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Refuse to Play the Game: An Alternative Document Production Strategy in Intellectual Property Litigation

Intellectual property lawsuits are complex. Such lawsuits, involving the litigation of patent, trademark, copyright, trade secret, unfair competition, and similar claims, are usually factually and legally complicated. These lawsuits also generally involve a significant amount of evidence, which takes the form of paper documents, electronic files and data, physical objects, and the like.

Due to the nature of such lawsuits, the extensive amount of information involved, and the substantial monetary stakes often at issue, the discovery process in these lawsuits often takes on a life of its own, a life that, for attorneys and litigants alike, has become an increasingly frustrating and an expensive experience. As many an attorney and litigant has said, or at least thought, there has to be a better way.

Gary Edward Hood, a trial attorney with the law firm of **Jenkins & Gilchrist, P.C.**, believes that there is a better way: "Simply refuse to play this game." Mr. Hood suggests that litigants should choose to spend the valuable time, effort, and money available for litigation on activities and efforts that can and do permit success: reviewing and evaluating all of the evidence, crafting a strategy that incorporates all evidence good and bad into a persuasive story, and creating a case presentation for judge and jury that maximizes chances at success.

Current Legal Issues Surrounding the Regulation of Voice Over Internet Protocol

VoIP is a relatively new Internet technology that allows people to make phone calls through their computers over the Internet. This technology is far more efficient and cost effective when the real time transmission of voice and data takes place in one technological device. With VoIP technology, data of all kinds, including voice, fax, email, Web browsing, or other content, is broken into small chunks called "packets," with each packet containing 1,000 to 1,500 bytes of data. The data is transmitted over the Internet and reassembled into its analog form when it reaches its intended destination. The technology allows simultaneous transmission in both directions of data and pursuant to the software protocol, re-routes the data through less "busy" lines for quick delivery.

In this article, **Konrad L. Trope** and **Paula K. Royalty** review pending regulatory developments and other legal issues involving VoIP and suggest steps that counsel should take when advising their clients about VoIP.

Patent Applications Containing Personal Information: A Survival Guide to Minimize Exposure Under Privacy Laws

In recent years, companies have become increasingly attuned to privacy and information management issues. Many US and foreign laws impose substantial penalties on corporate and individual actors for the unauthorized disclosure of nonpublic personal information. Patent applications filed in the US Patent and Trademark Office represent an often overlooked mine in the minefield of information protection, particularly for software technologies that use personal information. In a patent application, an applicant may inadvertently submit personal information that later becomes accessible to the public, potentially subjecting the applicant to liability under various causes of action.

As explained in this article by **Carlo M. Cotrone**, an attorney in the McLean, VA, office of Pillsbury Winthrop LLP, a pending patent application that discloses nonpublic personal information should be handled with extreme care. However, Mr. Cotrone says, savvy companies and practitioners can employ available mechanisms in the US Patent and Trademark Office to prevent the information from becoming publicly accessible and thus subject to information privacy provisions. Moreover, he believes, that diligence during the patent application drafting process may reduce the chances that such information is submitted in the first place.

Current Legal Issues Surrounding the Regulation of Voice Over Internet Protocol

By Konrad L. Trope and Paula K. Royalty

The debate over the regulation of Voice over Internet Protocol (VoIP) technology has many corporations, consumer groups, and government agencies very concerned. The Federal Communications Commission (FCC) on February 12, 2004, issued a Notice of Proposed Rulemaking Re: IP Enabled Services.¹ Under this procedure, the FCC will take comments on its stated intentions to minimally regulate VoIP² while seeking to balance and “implement important social objectives, such as public safety, emergency 911, law enforcement access, consumer protections and disability access.”³

What Is VoIP?

VoIP is a relatively new Internet technology that allows people to make phone calls through their computers over the Internet. This technology is far more efficient and cost effective when the real time transmission of voice and data takes place in one technological device.⁴ With VoIP technology, data of all kinds, including voice, fax, email, Web browsing, or other content, is broken into small chunks called packets, with each packet containing 1,000 to 1,500 bytes of data.⁵ The data is transmitted over the Internet and reassembled into its analog form when it reaches its intended destination. The technology allows simultaneous transmission in both directions of data and pursuant to the software protocol, re-routes the data through less busy lines for quick delivery.⁶

With the public switched telephone network (PSTN) (or, if you prefer, plain old telephone service (POTS)), data transmission is unidirectional rather than bi-directional or multi-directional.⁷ This means that, while someone is sending, the other side is “locked up” and cannot transmit, resulting in slower data transmission or no transmission since data re-routing is not automatically available.⁸

VoIP technology has improved to the point where companies like Vonage, AT&T, Time-Warner,

Net2Phone, and SBC IP Communications are all offering the VoIP service to both business and residential users in select regions of the country, with unlimited local and long distance plans that are 20 percent - 30 percent less expensive than calls made using PSTN/POTS, because VoIP technology uses the Internet, which has been left largely unregulated and untaxed to help spur growth.⁹ VoIP companies do not have to pay the taxes and tariffs that provide for government mandated services such as 911 calling, universal access, and access for the handicapped. Only the PSTN/POTS companies are required to provide these services and thus pass on the costs of the government mandated services to their customers.¹⁰

Some experts predict that VoIP consumer use could increase from its current level of 10 percent to 40 percent of the US market by 2009.¹¹ That kind of growth is bound to adversely impact the \$20 billion state public utility commissions annually collect as people switch from PSTN to VoIP services.¹² This reduction in revenues will not decrease the need for services such as 911, universal access, and access for the handicapped, all of which is funded by the states.¹³

A technological benefit of VoIP is more efficient use of the broadband cable, which currently carries half of all VoIP transmissions. Voice, data (e.g., faxes, email, instant messaging), and video can all be transmitted simultaneously through broadband cable. Another benefit is the portability of telephone numbers. The technology division of Lehman Brothers Holdings, Inc., started using VoIP in early 2001.¹⁴ After the terrorist attacks on September 11, the division’s Manhattan employees dispersed to several locations throughout the New York area. Employees using VoIP simply had to take their telephones and plug them in at the new location, and they were operational with the same telephone numbers.¹⁵ The employees were also able to record an outgoing message and leave it in their customers’ voice mail inboxes with one click, instead of repeating the same message several times a day.¹⁶ Moreover VoIP transmissions can be recorded, labeled, indexed, stored, and retrieved when necessary.¹⁷

Today, even though VoIP transmissions constitute up to 10 percent of all calls made in the United States, with estimates of up to 2.5 million US subscribers, there are

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still disadvantages to the technology.¹⁸ One disadvantage to VoIP is that it does not have an independent power source. If there is a power outage, one cannot make a VoIP call. That could be disastrous in an emergency. Moreover, sound quality and reliability are still not up to the level of traditional telephone service. Until there is dedicated bandwidth for VoIP transmissions, congestion will continue to be a problem, resulting in lost packets of data. Businesses and consumers alike will probably not tolerate clipped speech or missing dial tones after experiencing reliable telephone service.

The FBI Seeks to Wiretap VoIP

The technological benefits of VoIP made VoIP the new target of the federal government's war on terrorism. Under existing federal wiretapping laws, the FBI already has the ability to seek a court order to conduct surveillance of any broadband user through its DCS 1000 system, previously called Carnivore.¹⁹ But federal law enforcement agencies worry that, unless Internet service providers, and in particular VoIP providers, offer surveillance hubs based on common standards, lawbreakers can evade or, at the very least, complicate surveillance by using VoIP providers such as Vonage, Time Warner Cable, Net2Phone, 8X8, deltathree, and Digital Voice.²⁰

The origins of this debate date back nine years, to when the FBI persuaded Congress to enact a controversial law called the Communications Assistance for Law Enforcement Act (CALEA).²¹ The 1994 legislation requires that telecommunications services rewire their networks to provide police with guaranteed access for wiretaps. The legislation also empowered the FCC to issue regulations defining what categories of companies were subject to the broad sweeping legislation.²² So far, only traditional PSTN (analog) companies and wireless phone services have been subject to CALEA.

The FBI now has taken the position that the combination of the federal wiretap laws, originally enacted in 1964 and amended numerous times since,²³ along with CALEA, give it the authority to wiretap DSL and other types of broadband services, including VoIP.²⁴

Critics are worried about privacy issues. "Telecommunications services" as defined under CALEA and the 1996 Federal Communications Act²⁵ are required to modify their equipment so that law enforcement officials can effectively wiretap both data and voice transmissions.²⁶ In particular, since VoIP represents the blending of data and real time voice transmissions, privacy advocates worry that VoIP wiretapping will lead to "dataveillance," where data such as location information will be routinely collected for surveillance without

any investigatory predicate.²⁷ Moreover, neither VoIP providers nor the FBI can explain what will be done to ensure that private parties do not engage in illegal monitoring of private citizens, gaining access to privileged information, confidential business/trade secrets, or even sensitive medical information.²⁸

Moreover, the FBI has said that if broadband providers cannot isolate specific VoIP calls to and from individual users, they must give police access to the "full pipe," which, therefore, inevitably would include hundreds or thousands of customers who are not the target of the investigation.²⁹ This technological shortcoming of VoIP wiretapping would inevitably lead to over-inclusive sweeps of conversations and data transmissions that are not the target of any government probe.

Some companies like MetaSwitch and Cisco Systems, Inc., have already cooperated with the FBI's request for CALEA compliance to make their VoIP hardware products "surveillance friendly." These two companies have "developed backdoor technology in their VoIP products that enables the FBI to eavesdrop at will."³⁰ Yet segregating particular voice packets not the target of a search warrant still presents technological hurdles to many VoIP providers, leaving many VoIP transmissions subject to interception despite falling outside of the scope of the federal search warrant that authorized the interception.

On the other hand, not all Internet service providers see themselves as adverse to the interests of the FBI. EarthLink, for instance, wants CALEA and the federal wiretapping statutes applied to VoIP calls. If VoIP calls escape being subjected to this expanded regulatory scheme, it would mean that VoIP stays unregulated as far as the FCC is concerned. Such de-regulation of Internet services would allow the Baby Bells, such as Verizon and BellSouth, to raise the rates charged to ISP's, such as EarthLink, for access to the copper wire that runs to subscribers' homes and businesses.³¹

EarthLink, as an ISP provider has, therefore, admitted that it sees "the FBI as an ally of sorts," said David Baker, EarthLink's vice president for law and public policy.³²

VoIP, Sarbanes-Oxley, the USA PATRIOT Act, and Records Retention

Two new federal laws were quickly passed as a result of the terrorist attacks on September 11, 2001, and the Enron scandal: the USA PATRIOT Act and the Sarbanes-Oxley Act (SOX). The PATRIOT Act expands law enforcement's access to business records to include "any tangible things" if they are sought for an authorized intelligence or terrorism investigation.³³ SOX, which affects publicly traded companies and pri-

vate companies planning to go public, created two new crimes for intentionally altering or destroying documents to impede any federal investigation or proceeding, even if the defendant only has reason to know that an investigative action was being contemplated.³⁴

While neither act specifically addresses VoIP transmissions, the statutory requirements raise the question of whether VoIP transmissions should be treated as telephone calls, which are not normally recorded and retained, or as data, like emails, which are generally required to be archived. During a live VoIP call, data streams back and forth along the cable. Once the callers hang up, the data evaporates, as with a regular telephone call. However, when a caller leaves a VoIP voice mail message, it resides on the computer as an email in the form of an audio file in .wav format.

Should VoIP voice mail be subject to electronic records retention requirements because it, like ordinary email, is an electronic record stored in the email inbox? Messages on a conventional voice mail system can easily and inexpensively be transferred to and stored on other recording media. VoIP voice mail messages require substantially more memory than conventional voice mail. Archival requirements, similar to those imposed on email, would create a costly storage problem when applied to VoIP technology.

Commentators on this topic remain cautious and recommend that businesses save everything. For example, one article aimed at corporate and securities lawyers advised that “[a]ll forms of recorded communication, including e-mail and voice mail, fall within the reach of the Sarbanes-Oxley prohibitions and must be preserved.”³⁵

The Securities and Exchange Commission (SEC) gives a slightly different interpretation regarding the retention of voice mail messages. When considering any record retention, the SEC’s general approach is to focus on the content of the message and its audience, not the type of document. When asked whether voice mail messages were required to be kept according to Rule 17a-4 under the Securities Exchange Act of 1934, which lists records to be preserved by certain exchange members, brokers, and dealers,³⁶ a public affairs spokesperson for the SEC said, “The rule does not apply to oral communications,” including voice mail, “only written messages.”³⁷ This interpretation does not preclude a requirement that brokers make written records of certain information, like buy/sell orders, and all the other requirements listed in Rule 17a-3.³⁸ However, if any information was left in a voice mail message, the broker would be required to reduce it to writing, thereby eliminating the need to keep the voice mail message.

The SEC’s ruling regarding voice mail retention for SOX purposes is that voice mail messages “generally would not fall within the scope of new rule 2-06 provided they do not contain information or data . . . that is inconsistent with the auditor’s final conclusions, opinions or analyses on that matter or the audit or review.”³⁹ If the message was a “consultation or resolution of differences of professional judgment,”⁴⁰ then it should be retained, but it is hard to imagine someone conveying that type of information in a voice mail message without also reducing it to writing on either the sending or receiving end.

Future regulatory fines for noncompliance and possible court challenges will most likely determine whether these laws will change the records retention requirements of VoIP voice mail messages.

Current Status of the Regulatory Debate

Meanwhile, VoIP service providers such as AT&T, Vonage, and Free World Dialup have all filed petitions over the past 18 months seeking forbearance from paying access charges to local PSTNs for the privilege of initiating or terminating their Internet calls using the local PSTN’s.⁴¹ These access fees are mandated pursuant to the Federal Telecommunications Act of 1996.⁴² If these VoIP providers are deemed “telecommunications services” or “telecommunications,” then under the Federal Telecommunications Act these companies would have to pay access fees to the local PSTNs for use of their copper wire networks for initiating or terminating phone calls/data transmissions.⁴³ Moreover, these companies would be subject to CALEA and wiretapping. If these companies are declared to be merely “information services” under the Act, then they are free from paying the access fees and other tariffs that could be imposed by federal and state authorities⁴⁴ and would be free from CALEA.

The Telecommunications Act of 1996 defines telecommunications as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”⁴⁵ Then the Telecommunications Act defines telecommunications service as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”⁴⁶

On the other hand, *information service* under the Telecommunications Act is defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, . . . but does not

include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”⁴⁷

Thus, on February 12, 2004, the FCC issued its Notice of Proposed Rulemaking regarding VoIP. Commissioners Powell and Abernathy made it clear that a minimalist approach was their predisposition in order to facilitate competition and investment in this nascent industry.⁴⁸ In addition, both Commissioners expressed a desire to shift most forms of Internet Protocol (IP) regulation away from the states and make this regulatory framework “predominantly federal” owing to the fact that “most forms of IP communications appear to transcend jurisdictional boundaries, rendering obsolete the traditional separation of services into interstate and intrastate buckets.”⁴⁹

In addition, pulver.com’s petition for its Free World Dialup (FWD) VoIP service to be classified as an “information service” was granted.⁵⁰ The FCC premised its decision on the fact that all of FWD’s calls originate and terminate on the Internet and thus do not require the use of local PSTN equipment.⁵¹ These FWD transmissions are pure VoIP transmissions.⁵²

Thus, FWD’s classification as information service under the 1996 Telecommunications Act frees it from the reach of CALEA and the FBI’s desire to wiretap VoIP transmissions.⁵³ Moreover, pulver.com said that it does not know how to comply with CALEA mandates.⁵⁴ Indeed, the FBI was disappointed that the FCC moved forward without resolving its request for authority to intercept VoIP transmissions under CALEA.

The FCC’s decision to issue the Notice of Proposed Rulemaking does not necessarily mean that VoIP regulation will achieve the talismanic certainty that government law enforcement agencies, industry officials, and consumer groups have been seeking.⁵⁵

In contrast to the FWD’s pure VoIP services, the vast majority of VoIP transmissions originates on the Internet and then moves through the PSTN/POTS.⁵⁶ This is the VoIP service now being offered by Vonage, Net2Phone, and AT&T, as well as numerous cable companies.⁵⁷ Thus a major goal of the FCC’s Notice proceedings regarding VoIP is how the FCC “makes clear that functionally equivalent services . . . be subject to similar obligations and that the cost of the PSTN should be born equitably among those that use it in similar ways.”⁵⁸ Moreover, all of the Commissioners recognized the need for law enforcement agencies to have some reasonable access to intercept these transmissions.⁵⁹

Therefore, most of the Commissioners expressed a concern for a possible overhaul of the current rules

governing IP providers.⁶⁰ However, that kind of authority ultimately rests with Congress, not with the FCC.

Indeed, without congressional modifications to the Telecommunications Act, the federal courts are currently split on how to interpret the Act when applied to VoIP providers. In October 2003, the federal district court in Minnesota declared VoIP service provider Vonage to be free from state regulation based on Judge Michael J. Davis’s reading of the Act.⁶¹ The Ninth Circuit conversely declared in that same month, in *Brand X Internet Services v. FCC*, that, to the extent a cable operator provides its subscribers Internet transmission over its cable broadband facility, it is providing telecommunications services as defined in the Act, which are subject to the various state and federal tariffs imposed on PSTN/POTS companies.⁶²

Judge O’Scannlain, in writing his concurring opinion in the *Brand X* case, noted with great trepidation that “it cannot be denied that our holding today effectively stops a vitally important policy debate in its tracks, at least until the Supreme Court reverses us [the Ninth Circuit] or Congress decides to act.”⁶³

If consumers and providers alike want the courts to provide consistent decisions, then Congress may need to approach a complete overhaul of the Communications Act, with the same kind of debate and hearings that were held with respect to the overhaul of the welfare system that occurred during the Clinton administration. The courts, and the FCC, at the moment, are “stuck” with applying potentially outdated definitions, codified in the Communications Act, to rapidly changing technological paradigms.

Practice Pointers

There are a number of points that attorneys should keep in mind when advising clients about VoIP.

1. If there is only VoIP and no other telephone system used in a business, establish a back-up plan in case of a power failure, for example, having a cell phone available for every group of employees.
2. A business should contact all federal and state regulatory bodies that govern the business, for example, the SEC or NASD. Determine the records retention requirements of the agency and ask about all types of communication used by the organization, including VoIP. Schedule regular times to check with the regulators regarding updates in requirements, or request to be notified of any changes.
3. Transfer information required to be retained into a

written document, either electronic or paper, that is conveyed in a voice mail message. This eliminates the need to retain the voice mail message.

4. Assist clients in writing or updating their record retention plans to include all types of electronic documents. Include a rapid response plan that informs every employee about the suspension of the regular destruction schedule in case a contemplated or actual investigation or proceeding occurs.
5. Designate a single point of contact within the company to answer questions about the record retention policy for the company.
6. Ensure all employees are trained on any new record retention requirements, including how existing policies relate to VoIP transmissions.

Notes

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3. *Supra* n.1.
4. David P. McClure, "The Policy Dilemma of IP Networking: A Summary of Critical Policy Issues in VoIP," p.1, published in The Future of Internet Phone Calling: Regulatory Imperatives to Protect the Promise of VOIP for Industry and Consumers, New Millennium Research Council, Washington, DC, 2003; Jeff Tyson, "How IP Telephony Works," *houstuffworks.com*, available at <http://computer.houstuffwork.com/ip-telephony1.htm>, [telephony2.htm](http://computer.houstuffwork.com/telephony2.htm), [telephony3.htm](http://computer.houstuffwork.com/telephony3.htm) and [telephony4.htm](http://computer.houstuffwork.com/telephony4.htm), (last visited on Dec. 4, 2003); "Voice Over Internet Protocol," International Engineering Consortium Online tutorial, at http://222.iec.org/online/tutorials/int_tele/, (last visited on Nov. 16, 2003).
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6. *Id.*
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12. Testimony of The Honorable Lamar Alexander, US Senator, (R-TN), given at Voice Over Internet Protocol (VOIP) Hearing before the US Senate Committee on Commerce, Science & Transportation, Feb. 24, 2004; Testimony of The Honorable Stan Wise, President, National Association of Regulatory Utility Commissioners, given at Voice Over Internet Protocol (VOIP) Hearing before the US Senate Committee on Commerce, Science & Transportation, Feb. 24, 2004.
13. *See id.*
14. Peter Grant and Almar Latour, "Battered Telecoms Face New Challenge: Internet Calling," *Wall St. J.*, Oct. 9, 2003, at 1.
15. *Id.*
16. *Id.*
17. The Siemon Company, "White Paper: Video over IP," www.siemon.com, Aug. 2003; Cisco Systems, Inc., "White Paper: The Strategic and Financial Justification for IP Communications, 2002."
18. Ben Charny, "California to regulate VoIP providers," *CNET NEWS.COM*, available at <http://news.com.com/2100-7352-5084711.html> (last modified Sept. 30, 2003).
19. Declan McCullagh, "FBI targets Net phoning," *CNET News.com*, July 29, 2003, available at http://news.com.com/2100-1028_3_5056424.html?tag=mainstry.
20. *Id.*; see also Joint Comments of US Department of Justice, US Drug Enforcement Administration, and the Federal Bureau of Investigation, Dec. 15, 2003, submitted to Dec. 1, 2003 Federal Communications Commission VoIP Forum at <http://www.fcc.gov/voip/materials-submit.html.031215VoIPForum>.
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22. *Id.*
23. See 18 U.S.C. §§ 2510, *et seq.*
24. Joint Comments of US Department of Justice, US Drug Enforcement Administration, and the Federal Bureau of Investigation, Dec. 15, 2003, submitted to Dec. 1, 2003 Federal Communications Commission VoIP Forum at <http://222.fcc.gov/voip/materials-submit.html.031215VOIPForum>.
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 33. USA PATRIOT Act § 215, 50 U.S.C. § 1861a1 (2001).
 34. Sarbanes-Oxley Act of 2002, 18 U.S.C. §§ 1512c, 1519.
 35. "Do Not Toss That Paper: Sarbanes-Oxley Changes The Rules On Document Retention," Bowne Digest for Corporate & Securities Lawyers, available at <http://www.bowne.com/newsletters/friendly.asp?storyID=643> (May 2003). This statement was abstracted from an article written by a lawyer from Los Angeles. Pamela Palmer, "When Is It Safe To Shred Unwanted Documents After Sarbanes-Oxley?," *Wall St. L.*, Vol. 6, No. 8, pp.15-19 (Jan. 2003). When asked about that abstraction, the author stated in an email, "Sarbanes does not contain specific retention requirements for voice mail . . . broker dealers are obliged to retain electronic documents under SEC [Securities and Exchange Commission] regulations and voice mail is a form of electronic document." Email from Pamela Palmer, Partner, Latham and Watkins, to Paula Royalty (Nov. 18, 2003, 06:56:50 PST) (on file with author).
 36. See 17 C.F.R. § 240.17a-4 (2003).
 37. Telephone Interview with John Heine (Nov. 20, 2003).
 38. See 17 C.F.R. § 240.17a-3 (2003).
 39. "Final Rule: Retention of Records Relevant to Audits and Reviews," 17 C.F.R. Part 210, available at <http://www.sec.gov/rules/final/33-8180.htm> (Mar. 3, 2003).
 40. *Id.*
 41. See Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-21, filed with Federal Communications Commission on Sep. 22, 2003; Pleading Cycle Established for Comments on pulver.com Petition for Declaratory Ruling, WC Docket No. 03-45, Public Notice, DA 03-439, released by Federal Communications Commission on Feb. 14, 2003; Roy Mark, "Tauzin Presses FCC for VoIP Decision," *internetnews.com*, Jan. 30, 2004, available at <http://internetnews.com/xSP/article.php/3305951> (last visited Feb. 29, 2004).
 42. See generally 47 U.S.C. §§ 201, *et seq.*
 43. See generally 47 U.S.C. §§ 153, 201, *et seq.*
 44. See Memorandum Opinion and Order In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, WC Docket No. 03-45, Federal Communications Commission, adopted Feb. 12, 2004, released Feb. 19, 2004.
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 46. *Id.* § 153(44).
 47. *Id.* § 153(20).
 48. See *supra* n.1.
 49. *Id.*
 50. Federal Communications Commission, Memorandum and Order in the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service, WC Docket No. 03-45, Adopted Feb. 12, 2004, released Feb. 19, 2004.
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 52. *Id.*
 53. See 47 U.S.C. §§ 153, 1000, *et seq.*
 54. Ben Charny, "VoIP: It's not so easy to listen in," CNET News.com, Feb. 13, 2004.
 55. See Sprint Statement on FCC's Notice of proposed Rulemaking on Voice Over Internet Protocol, Feb. 12, 2004, Overland Park, KS, available at http://144.226.116.29/PR/CDA/PR_CDA_Press_Releases_Detail/1,3681,1111957.html (last visited on Feb. 28, 2004); Mark Wigfield, "FCC Makes First Ruling On Internet Telephony," *Wall St. J.*, A5, Feb. 13, 2004.
The F.B.I. had hoped the FCC would not issue the notice of proposed rulemaking before the issue of VoIP services being subject to CALEA has been resolved.
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 57. *Id.*
 58. Statement of Commissioner Kevin J. Martin Re: In the Matter of IP-Enabled Services, Federal Communications Commission Open Meeting of Feb. 12, 2004, adopted Feb. 12, 2004.
 59. *Id.*
 60. *Id.*
 61. Vonage Holdings Corp. v. Minnesota Public Utilities Commission, 290 F. Supp. 2d 993 (D. Minn. 2003).
 62. Brand X Internet Services v. Federal Communications Commission, 345 F.3d 1120 (9th Cir. 2003).
 63. *Id.* at 1133.