exception of the value of the Internet itself. There are hardly any new kinds of conflicts that could not have arisen but for the Internet.¹ It seems, however, that

* Professor of Law, Boston University School of Law. I am indebted to Dean Ronald Cass, and Professors Ward Farnsworth, Gary Lawson, and Michael Meurer, for the very helpful comments on this article. Many thanks to Basil Yanakakis, Esq. for the financial support in the preparation of this article. Many thanks to Katherine Heid and Bill Hecker for their valuable research.

¹ Because domain names have acquired a very special position on the Internet, a somewhat new type of conflict has surfaced between the owners of domain names and trademark owners. Maintaining Internet infrastructure requires unique names. No two persons or institutions can have the same name. In addition, name recognition has become far more important in Internet domain names colliding head-on with the rights of trademark holders. Technology enables competitors to divert customers to their own web sites by tagging on the names of others, raising the same issues with far more serious results. Ease of copying copyrighted materials has changed the balance

the Internet environment poses unusual pressures on the common law system and a special challenge to the courts. Its new technology has offered a global outreach never experienced before. By reducing significantly the cost of receiving and disseminating information the Internet has shifted benefits, costs, and disadvantages.

Through the Internet we can conclude transactions more efficiently, and that is good, but our personal information is more easily accessible, forged and stolen. Knowledge and enriching materials are at anyone's fingertips, but so are hate speech and fraudulent securities offerings. The reach of web sites is global, and this is good, but that can subject everyone who disseminates information on the web to the blanket jurisdiction of courts everywhere, undermining the current limits on personal and subject matter jurisdiction. Further, cyberspace is touching almost all areas of life. It is increasingly difficult to escape it. As it becomes more inhabited, those outside the space will lead the existence of exiles.

To those who suggest that the common law has lost its vitality, Internet jurisprudence offers a powerful rebuttal. United States courts have demonstrated the viability and strength of the common law. Internet issues have also highlighted the common law's limitations, shown in part by the legislative initiatives in this area. But the story does not end with legislation. The need for interpretation paves the way back to the courts, and on occasion ricochets back to the legislature. Internet cases demonstrate vividly not only how the common law works, but also how the courts and the legislatures interact.

My talk will focus on the following questions:

First, are we witnessing the emergence of the "Law of the Internet" or "Cyberlaw?" I believe that we are not. But there are few exceptions.

Second, how do the courts address issues that involve the Internet? I suggest that usually there is nothing new in their approach. They resort to precedents as they traditionally have, and use somewhat different choices of analogies, as they traditionally have. Courts may err in how they view the Internet. While the technical aspects of the system – the code and protocols – are identical in all respects, the impact of the Internet on various aspects of our lives may differ greatly. A code-based rule may bring unacceptable consequences that must later be corrected. I will tell a number of stories as examples of these propositions.

Third, are there cases demonstrating the common law's limitation? I believe there are. These limitations will be demonstrated by cases concerning domain names and trademarks.

between private and public spheres of intellectual property. It exposes copyright holders to far more losses than before. However, self-protecting contracts by copyright owners pits contract freedom and copyright entitlements against the public sphere of intellectual property and United States constitutional rights.

Fourth, under what conditions will Congress overrule the courts' decisions? Congress initiates legislation for a number of reasons. Among these reasons are the courts' decisions that have strayed away from the policies that power constituencies have agreed upon. Nonetheless, judicial decisions play a role in the legislation. They help narrow the issues that Congress will address and sometimes help to set the congressional agendas.

The last two questions are age-old normative questions about the design of the law. Should the law be specific or general? And who should make the law?

The sum and substance of my talk is in praise of common law and its interaction with legislation as an overall system of "muddling through." No grandiose plans laced with minute details are laid out. No overall principles with specific guidelines are enunciated, and no general policies of law are declared except to point the directions. Instead, the law is evolving piecemeal, addressing particular conflicts, not always uniformly nor predictably. Specificity with respect to select issues. Generality to show overall direction and guide interpretations. Both the courts and the legislature make the law, each guided by its own institutional structure and domain. The movement of lawmaking among them is interesting because the courts, tending to the specific affect the generality of the legislature. The legislature, tending to the general, affect the specificity of the courts. I believe that each mutes the other's movement to the extreme.

This kind of lawmaking is for the risk-averse -- of which I am one. Piecemeal solutions reduce the risk of mistakes and the cost of correcting mistakes when they occur—as they are bound to occur. To be sure, this method raises learning costs for the practitioners and consequently the cost for clients. But it reduces for clients the risk of a law that may seriously impede their operations long-term. I believe that, overall, the common law muddling through costs less and is safer.

To be sure, it would be nice to have clear, bright-line and predictable laws. I, and many others, doubt whether that is possible. The second-best would be small retractable steps rather than a fully detailed map—the plan with capital P—that is more rigid. If all steps must fit, they lose the necessary flexibility to adjust to a fast-changing environment, and law becomes a stranglehold if enforced, and a dead letter, if not enforced.

A. ARE WE WITNESSING THE EMERGENCE OF THE "LAW OF THE INTERNET?"

A University of Chicago Law School dean branded the classification of Internet law as the "law of the horse." Such a classification, he said, would produce a shallow understanding of law.² It would cover the subject matter of a horse under the laws of contract, tort, crime, racing, efforts to collect prize

² Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 207.

money,³ as well as cruelty to animals, food regulation, manufacturing of brushes and toupees (made of horsehair). Instead, he suggested, we should look at our main historical categories and adjust them to the horse situation. Another commentator made a similar argument.⁴ Nonetheless, the commentator wrote, cyberspace does have a special place, citing William Blake:

“To see a World in a Grain of Sand
And a Heaven in a Wild Flower,
Hold Infinity in the palm of your hand
And Eternity in an hour.”⁵

Whether Internet law will remain the grain of sand or grow to become a world of its own depends on our capacities for finding the materials and the way we remember and relate different contexts.⁶ Treatises on the legal problems concerning Telegraph and Trains have sprung up and disappeared as the general laws of torts and contracts and rate regulation have been adjusted to take into account these special situations. Statutes and their judicial gloss augmented common law solutions.

In contrast, securities regulation, the regulation of investment management, and antitrust law have become permanent categories of special situations—the laws of certain horses.⁷ While they touch on fundamental areas, and are composed of the common law and legislation, the materials are organized and compiled under their specific names. To avoid repetition those areas of the special laws leave out the “general categories” that can be regulated within those categories, such as usual tort, contract, and corporate law, and keeping those rules which adjust contract, tort, and corporate law to the particular context. For example, contract common law applies to the agreements between advisers and mutual funds. But in addition and superimposed on the law is section 15 of the

³ *Id.* at 207-08.

⁴ Joseph A. Sommer, *Against Cyberlaw*, 15 BERKELEY TECH. L.J. 1145, 1147 (2000) (“Very few bodies of law are defined by their characteristic technologies. Tort law is not ‘the law of the automobile.’”).

⁵ *Id.* at 1231.

⁶ The future may also depend on the extent to which the context, approach, institutional structures and common principles will underlie decisions concerning cyberspace and legislation relating to it. I owe these points to Professor Nicola Lugaresi, University of Bologna, Bologna, Italy, who expressed them to an Internet discussion group “Cyberprof” on March 2, 2001 (the common denominator of internet issues may also include common “presuppositions” e.g., “distance, interaction, architecture, geographic locus (Weinberg); control (Chichester); anonymity; information tracking; changes in politics and institutions; and lowered costs (Swire); or, at a different level, socially [sic] constructions of space,; property and identity; “unbundling”; libertarianism [sic], friendly or challenging (Boyle); regulation of information (Ku”).

⁷ One reason for the classification may have been the comprehensive statutory regulation. Another reason may be that the context is sufficiently unique to give rise to unique and cohesive jurisprudence and enforcement institutions. Putting them under the umbrella of “contract” would not have helped. Impersonal agreements among the parties through intermediaries reduced the parties face to face bargaining protections. Internal rules of syndicates and exchanges failed to maintain efficient operations and public trust.

Investment Company Act of 1940, which imposes rules that apply only to such contracts.⁸

Cyberlaw may not be one of these specialized categories because it touches many fundamental categories of law. Perhaps what will develop is a shallow, but important, generalized cyberlaw containing considerations, approaches, and ways of analysis -- a new type of conceptual generalization composed of accepted interpretative and adjusting rules that apply to all areas of the law when they relate to the Internet. My main point here is that by noting Internet law I am not suggesting that it forms a discrete area of law. At least not now. "But this does not mean that cyberspace and law is an unnatural combination, or is unworthy of study. Quite the contrary: Cyberspace is a delightful new playground for old games."⁹

B. HOW DO COURTS ADDRESS ISSUES THAT INVOLVE THE INTERNET?

1. Following the markets and parties' intent

A review of the decisions uncovers few innovations or surprises. Some courts resort to policies more than others, implicitly or explicitly. There are judges who look to the "markets" and the "parties' intent" for guidance. As one commentator argued, the problems regarding the Internet do not stem from the new environment but from lack of clarity of the general principles in the traditional particular area. Since no one knows how to prescribe better general laws, he suggests that courts "make rules clear; create property rights where now there are none; and facilitate the formation of bargaining institutions. Then let the world of cyberspace evolve as it will, and enjoy the benefits."¹⁰

I am skeptical. This wonderfully simple guide is not easy to follow even if the contracts are explicit. It becomes speculative when the contracts are implied. While the courts should pay attention to agreements among private parties the agreements are less clear than the laws, some of them are not even rendered in writing, the language of signs often supplements such agreements, but the signs disappear or are misinterpreted. I will agree that the law is unclear. I doubt whether contracts are the general guides for the law.

Besides, not all contract-based rules should be followed; some contracts may conflict with legislative agendas and overall social good. Most importantly, common law courts follow precedents and statutory rules of interpretation, not all of which are contract-based. Even policy-contract-oriented judges seek precedents to support their theories. I therefore view common law precedents or statutes and

⁸ 15 U.S.C. § 80a-15 (1994).

⁹ Sommer, *supra* note 4, at 1231.

¹⁰ Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 216.

their judicial gloss as the source of law addressing issues concerning cyberspace.¹¹

2. Analogies

The courts' choices of precedents depend on what they analogize to. They may analogize to the *facts of the cases*, or to the *applicable legal principles*. These approaches are demonstrated in the case of the freelancers' copyrights.

Freelance authors sell their writings to publishers but retain the copyright to these pieces. Under copyright law, publishers who have purchased copyrighted materials may republish the materials under a "privilege" to "reproduce" and to "distribute" the writings "as part of a larger whole." For example, publishers may reproduce their periodicals, which include the copyrighted freelancer materials.¹² When electronic databases appeared on the scene, courts have held that the publishers' privilege does not apply to electronic republication.

In *Tasini v. New York Times Co.* the defendant publisher reproduced freelancers' pieces in NEXIS -- a very large electronic database -- and in a CD-ROM. The question was whether these computer versions were privileged. The District Court held that they were so privileged.¹³ The Second Circuit reversed,¹⁴ and the Supreme Court affirmed the Circuit Court's decision.¹⁵ The privilege does not cover these new circumstances.

The interesting point, for our purpose, is the courts' use of analogies. The District Court sought an analogy to legal principles. It first determined whether the database constituted an infringement of the freelancers' copyrights, and then whether the database was privileged as a "revision" of the copyrighted materials. Since the distinguishing features of the original periodicals were retained in the database the court considered whether these aspects were preserved electronically and held that the *selected articles were included in the periodicals* were "substantially similar"¹⁶ to the electronic version.¹⁷ Infringement was established. Then, the court turned to the privilege, and held that the electronic reproduction was a "revision" to which the publishers' privilege applied. The question, said the court, was "whether the electronic reproductions retain enough of defendants' periodicals to be recognizable as versions of those periodicals." Noting that the NEXIS database retained the publishers' original selection of articles, the court

¹¹ I agree that these sources are affected by and may incorporate the parties' intentions express or implied.

¹² See Wendy J. Gordon, *Fine-Tuning Tasini: Privileges of Electronic Distribution and Reproduction*, 66 BROOKLYN L. REV. 473, 477-80 (2000).

¹³ *Tasini v. N.Y. Times Co.*, 972 F. Supp. 804 (S.D.N.Y. 1997), *rev'd*, 206 F.3d 161 (2d Cir. 1999), *aff'd*, 121 S. Ct. 2381 (2001).

¹⁴ *Tasini v. N.Y. Times Co.*, 206 F.3d 161 (2d Cir. 1999), *aff'd*, 121 S. Ct. 2381 (2001).

¹⁵ *N.Y. Times Co. v. Tasini*, 121 S. Ct. 2381 (2001).

¹⁶ *Id.* at 822.

¹⁷ 972 F. Supp. at 821-25.

viewed the database as a revision, within the privilege,¹⁸ and again supported its holding by analogizing to *compilation infringement* cases.¹⁹

The Second Circuit chose another analogy route. It focused on “*whether one or more of the pertinent electronic databases may be considered a ‘revision’ of the individual periodical issues from which the articles were taken.*”²⁰ (emphasis added). That is: whether the periodicals were revised rather than the individual pieces. The court compared revision in an electronic form with revision in a paper form. It noted that some of the periodicals’ content and arrangement was lost in NEXIS.²¹ Therefore, the databases “can hardly be deemed a ‘revision’ of every periodical that it contains.”²² There is a difference between periodicals that are not easily decomposed, and an electronic database in which the periodicals become available in decomposed parts. In addition, databases make it far easier for users to download the works. As one commentator noted, the databases constituted a prohibited “distribution” as well.²³

Similarly, contract law in the Internet context does not require innovation. The following, for example, is the case of the contract that the customers did not have a chance to read. Netscape, an Internet Service Provider (ISP), has been offering customers free software making it easier to download materials from Internet web sites. The customers alleged that Netscape invaded the customers’ privacy by using the software to monitor the materials that customers would download, without the customers’ knowledge. Netscape sought to remove the case to arbitration, on the basis of the license agreement covering the software. That agreement contained an arbitration clause.

The question was whether the license agreement was binding on the customers. The first page of the free software offer did not refer to a contract, and the customer could download the software without scrolling down the page. Had the customer scrolled down the page, however, he would have received a message to click on a hypertext link for the license agreement. The link would have led to a web page stating that the customer must read and agree to the license agreement before downloading the software, and containing a hypertext link to the license agreement. The agreement stated that by downloading the software the customer was bound by the license contract.

The court held that the customers were not bound by this contract. Too little information was revealed to which customers could agree before they downloaded the software. The “teasers” were insufficient to constitute consent to the terms of the contract that appeared only after an additional four-stage search.

¹⁸ *Id.* at 824-25.

¹⁹ *Id.* at 825.

²⁰ *Tasini v. N.Y. Times Co.*, 206 F.3d 161, 195 (2d. Cir. 1999), *aff’d*, 121 S. Ct. 2381 (2001).

²¹ *Id.* at 169.

²² *Id.* at 168 (relying also on analysis of statutory framework).

²³ Gordon, *supra* note 12, at 489. In fact, the Court declined to use the “substantial similarity” test of factual compilation cases. 206 F.3d at 169 n.4.

In this case too the court resorted to well-known and accepted contract principles of informed consent, and noted cases in which contracts on the Internet have been recognized when notice of its existence and location of its full terms were reasonably available.²⁴

In all these cases no groundbreaking new rules have developed. The courts resorted to precedents and usually analogized the facts of the precedents with the facts in the Internet context.

A danger in analogies lies when facts in cyberspace are analyzed inappropriately. One commentator analogizes the Internet to the paintings of the French artist Georges Seurat, showing the streets of Paris by thousands of color points. Closely, the points look the same, like the components of a code. At a distance, they form the image of Paris streets, like a particular software composed of the code. When the courts compare the close view of the Internet, the code, they design an overbroad rule that does not take into account the effect of the rule on the more relevant, broader impact.²⁵ For example encryption was held to be speech, protected by the First Amendment.²⁶ Another case could be interpreted to hold that every computer program with certain characteristics is patentable, without exceptions,²⁷ offering a broader protection than the protections afforded inventions in real space. That approach may be explained by the close view the courts take of code as similar to Seurat's points. Whether this criticism is warranted is open to debate. What is important is the need for caution and the requirement that courts view the Internet's impact as well as its functional aspects.

C. THE LIMITS OF THE COMMON LAW. ENTER CONGRESS

1. Congress overrules strict interpretation

The courts in the United States have taken different attitudes towards precedents. Some courts tend to address novel issues and even overrule precedents more readily than others. Others invite Congress to make the changes. In the following cases Congress overruled decisions in which the courts have strictly followed precedents on fairly narrow points.

In *United States v. LaMacchia*,²⁸ a student at Massachusetts Institute of Technology in Cambridge "set up an electronic bulletin board" that allowed people to upload "popular software applications . . . and computer games . . ." He transferred the applications to a second address where people with a password

²⁴ Specht v. Netscape Communications Corp. 150 F. Supp. 2d 585 (S.D.N.Y. 2001).

²⁵ Orin S. Kerr, *Are We Overprotecting Code? Thoughts on First-Generation Internet Law*, 57 WASH. & LEE L. REV. 1287, 1287-88, 1293 (2000) (citing *Junger v. Daley*, 209 F.3d 481 (6th Cir. 2000)).

²⁶ *Id.* at 1290-91.

²⁷ *Id.* at 1294-96.

²⁸ 871 F. Supp. 535 (D. Mass. 1994).

could download the materials. The student was accused of criminal copyright infringement under the wire fraud statute. The Court held that precedent²⁹ “precludes LaMacchia’s prosecution for criminal copyright infringement under the wire fraud statute.”³⁰ The criminal copyright act applied only to persons who obtained private financial gain or a commercial advantage from the violation of the copyright. The accused did not receive such gain or advantage. Therefore, the act did not apply to him.

Congress responded to the *LaMacchia* decision by amending the law in a specific act - the No Electronic Theft (NET) Act.³¹ The congressional committee understood and agreed with the court’s approach.³² “The judiciary’s reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme. Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the institutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.”³³ Congress responded³⁴ by specifically addressing electronic theft. It added the words: “including by electronic means.”³⁵ and required that conduct be “willful” and “for profit.”³⁶

In another copyright case, Congress overruled the Supreme Court’s strict following of precedent. The Copyright Act of 1909 offered copyright protection only to a work that is both original and creative. However, the language of the Act led some courts to overlook the originality requirement.³⁷ “[T]hese courts

²⁹ *Dowling v. United States*, 473 U.S. 207 (1985).

³⁰ 871 F. Supp. at 545.

³¹ No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997) (codified at 17 U.S.C. §§ 101, 506(a), 507(a), 18 U.S.C. §§ 2320 (d), 28 U.S.C. § 1498(b) (Supp. V 1999)). The purpose of the act was “to amend the provisions of titles 17 and 18, United States Code, to provide greater copyright protection by amending criminal copyright infringement provisions, and for other purposes.”

³² See H.R. REP. No. 105-339 at 5 (1997).

³³ 871 F. Supp. at 544 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984)).

³⁴ Congress expanded on the original requirement of copyright to include willful infringement “for purposes of commercial advantage or private financial gain,” offering two alternative ways of criminal responsibility. Congress inserted the words “by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords or 1 or more copyrighted works, which have a total retail value of more than \$1,000.” §2(b), 111 Stat. at 2678.

³⁵ The history of the criminal copyright act of 1897 is instructive. The Act was introduced into legislation by the Copyright Act of 1897, c. 4, 29 Stat. 481.

³⁶ . In 1909 the Copyright Act was revised and made any infringement on copyrighted material a misdemeanor, except for sound recordings. *Id.* at 539. In 1971 Congress passed the Sound Recording Act of 1971 to include sound recordings, which had been omitted from the 1909 Act. In 1976, Congress amended the Copyright Act to relax the mens rea requirements. *Id.* And in 1982 Congress made copyright infringement a felony. Proof of infringement required a showing that the defendant gained “commercial advantage or private financial gain.” *Id.* at 539-40.

³⁷ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 351-52 (1991).

developed a new theory to justify the protection of factual compilations. Known alternatively as ‘sweat of the brow’ or ‘industrious collection,’ the underlying notion was that copyright was a reward for the hard work that went into compiling facts.”³⁸ In *Feist v. Rural Telephone Service Co.*,³⁹ the Supreme Court reversed these decisions and held that copyright protection will be granted only to a work that is both original and commands a degree of creativity. A mere compilation of facts is not *per se* copyrightable; it must meet an “originality” requirement.⁴⁰

Congress was not enthused. In an era of abundant information, the social value of compilation and organization of “facts” is on the rise. Information may be available yet worthless if we cannot easily find it. In fact, the more information is available, the higher the cost of locating it is likely to be. Compilations, databases, and computer finder tools are crucial to the use of information. In addition, it is costly to compile and organize information. The cost rises with the amount and complexity of the information. Without copyright protection, people are unlikely to invest in this enterprise. Said the congressional committee:

“While *Feist* reaffirmed that most-although not all-commercially significant databases satisfy the ‘originality’ requirement for protection under copyright, the Court emphasized that this protection is ‘necessarily thin.’ Several subsequent lower court decisions have underscored that copyright cannot stop a competitor from lifting massive amounts of factual material from a copyrighted database to use as the basis for its own competing product. This casts doubt on the ability of a database proprietor to use contractual provisions to protect itself against unfair competition from ‘free riders’.”⁴¹

The time was ripe for change. In its report, the congressional committee stated: “[I]t is clear that now is the time to enact new Federal copyright-related legislation to protect developers against piracy and unfair competition, and thus encourage continued investment in the production and distribution of valuable commercial collections of information.”⁴²

It is interesting that the Supreme Court missed the mark in *Feist* by changing the statutory interpretation of some courts, reiterating and strengthening the principle of originality. The Court did not analyze the new context of the Internet, in which compilation and organization of materials (facts) became far more important. While *Feist* does not actually say “let Congress decide” the Court makes it clear that the original statute was ambiguous, and should specify which compilations of facts merit copyright protection. Courts do not rewrite the statute-Congress does. But rewriting is such a vague term. In some sense the courts

³⁸ *Id.* at 352; *see id.* at 352-53 (quoting *Jeweler’s Circular Publ’g Co. v. Keystone Publ’g Co.*, 281 F. 83, 88 (2d Cir. 1922)) (“[t]he classic formulation of the doctrine”).

³⁹ 499 U.S. 340.

⁴⁰ *Id.* at 357-58.

⁴¹ H.R. REP. No. 106-349, pt. 1, at 10 (1999).

⁴² *Id.* at 11.

rewrite the statutes with every decision. It may well be that the Supreme Court had anticipated congressional inclination to amend and clarify the statute, and to give it the specificity and predictability that would be harder, though not impossible, to achieve by judicial decisions.

2. The unique cases. Domain names and trademarks

a. The unique cases. The Internet does not create an entirely new environment in the cases mentioned. Therefore, many of the legal problems that are raised in the Internet environment can find ready analogues in precedents. But not all cases concerning the Internet are that easy. Few are very difficult and these ended on the legislature's table. Time constraint does not permit a historical view and comparison to other areas of law. Rather, I discuss the role of the courts in triggering congressional lawmaking in Internet cases. This role points both to the limits and the impact of the common law.

One set of facts comes close to producing a unique environment. It relates to domain names and their clash with trademarks. While the law of trademarks and unfair competition may have relevance to this conflict, the issues are fundamentally different from anything we have known before.⁴³ That is because the purpose, use, and legal situation of domain name holders is different from the position of traditional violators of trademarks.

b. What are domain names and how do they compare with trademarks? Domain names are the keys to accessing the Internet. Without a name there is no access. More importantly, domain names attest to one's very existence in cyberspace. These names are not like birth certificates, but like the very flesh and blood of persons, and existence of entities. In cyberspace there are no nameless persons or entities. The reverse is also true. In cyberspace, persons die and entities disappear when their names are erased from the registries' database. This is the reason why domain names can be used for business, or personal purposes, or just held for no use at all.

The main purpose of trademarks is different. It is to protect customers from confusion.⁴⁴ While domain names signify anyone in cyberspace, trademarks cover only goodwill (businesses and products), and cannot exist without them. Domain names are a condition to the existence of persons and entities in cyberspace, businesses can exist without trademarks.

⁴³ *But see* Sommer, *supra* note 4, at 1228 (“The law of domain names, for example, is not quite the law of trademark and unfair competition. But it is not all that different”).

⁴⁴ See 1 J. THOMAS MCCARTHY, MCCARTHY ON TRANSACTIONS AND UNFAIR COMPETITION § 1:2, at 2-2 (4th ed. 2001). Other policies underlying trademark law include “property rights, economic efficiency and universal concepts of justice.” *Id.* § 212 at 2-3; *see also* S. REP. No. 97-1333 (1946), *reprinted in* 1946 U.S.C.C.A.N. 1274, 1274 (stating that any trademark statute has twofold purposes: protection of the public and protection of the investment of trademark owner).

Trademark protections are exclusive like domain names, but are more limited by conditions of registration, and linked to a business or a product. Further, both trademarks and domain names are a means by which others can identify the name holders. But again, they differ. Domain names are designed to help find the name holders among millions of others. Trademarks have a more negative origin. Their main purpose is to prevent confusing customers through names that are similar to trademark holders, as well as to draw attention to the trademark holders.

For both domain names and trademarks a name's brevity and uniqueness are important. It is easier to remember a simple name, like Tamar Frankel and Boston University. It is more difficult to remember a long and complex name, like xarfsb33mnoq10 or 26 characters and numbers. But short and recognizable names are in short supply. While domain name holders may seek a short and easy to remember name that can identify them, trademark holders are more interested in protecting a name that has acquired the value of a brand name and is connected with their business and its reputation. Thus, domain name holders may over time have the same interest as trademark holders, although their desire for recognition need not be connected to business.

Desirable domain names have acquired high values, sometimes in the hundreds of thousands of dollars, and an active market has developed in these names. Because trademarks are linked to the businesses or products they designate, trademarks have no value apart from these business or products.⁴⁵ There is no market for trademarks and their value is not determined by supply and demand.

The legal status and the weight of legal claims to domain names and trademarks differs greatly. Domain names are new and novel. They do not carry the legitimacy and respect of long use and practice. They are based on a contract that is subject to revocation under certain conditions. They are not recognized in statutes nor backed by government registration.

In contrast, trademarks have been around for generations. Trademarks have been registered with government agencies and afforded a specific recognizable status. Even though they are protected mainly for the benefit of consumers, the protection beneficial to the holders and the law recognizes the owners' interests and investments in the goodwill of their businesses.

⁴⁵ “[A] trademark cannot be sold or assigned apart from the good will it symbolizes.” 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 18:2, at 18-6 (4th ed. 2001). *See also* Sugar Busters LLC v. Brennan, 177 F.3d 258 (5th Cir. 1999).

If trading were the criterion for property rights, the category of property would more likely include domain names and exclude trademarks.⁴⁶ Nonetheless, the courts have shown no inclination to recognize domain names as property. One reason for this attitude is the courts' hostility to recognizing new form of value as property,⁴⁷ especially contract-based property.⁴⁸ Besides, there are no precedents on which the courts can hang their hats for domain names. On the other side of this conflict, Congress has strengthened trademark rights, awarding famous trademarks the features of property.

My description *is* designed to confuse. It shows that the conflict between trademark holders and domain name holders is unlike the balance between trademark holders and those who violate the trademarks for gain, and is difficult to sort out. I can only speculate on the fate of domain names. They are not going to go away, so long as the Internet is here and is developing. I expect them to multiply and populate the earth.

3. Three scenarios

a. The case of the abusive domain name. Assume the following scenario. A person registers the name McDonaldsucks. No business bears this name. The named web site shows a typical McDonald's Hamburgers shop with the famous Ronald McDonald doll holding its stomach and grimacing in pain. McDonald's Hamburgers' lawyer writes to the name holder demanding the removal of the name, and receives a rude reply containing a detailed description of an unfortunate personal experience after eating at McDonald's.

Before Congress had passed the act that protected "famous trademarks" the plaintiff in this case would have lost. McDonald's Hamburgers customers are unlikely to be confused when they see the web site. This web site does not advertise the plaintiff's products, nor is it set up by the plaintiff but by someone who believes that the plaintiff's hamburgers cause a bellyache. No confusion—no trademark violation.

Is this scenario unique? Not at all. It could have happened before the emergence of the Internet. But the Internet's power of disseminating information at very low cost has changed the effect on the trademark holders. That is unique.

⁴⁶ In many cases the existence of a market is the criterion for property. Even the prohibition on dealing with some goods and services, such as drugs and prostitution, may indicate that trading tends to be a strong criterion.

⁴⁷ See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000) (suggesting that courts are hostile to allowing the parties to create new property rights); Tamar Frankel, *The Legal Infrastructure of Markets: The Role of Contract and Property*, 73 B.U. L. REV. 389, 398 & n.38 (1993) (same).

⁴⁸ 1 TAMAR FRANKEL, SECURITIZATION § 1.7, at 16 (1991).

Congress took the bull by the horns and established a new principle with respect to “famous names.”⁴⁹ The holders of trademarks that register famous names can sue for “dilution” of the names. This provision caught in its net McDonaldsucks. The protection afforded to famous names did not leave the courts idle. They had to determine what is a famous name and what is dilution, no mean efforts. These concepts are slowly being refined, and with time will be more or less settled.⁵⁰

b. The case of Sleazy Squatter. Assume a second scenario as follows. Mr. Sleazy Squatter registers hundreds of domain names including McDonald’s. He conducts no business under that name. The web site under the name shows a pasture, a grazing bull, and a shack with the name McDonald’s on the door. When Sleazy Squatter receives a demand from the McDonald’s Hamburgers’ lawyer to withdraw the name and the web site, his answer implies that he would be happy to sell the name at a hefty price. Squatter has received many such letters concerning the names that he has registered. In this case the plaintiff may win. The defendant violated the plaintiff’s trademark.

We have little sympathy for Sleazy Squatter in this case. His behavior smacks of extortion. Soon he was called “cybersquatter” and condemned by the courts. Congress followed with a statutory prohibition in the Anticyebersquatting Consumer Protection Act of 1999.⁵¹ Cybersquatters do not seem to create value. They do not think up useful programs, ideas or slogans, and do not pay for the use of the trademarks. Being unproductive, they might not be entitled to cash on their registered names.

c. The tag-along competitor. On the Internet, competitors can tag their names to the names of more renowned businesses. Suppose Juicy Hamburgers tagged its name to that of McDonald’s. When surfers on the Internet seek the name McDonald’s Hamburgers they receive a list of 10 names, and immediately after McDonald’s appears Juicy. The issue has a close analog in real space. For

⁴⁹ Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (1996) (codified as amended at 15 U.S.C. §§ 1125(c), 1127 (Supp. V 1999)).

⁵⁰ A further mechanism has been developed to provide for online arbitration on name-trademark issues, and that has reduced the costs to the plaintiffs. Arguably, these arbitrations lean towards the plaintiffs’ claims, and proposals for leveling the arbitration field are being examined. A second issue in connection with the name saga involved the status of the registries and registrars. They were sued as allowing and facilitating violation of trademark rights. Early on these defendants have resolved the issue and protected themselves by the registration contract and through procedure. If a name dispute arises, the registries and registrars seek a decision of third parties and exit the scene. Before they solved the problem, the courts have exonerated them recognizing them as conduits rather than as decision-makers on the rights concerning the names. They are rarely sued today.

⁵¹ Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, app. I, §§ 3001-3010, 1999 U.S.C.C.A.N. (113. Stat.) 1501, 1501A-545 to -552 (codified at 15 U.S.C. §§1114, 1116(a), 1117 (a), (d), 1125(d), 1127, 1129, 16 U.S.C. § 470a(a)(1)(A), 28 U.S.C. § 1338, 1338 (a), (b) (Supp. V 1999)).

example, Juicy Hamburger puts a sign on the turnpike: McDonald's Hamburgers, exit 4. When hungry travelers follow the sign they reach Juicy Hamburgers instead, and being hungry, buy its hamburgers. The courts held that McDonalds can sue on violation of the trademark, even though the customers know they are not eating its hamburgers.

The confusion occurred when potential customers saw the trademark name which led them to the defendant's site restaurant instead. Clearly, once they reached Juicy they were no longer confused. Nonetheless, the courts held that the use of the plaintiff's trademark was closely related to the purchase of the defendant's products.

The tag-along case was analogized to the real space case, and resulted in the defendant's liability for violation of the plaintiff's trade marks. This result may be questioned. The Internet situation is different from that of the real space sign. The defendant's name does not result in substitution of the plaintiff's trademarked name. It results in adding the defendant's name. When a competitor tags along after the bigger one, customers have a richer choice. Further, small competitors have a better chance to compete. Nonetheless, at least one court held that the Juicy-type competitor has violated the trademark of its larger competitor by tagging by analogy to the turnpike case.⁵² I am not sure that this decision will take hold without further distinctions.

Is this scenario unique? It is not, as a real space case has shown. Some courts have brought prior confusion under the protective umbrella of trademarks in real space, and have applied the same principle in cyberspace.⁵³

d. The case of the honest trademark violator. The fourth scenario is far more difficult because it pits two legitimate claims against each other. Assume a small bicycle tires business owner registers under his name Ronald McDonald. In the physical area, everyone knows Ronald McDonald and clearly distinguishes his bicycle tires shop from McDonald's Hamburgers next door. Our bicycle McDonald's did not register his name as a trademark but has acquired a domain name. He has established a reputation as an honest expert in his area. McDonald's Hamburgers registered McDonald's as a trademark years ago, and its reputation is worldwide. If McDonald's Hamburgers sues it is likely to win. The defendant is using a trademark that might confuse customers before they reach the web site. If the defendant, however, did not sell anything but bicycle tires, the courts might have disregarded the initial confusion, especially since the defendant is using his own name and would suffer significant loss by the elimination of the name.

⁵² Brookfield Communications v. West Coast Entertainment Corp., 174 F.3d 1036, 1066 (9th Cir. 1999).

⁵³ See, e.g., Brookfield Communications v. West Coast Entertainment Corp., 174 F.3d 1036, 1062 (9th Cir. 1999) (citing Dr. Seuss Enters. V. Penguin Books USA, Inc., 109 F.3d 1394, 1405 (9th Cir. 1997) (finding prior confusion in real space)).

However, if, in addition to the bicycle shop, the defendant has also developed a diner that sells, among other things, hamburgers, it is very likely that he would lose his domain name and be held liable for trademark violation. That would be so even if as he started his business he did not attach the diner, and the diner was a natural extension of the business, inviting people to eat while they are waiting for the repair of their bicycles.⁵⁴

It is not surprising that the courts could not solve the domain names-trademarks conflict holders fully and satisfactorily. It was anticipated correctly that the Internet would continue to evolve and the number of names would continue to grow. These companies were interested in Internet growth to support their businesses, but objected to bearing the entire burden of the new technology with respect to their trademarks and reputation. Rather than the courts, Congress was the appropriate lawmaker to change the law and reduce the corporations' costs. Another mechanism reduced the litigation costs by establishing three forums of international arbitration tribunals. A rebalance has been made, it seems to the satisfaction of the large corporations. Small businesses are not yet satisfied, for it appears that the arbitrators tend to favor the large corporations. I believe, however, that public opinion and pressures from other organizations will drive towards a better new regime for resolving the conflicts between Internet trademark holders and domain name holders. The environment has changed too drastically for the common law to resolve this issue alone.

e. The clash of policies. The domain names-trademarks conflict is not over yet. Pressures to increase the number of top-level domain names have come from many quarters. There are entities interested in entering the domain name registry business. There are consumer advocates who seek more available short and memorable domain names. And there is the government that drives for increased competition among registries. The executive branch of the government has announced the policy of eliminating the monopoly of top-level domain name registries, such as .com, and of encouraging competition among such registries. There has been an increasing demand for domain names by consumers and great interest in the registries' business by qualified businesses.

However, every increase of such names raises the possibility of trademark violations and consequently the cost of protecting trademarks. Therefore, trademark owners object to any increase of top-level domain names. This type of issue is hard to analogize to precedents. It requires weighing conflicting policies and establishing a balance between them.

While Congress has provided holders of famous trademarks with added protection, it has not prohibited the increase of top-level domain names. Now, that

⁵⁴ See *Virgin Enters. Ltd. v. Virgin Petroleum, Inc.*, No. CV 99-12826 MMM (MAN), 2000 U.S. Dist. LEXIS 8100 (C.D. Cal. Jan. 10, 2000) (noting that defendants' service station bearing mark similar to the plaintiff's is adjacent to the highway. Therefore, drivers may have little time to decide whether to purchase from the defendants).

more such names have been approved voices in Congress were raised to slow down the process. And the issue is currently before the courts.

NeuLevel, Inc., the company charged with conducting the lottery, is currently seeking a declaratory judgment as to the legality of the process. In the objectors' opinion NeuLevel is not *auctioning domain names* but a *chance to win* a name, and is therefore an illegal lottery.⁵⁵ The trademark owners are concerned that the scheme would encourage cybersquatters who will pay a few dollars for the chance to win a tremendously valuable asset for sale or extortion.

Therefore, trademark owners demand a chance to *register first*, so that IBM.com would have the first chance to register also IBM.biz, and IBM under any other top-level domain name. They further seek a prohibition on multiple applications for the same domain name. That would require the auctioneer to refund the fees that participants in the auction would have paid for the privilege of participating in the auction, and would significantly deplete the auctioneer's income.⁵⁶

In fact, the trademark owners demand a reduction in their cost of protecting their trademarks under the new top-level domain names. If the process constitutes an auction, then no matter what the base prices is, the trademark owners can outbid the other bidders to the extent that the name is more valuable to them. In such a case the price of the top-level domain names will be pocketed not by the other bidders but by the auctioneers or the entity that metes out the names, or both. The purpose of this discussion is not to answer the puzzle but to show that these issues can hardly be analogized to cases interpreting state lottery statutes. The issues involve cost-benefit balancing that the courts do not usually make. It is not surprising that this issue is of great interest to Congress, and may well be resolved by legislation.⁵⁷ The validity of the process under trademark laws, and judicial protection before the fact of trademark holdings on the basis of possible future violations, is similarly a difficult question with few precedents that can be analogized in factual context as well as legal principles.

The solution may be technical. Domain name databases may have an automatic link to trademarks to identify conflicts. Or perhaps the trademark

⁵⁵State laws prohibiting lotteries are mainly aimed at protecting state lotteries. Whether they should apply to this type of auction is an interesting issue. Not every lottery is an auction or the reverse. Auctions also provide a chance of winning, depending on how others bid. The last word is always with the bidder. The last word with a lottery is the formula and machine that determine fully the chance of winning. Another meaningful distinction is in terms of the degree of the chance. If the chances of receiving the Top-Level domain name are about 9 billion to one, then perhaps an auction may become a lottery. That is especially true if the participants in the auction pay a few dollars and have no interest in the names. However, it is doubtful whether state lottery statutes were aimed at such a lottery or something similar to such a lottery.

⁵⁶ *Id.*

⁵⁷ *Is ICANN's New Generation of Internet Domain Selection Process Thwarting Competition?: Hearing Before the Subcomm. on Telecommunications and the Internet of the House Comm. on Energy and Commerce, 107th Cong. (2001).*

holders will get their wish and will register every domain name that may copy, abuse or even dilute the value of their trademarks. The consequences of these decisions to the development of the Internet should be studied. But whatever decisions are taken, I believe, should be taken in small retractable doses, adhering to the muddling through principle of the common law. We can test the possible results against efficiency, consent, fairness and public choice theories. Then find how these pan out in practice.

D. UNDER WHAT CONDITIONS WILL CONGRESS OVERRULE THE COURTS' DECISIONS?

I submit to you that legislation is the product of agreements among power centers. Congress will interfere when the courts' decisions have strayed away from these agreements. Nonetheless, judicial decisions play a role in the legislation that affects them by narrowing the issues that Congress will address and setting the agendas.

1. How do the courts and Congress interact? What are the pressures that trigger congressional intervention?

“Pure” common law is a rarity in the United States. The contract cases cited above are exceptions. Congress and state legislatures have dealt at least partially with most aspects of our private and public lives. However, the common law has continued to grow and create a gloss over the statutes. The gloss at times has been as limiting as ancient precedents. With the appearance of the Internet the interaction between Congress and the courts has intensified. Congress reacts to judicial decisions, and courts, in turn, react to legislative initiatives, especially if these initiatives constitute reactions to court decisions.

The differences in judicial and legislative lawmaking have been aired for decades, and the different forms in which they create law are well researched. An interesting question, especially as demonstrated in the Internet area, is: How have judicial decisions affected legislative action?

The cases discussed above show that some courts are doctrinally conservative. They follow established precedents regardless of the changed environment and await legislative guidance. Some courts are activists. They overrule precedents in light of the changed environment. I submit that the doctrinal conservatism does not necessarily result in maintaining fundamental principles in law, and activism does not necessarily result in changing these fundamental principles.

Decisions are grounded in values and policies. In a changing environment one must amend or eliminate the precedents and rules in order to maintain existing values. If rules and precedents remain unaltered in a changing environment they may result in altered values and policies. In terms of underlying

values and policies which precedents implement, non-action is not necessarily conservative; action is not necessarily activist.

Does Congress react to an activist judicial decision differently from a conservative judicial decision? In my opinion the answer depends on the results of the decisions rather than on the doctrinal approach of the courts. Congress has overruled the precedents that have been preserved by the courts and approved by non-action judicial overruling of the precedents.

2. Judicial decisions that activate Congress are those that result in a fundamental change in existing values and policies.

It is the result of the courts' decisions that matters to Congress rather than doctrinal changes. If the courts' actions changed the status quo, Congress may interfere even if the courts followed precedent. Or if the courts did not change the status quo, Congress may not interfere even if they overruled precedents.

Congress may intervene when courts don't change the status quo in the face of political pressure for change – or may not intervene when the status quo is upset if it fits the political dynamic. Further, courts may sometimes venture outside the parameters of congressional agreements. Judicial legitimacy enables the courts to change the law at lower costs than legal amendments through other bodies where politics is more visible.

There is a rich literature on the legislative process in the United States. Theoretically, there is “legislative intent” at all, to which courts can resort as guidelines.⁵⁸ There is empirical evidence, however, that institutional, behavioral, and human elements provide predictable patterns.⁵⁹ Legislation is often an agreement or compromise among certain factions. Institutionally these factions are the Senate, the House of Representatives, and the President. Other factions may affect legislative outcomes as well.

The courts and administrative agencies, among others, are expected to enforce and implement this agreement. If and when judicial decisions upset the policies of the agreement by straying outside its acceptable boundaries, Congress will react. If, however, courts change the law within the parameters of the agreement, Congress will not act. What is important here is that Congress does not react to *change of doctrine* or the *overruling of a precedent*. It reacts to the change in the realm of the agreement among the coalition parties. Congress is also likely to react, even without judicial action, when, as a result of a new environment, the agreement no longer provides the anticipated effects.

⁵⁸ See DANIEL A. FARBER & PHILIP P. FRICKLEY, LAW AND PUBLIC CHOICE 40-41 (1991).

⁵⁹ *Id.* at 58-62.

Regardless of outcomes, courts provide Congress with an opportunity to focus on specific issues. It is far easier to legislate with respect to one problem at a time than to provide general provisions that may bring unnecessary arguments and unanticipated results. The cases above demonstrate the usefulness of the courts' decisions. The facts were clear and the ambiguity was narrow. Hence, the legislation fairly clearly addressed the narrow issue.

Even though all court decisions, whether activist or conservative, may trigger congressional action, the different posture of the decisions—following the existing rules as compared to changing them—may result in a different congressional action. That is because judicial decisions help Congress identify the issues and narrow the range of legislation. Decisions provide the legislators with case studies, evidence, expert opinions, and reasoned analysis. The decisions have the powerful impact of an agenda.⁶⁰

Judicial decisions that upset the status quo realm of legislative agreement trigger a justified demand for renegotiation. The decisions may also affect the extent to which the parties to the legislative agreement would resist renegotiation. Decisions that tilted the balance to benefit one party are likely to create resistance to renegotiation. Even if the parties agree to renegotiate, the courts' decisions place the parties in stronger or weaker positions. Besides, the purpose of these negotiations is no longer to restore the status quo but to reach another agreement. That is especially so if the renegotiated agreements were made many years ago or before the advent of the Internet. Thus, the outcome of the renegotiations is not necessarily the prior agreement, which was upset by the courts' active or conservative decisions. The field has been opened to other outcomes.

CONCLUSION

The common law is a wonderful mechanism for “muddling through.” That is one of its greatest contributions. Legislation is a mechanism for generalizations. That is its great strength, but also its weakness. Muddling through reduces the risks from mistaken decisions. When mistakes are made -- and they are made -- the damage they cause is more limited, they can be spotted faster, and corrected more easily. The common law is the choice technique for the risk-averse lawmakers.

Muddling through may sacrifice clarity, precision and predictability. Mainly it conceals the overall grand scheme of things and overview. Legislative generalizations, however, can remedy this flaw to some extent. The grander the overall view, the more generalized it is, the lower the chances of a fundamental mistake it poses. Therefore, even though this plan needs reviews and revisions, they need not be monitored as often as the implementing details. The real danger lies in legislation that, without specific proven problems, provides detailed directives to future behavior. Such legislation is likely to result in significant

⁶⁰ *Id.* at 55-56.

losses, as overarching planning has shown. Legislation in the Internet area has highlighted the kind of plan that Congress may provide, and its role as monitor. Congress signals its approval of the policy to encourage the development of the Internet. It signals its decisions to rebalance the costs and benefits brought by the Internet. And it monitors the courts, the administrative agencies and the enforcement arms of the government that implement the law.

The courts and these implementing agencies contribute to congressional tasks by helping define the issues and setting up the agendas. These judicial services help the legislature to focus on one or a few problems at a time and remedy one or a few flaws at a time. Thus, they help reduce congressional mistakes as well. The Internet cases demonstrate this process well. I could criticize this or that decision or aspects of various laws. But *as a system of cooperative law making*, it serves the country extremely well.