Foreword

In *Code Wars: 10 Years of P2P Software Litigation* Dr Rebecca Giblin poses a paradox. From the inception of peer-to-peer file sharing networks (at the end of the Paleolithic 1990s), every time a copyright owner has alleged the legal liability of a P2P network entrepreneur, the copyright owner has prevailed in court; yet unauthorized P2P file sharing persists, if anything, more virulently than before. This book examines and explains the technological developments and legal doctrines that have produced that paradox. Equally importantly, and more rarely for analyses of the phenomenon of online piracy (which abound in the academic and popular press), Dr Giblin does not just diagnose the causes of current legal norms' inadequacy to the task of stemming rampant copying; she prescribes how legal rules should change in order better to confront those causes.

That said, Dr Giblin's diagnosis is both original and persuasive. She aptly sets out how P2P technologies work; her straightforward explanations make the software-design decisions comprehensible even to the technologically unacquainted. She also provides a compelling account of the history of the various P2P cases in the United States and elsewhere, particularly her native Australia. She builds on the insights of scholars such as Tim Wu's *When Code Isn't Law*, which, contesting the claim that technology progresses according to its own logic that creates its own law, demonstrated that P2P technologies instead developed specifically to elude legal constraints. Dr Giblin significantly supplements the reasons that have motivated and enabled the propagation of what she calls "anti-regulatory code." In addition to the already-recognized causes – widespread ability of end users to copy and distribute works (absence of industry gatekeepers), and many of those users' willful disregard of copyright law (lack of public support for legal rules regarding copyright) – Dr Giblin identifies two more: the absence of a profit motive for much software development, and widespread norms among software developers promoting the sharing of their innovations. Legal rules that assume that software will be expensive, and that its creators, in order to keep creating it, therefore require both monetary incentives and security from copying their output, thus fall far short of the mark. Together, these features critically distinguish the online world from the hardcopy world, and account for the failure of rules

grounded in assumptions about the off-line world to regulate behavior online.

Regarding the cures for these causes, Dr Giblin starts from proposals by Peter Menell and David Nimmer to substitute for the current tests for contributory infringement of copyright the products liability tort law standard of “reasonable alternative design.” She considers what such a standard would mean not only for physical hardware such as recording equipment, but, more pertinently, for infringement-enabling software. As in her analysis of the causes of P2P file sharing, Dr Giblin underscores how “physical world assumptions” have hampered the conception of appropriate responses to “anti-regulatory code.” In fact, as Dr Giblin shows, the points of non-correspondence between hard goods and software may reveal the way forward. For example, distribution of hard goods removes their end use from the manufacturer’s or distributor’s ability to control. The software horse, by contrast, never completely leaves the barn: automatic updates and other features that tether the end user to the software provider can perform the function of a virtual bridle. A developer’s failure to retain the horse on its lead may under appropriate circumstances be ruled an actionable rejection of a reasonable alternative design. What those circumstances are, how the test would be applied, and whether the test implements good policy, constitute the essence of the last chapter of this book.

Code Wars is an eye-opening contribution to the debate over the copyright-technology rivalry. Whether Dr Giblin’s prescriptions will convert a fratricidal conflict into an exemplar of sibling harmony (or at least a workable truce) remains to be seen. In the interim she has evocatively described the contending forces and convincingly shown why, court victories to the contrary notwithstanding, the legal rules that should prevent the exploitation of piracy-based business models have in fact charted the course for a behind-the-lines rout.

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