



Source: Electronic Commerce & Law Report: News Archive > 2013 > Latest Developments > Lead Report: Bloomberg BNA Cyberlaw Outlook for 2013 > Keeping Up With Domain Name Explosion, Big Data, Social Media, And Online Innovation Are Top-of-Mind Legal Issues Among Cyberlaw Experts

Bloomberg BNA asked several dozen leading attorneys and online experts for their views on the most important legal developments in online law during 2012 and on what policy areas they believed would be the most important to their practices in 2013. We asked that the responses be short and to the point, similar to a "tweet" or status update. The result is the 300-plus brief insights published below, all of which have been lightly edited and categorized by subject matter.

Many contributors cited the Internet Corporation for Assigned Names and Numbers's nearly completed initiative to create hundreds of new top-level domains as a critical area for attorney attention. Many headaches (but also opportunities) for brand owners, governments, and internet users were identified there. Other leading issues to watch are those spun off by the convergence of social networking and mobile communications technologies: privacy, information security, as well as new opportunities for intellectual property infringements. Many contributors believe that privacy policy—pushed to the fore by emerging "big data" technologies, cloud computing, and pervasive digital adoption by consumers—is ripe for action in both the United States and Europe in 2013. Commenters also offered their impressions on the significance of official failures to advance tough copyright enforcement measures here and abroad, and on the inauspicious conclusion to the WCIT internet governance talks in Dubai. Finally, turmoil in the patent system and the prospect of leadership change at the Federal Trade Commission drew many observations.

The comments below—each attributed to the author, the author's law firm or organization, website, and Twitter username—are published for informational purposes only and do not constitute legal advice.

Keeping Up With Domain Name Explosion, Big Data, Social Media, And Online Innovation Are Top-of-Mind Legal Issues Among Cyberlaw Experts The Coming Domain Name 'Land Rush'

Despite 10 years' preparation, ICANN swamped by 2,000 new gTLD applications, many from brands concerned about cybersquatting. New gTLDs accredited in 2012: zero. *Christine Jones, @attyjones, Former General Counsel, GoDaddy.com, Phoenix, Ariz.*

2013 will be the year of New gTLDs and the beginning of a dramatic and long overdue expansion of the domain name space! *Kathryn Kleiman, @KleimK, Internet Counsel, Fletcher Heald & Hildreth, Arlington, Va.*

2013 may see the domain name floodgates open if ICANN finally moves ahead with its new gTLD program. Conventional wisdom is that this will lead to massive cybersquatting in the new domains, and I agree. But the real story will be the beginning of the end of the domain name system, as domain confusion sends more and more consumers into search. *David Bernstein, Partner, Debevoise & Plimpton LLP, New York, N.Y.*

New gTLDs will start appearing at the rate of 20 per week from mid 2013. The strategy of defensive registrations in all TLDs will be prohibitively expensive, an unrealistic option for nearly all brands. Brand owners need to determine their registration strategy – from both a brand protection and brand promotion perspective—in early 2013 to be ready for the rush. *Martin Burke, @melbourneitdbs, EVP, Melbourne IT DBS, London.*

The first new TLD will be an IDN—non-ASCII characters—and will enter the root system 2 weeks after ICANN meets in April in Beijing. *Paul Stahura, @stahura, CEO, Donuts Inc., Bellevue, Wash.*

Leading Predictions for 2013

Several broad themes emerged from the hundreds of contributions received in response to Bloomberg BNA's call for short, expert takes on noteworthy cyberlaw developments in 2012 and policy hotspots to watch for in 2013. Here are 10 of the most frequently mentioned predictions for the coming year:

1. Trademark owners must adjust their online brand protection

The internet is about to get much larger—are you ready? In Spring 2013 a few hundred new domain registries (i.e., new .com's) will go live. The potential pitfalls and possibilities are tremendous. Brand owners are going to have to prioritize and develop new strategies to leverage and monitor new gTLDs in a rapidly expanding world. *David Mitnick, @domainskate, Founder and President, Domain Skate LLC, New York, N.Y.*

One of the greatest innovations that will impact the internet is the expansion to include internationalized domain names (IDNs)—the ability to utilize non-Latin characters. New TLDs in Chinese, Arabic, Cyrillic, etc. will have enormous consequences and dramatically transform the internet. *Ellen Shankman, Principal, Advocate, Notary, Ellen B. Shankman & Associates, Rehovot, Israel.*

With the litany of generic top-level domain (gTLD) applications filed this year and the impending roll out, lawyers/clients will want to follow this electronic land rush and the related disputes that develop. *Joseph Geisman, @JoeGeisman, Vice President, Business and Legal Affairs, Maize Marketing, Los Angeles.*

Trademarks on the New Internet

The establishment of ICANN's Trademark Clearinghouse in 2012 will have profound ramifications for 2013 and beyond. It is anticipated that the Clearinghouse will connect not only for pre-registration claims and pre-launch sunrise, but very likely also for URS complaints and perhaps even UDRP complaints. Planning an appropriate Clearinghouse strategy is job one for the trademark practitioner. *Paul D. McGrady, Partner, Winston & Strawn LLP, Chicago.*

The Trademark Clearinghouse, as incorporated into the ICANN Top-Level Domain program, offers novel, groundbreaking, global protection for rights holders. *Adrian Kinderis, @AdrianKinderis, Chief Executive Officer, ARI Registry Services, Melbourne & Los Angeles.*

ICANN Toronto was the calm before the new gTLD storm. By April in Beijing the program will be steeped in new legal and policy controversies. *Philip Corwin, @vlawdc, Founding Principal, Virtualaw LLC, Washington, D.C.*

Bar none, the most important trademark-related issue of 2013 will be ICANN's expansion of top-level domain names, going from .com and a couple dozen others to over 1,000. If trademark owners are not prepared, it will crush them like an avalanche. *Brad R. Newberg, Partner, Reed Smith, Falls Church, Va.*

Eye-popping sums will ultimately be paid for the hottest new gTLDs, but many of the new applications will get bogged down in process and litigation and fail to ever take off. *Mark Owen, Partner, Harbottle & Lewis, London.*

Watch out for the launch of new gTLDs and have your proactive or defensive strategy in place. New rights protection mechanisms facilitate digital brand management. Are you ready for the challenge? *Thomas Rickert, @thomasrickert, Managing Partner, Schollmeyer & Rickert Law Firm, Bonn & Frankfurt, Germany.*

1930 new gTLD applications? Over 1/3 .brands? Even gTLD doubters must admit that a new internet is around the corner. And a new ICANN, too, once the .brands sign contracts. *Kristina Rosette, @kristinarosette, Of Counsel, Covington & Burling LLP, Washington, D.C.*

Trademark clearinghouse, sunrise, trademark claims, URS. Finding the balance between trademark enforcement budget busters and valuable new gTLD rights protection mechanisms will be a critical challenge for brand owners in 2013. *Kristina Rosette, @kristinarosette, Of Counsel, Covington & Burling LLP, Washington, D.C.*

2013—the year the internet changed, new gTLDs into the root. Time to see whether all the efforts to have clean space will work or not. *David*

strategies as ICANN's new top-level domains program goes live.

2. Many governments will attempt to exert greater control over the internet despite setbacks suffered at the 2012 World Conference on International Telecommunications.

3. Innovators will continue to test the bounds of copyright law with new digital services that deliver creative content such as 2012's Aereo—resulting in more copyright litigation.

4. The new Congress will renew efforts to push copyright enforcement legislation, notwithstanding the last Congress's inability to advance the notorious SOPA and PIPA measures.

5. States will seek to regulate online and mobile privacy, filling in the policy vacuum created by federal legislators' lack of agreement on the need for, or contours of, a baseline federal privacy regime.

6. For much the same reason, the FTC—likely under new leadership and with several new key officials—will step up privacy enforcement activities.

7. Class actions involving data privacy, targeted advertising, and data breaches will grow.

8. Businesses will face uncertain, and potentially enhanced, compliance burdens under the new data protection legislation in the European Union.

Taylor, Partner, Hogan Lovells, Paris.

Next year or two will see the launch of 1000 new domain endings, gTLDs. There are strengthened brand protection mechanisms, but they are untried, and unproven. Review your online protection strategies now. *Emily Taylor, @etaylaw, Consultant, Emily Taylor Consultancy Limited, Oxford, United Kingdom.*

New gTLDs will either change the nature of the internet or will go the way of all other gTLDs introduced after .com (when was the last time you bought or went to a .biz domain name?). Or maybe a little of both depending on the gTLD. Either way, they are going to exponentially increase the cost of monitoring and enforcement for IP owners. *Marc H. Trachtenberg, @winstonadvlaw, Partner, Winston & Strawn LLP, Chicago.*

Expect around 1,200 new gTLDs to be approved for the internet in the next couple of years. Some could even launch in 2013! Let's hope this bold expansion of the internet doesn't take trademark holders back to the dark old days of the Wild Wild Web. But look on the bright side. New IP protection mechanisms developed for new gTLDs may end up improving trust and safety for TM holders on the Web. *Stephane Van Gelder, @stephvg, Chairman and Managing Director, Stephane Van Gelder Consulting Ltd., United Kingdom/France.*

Defensive registrations in the second level will be "all the rage" in late 2013 and 2014 as new gTLD registries go online. Savvy brand owners will resist the urge to stock up on second level domain names that they don't need and that fail to drive meaningful customer traffic. *Paul D. McGrady, Partner, Winston & Strawn LLP, Chicago.*

New gTLDs will force TM owners to adapt strategies for online TM protection. Volumes of C&D's and defensive reg's is not a viable strategy. *David E. Weslow, @davidweslow, Partner, Wiley Rein LLP, Washington, D.C.*

Claims by TM owners against domain registry operators are likely to increase due to registry business models and ancillary service offerings. *David E. Weslow, @davidweslow, Partner, Wiley Rein LLP, Washington, D.C.*

The outcome of the debate around second level protections for trademark owners in new gTLDs will be a key development in 2013. While the IPC-BC proposal is unlikely to gain broad support, already there are signs in the ICANN "strawman" proposal that a stronger result for trademark owners is in the offing. *Martin Burke, @melbourneitdbs, EVP, Melbourne IT DBS, London.*

gTLDs will be a catalyst for disruptive innovation, requiring more critical analysis by IP departments in protecting digital assets via design patents and copyright. *Jen Wolfe, @JenWolfe, President, Wolfe Domain, Cincinnati.*

Trademark lawyers must integrate with marketing to combine offensive and defensive strategy in brand protection in an expanding internet environment. *Jen Wolfe, @JenWolfe, President, Wolfe Domain, Cincinnati.*

Trademark lawyers have opportunity to create economies of scale by thinking innovatively about brand protection in an expanding internet environment. *Jen Wolfe, @JenWolfe, President, Wolfe Domain, Cincinnati.*

Trademark interests will not be satisfied by the ultimate resolution of the "Strawman" debate and will pivot in the first quarter of 2013 to demands related to ICANN's enforcement of Applicant Guidebook qualifications and new gTLD registry agreement requirements. *Philip Corwin, @vlawdc, Founding Principal, Virtualaw LLC, Washington, D.C.*

Regardless of what happens with the expansion of top-level domains in 2013, all trademark owners should be prepared to take additional steps to protect their brands online from cybersquatters and other bad actors. *Doug Isenberg, @dougisenberg, Founder, The GigaLaw Firm, Atlanta.*

The first new generic top level domains will begin to rollout in 2013. Brand owners should expect a substantial increase in cybersquatting despite the rights protection mechanisms that have been adopted by ICANN. *James L. Bikoff, Partner, Silverberg, Goldman & Bikoff, LLP, Washington, D.C.*

Despite the introduction of ICANN's Uniform Rapid Suspension System (URS), the Uniform Domain Name Dispute Policy (UDRP) will remain one of the most important and successful legal tools for trademark owners online. *Doug Isenberg, @dougisenberg, Founder, The GigaLaw Firm, Atlanta.*

9. Blurred lines between employees' use of social media, home and office computers, and mobile devices will result in more regulatory activity and litigation.

10. The definition of "celebrity" grows increasingly unclear as technology and user-generated content advances, creating uncertainty under state right-of-publicity laws.

For ICANN's new gTLDs, 2012 took us through a dramatic series of events: 1,900+ applications and an Intellectual Property community nervous about the Trademark Clearinghouse, URS, sunrise and what post-delegation will look like. In 2013, it will not only be about establishing strategies to manage and mitigate potential abuses, but also educating the general public because in a survey of 2,000 Internet users only about 25 percent know the new gTLDs even exist. *Jamila Hunte, @jamilaenta, Account Manager, BrandProtect, Ontario, Canada.*

Globalization, Innovation, Commercialization

How much the new TLDs will spawn real innovation, rather than merely virtual real estate monetization game-changers, remains an interesting open question. *Ellen Shankman, Principal, Advocate, Notary, Ellen B. Shankman & Associates, Rehovot, Israel.*

If the arrival of hundreds of new gTLDs in 2013 wasn't enough, the growing trend among ccTLD operators to shift from a third level (example.co.uk) to second level (example.uk) registration model adds more complexity for brand owners. Japan and China have already made the shift, while the UK and New Zealand are mulling it over—with others sure to follow. *Martin Burke, @melbourneitdb, EVP, Melbourne IT DBS, London.*

Ultimately it's all about "trust." Whether users will gravitate to new domain names, social media platforms or rely on search engines, the most important factor is one of "trust." *Ellen Shankman, Principal, Advocate, Notary, Ellen B. Shankman & Associates, Rehovot, Israel.*

Everyone I know said that opening up the internet so anyone can own a ".com" or ".whatever" was a terrible idea. But what is the alternative? If ICANN simply keeps the internet root zone "as is" does that keep would-be participants out? A multistakeholder internet is critical to global progress and giving everyone the opportunity to have an actual "stake" is definitely one way to foster this goal. *David Mitnick, @domainskate, Founder and President, Domain Skate LLC, New York, N.Y.*

Consumer benefits of new gTLDs? Wait until you see. They will far exceed the costs, including the costs of getting to this point. *Paul Stahura, @stahura, CEO, Donuts Inc., Bellevue, Wash.*

The new Top-Level Domain program, and the myriad of new laws that underpin it, including IP, trademark and privacy legislation, will see a paradigm shift in how the internet is consumed across the globe. *Adrian Kinderis, @AdrianKinderis, Chief Executive Officer, ARI Registry Services, Melbourne & Los Angeles.*

'Internet Governance'

The Internet is what it is because most governments haven't meddled with it. We need to keep it that way. *Paul Stahura, @stahura, CEO, Donuts Inc., Bellevue, Wash.*

It is ultimately the users that define what the internet is and what it will become. *Lynn St. Amour, @LynnStAmour, President/CEO, Internet Society, Geneva, Switzerland/Reston, Va.*

WCIT shows that U.S. and EU can no longer set global Internet policy by fiat. That's bad news for those that like online privacy and freedom of expression. *Harold Feld, @haroldfeld, Senior Vice President, Public Knowledge, Washington, D.C.*

The unprecedented implosion of the ITU's treaty process in Dubai will be seen by historians as the first and most dramatic step toward the inevitable dismantling of the state-centric, government-controlled, monopoly-bolstering, repression-friendly, pre-Internet regulatory regime for global communications networks. *Andrew McLaughlin, @McAndrew, Entrepreneur-in-Residence, betaworks, New York, N.Y.*

Considering the anti-SOPA/PIPA movement, the defeat of ACTA, and the mobilization against the ITU's World Conference on International Telecommunications, 2012 can be seen as the year the internet created its own global polity. *Milton Mueller, @miltonmueller, Professor, Syracuse University School of Information Studies, Syracuse, N.Y.*

The internet belongs to everyone—but as more people rely on it as part of their daily lives who is in charge of regulating it? In what situations? How can companies and individuals in different countries protect themselves in a global marketplace that is still subject to national laws? *David Mitnick, @domainskate, Founder and President, Domain Skate LLC, New York, N.Y.*

National governments claim that they are going to bring "order" to the global internet, but a world consisting of 192 sovereign, competing authorities is the very definition of anarchy. *Milton Mueller, @miltonmueller, Professor, Syracuse University School of Information Studies, Syracuse, N.Y.*

You may not like ICANN. But WCIT showed us that ICANN's multistakeholder model of internet governance—warts and all—is still far better than the alternative. *Kristina Rosette, @kristinarosette, Of*

Counsel, Covington & Burling LLP, Washington, D.C.

A move to have governments regulate the internet through the International Telecoms Union has failed, but the pressure won't go away. We will continue to see sustained pressure to change the way the internet is governed. *Emily Taylor, @etaylaw, Consultant, Emily Taylor Consultancy Limited, Oxford, United Kingdom.*

In 2013, look out for repercussions from the ITU's December 2012 World Conference on International Telecommunications. Bids by some U.N. member states to govern the cost of internet traffic and regulate the internet itself may pave the way for more attempts to curb the freedom of enterprise, choice and innovation that the internet has given us all. *Stephane Van Gelder, @stephvg, Chairman and Managing Director, Stephane Van Gelder Consulting Ltd., United Kingdom/France.*

The U.N. Human Rights Council resolution of 6/29/2012 will begin to take on real meaning. It states that "the same rights that people have offline must also be protected online," so those opposed to due process and freedom of expression online beware! *Kathryn Kleiman, @KleimK, Internet Counsel, Fletcher Heald & Hildreth, Arlington, Va.*

In 2012 Peru joined the countries that officially regulate basic principles for net neutrality. During 2013 complementary rules and regulations should be issued shaping the legal framework for telecommunications and internet regulation in the country. *Oscar Montezuma, @montezumaypanez, Partner, Montezuma & Panes Consultores Legales, Lima, Peru.*

2013 will see increasing sophistication and effectiveness by many governments—from China to India to Saudi Arabia to South Korea and beyond—in recasting their internet control agendas as efforts to combat fraud, hacking, pornography, child exploitation, copyright infringement, and terrorism. *Andrew McLaughlin, @McAndrew, Entrepreneur-in-Residence, betaworks, New York, N.Y.*

Internet governance is not a monolithic concept—it constantly evolves to embrace such issues as intellectual property. Multistakeholder processes and transparency, therefore, should also be reflected in all Internet-related intellectual property discussions. *Konstantinos Komaitis, @kkomaitis, Policy Advisor, The Internet Society, Geneva.*

Do we want an Internet defined by governments, or an Internet defined by our imagination? As we are preparing for the review of the 10th anniversary of the World Summit on the Information Society (WSIS), we will need to re-emphasize the importance of the open Internet model of standards and policy development processes in a multistakeholder framework. This is the key to the success of the Internet! *Markus Kummer, Vice President, Public Policy, Internet Society, Geneva.*

The International Telecommunication Union's agenda for increased internet regulation away from the successful multi stakeholder model, backed by a number of nation states, marks the single greatest threat to the stability, governance, and openness of the Internet. *Adrian Kinderis, @AdrianKinderis, Chief Executive Officer, ARI Registry Services, Melbourne & Los Angeles.*

ICANN: New Leadership, Old Problems

2013 will be the first full year under new leadership for the body that oversees the management of domain names and IP addresses. New CEO Fadi Chehadé has a strong business bias. His challenge: Balancing a natural drive to get things down through top-down management decisions with ICANN's unique bottom-up, consensus-driven processes. *Stephane Van Gelder, @stephvg, Chairman and Managing Director, Stephane Van Gelder Consulting Ltd., United Kingdom/France.*

I knew ICANN was going to be different when the new President and CEO didn't take and tweet a panoramic photo during the ICANN Board-GAC meeting in Toronto. *Kristina Rosette, @kristinarosette, Of Counsel, Covington & Burling LLP, Washington, D.C.*

Year in, year out, the WHOIS debate rages on. The antiquated domain owner ID card system is decried by all. Some (law enforcement for example) get riled by WHOIS databases that have incomplete or false data. Others (businesses and individuals who own domains) worry about data privacy issues. All hate it that there's no unique WHOIS, with each TLD having its own specific format. The good news? ICANN really wants to fix WHOIS in 2013. *Stephane Van Gelder, @stephvg, Chairman and Managing Director, Stephane Van Gelder Consulting Ltd., United Kingdom/France.*

No birthday party when Affirmation of Commitments (USG-ICANN) turned 3. Before it turns 4, should Congress ask whether ICANN's living up to it? *Steve Metalitz, @mskllp, Partner, Mitchell Silberberg & Knupp LLP, Washington, D.C.*

Whois policy: hardy perennial in ICANN garden. Now ICANN Board wants to tear up, start over with "expert" gardeners. Will this produce more fruit and fewer weeds? *Steve Metalitz, @mskllp, Partner, Mitchell Silberberg & Knupp LLP, Washington, D.C.*

Déjà vu—WHOIS, privacy and rights protection mechanisms—has there been progress since 1996? Sometimes, it doesn't seem that way. *David Maher, Senior Vice President — Law & Policy, Public Interest Registry, Reston, Va.*

The “hands on” management style of ICANN's new CEO will hasten a full-scale debate on whether ICANN's multi-stakeholder policy process should be clarified and preserved, or substantially reformed. *Philip Corwin, @vlawdc, Founding Principal, Virtualaw LLC, Washington, D.C.*

The Department of Commerce's decision to freeze .com wholesale pricing was a long-overdue correction of a six-year old mistake. Now VeriSign has a vested yet somewhat conflicted interest in hoping that new gTLDs provide enough of a marketplace challenge to .com to justify a request to ease pricing restrictions by the time the current registry contract expires in 2018. *Philip Corwin, @vlawdc, Founding Principal, Virtualaw LLC, Washington, D.C.*

Social Media Explosion

When Instagram changed its terms of use in December, it inadvertently reinforced two important lessons: (1) people do read website terms of use and privacy policies (especially journalists who cover media and technology) and (2) web communities can police themselves pretty effectively. No lawyers or regulators had to step in; the community took care of itself. *Jonathan D. Hart, Partner, Dow Lohnes PLLC, Washington, D.C.*

Some state bars will continue their ham-fisted attempts to regulate attorney marketing via social media—even as the courts keep carving back speech regulation on First Amendment grounds. *Josh King, @joshuamking, General Counsel, Avvo, Seattle.*

In politics, robocalls, direct mail, and negative ads failed to move the needle, but social media and authentic interaction by candidates was compelling to voters. *Christine Jones, @attyjones, Former General Counsel, GoDaddy.com, Phoenix, Ariz.*

This year the UK struggled with the criminal consequences of twitter as convictions for tweeting grew *Jonathan Armstrong, Partner, Duane Morris LLP, London.*

Ownership of social media accounts between employers and employees remains a very hot topic as shown by *Eagle v. Morgan* and *PhoneDog v. Kravitz* cases as well as new social media legislation passed in Illinois, California, and Maryland. *Robert B. Milligan, @tradesecretslaw, Partner, Seyfarth Shaw LLP, Los Angeles.*

Federation of State Medical Boards adopts model policy guidelines—practitioners and app developers need to understand. *James Gatto, @Get_SET_Law, Partner, Pillsbury Winthrop Shaw Pittman LLP, McLean, Va.*

Recent proposed changes to Facebook's terms of services and the resultant copyright notice hoax reveal an ongoing angst over user privacy, an issue that should be watched by anyone doing business online. *Joseph Geisman, @JoeGeisman, Vice President, Business and Legal Affairs, Maize Marketing, Los Angeles.*

Expect more variances (and questions) concerning the level of control that social media platforms exercise over communications and content on their networks. *Joseph Geisman @JoeGeisman, Vice President, Business and Legal Affairs, Maize Marketing, Los Angeles.*

Pinterest and Instagram are sites to watch in 2013. Brands will gravitate to these sites to help drive traffic to their Websites. *Kenneth Suzan, @ksuzan, Of Counsel, Barnes & Thornburg LLP, Minneapolis.*

Twitter® may be a favorite forum for online gabbing, but it sometimes stifles intellectual property rights. True, the Twitter Rules prohibit the misleading use of trademarks, copyright violations and false impersonations. Despite these Rules and online reporting forms, however, the process for removing infringements is slow and painful — especially when it comes to impersonation. Be prepared to submit your driver's license, a brief showing why the impersonation is illegal, and an affidavit to prove that you did not authorize the unlawful Twitter handle. *Roberta Horton, Partner, Arnold & Porter LLP, Washington, D.C.*

Pinterest reminded us that a picture is worth a thousand words—and possibly much more if it's “pinned” without a user's permission. *Glen Gilmore, @glengilmore, Attorney and Digital Marketing Strategist, Gilmore Business Network, Greater New York, N.Y.*

An emerging area of social media and employment law for 2012 involves the legality (or illegality) of an employer's “over the shoulder” examination of its employees' social media posts and blog site posts to support adverse action against employees for misconduct, including posts on social

networking sites such as Facebook, Twitter, and LinkedIn. An employer's examination of an employee's social network posts, through another employee or other "friend," "follower" or "connection," may reveal conduct that violates the employer's policies governing confidentiality, ethics, non-competition, and leave-of-absence, to name a few. 2013 is a year in which the courts will see an increasing number of claims for alleged invasion of privacy and violation of the federal Stored Communications Act, forcing the courts to break new ground in the areas of social media and employment law. *Gary E. Perlmutter, Partner, Asker Perlmutter PLC, Farmington Hills, Mich.*

Regulated industries such as health care and pharmaceutical must ensure that their social media activities are compliant with all laws. Regulators are monitoring. *Kenneth Suzan, @ksuzan, Of Counsel, Barnes & Thornburg LLP, Minneapolis, Minn.*

The popularity of social media will be fueled by the increased growth and expansion of mobile devices such as smartphones and tablets. All eyes will be on mobile. *Kenneth Suzan, @ksuzan, Of Counsel, Barnes & Thornburg LLP, Minneapolis, Minn.*

In the age of viral videos and social media, anyone can become an overnight "celebrity." Accordingly, fame-seekers should consider that choosing the location of their domicile is not only relevant, but vital, in terms of their right of publicity, enforcement of same, and their ability to pass such rights on to their heirs. *Lynne Boisineau, Partner, McDermott Will & Emery, Irvine, Calif.*

Social gaming thriving. Online gambling slowed by legislative process. Social gaming provides profitable online gaming alternative. *Bradford Blaise, @Get_SET_Law, Associate, Pillsbury Winthrop Shaw Pittman LLP, McLean, Va.*

The ever increasing motion practice on e-discovery issues will hopefully provide greater clarification on what types of traditionally private media (e.g., smartphones, social media accounts, personal emails) lie beyond the scope of what is discoverable in unrelated litigation. *Tim Bukher, @tbukher, Partner, <http://www.handalglobal.com>, Handal & Morofsky LLC, New York, and editor of the Law Techie blog.*

Social Media in the Workplace

If the company social media policy is more than two years old, it is time for a refresh, thanks to state legislatures and the NLRB, among other developments. And don't overlook the importance of training that is relevant and customized to subsets of workers and your actual industry and corporate culture. *Jennifer C. Archie, Partner, Latham & Watkins LLP, Washington, D.C.*

Expect to see more litigation arising from the blurring lines between personal social media usage and work-related social media usage. *John F. Delaney, @MoFoSocMedia, Partner, and editor of SociallyAwareBlog, Morrison & Foerster LLP, New York, N.Y.*

What tech law developments to look for in 2013? Mobile, mobile, mobile! From rules surrounding mobile payments, to BYOD to work issues, mobile rules 2013. *Mandy Woodland, Associate, @mandywoodlandCox and Palmer, St. Johns, Newfoundland, Canada.*

Unexpected adverse impacts on employers and employees created by BYOD (Bring Your Own Device) programs. *Holly K. Towle, Partner, K&L Gates LLP, Seattle.*

Mobile devices (e.g., cell phones, tablets, etc.) will in 2013 continue to present new legal challenges for vendors, consumers, and regulators. These challenges will include a myriad of legal issues such as copyright, patent, trade secret, licensing, and privacy issues. *Alan S. Wernick, Founder & Director, ITIP Institute, Chicago.*

With the explosive growth of enterprise social networks such as Jive, Yammer and NewsGator, we're anticipating a wave of employment disputes arising from intra-company usage of such networks. *John F. Delaney, @MoFoSocMedia, Partner, and editor of SociallyAwareBlog, Morrison & Foerster LLP, New York, N.Y.*

In 2013 we will likely see more disputes between employers and employees over the ownership of social media accounts, contacts and other online assets. *Joseph Geisman @JoeGeisman, Vice President, Business and Legal Affairs, Maize Marketing, Los Angeles.*

The lesson from the lawsuit over who owns a Twitter account is that where something has a business value, a written agreement should exist. *Glen Gilmore, @glengilmore, Attorney and Digital Marketing Strategist, Gilmore Business Network, Greater New York.*

NLRB guidance on social media policies has put an end to "warm and fuzzy": drafting a compliant policy has become a lot more complicated. *Glen Gilmore, @glengilmore, Attorney and Digital Marketing Strategist, Gilmore Business Network, Greater New York.*

Social media is steadily evolving with Facebook, LinkedIn, and Twitter continuing to be key players in 2012, but Pinterest has been steadily gaining steam. Employer social media policies were a hot news topic in 2012 with a considerable amount of coverage on employee privacy rights. Vigilance is the key for legal teams in 2013 as they need to keep on top of the ever changing social media and legal landscape to maintain policies that are both lawful and enforceable. *Jamila Hunte, @bdbrandprotect, Account Manager, BrandProtect, Ontario, Canada.*

BYOD challenges security of IT systems and traditional concepts of responsibility within companies. Bring in 2013 with a fresh approach to employment contracts & policies. *Bradley L. Joslove, Partner, Franklin Societe D' Avocats, Paris.*

Computer Fraud Among Employees

A pending cert petition in *WEC Carolina Energy Solutions LLC v. Miller* gives the U.S. Supreme Court a chance to weigh in on whether the CFAA applies to workers who use office computers outside the scope of their employers' computer use policy, a question affecting anyone who uses a computer at work. *Neel Chatterjee, Partner, Orrick Herrington & Sutcliffe LLP, Silicon Valley.*

The Ninth Circuit's decision in *U.S. v. Nosal* was a game changer for employers attempting to protect against data theft by insiders under the Computer Fraud and Abuse Act. *Robert B. Milligan, @tradesecretslaw, Partner, Seyfarth Shaw LLP, Los Angeles.*

The 1986 Computer Fraud and Abuse Act is painfully outdated and is constantly being reinterpreted by several circuit courts of appeal. It could be argued that based on broad interpretation of the act employees use of a workplace computer to access Social Media sites could potentially be criminalized. 2013 may be the year this almost three decade old act could be (or should be) revised to reflect the current digital landscape more realistically. *Darren Enta, BrandProtect, Ontario, Canada.*

Recent *Zynga v. Patmore* case highlights that employers must be vigilant in ensuring that former employees don't take company data and store it in personal online data repositories like Dropbox. *Robert B. Milligan, @tradesecretslaw, Partner, Seyfarth Shaw LLP, Los Angeles.*

Will they or won't they? Will the U.S. Supreme Court grant the petition for review in *WEC Carolina v. Miller* and resolve the circuit split over the application of the Computer Fraud and Abuse Act regarding employee data theft? *Robert B. Milligan, @tradesecretslaw, Partner, Seyfarth Shaw LLP, Los Angeles.*

Privacy in the United States

Federal Trade Commission

The "changing of the guard" at the FTC, with at least one new commissioner and a likely new chair, as well as a new director of consumer protection, necessarily will mean a different approach to enforcement of Section 5 in the area of privacy and data security. Given the slow pace of the multistakeholder process and that broad privacy legislation is unlikely, the FTC's enforcement agenda will remain an important component of the country's privacy framework. *Christopher Wolf, Partner, Hogan Lovells, Washington, D.C.*

New FTC leadership will take over in 2013 (Chairman and Director of Bureau of Consumer Protection). The trend will likely be to even greater enforcement in the privacy and data security areas and more policy papers issued by the Commission establishing "best practices" for companies, including big data, comprehensive data collection, and disclosures on mobile devices. *D. Reed Freeman Jr., Partner, Morrison & Foerster LLP, Washington, D.C.*

FTC's recent actions against window marketers for making "up to" savings claims not supported by savings experienced by a majority of users portends a dramatic change in making such claims. The actions have the potential of eliminating the well-established standard that a marketer should substantiate a savings claim by having at 10% of the consuming population experience the "up to" result. Will the decisions be limited to big ticket items or do they signal future restrictions on "up to" claims? *Andrew Lustigman, @advlaw, Partner, Olshan Frome Wolosky LLP, New York, N.Y.*

New FTC COPPA Rule will almost certainly expand the Rule's coverage. Watch for vigorous FTC enforcement and potential challenges if the Rule exceeds the statute's grant of authority to the FTC. *D. Reed Freeman Jr., Partner, Morrison & Foerster LLP, Washington, D.C.*

With the FTC in transition and a gridlocked Congress, look for California to re-emerge as the principal driver of privacy and data security regulation in the United States. *Stephen P. Satterfield, Associate, Covington & Burling LLP, Washington, D.C.*

A very notable development in 2012 was the increase in enforcement in consumer privacy and healthcare privacy, especially by the FTC and HHS. This will push privacy up the priority list at many

organizations. *Daniel J. Solove, @DanielSolove, John Marshall Harlan Research Professor of Law, George Washington University Law School, Washington, D.C., and Founder, Teach Privacy consulting and training firm.*

The FTC's unfairness authority will face a crucial test in the FTC's data security case against Wyndham. Watch for any curtailment of authority, which the FTC will appeal, or the FTC's more aggressive use of unfairness if the court upholds the Commission's use of it in this case. *D. Reed Freeman Jr., Partner, Morrison & Foerster LLP, Washington, D.C.*

FTC antitrust activity on the high-tech front will continue to expand and start attracting a great deal more congressional scrutiny. *Adam Thierer, @adamthierer, Senior Research Fellow, Mercatus Center at George Mason University, Fairfax, Va.*

Increased challenges to authority and boundaries of FTC authority to create privacy regulatory regime under Section 5 of FTC Act. *Holly K. Towle, Partner, K&L Gates LLP, Seattle.*

Will Congress amend the Electronic Communications Privacy Act in 2013 to require a search warrant before government can get access to the content of any electronic communications? Momentum seems to be building, but law enforcement could still put the kibosh on it. *Michael Vatis, Partner, Steptoe & Johnson LLP, New York, N.Y.*

The 2008 "red flags rule," directed at identity theft prevention, was revised in November 2012. In February 2013, the FTC is scheduled to finally begin enforcing the rule, as revised. Businesses that take the red flags rule to heart, whether or not they're covered entities, may realize a decrease in liabilities for data breaches and identity theft (and find it far less expensive than responding to an FTC inquiry). *Alan S. Wernick, Founder & Director, ITIP Institute, Chicago.*

State Forays Into Privacy

California's attorney general seeks to regulate privacy on small screen mobile devices. *Ian Ballon, @ianballon, IP & Internet Litigation Shareholder, Greenberg Traurig LLP, Silicon Valley & Los Angeles.*

State regulators recently have made aggressive moves to regulate online and mobile privacy standards (e.g. California AG "enforcement" action against Delta for lack of mobile privacy policy), filling a void left by Congress which has yet to pass comprehensive data privacy legislation. Like earlier state efforts to prescribe standards for commercial email, this patchwork approach to regulation is unworkable and renews questions about states' ability to prescribe standards for the Internet and digital commerce. *Ashlie Beringer, Partner, Gibson, Dunn & Crutcher LLP, Palo Alto, Calif.*

State attorneys general are likely to play an increasingly important role in privacy enforcement. The California attorney general is leading the way on mobile apps, and the National Association of Attorneys General has made privacy a main focus for the organization. *Christopher Wolf, Partner, Hogan Lovells, Washington, D.C.*

More healthcare CEs and BAs will be sanctioned for HIPAA violations, by HHS as well as state AGs, in 2013 than in all previous years combined. *Rebecca Herold, @PrivacyProf, Chief Executive Officer, The Privacy Professor, Compliance Helper, and Norwich University, Des Moines, Iowa.*

The Great Privacy Debate

For 2013, online businesses should view the posted privacy policy as the starting point, not the ending point, for achieving notice and choice. *Jennifer C. Archie, Partner, Latham & Watkins LLP, Washington, D.C.*

Data privacy and security will continue to dominate the news in 2013—look for the Boy Scouts to issue merit badges for Scouts who master "Privacy Compliance" as well as First Aid. *Joseph V. DeMarco, @devoredemarco, Partner, DeVore & DeMarco LLP, New York, N.Y.*

The signature issue of 2013 will be do not track. Will the W3C come up with a consensus standard? If so, will the FTC and the European regulators approve of it? If the W3C fails, will the FTC broker a deal directly with industry? How would any such deal be seen by the Europeans? All of those questions will be answered in 2013. *D. Reed Freeman Jr., Partner, Morrison & Foerster LLP, Washington, D.C.*

Expect more privacy rules as lawmakers balance needs of pubs to sell ads, marketers to target consumers and individuals to protect privacy. *Terri Seligman, @FrankfurtKurnit, Partner, Frankfurt Kurnit Klein & Selz PC, New York, N.Y.*

In 2013 the privacy industry may remember that the state is more threatening than a cookie. *Graham Smith, @cyberleagle, Partner, Bird & Bird LLP, London.*

Expect to see more privacy-related enforcement at both the state and federal level related to mobile

apps, particularly those that collect data from children. *Aaron P. Rubin, @MoFoSocMedia, Of Counsel, Morrison & Foerster, San Francisco.*

In 2013, the White House Consumer Privacy Bill of Rights will be introduced and will get a surprisingly positive reception from businesses weary of media and advocacy criticism of their data practices. *Jules Polonetsky, @julespolonetsky, Co-chair and Director, Future of Privacy Forum, Washington, D.C.*

The ongoing push for new or expanded privacy laws will finally result in some sort of action with kids' privacy concerns leading the way. *Adam Thierer, @adamthierer, Senior Research Fellow, Mercatus Center at George Mason University, Fairfax, Va.*

Increasingly more surveillance activities, and the expanding use of drones and robots to do such spying, will bring multiple proposed privacy bills specific to surveillance in the U.S. Congress, as well as new legal proposals throughout the world for restricting such activities. *Rebecca Herold, @PrivacyProf, Chief Executive Officer, The Privacy Professor, Compliance Helper, and Norwich University, Des Moines, Iowa.*

In 2013, the emergence of web 3.0 will change the frontiers of privacy. *Bradley L. Joslove, Partner, Franklin Societe D' Avocats, Paris.*

Will 2013 be the year that law enforcement rules governing access to electronic communications enter the 21st Century? There's more cause for optimism than ever before—especially for improvements regarding access to the content of communication and location tracking. *Chris Calabrese, @CRCalabrese, Legislative Counsel, American Civil Liberties Union, Washington, D.C.*

Judiciary Committee votes to extend ECPA warrant requirement to all stored content; but ECPA waits yet another year for uncertain reform in 2013. *Albert Gidari, Partner, Perkins Coie LLP, Seattle.*

As content distribution moves increasingly online and over apps, considerations of privacy law will become as important as copyright, branding and marketing law have been in the traditional distribution space. *Eleanor Lackman, @EMLackman, Partner, Cowan DeBaets Abrahams & Sheppard LLP, New York, N.Y.*

Privacy Litigation

2013 will be the year of privacy class actions for the mobile industry. *Jay Edelson, @jayedelson, Founder and Managing Partner, Edelson McGuire LLC, Chicago.*

The wave of litigation over online tracking appears to have crested. After a series of adverse decisions, the plaintiffs' bar may fear making more bad law. *Stephen P. Satterfield, Associate, Covington & Burling LLP, Washington, D.C.*

There has been a chipping away at the "proof of harm" wall preventing privacy lawsuits to proceed. Judges have started to allow creative damage theories to establish standing to sue and to fulfill the damages requirement of causes of action. If the wall comes crumbling down, privacy class actions will proliferate. *Christopher Wolf, Partner, Hogan Lovells, Washington, D.C.*

More judicial exploration of the actual dividing line and balance between the First Amendment and data protection laws. *Holly K. Towle, Partner, K&L Gates LLP, Seattle.*

While attackers can be persistent and use sophisticated tools, most data breaches result from the failure to implement basic or intermediate security controls across a network, or across a linked network of affiliated entities. As a legal risk management matter, therefore, corporate legal departments need to get involved in whether IT department has the time, resources, head count, and budget to mitigate the top threats and vulnerabilities. *Jennifer C. Archie, Partner, Latham & Watkins LLP, Washington, D.C.*

More data privacy, behavioral advertising and security breach litigation despite the absence of damage or legally cognizable injury in most cases. *Ian Ballon, @ianballon, IP & Internet Litigation Shareholder, Greenberg Traurig LLP, Silicon Valley & Los Angeles.*

2012 saw a ton of activity around privacy and social networks, including privacy class action lawsuits against networks, regulatory action, one high-profile battle involving government efforts to obtain user data from networks, and cases involving social media evidence. No decision really stands out to me. What we didn't see was significant legislation (do not track; email/account privacy; federal data breach law). We are sure to see some legislative activity in this area in 2013. *Venkat Balasubramani, @Vbalasubramani, Partner, Focal PLLC, Seattle.*

Marketing to mobile devices remains an exceptionally difficult task. The laws governing mobile marketing have not kept up with America's transition to the smart phone. This is true both in terms of

lack of space for sufficient disclosures in advertising to contacting customers about potential offers. Class action attorneys are exploiting this chasm. *Andrew Lustigman, @advlaw, Partner, Olshan Frome Wolosky LLP, New York, N.Y.*

Companies beleaguered by privacy-related class action lawsuits had their hearts broken this year when the Supreme Court revoked its grant of certiorari after entertaining oral argument in *Edwards v. First Financial Corp.*, a case in which the Ninth Circuit held that the constitutional standing requirement was satisfied despite the fact that the plaintiff suffered no concrete injury. *Neel Chatterjee, Partner, Orrick Herrington & Sutcliffe LLP, Silicon Valley.*

Google agreed to pay a record \$22.5 million civil penalty this year to settle charges by the FTC that Google misrepresented its use of tracking cookies to users of Apple's Safari browser. In addition to imposing the largest civil fine in history for violation of a Commission order, the settlement agreement also requires Google to disable the subject cookies. *Neel Chatterjee, Partner, Orrick Herrington & Sutcliffe LLP, Silicon Valley.*

Early this year, the First Circuit held that a plaintiff lacked Article III standing to sue her investment broker for failing to conform to data encryption standards, which plaintiff argued increased the risk that her private information would be subject to unauthorized access. *Neel Chatterjee, Partner, Orrick Herrington & Sutcliffe LLP, Silicon Valley.*

The best way to prepare for a major data breach is to experience a major data breach—after your first, they are all routine. *Joseph V. DeMarco, @devoredemarco, Partner, DeVore & DeMarco LLP, New York, N.Y.*

Watch for increasing class action activity as courts in 2nd, 9th, and 11th Circuits are offering plaintiffs new theories to survive motions to dismiss. *D. Reed Freeman Jr., Partner, Morrison & Foerster LLP, Washington, D.C.*

Location privacy remains unsettled, but a baseline emerges as SCOTUS finds persistent government tracking by GPS to be a search in *United States v. Jones*. *Albert Gidari, Partner, Perkins Coie LLP, Seattle.*

CA federal court rules Video Privacy Protection Act applies to streaming video (*Hulu case*). *Jeffrey Jacobson, Partner, Debevoise & Plimpton LLP, New York, N.Y.*

9th Cir. approves Facebook settlement with no payments to class members, just establishment of new privacy foundation with Facebook representative on board. *Jeffrey Jacobson, Partner, Debevoise & Plimpton LLP, New York, N.Y.*

Multiple decisions holding that violation of privacy statute confers standing to sue even without quantifiable damages; Supreme Court declines to weigh in. *Jeffrey Jacobson, Partner, Debevoise & Plimpton LLP, New York, N.Y.*

The Supreme Court missed an opportunity to use a real estate case to clarify the law of data privacy. Courts have differed in deciding when violation of a privacy statute creates enough injury to confer standing. The Supreme Court seemed primed to address this issue in *First American Financial Corp. v. Edwards*, where the plaintiff alleged injury based on violation of the Real Estate Settlement Procedures Act. But the Court dismissed cert. as improvidently granted. The case may have been a victim of the Court's end-of-term focus on the Obamacare case. *Howard S. Hogan, Partner, Gibson, Dunn & Crutcher LLP, Washington, D.C.*

2012 was the year LinkedIn got hacked. Expect more class-action lawsuits for data breaches and bigger settlements. *Glen Gilmore, @glengilmore, Attorney and Digital Marketing Strategist, Gilmore Business Network, Greater New York, N.Y.*

The HIPAA and HITECH final omnibus rules will be released, if not before the end of 2012, for sure in 2013. The remaining CEs who have been sitting on their hands for the past several years, and almost all of the BAs who've done little more than sign a BA agreement, will scramble trying to get into compliance as quickly as possible, fearing that they will be audited and will face huge fines and associated penalties. *Rebecca Herold, @PrivacyProf, Chief Executive Officer, The Privacy Professor, Compliance Helper, and Norwich University, Des Moines, Iowa.*

Privacy in the European Union

Privacy by design—Let's prepare for proposed EU data protection regulation. *Bradley L. Joslove, Partner, Franklin Societe D'Avocats, Paris.*

New draft European Data Protection Regulation: what changes for data controllers? Also applicable to companies outside the EU! Companies may need to appoint data protection officer. *Edwin Jacobs,*

@Edwin_Jacobs, Partner, time.lex, Brussels.

European Parliament and the Council are reviewing the draft EU Data Protection Regulation—new proposal expected early 2013 but no major changes expected. *Karin Retzer, Partner, Morrison & Foerster, Brussels.*

Continued morphing of non-U.S. data protection laws into competition vehicles. *Holly K. Towle, Partner, K&L Gates LLP, Seattle.*

The EU seems bent on making its data protection regime even more complicated and burdensome for businesses with the passage of a new Data Protection Regulation. Yet industry doesn't seem to be putting up much of a fight, yet. *Michael Vatis, Partner, Steptoe & Johnson LLP, New York, N.Y.*

The proposed EU Data Protection Regulation will move closer to reality in 2013, and it is likely to emerge with fewer adjustments to the originally-proposed text than many in business would want. Businesses will need to prepare for compliance with the new regime. *Christopher Wolf, Partner, Hogan Lovells, Washington, D.C.*

Will Google, Facebook and Twitter become illegal in Europe? In the year 2013 the European Union will introduce new data protection rules which are totally different to the understanding and practice in the U.S. The big question is: Will there be a cultural clash or competition between the systems and who will pay for all that. Are the U.S. companies willing to obey to such rules? *Michael Zoebisch, @zoebisch, Partner, rwzh Rechtsanwälte, Munich, Germany.*

User consent rules for cookies have been finalized in all EU countries. The U.K. and German authorities are the most active—the ones to watch. *Karin Retzer, Partner, Morrison & Foerster, Brussels.*

Europe and the U.S. will continue their long, slow, uneven convergence toward a common approach to online privacy protection, and both will be better off as a result. The U.S. Congress will, directly or through FTC rulemaking, set some broad baseline principles of awareness and control over personal data; in parallel, the European Commission and the EU members' data protection commissions will adopt a more pragmatic, less self-defeatingly formalistic approach toward enforcement. *Andrew McLaughlin, @McAndrew, Entrepreneur-in-Residence, betaworks, New York, N.Y.*

The Right to Be Forgotten in the internet era seems to restore the power balance by giving effective control to individuals over their personal data. Will the new European Data Protection Regulation do the trick? *Edwin Jacobs, @Edwin_Jacobs, Partner, time.lex, Brussels.*

2012 saw proposed huge changes to the EU data privacy regime, but objections too. *Jonathan Armstrong, Partner, Duane Morris LLP, London.*

Turkey fails to pass the Data Protection Bill again, for nearly a decade now. But there's pressing need for the same; global companies and businesses should be on the look-out. *Ceylin Beyli, @ceylinb, Founder & Managing Lawyer, CBL Law Office, Istanbul, Turkey.*

Web sites operating in Russia should now publish their privacy policy as it is compulsory under the updated version of the Russian law on personal data. *Igor Motsnyi, Partner, Motsnyi Legal Services, Moscow.*

The EU's proposed "right to be forgotten," if implemented, would pose major operational challenges for both traditional and new media. *Andy Roth, Partner, SNR Denton, New York, N.Y.*

The debate over how much power consumers should have over "their data" will become increasingly febrile in the run-up to the new EU Data Protection Regulation. *Mark Owen, Partner, Harbottle & Lewis, London.*

E-Commerce Bill is on the way for codification in Turkey, in 2013. A limited regulation of Data Protection is in question, but spam and cache regulations prevail. Monetary fines will be the topping of this fine cake. *Ceylin Beyli, @ceylinb, Founder & Managing Lawyer, CBL Law Office, Istanbul, Turkey.*

In 2013, Brazil will head to a more regulated cyberspace: laws on the use of internet, e-commerce and protection of data and privacy are expected. *João Harres & Fábio Pereira, Associates, Veirano Advogados, Rio de Janeiro.*

Law 46/2012, transposing Directive 2009/136/EC on the processing of personal data and the protection of privacy in the electronic communications sector, amended Law 41/2004 (Privacy and Data Protection in Electronic Communications Law) and Decree-Law 7/2004 (E-Commerce Law) and came into force on 30 August 2012. This new law makes significant changes and affects all companies with e-commerce activity. The main updates of the law are: (1) the implementation of a data breach notification obligation to the Data Protection Commission; (2) establishing a requirement for prior

express consent based on “clear and comprehensive information” for the use of cookies; (3) the regulator must issue best practice recommendations on the security levels for the technical and organizational measures to be implemented; (4) companies must maintain lists recording consent/absence of objection for direct marketing purposes and also consult the existing public opt-out list maintained by the Consumer Directorate-General on a monthly basis. *Cesar Bessa Montiero, Partner, PBBR — Pedro Pinto, Bessa Monteiro, Reis, Branco, Alexandre Jardim & Associados, Lisbon, Portugal.*

Information Security

If only Privacy by Design had started out as Cybersecurity by Design. *Alan Charles Raul, Global Coordinator of Privacy, Data Security and Information Law Group, Sidley Austin LLP, Washington, D.C.*

Whether by legislation, FTC action, or common law, we're rapidly moving toward an environment where all businesses will be subject to a legal duty to provide “reasonable” security for the data they maintain and the systems they operate. *Thomas J. Smedinghoff, @smedinghoff, Partner, Edwards Wildman Palmer LLP, Chicago.*

Grammatical errors in spam will increase because they are intentional and tactical. The errors weed out sophisticated people who assume the spam is from clumsy low-level scam artists rather than cunning criminals, and effectively generate responses from less sophisticated internet users who innocently answer phony requests for emergency funds purportedly sent by acquaintances saying they have been robbed at gunpoint while traveling abroad. *William A. Tanenbaum, Partner and Chair, Intellectual Property & Outsourcing Group, Kaye Scholer LLP, New York, N.Y.*

An international convention on cybersecurity will authorize deep packet inspections and other governmental intrusions, confirming existing homeland security rules. *William B. Bierce, @wbierce, Partner, Bierce & Kenerson, P.C., New York, N.Y.*

Security of critical infrastructure will emerge as a defining issue of 2013. *Andy Roth, Partner, SNR Denton, New York, N.Y.*

There won't be cybersecurity legislation anytime soon, but there will be an executive order. What it says about information sharing and “voluntary” security standards will be important for companies that constitute “critical infrastructures,” even if the EO lacks the force of legislation. *Michael Vatis, Partner, Steptoe & Johnson LLP, New York, N.Y.*

Cybersecurity is the new frontier. Private companies and governments will have to cooperate in new and creative ways to protect assets, critical infrastructure and data. *Miriam Wugmeister, Partner, Morrison & Foerster, New York, N.Y.*

Identity Management

Digital identity management is becoming a hot issue both in the U.S. and the EU. Businesses and governments alike are beginning to realize that digital identity management is fundamental to the further development of the internet economy. For each party to a significant online transaction, identifying the other, and being able to authenticate that identity is a key requirement. *Thomas J. Smedinghoff, @smedinghoff, Partner, Edwards Wildman Palmer LLP, Chicago.*

Identity management should be a basic course for everyone in the school of life. Individuals need to consider how much information they give up to third parties with whom she/he interacts. Companies need to develop what they collect and how they use identity information as the repercussions of leaking identity information or mismanaging it is being increasingly policed by public and private parties. *Kevin R. Erdman, @kevinerdman, Partner, Reichel IP LLP, Indianapolis.*

Through implementation of its National Strategy for Trusted Identities in Cyberspace (NSTIC), the U.S. is seeking to establish a private-sector led voluntary framework to facilitate trustworthy online identity verification. By contrast, the European Commission is promoting a draft eID regulation for the EU to achieve the same goal. Addressing the privacy and liability issues remain the biggest legal hurdles under both approaches. *Thomas J. Smedinghoff, @smedinghoff, Partner, Edwards Wildman Palmer LLP, Chicago.*

Cloud Computing

In the cloud, nobody knows you're a dog—unless they do their due diligence. *Alan Charles Raul, Global Coordinator of Privacy, Data Security and Information Law Group, Sidley Austin LLP, Washington, D.C.*

Cloud computing will make disaster recovery sites unnecessary. There is little need to maintain expensive backup sites when data is replicated in the cloud and can be downloaded rather than restored from backup media in a time-consuming, labor-intensive effort under emergency conditions. *William A. Tanenbaum, Partner and Chair, Intellectual Property & Outsourcing Group, Kaye Scholer LLP,*

New York, N.Y.

Cloud Computing is rapidly growing market, but legal differences make it difficult for U.S. companies to successfully offer their services in Europe. Seek expert advice and make your services compliant with European laws. *Thomas Rickert, @thomasrickert, Managing Partner, Schollmeyer & Rickert Law Firm, Bonn & Frankfurt, Germany.*

After Hurricane Sandy, every enterprise will put key confidential operational data into the Cloud or other virtual environment, with uncertain security. *William B. Bierce, @wbierce, Partner, Bierce & Kenerson, P.C., New York, N.Y.*

The shift to smartphone-centric computing is as big an inflection point as the shift from mainframes to PCs. It is not a return to mainframe time-sharing, because the computing power is in your hand and the data is available by the data anytime, data anywhere cloud model. *William A. Tanenbaum, Partner and Chair, Intellectual Property & Outsourcing Group, Kaye Scholer LLP, New York, N.Y.*

'Big Data'

2013 is likely to be big year for privacy and a tough year for data brokers. *Jonathan D. Hart, Partner, Dow Lohnes PLLC, Washington, D.C.*

The merger of on line data and offline data will produce vast—and largely unregulated—repositories of information on a significant portion of the American population. *Joseph V. DeMarco, @devoredemarco, Partner, DeVore & DeMarco LLP, New York, N.Y.*

The digital privacy debate won't progress until we re-define "PII" from "Personally Identifiable Information" to "Privacy-Impacting Information." In the world of "Big Data," any data is potentially privacy-impacting. *Lynn St. Amour, @LynnStAmour, President/CEO, Internet Society, Geneva, Switzerland/Reston, Va.*

Many states and countries passed comprehensive privacy reform while Google and Facebook continued to amass unimaginable quantities of personal data. *Christine Jones, @attyjones, Former General Counsel, GoDaddy.com, Phoenix, Ariz.*

Personalized medicine, personal devices, and tracking: bioinformatics companies will need to figure out how to keep feeding big data while keeping the regulators from shutting down the flow of sometimes quite personal information. Plus the USPTO and EPO need to figure out how to provide reasonable and balanced protection to the IP of the biometrics industry. *Kevin R. Erdman, @kevinerdman, Partner, Reichel IP LLP, Indianapolis.*

Big data, a big issue for privacy. *Bradley L. Joslove, Partner, Franklin Societe D' Avocats, Paris.*

In 2013, people will still discuss PII, but PII is already becoming outdated as important currency in the information economy, since with the right data sets and right analytics you can know incredible details about people without ever knowing their name. *Joseph V. DeMarco, @devoredemarco, Partner, DeVore & DeMarco LLP, New York, N.Y.*

2013 should be the year when regulators, lawyers and the law catch up to social business and begin to decipher the impact of big data. *Glen Gilmore, @glengilmore, Attorney and Digital Marketing Strategist, Gilmore Business Network, Greater New York.*

Over 2 zettabytes of info created and shared annually—now that's Big Data—and it will only get bigger in 2013. *Albert Gidari, Partner, Perkins Coie LLP, Seattle.*

Politicians who used relevant advertising and tailored marketing tools for 2012 campaigns should be wary of regulating the way consumer information is collected, shared and used, as it will impact the quality of the data they can use in the future as well. *Francine Friedman, Senior Policy Counsel, Akin Gump Strauss Hauer & Feld LLP, Washington, D.C.*

Irony Alert: the same Obama Administration that was so vocal in 2012 about protecting consumer privacy had been collecting, mining and amassing a trove of personal data about its supporters over the past four years for use in the President's re-election campaign. *Yaron Dori, @yarondori, Partner, Covington & Burling LLP, Washington, D.C.*

Data quality will become a critical aspect of big data as poor data quality results in increased legal liabilities and privacy violations for companies in the U.S. and global marketplace. *Alan S. Wernick, Founder & Director, ITIP Institute, Chicago.*

Big data will change corporate data retention policies. Current polices hold data only as long as litigation or regulatory retention periods require or for even shorter corporate data periods. To get

the benefit of running data analytics against a company's own historical customer and other data, the retention periods will need to be lengthened so the data remains available. *William A. Tanenbaum, Partner and Chair, Intellectual Property & Outsourcing Group, Kaye Scholer LLP, New York, N.Y.*

Hackers and Other Cybercriminals

By the end of 2013 (if not already), every type of crime will rely heavily on the use of computers. As a result, every law enforcement official from the head of the FBI down to the traditional “beat cop” must master cybercrime, digital evidence collection, and computer forensics.” *Joseph V. DeMarco, @devoredemarco, Partner, DeVore & DeMarco LLP, New York, N.Y.*

Phishing & Vishing: why is it so difficult to catch the fisherman? Convention of the Council of Europe on Cybercrime is first international treaty to address cybercrime. Increasing investigative techniques and providing procedural measures. *Edwin Jacobs, @Edwin_Jacobs, Partner, time.lex, Brussels.*

Brazilian cybercrime bill, enacted on December 3, 2012, will be enforceable in April, now unauthorized access is forbidden. *Renato Opice Blum, @opiceblum, Partner, Opice Blum Advogados Associados, Sao Paulo.*

New types of cyber-fraud will emerge through exploiting privacy risks associated with big data analytics. Even with no specific PII involved, the big data will reveal personal information that will be exploited for fraud and other crimes. *Rebecca Herold, @PrivacyProf, Chief Executive Officer, The Privacy Professor, Compliance Helper, and Norwich University, Des Moines, Iowa.*

First steps are taken against Brazil's lack of legal framework to prevent illegal activities in the cyberspace, as two laws on cyber and computer crimes were enacted in late 2012. *João Harres & Fábio Pereira, Associates, Veirano Advogados, Rio de Janeiro.*

Invasion of digital devices for obtainment, adulteration or destruction of data or information are now typified as crimes in Brazil and may lead to imprisonment. *João Harres & Fábio Pereira, Associates, Veirano Advogados, Rio de Janeiro.*

Technology and the Law

Technology simply outpaces the poor law, which struggles to balance everyone's interests. Security, privacy, big data, and IPv4 issues will be important in 2013. *Michael Powell, @mpowell_iplaw, Partner, Baker Donelson Bearman Caldwell & Berkowitz PC, Atlanta.*

Clash between privacy regimes and online activity will grow in 2013. Social media, analytics, geolocation, social sharing, cloud computing—it is likely too late to put the genie back in the bottle. *Miriam Wugmeister, Partner, Morrison & Foerster, New York, N.Y.*

The notion of “video games” as game consoles sold only to adolescents is anachronistic—baby boomers, CEOs, stay-at-home parents, teens, and toddlers are all using laptops, smartphones and tablets in equal measure and are enjoying games in the form of apps, online virtual worlds, exercise-based games, musical games, digital flip books, and the like. Businesses feeding this demand and contributing to the social aspects of these games will continue to be ahead of the curve, but they will need to be vigilant about analyzing the attendant trademark, copyright and right of publicity issues that can accompany such games. *Lynne Boisineau, Partner, McDermott Will & Emery, Irvine, Calif.*

Human Rights and the open internet have become inexorably linked, sharing a common DNA. *Lynn St. Amour, @LynnStAmour, President/CEO, Internet Society, Geneva, Switzerland/Reston, Va.*

2012 was the first Olympics on demand when multi-channel viewing went mainstream. *Jonathan Armstrong, Partner, Duane Morris LLP, London.*

The very design of the internet—an open, global and distributed network—empowers individuals on the margins to make their voices heard and to innovate. *Lynn St. Amour, @LynnStAmour, President/CEO, Internet Society, Geneva, Switzerland/Reston, Va.*

Laws depend on societal & cultural norms. What is “normal” in a networked, linked, socially connected, overly exposed world without borders? *Joseph Rosenbaum, @JIRLaw, Partner, Global Chair—Advertising Technology & Media Law Practice, Reed Smith LLP, New York, N.Y.*

The law always lags behind technology. Will courts grapple with inline linking, hashtags, and sponsored stories in 2013? Fingers crossed. *Brian G. Murphy, @frankfurtkurnit, Partner, Frankfurt Kurnit Klein & Selz PC, New York, N.Y.*

In 2013, companies will really start competing on privacy, transparency and security. *Alan Charles Raul, Global Coordinator of Privacy, Data Security and Information Law Group, Sidley Austin LLP, Washington, D.C.*

Digital world—paper laws: Privacy. Publicity. Intellectual property. Sovereignty. Labor relations. Legal practice. Advertising. Security. *Joseph Rosenbaum, @JIRLaw, Partner, Global Chair – Advertising Technology & Media Law Practice, Reed Smith LLP, New York, N.Y.*

Convergence: Social media. Cloud computing. Mobile marketing. Crowd sourcing. Need we say more? *Joseph Rosenbaum, @JIRLaw, Partner, Global Chair – Advertising Technology & Media Law Practice, Reed Smith LLP, New York, N.Y.*

Two potential breakout legislative issues for 2013: Domestic drones and 3D printing. Policymakers will get interested in regulating both. *Adam Thierer, @adamthierer, Senior Research Fellow, Mercatus Center at George Mason University, Fairfax, Va.*

The recent defeats of plaintiffs in right of publicity suits is encouraging some companies to be more liberal in referring to famous people in their advertising. This is a mistake and I have a feeling these companies will soon be receiving cease and desist letters and it will cost them more to fight the claims and in PR than it would have to get permission. *Marc H. Trachtenberg, @winstonadvlaw, Partner, Winston & Strawn LLP, Chicago.*

The Justice Department now says that the Wire Act applies only to sports betting, and a federal court has said poker is a game of skill, not chance. But odds are still slim that internet gambling will be legal in the U.S. anytime soon, outside a few games in a few states. *Michael Vatis, Partner, Steptoe & Johnson LLP, New York, N.Y.*

As the lines defining “a celebrity” continue to blur and technology continues to advance, the current right of publicity laws in every state will need to be reevaluated to determine whether they are still relevant, or whether they require updating to encompass new ways of exploiting that right that did not exist when they were drafted. For those states without existing statutes, now is the time to consider implementing such laws. *Lynne Boisineau, Partner, McDermott Will & Emery, Irvine, Calif.*

The Online Economy

PSD and EMD allow more competition and newco's in SEPA payment market. Who will win the most? The gold digger or the provider of the digger's tools? *Edwin Jacobs, @Edwin_Jacobs, Partner, time.lex, Brussels.*

Unemployed millennials will team with VC's and pre-retirement seniors for knowledge transfer to new specialized business service providers in knowledge industries like law, accounting and engineering. *William B. Bierce, @wbierce, Partner, Bierce & Kenerson, P.C., New York, N.Y.*

The SEC's prospective rulemaking to allow internet funding portals under the Jobs Act will have a profound impact on crowdfunding for start-up ventures in 2013 and may supplant existing portals like Kickstarter.com. *Tim Bukher, @tbukher, Partner, <http://www.handalglobal.com>, Handal & Morofsky LLC, New York, and editor of the Law Techie blog.*

To what extent will the recent advent of virtual currency exchanges, like Kurrenci.com, allow gambling websites to sidestep the federal prohibitions against internet betting, and how will the government move to limit such loopholes? *Tim Bukher, @tbukher, Partner, <http://www.handalglobal.com>, Handal & Morofsky LLC, New York, and editor of the Law Techie blog.*

Big Picture IP Concerns

With Congress focused on economic issues, it may be up to stakeholders—with some guidance from the courts and international organizations—to lead the way in addressing new challenges to copyright and trademark enforcement on the internet. *Eleanor Lackman, @EMLackman, Partner, Cowan DeBaets Abrahams & Sheppard LLP, New York, N.Y.*

In the context of intellectual property, creativity, innovation, expression and ideas do not exist as some Platonic ideal. The Internet is one place where ideas, creativity, innovation and expression thrive. *Konstantinos Komaitis, @kkomaitis, Policy Advisor, The Internet Society, Geneva.*

Federal jurisdiction has existed in modern times for patent, copyright and trademark actions, but trade secrecy largely has been relegated to state courts, making practical enforcement issues such as nationwide service of process and misappropriation from the U.S. to another country challenging. There will be a strong push in 2013 for more general federal trade secret legislation. *Stuart P. Meyer, Partner, Fenwick & West LLP, Mountain View, Calif.*

Discussions on intellectual property have been hitherto trapped in the general tension between democratic governance and network governance. This is misleading and not helpful. Discussions should focus on finding ways to reconcile creativity, innovation, intellectual property and the Internet's open architecture. *Konstantinos Komaitis, @kkomaitis, Policy Advisor, The Internet Society,*

Geneva.

2012 was the year that the end of the knee-jerk judicial deference to IP stakeholders' claims arising from internet activity could really be perceived. *Ronald Coleman, @roncoleman, Partner, Goetz Fitzpatrick LLP, New York, N.Y.*

In 2012, the U.S. Immigration and Customs Enforcement (ICE), along with other U.S. government agencies, Interpol and a number of foreign enforcement bodies, launched Phase V of Operation Pangea. After just one week, the joint effort resulted in the confiscation of more than 3.75 million counterfeit pills and more than 18,000 websites; this was by far one of the largest seizures of domain names and other assets worldwide. It appears that in 2013 there will be increased efforts by ICE and its foreign counterparts to police the manufacture and distribution of all kinds of dangerous counterfeit products including pharmaceuticals, munitions, aircraft/auto parts and pesticides. *James L. Bikoff, Partner, Silverberg, Goldman & Bikoff, LLP, Washington, D.C.*

The first sale doctrine provides that when an IP right-holder sells an item embodying its IP, his or her rights are exhausted for that item. How does the doctrine apply when transactions take place across borders (because IP rights tend to be country-specific) and when the item that is sold makes its own copies—like seed from crops. The Supreme Court is considering both of these more-challenging fact patterns this coming year. *Stuart P. Meyer, Partner, Fenwick & West LLP, Mountain View, Calif.*

The Copyright Office's renewed and expanded DMCA exemptions for using short clips from DVD and online services recognize the need to modify the DMCA's restrictions, and preserve fair use, as technologies continue to change rapidly. *Rebecca Tushnet, @rtushnet, Professor, Georgetown University Law Center, Washington, D.C.*

The debate over property rights in digital goods promises to remain front and center in 2013. Questions surrounding the first-sale doctrine and what rights users retain in their digital goods property in the cloud will confront courts and Congress, along with the related question of what responsibility the government owes to innocent users when it continues the trend of shutting down websites and cutting off access to their data. *Julie Samuels, @juliepsamuels, Staff Attorney, Electronic Frontier Foundation, San Francisco.*

In 2013, even more people will share even more content they don't own over social media platforms. Will courts brand them as infringers or recognize much (some?) of this as fair use? Stay tuned. *Brian G. Murphy, @frankfurtkurnit, Partner, Frankfurt Kurnit Klein & Selz PC, New York, N.Y.*

The March 2012 "Intellectual Property and the U.S. Economy: Industries in Focus" report by the U.S. Department of Commerce found some 40 million U.S. jobs tied to intellectual property intensive industries. 2013 will see the number of jobs tied to IP intensive industries increase not only in the United States, but in other countries as well. China will also push ahead in strengthening its understanding and protection of IP in its business and legal communities. *Alan S. Wernick, Founder & Director, ITIP Institute, Chicago.*

Major changes in the copyright law and the creation of a legal-oriented framework for the internet are hot topics for 2013 in Brazil. *João Harres & Fábio Pereira, Associates, Veirano Advogados, Rio de Janeiro.*

Canada modernizes its Copyright Act. The regime now prohibits TPM circumvention and targets enablers of online infringement; but permits consumer exceptions like format and time shifting and user-generated content. *Rish Handa, Associate, McCarthy Tetrault LLP, Montreal.*

Russia expects to introduce provisions on liability of ISPs for copyright and other IPRs violations in 2013. If this happens, Russia will have its own version of the DMCA safe harbor provisions and notice and take-down procedure. *Igor Motsnyi, Partner, Motsnyi Legal Services, Moscow.*

Cutting-Edge Copyright Disputes

The ongoing battle between content owners and distribution services is playing out in two copyright cases now before the Second Circuit: Aereo and Dish Network Hopper. Aereo streams over-the-air local TV to subscribers over the Internet. The broadcast network plaintiffs claim Aereo is directly infringing their copyright rights by "transmitting" their programming to subscribers. Aereo claims these transmissions over the Internet are private performances made by their users and therefore not infringing. Dish's Network Hopper service permits subscribers to record the prime time programming of the four most popular broadcast networks with the push of a button. The networks claim Dish is violating their copyright rights by making copies of the programs without commercials. Dish claims its users are making fair-use copies. Decisions in both cases are expected in 2013. *Jonathan D. Hart, Partner, Dow Lohnes PLLC, Washington, D.C.*

Copyright is supposed to encourage innovation but new technologies, like Aereo's platform enabling

consumers to view on their computers their own recorded copies of TV programming, instead encourage litigation. *Andrew Berger, @IpInBrief, Counsel, Tannenbaum Helpen Syracuse & Hirschtritt LLP, New York, N.Y.*

The assault on the constitutionality of substantial statutory damages in copyright litigation is thankfully over, at least for now, with decisions by the District Court in *Sony v. Tenenbaum*, and by the 8th Circuit in *Capitol Records v. Thomas-Rasset* affirming jury awards of \$675,000 and \$222,000, respectively *Andrew Berger, @IpInBrief, Counsel, Tannenbaum Helpen Syracuse & Hirschtritt LLP, New York, N.Y.*

Fave case of 2012: Southpark spoof of "What What (in the Butt)" video = fair use. Of course! Don't mess with Cartman. *Brian G. Murphy, @frankfurtkurnit, Partner, Frankfurt Kurnit Klein & Selz PC, New York, N.Y.*

Copyright troll actions related to file-sharing continue to present challenges to courts, but a uniformity of rulings may begin to emerge in 2013. *David E. Weslow, @davidweslow, Partner, Wiley Rein LLP, Washington, D.C.*

2013 will see decisions in the *Aereo* and *DISH* cases. Will the TV networks be able to preserve their current advertising and retransmission fee based income streams? *David Bernstein, Partner, Debevoise & Plimpton LLP, New York, N.Y.*

Despite progress in the courts, meritless copyright "enforcement" campaigns will continue to plague citizens, commerce and judiciary unless Congress acts. *Ronald Coleman, @roncoleman, Partner, Goetz Fitzpatrick LLP, New York, N.Y.*

In *FlavaWorks*, Judge Posner of the Seventh Circuit took a different approach to linking from the Ninth Circuit in *Perfect 10*, finding inline links to infringing videos not sufficiently material to amount to contributory copyright infringement. *Ian Ballon, @ianballon, IP & Internet Litigation Shareholder, Greenberg Traurig LLP, Silicon Valley & Los Angeles.*

As new business models arise to target cord-cutting Millennials, expect to see more *Aereo*-type copyright lawsuits in the coming year. *John F. Delaney, @MoFoSocMedia, Partner, and editor of SociallyAwareBlog, Morrison & Foerster LLP, New York, N.Y.*

In 2013, two different federal courts of appeal will review whether the copyright contours of *Aereo's* internet television product and Dish Network's DVR Hopper. The outcomes of these cases is critical to the internet industry. A split between the circuits could result in the next big copyright case before the Supreme Court. Consistent opinions in favor of Dish and *Aereo* likely will result in the broadcasting industry lobbying Congress for changes to the Copyright Act. *Markham Erickson, Partner, Holch & Erickson LLP, Washington, D.C.*

The public performance right under the Copyright Act may not have received as much attention in the past 35 years as it is receiving now, due mainly to technological development. Dish Network's AutoHop, Diller's *Aereo* and other television services continue to challenge the scope of the public performance right in court, while Pandora and other music users are battling performing rights organizations for lower fees. Content owners and technology companies will be watching closely as courts decide whether a public performance is made via a type of new technology, and as copyright owners and users negotiate over the value to be placed on a public performance. *Eleanor Lackman, @EMLackman, Partner, Cowan DeBaets Abrahams & Sheppard LLP, New York, N.Y.*

The EU court ruling in *Oracle v. Usedsoft* on the sale of used software licenses was past year's most significant IT law development. Oracle predicts that software companies will move to fixed term and volume-based licenses, limit maintenance to approved transferees and accelerate transition to SaaS model. *Bradley L. Joslove, Partner, Franklin Societe D'Avocats, Paris.*

Between the *Georgia State* ruling in May and the *HathiTrust* ruling in October, it was a banner year for library fair use. Watch for the appeals in 2013. *James Grimmelmann, Professor of Law, New York Law School, New York, N.Y.*

Kirtsaeng loser at Supreme Court will race across street to Capitol. Will Congress decide role of copyright territoriality in Internet economy? *Steve Metalitz, @mskllp, Partner, Mitchell Silberberg & Knupp LLP, Washington, D.C.*

The important copyright developments will continue to be around access to, more than ownership of, content. Expect continued analysis of how much access service providers can permit their customers. *Mark Owen, Partner, Harbottle & Lewis, London.*

2013 will see the courts becoming more deeply enmeshed in the interaction between copyright and

fundamental rights such as freedom of expression. *Graham Smith, @cyberleagle, Partner, Bird & Bird LLP, London.*

2012 was the year in which tech law principles started to mould digital copyright CPentology #UsedSoft. *Graham Smith, @cyberleagle, Partner, Bird & Bird LLP, London.*

2012 saw important decisions in *Viacom v. YouTube* and *Rosetta Stone v. Google*, as well as in the *FlavaWorks* and cloud "locker" service cases, but the rulings leave the boundaries of primary and secondary liability on the Internet unclear. *Eleanor Lackman, @EMLackman, Partner, Cowan DeBaets Abrahams & Sheppard LLP, New York, N.Y.*

Second and Ninth Circuits weigh in on DMCA protection for UGC sites. *Ian Ballon, @ianballon, IP & Internet Litigation Shareholder, Greenberg Traurig LLP, Silicon Valley & Los Angeles.*

SOPA, PIPA and Their Aftermath

SOPA not passed. Next day MegaUpload seized by US government. *Ian Ballon, @ianballon, IP & Internet Litigation Shareholder, Greenberg Traurig LLP, Silicon Valley & Los Angeles.*

2012 was marked by the failure of Congress to pass legislation to curtail online counterfeiting and piracy after efforts by Internet companies succeeded in stopping the PIPA and SOPA bills. In 2013, we expect to see renewed efforts by new leadership in the House and Senate to restart such legislation without the controversial provisions, such as DNS blocking, that led to the downfall of the prior bills. *James L. Bikoff, Partner, Silverberg, Goldman & Bikoff, LLP, Washington, D.C.*

A global polity of netizens is arising. *David Johnson, Visiting Professor, New York Law School, New York, N.Y.*

SOPA/PIPA in the U.S. and ACTA in Europe made copyright policy a mainstream issue—with many Republicans seeing this as a way to connect to younger voters. Hollywood can no longer count on bipartisan support to move its agenda in Congress, and faces an uphill battle in getting trade agreements on Internet piracy ratified abroad. *Harold Feld, @haroldfeld, Senior Vice President, Public Knowledge, Washington, D.C.*

Most agree offshore pirate sites a huge problem. If PIPA/SOPA not the solution, what is? How are search engines, advertisers, payment services, gov'ts stepping up? *Steve Metalitz, @mskllp, Partner, Mitchell Silberberg & Knupp LLP, Washington, D.C.*

In the wake of the SOPA debate, we will witness the start of legislative efforts to scale back copyright law for the first time in decades. *Adam Thierer, @adamthierer, Senior Research Fellow, Mercatus Center at George Mason University, Fairfax, Va.*

The SOPA/PIPA protests put Congress on notice that the public cares about copyright issues. But the Republican Study Committee's firing of Derek Khanna showed that Congress may not be interested in listening. *James Grimmelman, Professor of Law, New York Law School, New York, N.Y.*

Copyright law and policy is getting in the way of innovation and free expression. It's time for real copyright reform that benefits everyone, not just a few entrenched interests. *Corynne McSherry, Intellectual Property Director, Electronic Frontier Foundation, San Francisco.*

Traditional first sale rights are under assault on multiple fronts, as copyright owners do their best to use EULAs and the courts to challenge our right to make full use of the goods we "buy." You can re-sell, lend, or give away a paperback or a CD—but not, according to many in the content industries, an ebook or mp3. Americans need to decide if we want to be a nation of owners, with real rights, or a nation of renters, with only the limited options copyright owners choose to give us. *Corynne McSherry, Intellectual Property Director, Electronic Frontier Foundation, San Francisco.*

The battle between content owners and content users over lawful use of IP on the Internet erupted in the halls of Congress this year when content users inspired an uprising against the Stop Online Piracy Act that left Members of Congress and their staffs running for cover. *Howard S. Hogan, Partner, Gibson, Dunn & Crutcher LLP, Washington, D.C.*

Here's one thing we learned in 2012: Internet users won't stand for backroom deals, like SOPA, ACTA, and now TPP, that threaten internet infrastructure, free expression, and innovation. *Corynne McSherry, Intellectual Property Director, Electronic Frontier Foundation, San Francisco.*

The TransPacific Partnership discussions are continuing, and public interests groups are still excluded. Apparently international trade negotiators still believe that Internet users will acquiesce in whatever backroom deal they come up with, no matter how dangerous to expression, internet infrastructure, innovation and privacy. If they can't make the process more participatory, we will see the same kind

of massive protests we saw with SOPA and ACTA. *Corynne McSherry, Intellectual Property Director, Electronic Frontier Foundation, San Francisco.*

(Non-Domain Name) Trademark Issues

Is my soul a red sole? Will I know you by your soul or the sole you wear? Whatever you choose—dress, shoe or scarf—you can tell me who you are with the color of your identity. *Louboutin v. Yves St. Laurent* (2nd Circuit 2012), *Katherine M. Basile, Partner, Novak Druce & Quigg LLP, Cupertino, Calif.*

January 2013 will bring a Canadian trademark data validation and foreign filing platform that bridges the Madrid gap into Canada Follow @madridfiler for game changer developments and launch date. *Claire Wilson, @ollip_PC, Trademark Coordinator, Ollip PC, Ottawa, Ontario, Canada.*

The USPTO has finally published guidelines for when a webpage can function as an acceptable specimen for the display of goods associated with a trademark. A webpage may be acceptable if it: (1) contains a picture or textual description of the identified goods; shows the mark sufficiently near the picture or description of the identified goods to associate the mark with the goods; and (3) provides information necessary to order the identified goods. Otherwise, the webpage is merely an advertisement that promotes the goods without allowing them to be purchased. *Timothy D. Casey, Partner, Woodcock Washburn LLP, Seattle.*

Will trademarks mimic patents? In patent cases, if the patent owner doesn't like where he's been sued, he can promise not to sue for the current product and tell the court it lacks jurisdiction; when the next version comes out, the owner sues where he wants to. In a variation on that theme, Nike argued before the U.S. Supreme Court that because it dismissed its trademark infringement case and promised broadly not to sue defendant again, defendant no longer had standing to maintain its counterclaim for declaratory relief to cancel Nike's federal trademark registration—defendant could take up its grievance with the TTAB. Many trademark attorneys expect Nike to prevail, but stay tuned. *Nike v. Already* (U.S. Supreme Court, argued 11/2012), *Katherine M. Basile, Partner, Novak Druce & Quigg LLP, Cupertino, Calif.*

The settlement in the *Rosetta Stone v. Google* trademark dispute announced in October over the Google AdWords program leaves the legality of that program uncertain, which is the way Google apparently wants it. *Andrew Berger, @IpInBrief, Counsel, Tannenbaum Helpert Syracuse & Hirschtritt LLP, New York, N.Y.*

Trademark law will continue to grapple with aesthetic functionality, as the impact of *Louboutin* and *Betty Boop* ripple across the Circuits. *David Bernstein, Partner, Debevoise & Plimpton LLP, New York, N.Y.*

The PTO's pathetic punt on the issue of trademark bullying was also a big disappointment—unsurprising but still remarkable for its lack of intellectual honesty. *Ronald Coleman, @roncoleman, Partner, Goetz Fitzpatrick LLP, New York, N.Y.*

After three consecutive years of a record number of filings under the Uniform Domain Name Dispute Policy (UDRP), cybersquatting will continue to be a growing problem for all companies on the Internet. *Doug Isenberg, @dougisenberg, Founder, The GigaLaw Firm, Atlanta.*

Courts are continuing to grapple with what constitutes confusion on the internet. Is mere momentary confusion actionable? In *Rosetta Stone v. Google*, the Fourth Circuit affirmed that clicking on a link that makes use of a trademark can give rise to infringement liability if the context makes consumers likely to conclude that the trademark's owner endorsed the link. *Howard S. Hogan, Partner, Gibson, Dunn & Crutcher LLP, Washington, D.C.*

INTA will embark on a new era next year, as Alan Drewsen's brilliant leadership of the International Trademark Association comes to a close in 2013 and a new chief executive officer takes the helm of the world's leading association for the advancement of trademark law. *David Bernstein, Partner, Debevoise & Plimpton LLP, New York, N.Y.*

Polarized Patent Perspectives

U.S. patent law is stifling innovation and driving up costs and must change. I'm tired of fighting over the patent indemnification clause in every agreement and it's getting to the point where you cannot even think about a new business idea without receiving a demand letter from a patent troll. *Marc H. Trachtenberg, @winstonadvlaw, Partner, Winston & Strawn LLP, Chicago.*

The big story for 2012 is not a singular event, but rather the constant erosion of patent rights and unending (and unfounded) claims that the patent system is broken. Uninformed critics teaming up with ivory tower academics can only cause mischief that leads to further problems for universities, research and development companies and true innovators. *Eugene R. Quinn Jr., @ipwatchdog, Founder, IPWatchdog, Inc., Leesburg, Va.*

The Federal Circuit will yet again deal with patentability this year, this time addressing software more directly than in the past. Look out for the en banc decision in the *CLS Bank v. Alice* case, which will be argued in February. *Stuart P. Meyer, Partner, Fenwick & West LLP, Mountain View, Calif.*

Apple v. Samsung validated patents on touch, look, feel, sequencing and human stroking, forcing Microsoft Surface® et al. to introduce a new palette of manual strokes. Pretty soon we will be patenting the strokes used in the Semaphore code. *William B. Bierce, @wbierce, Partner, Bierce & Kenerson, P.C., New York, N.Y.*

For many years, European countries have been trying to agree on creating a single, unified European Patent as well as a Unified Patent Court (UPC). In December, the European Parliament approved the “unitary patent” structure, with a new court to be headquartered in Paris, with London and Munich outposts. The new Unified European Patent could mark a significant change in the worldwide IP landscape. *Stuart P. Meyer, Partner, Fenwick & West LLP, Mountain View, Calif.*

The America Invents Act includes a new procedure for reviewing patents on “covered business methods,” but there was little clarity in which patents would qualify for such review. Some of the filings made under this provision in 2012 will address this issue and we'll soon learn what the PTO thinks is the scope of this new procedure. *Stuart P. Meyer, Partner, Fenwick & West LLP, Mountain View, Calif.*

The America Invents Act of 2011 will transform patent strategies for a higher number of incremental applications, more extensive pre-issuance litigation and fewer business process patents. It won't stop non-practicing entities (“trolls”), who will have to choose their infringement targets in stages for snowball-like self-financing. *William B. Bierce, @wbierce, Partner, Bierce & Kenerson, P.C., New York, N.Y.*

Patent trolls have an ever increasing impact on internet technologies. We appear to be seeing a sea change as government agencies—for example the FTC/DOJ hearings in December—look for ways to holistically address the impact trolls have on business. *R. David Donoghue, @rdd, Partner, Holland & Knight LLP, Chicago.*

Social media patent wars—there is too much money and too many players to keep this powder keg from exploding, smaller players need to be wary of involvement in any disputes as the social network can shut them down without a trial. Companies should avoid the patents they know about and obtain contractual protection to shield against the patents they don't know about. *Kevin R. Erdman, @kevinerdman, Partner, Reichel IP LLP, Indianapolis.*

3D Systems files patent infringement suit against Formlabs and Kickstarter. Just as with Betamax case in copyright area, 3D printing needs to get to a critical mass in the consumer market to protect innovators like Makerbot. *Gary Friedlander, Vice President and Division General Counsel, TransUnion, Chicago.*

Computer technologists are increasingly speaking out against software patents. They've convinced Richard Posner, but not the Federal Circuit. *James Grimmelmann, Professor of Law, New York Law School, New York, N.Y.*

Competition, Regulation in Internet Space

Next #FCC chair will have to confront inadequate & uncompetitive internet access turning US into a #captiveaudience. *Susan Crawford, @scrawford, Visiting Professor, Harvard Kennedy School, Cambridge, Mass.*

Legacy number concerns should be addressed in 2013—especially if we want to reduce artificial scarcity in the IPv4 space. *Kathryn Kleiman, @KleimK, Internet Counsel, Fletcher Heald & Hildreth, Arlington, Va.*

The petitions filed by AT&T and the NTCA at the FCC to facilitate the transition from legacy copper networks to IP networks will become central to telecom policy discussions in 2013. *Yaron Dori, @yarondori, Partner, Covington & Burling LLP, Washington, D.C.*

Antitrust is becoming a key question for Internet platforms. Apple is fighting serious lawsuits on e-book pricing; the other shoe is expected to drop on Google any day now. *James Grimmelmann, Professor of Law, New York Law School, New York, N.Y.*

AT&T's announcement it will shift to an all IP-network in the next few years will radically alter the telecom regulatory landscape. With Congress unable to act, the FCC will muddle through with its existing authority on just about every area in telecom from carrier of last resort to interconnection to privacy to universal service. *Harold Feld, @haroldfeld, Senior Vice President, Public Knowledge, Washington, D.C.*

Deep vertical integration of tech giants raises q: Is choice of a platform at birth our last choice? *Susan Crawford, @scrawford, Visiting Professor, Harvard Kennedy School, Cambridge, Mass.*

Regulators and policymakers on both sides of the Atlantic will be reviewing antitrust and competition issues raised by the new gTLD program throughout the coming year. *Philip Corwin, @vlawdc, Founding Principal, Virtualaw LLC, Washington, D.C.*

Look for the 10th Circuit to reverse and remand portions of the FCC's Transformation Order addressing intercarrier compensation and universal service reform in 2013. *Yaron Dori, @yarondori, Partner, Covington & Burling LLP, Washington, D.C.*

Wireless policy took a radical turn in 2012 as formerly unspeakable ideas went mainstream. The Department of Justice and the FCC decided "there will be 4 national wireless carriers, and there will be enough spectrum for them to stay viable." Suddenly, regulation to promote competition is cool again, with the result that Deutsche Telekom and Softbank have put in \$25 billion in new investment into T-Mobile and Sprint in the last few months. *Harold Feld, @haroldfeld, Senior Vice President, Public Knowledge, Washington, D.C.*

Calls to divide content/conduit will increase as telecoms claim "speaker" status under 1st Amend. for transmitting bits. *Susan Crawford, @scrawford, Visiting Professor, Harvard Kennedy School, Cambridge, Mass.*

Online Contracting

The Supreme Court's recent decision in *Nitro-Lift Technologies LLC v. Howard* may inspire more employers to mandate arbitration and favorable forum selection provisions in their noncompete agreements, particularly in jurisdictions where noncompetes are difficult to enforce. *Robert B. Milligan, @tradesecretslaw, Partner, Seyfarth Shaw LLP, Los Angeles.*

Courts continue to struggle with online contracting practices. In particular, courts are having problems in determining whether a contract was made in the first place, and are using artificial "clickwrap" and "browsewrap" constructs. But there really is no need to make a distinction for purposes of determining whether an enforceable contract has been created. Just use this four part test: (1) the user is provided with adequate notice of the existence of the proposed terms; (2) the user has a meaningful opportunity to review the terms; (3) the user is provided with adequate notice that the taking of a specified action manifests assent to the terms; and (4) the user takes the action specified in the notice. *John E. Ottaviani, Partner, @jottaviani, Edwards Wildman Palmer LLP, Providence, R.I.*

Watch for clickwrap agreements used by cloud providers and social media networks to become even more one-sided, with patent-related covenants not to sue and other previously atypical terms becoming common. Watch for an increase in companies seeking to challenge one-sided clickwrap agreements entered into with cloud providers and social media networks. *John F. Delaney, @MoFoSocMedia, Partner, and editor of SociallyAwareBlog, Morrison & Foerster LLP, New York, N.Y.*

Multiple decisions enforcing arbitration clauses with class action waivers, but not where arbitration clause appears only in website TOS that the website does not require to be read and accepted *Jeffrey Jacobson, Partner, Debevoise & Plimpton LLP, New York, N.Y.*

Online Speech

Right of publicity vs. First Amendment—will EA be able to continue to depict avatars of athletes in video games without obtaining licenses? *David Bernstein, Partner, Debevoise & Plimpton LLP, New York, N.Y.*

Given the recent proliferation of gossip websites, such as the dirty.com and isanyoneup.com, and the rising number of publicized cyber-bullying incidents the boundaries of the safe harbor provided by Section 230 of the Communications Decency Act (CDA) are again being tested. *Neel Chatterjee, Partner, Orrick Herrington & Sutcliffe LLP, Silicon Valley.*

The next year will likely bring more cases in which courts struggle with the boundaries of Section 230 of the Communications Decency Act and where to draw the line with respect to holding social media sites responsible for user posted content. *Aaron P. Rubin, @MoFoSocMedia, Of Counsel, Morrison & Foerster, San Francisco.*

CDA section 230 continues to offer broad immunity for ISPs for non-IP claims even as legal theories mutate; like democracy, it seems to be the worst solution except for the alternatives. *Rebecca Tushnet, @rtushnet, Professor, Georgetown University Law Center, Washington, D.C.*

More states will adopt anti-SLAPP laws, and such laws will increasingly be applied to defamation lawsuits over online consumer reviews. *Josh King, @joshuamking, General Counsel, Avvo, Seattle.*

Russia attempts to tackle illegal activity on the Internet by creating a list of prohibited web sites that should be blocked by ISPs. While some commentators praise the new legislation, others see it as a new form of Internet censorship. *Igor Motsnyi, Partner, Motsnyi Legal Services, Moscow.*

Consumer Protection Online

UK Advertising Standards Authority (ASA) to regulate OBA in New Year: Regulator's remit extended to cover online ads and active enforcement starts Feb. 4. *Karin Retzer, Partner, Morrison & Foerster, Brussels.*

Are you doing business online with German users? Make sure you are compliant with local distance selling provisions. Users tend not to buy if they don't trust a shop. *Thomas Rickert, @thomasrickert, Managing Partner, Schollmeyer & Rickert Law Firm, Bonn & Frankfurt, Germany.*

Self-reg organization NAD reminds us that ad claims come in all shapes and sizes—whether on a Pinterest board or in a contest headline—and if you're making a claim, you better have support for it, no matter how or where you're making it. *Terri Seligman, @FrankfurtKurnit, Partner, Frankfurt Kurnit Klein & Selz PC, New York, N.Y.*

Impact on merchants and licensors of mandated 2013 adoption by EU member states of new EU Consumer Rights Directive. *Holly K. Towle, Partner, K&L Gates LLP, Seattle.*

Groupon and Living Social class action settlements should serve as warning to merchants doing daily deals: To comply with gift card laws you need clear disclosures and long redemption periods for the paid value. *Terri Seligman, @FrankfurtKurnit, Partner, Frankfurt Kurnit Klein & Selz PC, New York, N.Y.*

Consumer privacy continues to be a hot button issue; industry should continue to educate consumers about the benefits of relevant marketing including cost savings, free content and well-tailored promotions. *Francine Friedman, Senior Policy Counsel, Akin Gump Strauss Hauer & Feld LLP, Washington, D.C.*

Some notable recent National Advertising Division decisions have rejected marketers' compliance with federal regulatory standards set forth by the agency with primary jurisdiction. Marketers should not expect that such compliance will be sufficient because NAD may still exercise its own expertise and require advertisers to discontinue or modify their claims it does not believe are appropriate. *Andrew Lustigman, @advlaw, Partner, Olshan Frome Wolosky LLP, New York, N.Y.*

Mobile marketing pitfalls: Failure to disclose, esp when kids' privacy involved, and not getting clear consent from users to text them. *Terri Seligman, @FrankfurtKurnit, Partner, Frankfurt Kurnit Klein & Selz PC, New York, N.Y.*

Latin America

In 2013 Peru will likely enact the long awaited complementary regulations to its Data Protection Act from 2011. This will bring a whole new set of obligations for companies and public entities that will need to adjust their databases and information security protocols to a new set of legal standards. Fines can reach US\$139,500. *Oscar Montezuma @montezumaypanez, Partner, Montezuma & Panez Consultores Legales, Lima, Peru.*

According to the Peru-United States Trade Promotion Agreement, Peru should implement a DMCA styled legal framework regulating ISP liability for copyright infringement. The drafting process just started and 2013 may likely see a final draft for public debate in the Congress. *Oscar Montezuma, @montezumaypanez, Partner, Montezuma & Panez Consultores Legales, Lima, Peru.*

Asia

Asia is the region to watch in 2013. New laws in Malaysia, Philippines, Singapore will take effect in 2013. *Miriam Wugmeister, Partner, Morrison & Foerster, New York, N.Y.*

As China's relatively young competition regime continues to develop, use of IPR to compete and win market share will likely face greater scrutiny in the coming year. *Grace Chen, @twobirdsIT, Partner, Bird & Bird LLP, Beijing.*

As more and more B2B and B2C commercial transactions take place in cyberspace, during the next year, we would expect to see very significant developments in cyberlaw in China, focusing on e-commerce, online contracts, etc. *Grace Chen, @twobirdsIT, Partner, Bird & Bird LLP, Beijing.*

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