

## Law Students Perspective

by Jacquelyn L. Bolen and Mohammad S. Imaad



# Ripe for Pursuit: Technological Developments and Their Impact on Practice Areas Spanning the Legal Profession

**Historically, American law schools have provided** state-focused legal education to students. While state-based legal preparation is essential to practice in a particular jurisdiction, pass the bar exam, and establish a firm understanding of basic legal principles, enhanced involvement in federal legal discourse is critical for today's young lawyer. Law Student Divisions provide students the opportunity not only to network with the corresponding chapters of the Federal Bar Association in their particular areas, but also to demonstrate students' value to potential employers. The primary benefit of youth and young lawyering lies in exposure to innovative ideas and unique perspectives on application of various laws to emerging technology. Young lawyers and law students can provide fresh insight into many burgeoning fields in federal legal practice. This article presents a few topics spanning various practice areas in which the authors have observed opportunities for young lawyers in major areas of interesting federal law.

### The Cloud: Privacy and Procedure

Cloud computing is just beginning to inundate legal discourse in the United States. It allows users to access services through the Internet without controlling the infrastructure that provides the services.<sup>1</sup> The average American uses the cloud for purchasing items (use of cash registers), accessing telecommunication networks, watching television programming, and using mobile devices (smartphones) and email services.<sup>2</sup> These essential day-to-day activities are possible through community cloud networks, where a third-party vendor owns or controls the remote hardware, software, and facilities, and the cloud-computer user accesses or uploads his or her data anytime, anywhere.<sup>3</sup>

Critics have given much attention to cloud computing due to challenges in information security, reliability, and compliance with government regulations.<sup>4</sup> Evolving technology and undeveloped federal regulations are two areas in which legal counsel is important. The United States and many European nations have existing

regulations controlling Internet privacy, securities regulations, Internet security and transparency, and cyber terrorism.<sup>5</sup> However, few laws "were written with cloud computing in mind, and in most cases, neither the laws nor accompanying regulations and guidance have been amended to specifically address cloud computing."<sup>6</sup> Some government agencies and officials are beginning to understand the security-related concerns about cloud computing but are just taking steps to address those concerns.<sup>7</sup>

Courts are adjusting to their understanding of how the Internet affects almost all aspects of daily life. The past few years "have seen a shift in usage from consumption to participation, and users now interact with applications and store data remotely rather than on their own computers" through cloud technology.<sup>8</sup> In *Palma v. Metro PCS Wireless*, the plaintiffs brought a Fair Labor Standards Act action against Metro PCS. Metro PCS sought discovery of "all posts to [the p]laintiffs' social media accounts from 2010 to the present that relate to 'any job descriptions or similar statements. ...'"<sup>9</sup> The court characterized this request as seeking to "rummage at will" through the plaintiffs' private (or at least, semiprivate) communications.<sup>10</sup>

Similarly, in *Ogden v. All-State Career School*, the court also deemed discovery into social media "stored" in cloud environments as overly broad and intrusive.<sup>11</sup> Under practically similar yet legally distinct circumstances, the Fifth Circuit grappled with whether "stored" site information is protected by the Fourth Amendment under the Stored Communications Act and held that "orders to obtain *historical* cell site information for specified cell phones at the points at which the user places and terminates a call are not categorically unconstitutional."<sup>12</sup> Most recently, the Supreme Court held the warrantless search and seizure of digital contents of a cell phone during an arrest is unconstitutional.<sup>13</sup>

Privacy concerns remain with cloud computing regulation because the Electronic Communications Privacy Act (ECPA) of 1986, which sought to extend the codification of Fourth Amendment

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*Jacquelyn L. Bolen and Mohammad S. Imaad are third-year students at the University of Richmond School of Law. Bolen is a graduate of the University of Virginia, where she majored in history and bioethics. She is currently the managing editor of the Richmond Journal of Law and the Public Interest. Imaad is a graduate of the University of Virginia, where he majored in chemistry and history. He is currently an articles editor on the University of Richmond Law Review. The authors would like to thank Clayton LaForge for his generous guidance and support in writing and editing this article.*

protections to the world of electronic communication and remote computing, would not necessarily apply to cloud computing.<sup>14</sup> The ECPA requires a service provider to give users “the ability to send or receive ... electronic communications.”<sup>15</sup> However, most of the cloud computing services available today are designed for purposes other than communication.<sup>16</sup>

E-discovery of information stored through cloud computing also presents privacy and security challenges that courts and regulatory bodies must consider. One of these issues relates to Rule 26 of the Federal Rules of Civil Procedure, which requires “reasonable inquiry” for discovery purposes.<sup>17</sup> Courts are unsettled as to how cloud computing may affect the application of this rule. As these technologies continue to change, it becomes important for the standard of reasonableness to keep pace. This is an area in which a novel and informed perspective of the related technology becomes critical.

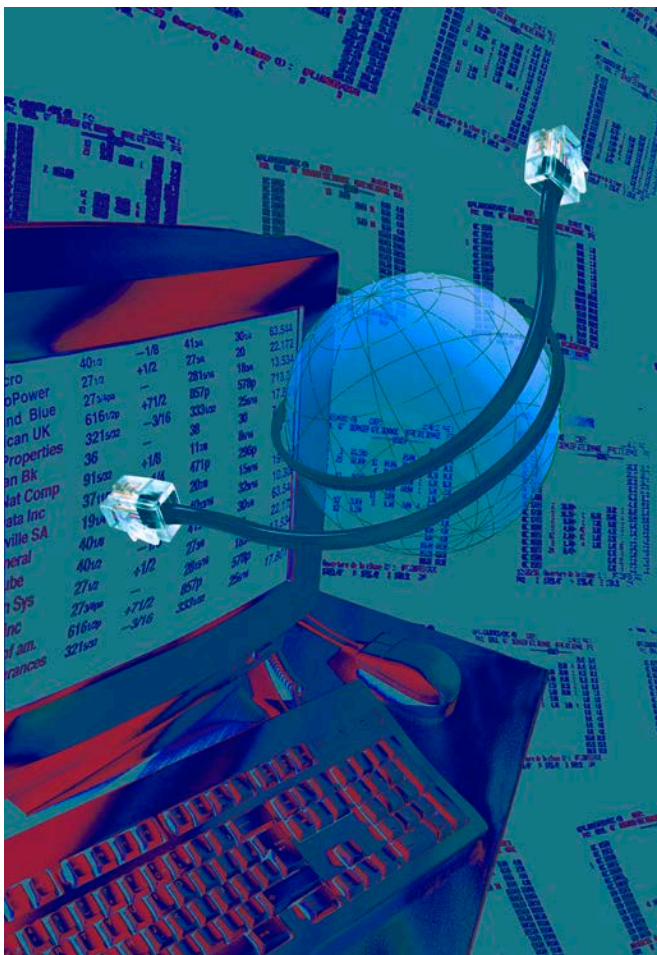
### Netflix, iTunes, and Kindles: Intellectual Property Protection

*Content delivery methods* are the vehicles by which we consume entertainment: music, television, and books. Services such as iTunes, Netflix, and Kindle provide users with a legal means to access copyrighted content. These services need similar intellectual property protections to the content they hold to facilitate a robust and legal market for innovation.

Section 512 of the Digital Millennium Copyright Act (DMCA), the “Sony Doctrine,” and the Doctrine of Fair Use are three ways end users legally access copyrighted material, instead of pirating the content illegally through unlicensed sources.<sup>18</sup> Given that copyrighted industries now contribute more than \$1 trillion to the U.S. economy, it is essential that they be protected to the greatest extent possible under the law.<sup>19</sup> Section 512, referred to as the “safe harbor,” protects service providers such as Internet service providers (ISPs) and search engines from liability based on the actions of its users.<sup>20</sup> This provision enables social media networks like Facebook and Reddit to avoid copyright infringement liability in certain situations if their users post illegally obtained materials on their platforms. While some argue that § 512 has a chilling effect on the creation of copyrighted material, this provision has facilitated the creation of delivery methods people love, such as Spotify and Hulu.<sup>21</sup> Courts have also been weary about restricting § 512, given that it could “chill innovation that could also serve substantial socially beneficial functions.”<sup>22</sup>

Additionally, the “Sony Doctrine,” which was established following the 1984 Supreme Court decision in *Sony v. Universal City Studios*, permits creators to use technology despite its ability for infringement, if the service is widely used for a legitimate purpose and has a “substantial noninfringing use.”<sup>23</sup> This doctrine allows a vast array of services to permeate the marketplace without the concern that their product may be circumvented for illegal use. It can be argued that this doctrine helped contribute to Internet innovations, as well as countless other social media and data services since the Court’s decision.<sup>24</sup>

Finally, the Fair Use Doctrine, codified in § 107 of the U.S. Copyright Law, states that using copyrighted work for certain purposes, such as scholarship and research, are not considered infringements on a copyright.<sup>25</sup> This provision gives creators another means by which to create new and innovative processes for content accessibility without the fear of infringement in the process. These three avenues for innovation will not only lead to greater choice in



the market, but will also protect copyright holders in the long run as consumers use legal means for access. For students searching for a niche, these areas provide ample opportunities.

### Social Media and Its Impact on Administrative Law

The “notice and comment” period in informal rulemaking is an important step in an agency’s creation of a regulation.<sup>26</sup> This process has been transformed in recent years by regulations.gov, which allows commenters to submit online their opinions of a proposed regulation. It also allows users to track the rulemaking process through the stages of implementation, from the notice of proposed rulemaking (NPRM) to a final rule.<sup>27</sup> This electronic process, often dubbed “e-rulemaking,” was intended to increase public participation in the rulemaking process and to provide a more user-friendly and transparent forum for all interested parties.<sup>28</sup> To some observers, however, it appears that e-rulemaking has merely digitalized a process friendly only to Washington insiders with industry ties and strong funding.<sup>29</sup>

The Administrative Conference of the United States (ACUS) has studied this issue and recommended another potential way to garner more public participation in the rulemaking setting. ACUS considered turning to social media platforms, such as Facebook and Twitter, for possible avenues of commentary.<sup>30</sup> Given the volume of highly interesting and informative content shared over Twitter, for example, this rationale may allow more interested parties to take part in the rulemaking process. Indeed, the D.C. Circuit has emphasized the importance of a robust notice and comment period,

noting “there must be an exchange of views, information, and criticism between interested persons and the agency” to “provide fair treatment for persons affected by a rule.”<sup>31</sup> Anyone who uses Twitter knows how easily and efficiently users swap news updates, innovative ideas, and public opinion. Through the use of social media, agencies can reach “interested persons who have traditionally been underrepresented in the rulemaking process” and “missing stakeholders,” who may contribute valuable information that otherwise would be overlooked.<sup>32</sup> Incorporating the opinions of everyday Americans through social media would clearly further the goal of inclusive government and policymaking.

Conformity with the Administrative Procedures Act (APA), which lists specific requirements for notice-and-comment rulemaking, may pose an initial hurdle in implementing social media or smartphone commentary on proposed rules. However, the law should and must conform to technological developments, whether by protecting or restricting them, given the circumstances. The APA should not be considered a barrier to participation by the average American; rather, young lawyers should view this area as an undeveloped aspect of the legal profession ripe for pursuit. ☉

## Endnotes

<sup>1</sup>Bryan Reingold and Ryan Mrazik, *Cloud Computing: The Intersection of Massive Scalability, Data Security, and Privacy*, 14 No. 5 CYBERSPACE LAW 1 (2009); see also Peter Mell and Timothy Grance, THE NIST DEFINITION OF CLOUD COMPUTING: RECOMMENDATIONS OF THE NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY 2 (2011), available at [csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf](http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf).

<sup>2</sup>See Ryan P. Murphy, *U.S. Export Controls Over Cloud Computing: The Forecast Calls for Change*, SYRACUSE J. SCI. & TECH. L. REP. 65, 71 (2013).

<sup>3</sup>See *id.*

<sup>4</sup>See *id.*

<sup>5</sup>See, e.g., Jared A. Harshbarger, *Cloud Computing Providers and Data Security Law: Building Trust with United States Companies*, 16 J. TECH. L. & POL'Y 229, 238-45 (2011).

<sup>6</sup>See J. Nicholas Hoover, *Compliance in the Ether: Cloud Computing, Data Security and Business Regulation*, 8 J. BUS. & TECH. L. 255, 258 (2013).

<sup>7</sup>Harshbarger, *supra* note 5, at 240.

<sup>8</sup>David A. Couillard, *Defogging the Cloud: Applying Fourth Amendment Principles to Evolving Privacy Expectations in Cloud Computing*, 93 MINN. L. REV. 2205, 2208 (2009).

<sup>9</sup>*Palma et al v. Metro PCS Wireless, Inc.*, --- F. Supp. 2d ---, 2014 WL 1877578 (M.D. Fla. 2014).

<sup>10</sup>*Id.* at \*1.

<sup>11</sup>*Ogden v. All-State Career School*, --- F.R.D. ---, 2014 WL 1646934 (W.D. Pa. 2014).

<sup>12</sup>In re U.S. for Historical Cell Site Data, 724 F.3d 600, 615 (5th Cir. 2013).

<sup>13</sup>*Riley v. California*, 134 S.Ct. 2473, 2477 (2014).

<sup>14</sup>18 U.S.C. §§ 2510, 2701.

<sup>15</sup>18 U.S.C. § 2510(15).

<sup>16</sup>*Id.*; see also Jake Vandelist, *Status Update: Adapting the Stored Communications Act to A Modern World*, 98 MINN. L. REV. 1536, 1545 (2014).

<sup>17</sup>Fed. R. Civ. P. 26(g)(1).

<sup>18</sup>“The Rise of Innovative Business Models: Content Delivery

Models in the Digital Age” Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet Before the H. Comm. on the Judiciary, 113th Cong. 5-6 (2013) (statement of David Sohn, General Counsel and Director, Center for Democracy and Technology), available at [judiciary.house.gov/files/hearings/113th/11192013/111913%20Testimony%20Sohn.pdf](http://judiciary.house.gov/files/hearings/113th/11192013/111913%20Testimony%20Sohn.pdf) [hereinafter Sohn statement].

<sup>19</sup>Stephen Siwek, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY, THE 2013 REPORT, INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2 (2013), available at [www.iipa.com/pdf/2013 Copyright Industries Full Report.PDF](http://www.iipa.com/pdf/2013%20Copyright%20Industries%20Full%20Report.PDF).

<sup>20</sup>17 U.S.C. § 512.

<sup>21</sup>See William Henslee, *Copyright Infringement Pushin': Google, Youtube, and Viacom Fight for Supremacy in the Neighborhood That May Be Controlled by the DMCA's Safe Harbor Provision*, 51 INTELL. PROP. L. R. 607, 642 (2011) (contending that the Safe Harbor has led to a chilling effect and the DMCA should be reformed); Sohn statement, *supra* note 18, at 5 (arguing that the Safe Harbor has empowered an “explosive expansion of creative content”).

<sup>22</sup>*UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1014 (9th Cir. 2013).

<sup>23</sup>*Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

<sup>24</sup>See Mitchell Zimmerman, *Does Aimster Survive Grokster? The Supremes' File Sharing Decision and the Circuit Split on Sony and Contributory Infringement*, 10 CYBERSPACE LAW. 1, 1 (2005).

<sup>25</sup>17 U.S.C. § 107.

<sup>26</sup>See 5 U.S.C. § 553 (allowing “interested persons an opportunity to participate in the rule making through submission of written data, views or arguments ...”).

<sup>27</sup>See REGULATIONS.GOV, HOW TO USE REGULATIONS.GOV, [WWW.REGULATIONS.GOV, HOW TO USE REGULATIONS.GOV, WWW.REGULATIONS.GOV/#!help](http://www.regulations.gov/#!help).

<sup>28</sup>See MICHAEL HERZ, USING SOCIAL MEDIA IN RULEMAKING: POSSIBILITIES AND BARRIERS, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 5-7 (Nov. 2013), available at [www.acus.gov/sites/default/files/documents/Herz%20Social%20Media%20Final%20Report.pdf](http://www.acus.gov/sites/default/files/documents/Herz%20Social%20Media%20Final%20Report.pdf).

<sup>29</sup>*Id.* at 8-9.

<sup>30</sup>ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 2013-5, SOCIAL MEDIA IN RULEMAKING 1 (Dec. 2013), available at [www.acus.gov/sites/default/files/documents/Social%20Media%20Rec.Final.12.9.13.pdf](http://www.acus.gov/sites/default/files/documents/Social%20Media%20Rec.Final.12.9.13.pdf).

<sup>31</sup>*Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977).

<sup>32</sup>*Supra* note 30, at 5.

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