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Privacy and Surveillance on the Internet

Class 11 – November 14, 2008

SI 519 / PubPol 688

Bryce Pilz

Fall 2008

Schedule

- 2:10 – Introduction
- 2:20 – Exercise
- 2:30 – IP Policies – Closing Points
- 2:40 – Student Presentation: Employee's Rights
- 2:50 – Student Presentation: Computer Use Policies
- 3:00 – Student Presentation: Privacy Online
- 3:10 – Privacy Law Background
- 3:45 – Break
- 4:00 – Student Presentation: Cookies
- 4:10 – Student Presentation: Patriot Act
- 4:20 – Privacy Law Discussion

Review: Defamation

- Elements

- 1) False statement of fact (or understood as such) about plaintiff
- 2) Unprivileged communication to another
- 3) Damage
- 4) If public figure → malice on part of defendant

Exercise

Group Drill

- UM faculty member creates software the she uses in the course of her research to collect and analyze genetic data
- Software was created in the faculty member's department's computer lab
 - Only members of this department can use the computer lab
- Software not funded by an outside party

Sec. 3.10. Ownership of Patents, Copyrights, Computer Software, Property Rights, and Other

Unless otherwise provided by action of the Regents:

1. Patents and copyrights issued or acquired as the result of or in connection with administration, research, or other educational activities conducted by members of the university staff and supported directly or indirectly (e.g., through the use of university resources or facilities) by funds administered by the university, regardless of the source of such funds, and all royalties or other revenues derived therefrom shall be the property of the university.
2. Computer software created by members of the university staff in connection with administration, research, or other educational activities supported directly or indirectly by funds administered by the university, regardless of the source of such funds, shall be the property of the university. Such computer software may be made available for use on a non-exclusive basis by those who pay appropriate charges to reimburse the university for the costs of development, distribution, and reproduction.
3. The provisions of 1 and 2, *supra*, shall apply unless they are inconsistent with the terms of any applicable agreement with a third-party sponsor or provider of funds, in which case the university's agreement with such sponsor or provider shall control.

Bylaw
3.10
Signed by
employees

Technology Transfer Policy

II. Ownership of Intellectual Property

- A. Intellectual Property made (e.g., conceived or first reduced to practice) by any person, regardless of employment status, with the direct or indirect support of funds administered by the University (regardless of the source of such funds) shall be the property of the University, except as provided by this or other University policy. Funds administered by the University include University resources, and funds for employee compensation, materials, or facilities.

"Intellectual Property" means inventions, processes, compositions, life forms, computer software, copyrighted works, mask works, research tools and data, certain defined trade and service marks, Tangible Materials, and legal rights to the same.

Source: University of Michigan Tech Transfer, <http://techtransfer.umich.edu/resources/policies.php>

Copyright Ownership Policy

I. Categories of Works

A. Faculty Works

1. Ownership Principles

Consistent with academic freedom and tradition, all faculty² (including full-time, part-time, adjunct, and emeritus faculty) own and control instructional materials and scholarly works created at their own initiative with usual University resources. "Usual University resources" are those resources commonly provided or made available to similarly situated faculty. They include, for example, ordinary use of resources such as the libraries; one's office, computer and University computer facilities; secretarial and administrative support staff; and supplies. For any given department, unit, or individual, what constitutes a usual resource will depend upon the functions and responsibilities of that department, unit, or individual. For example, access to a chemistry laboratory may be a usual resource in chemistry, but would probably be considered an unusual resource in English literature.

Examples of faculty-owned works created at faculty members' own initiative with usual University resources may include, but are not limited to: lecture notes, transparencies, case examples, textbooks, interactive textbooks, other works of nonfiction or novels, software, CD-ROMs, articles, books, literary works, poems, musical compositions, visual works of art, and other artistic creations regardless of the media in which the works are produced or the forms of dissemination (e.g., print or electronic).

Points on Policies

- Are they contracts?
- Do they effectively assign rights (if needed)?
- Are they clear?
- What political pressures exist?
- Are they constitutional / legal?

Privacy Law



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Privacy Regulation

- I. Constitutional Protection Against Government Searches and Seizures
- II. Laws Protecting Against Invasion of Privacy By Private Entities
 - Federal Laws
 - State Laws (statutes and common law)
- III. Self-imposed Regulation

Protecting Privacy Against The Government



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Maxim: The home is one's castle - 1499

Revolutionary War: Central privacy concern was government invasion of



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Patrick Henry

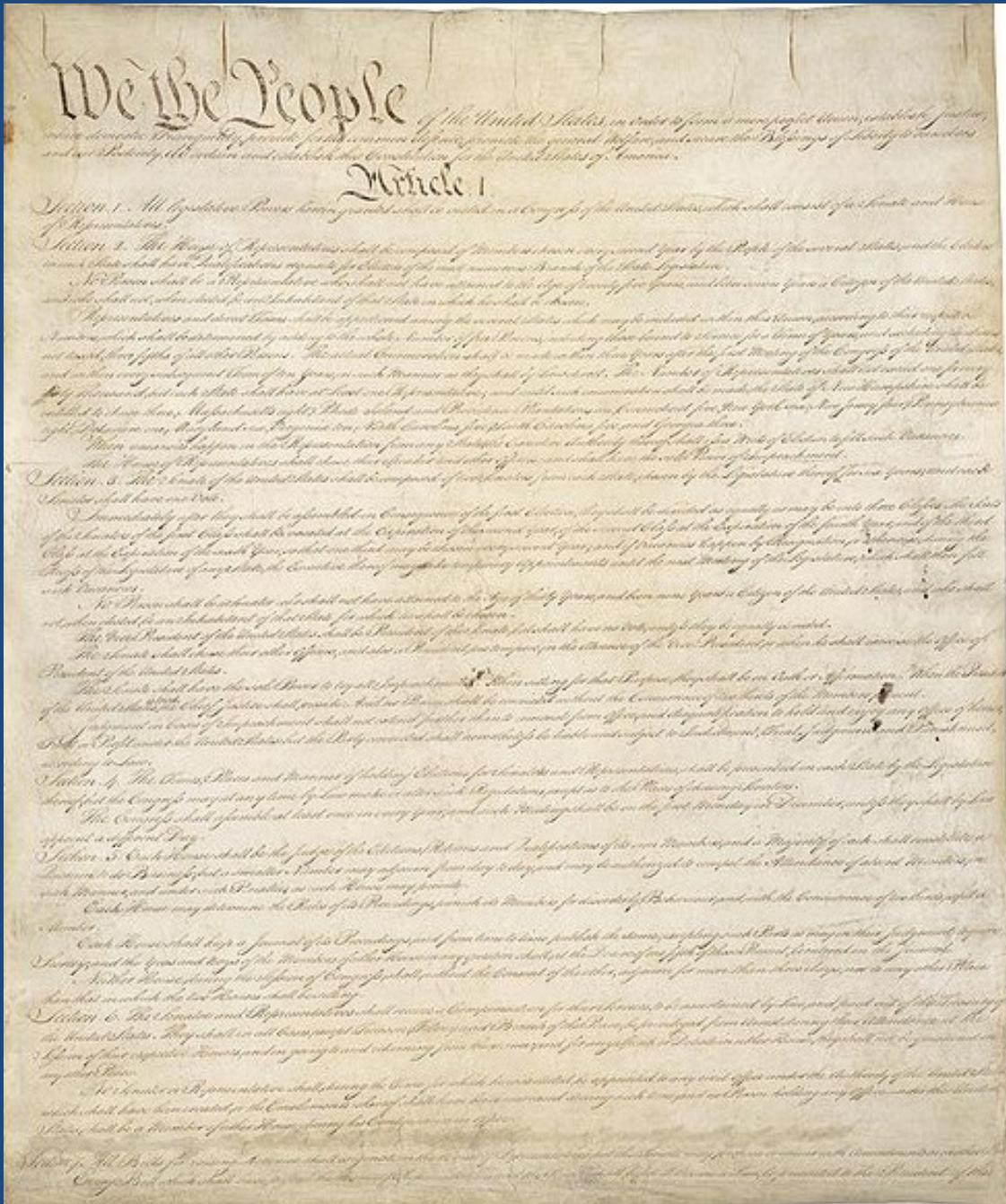
- “They may, unless the general government be restrained by a bill of rights, or some similar restrictions, go into your cellars and rooms, and search, ransack, and measure, everything you eat, drink, and wear. They ought to be restrained within proper bounds.”

- June 16, 1788, Virginia Constitution Ratification

- 3rd Am. – soldiers living with you in a time of peace

- 4th Am. – searches and seizures

- 5th Am. – privilege against testifying about self-incriminating information



4th Amendment

- “The Right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches, and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Comparing Judicial Analysis Under First and Fourth Amendments

1st Amendment	4 th Amendment
<p>“Congress shall make no law...”</p> <p>(no exceptions provided in Constitution)</p>	<p>“The Right of the people to be secure [] against unreasonable searches and seizures shall not be violated [] but upon probably cause [].”</p>
<p><u>Judicially-created scrutiny for regulation of expression:</u></p> <p>Courts apply strict scrutiny to content-based regulation: (1) compelling government interest; (2) narrowly tailored to satisfy that interest; (3) no less restrictive means.</p>	<p>(1) Reasonableness (if no legitimate expectation of privacy in information searched)</p> <p>(2) If there’s a legitimate expectation of privacy, then there must be probable cause for a government search</p>

1928: Olmstead v. U.S.



Source: <http://en.wikipedia.org/wiki/Image:TelRecAdapter.jpg>

1928: Olmstead v. U.S.

- Court: The 4th Amendment did not apply to wiretapping
 - “There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the house or offices [].”
- Brandeis dissent: new technological developments require revising traditional views of the 4th Amendment

Source: Olmstead v. United States, 277 U.S. 438 (1928)

Katz v. United States (1967)



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Katz v. United States (1967)

- 4th Amendment protects people, not places
- “What a person knowingly exposes to the public, even in his own home or office, is not subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an areas accessible to the public, may be constitutionally protected.”

Source: Katz v. United States, 389 U.S. 347 (1967)

Katz

- Two requirements:
- 1) That a person have exhibited an actual (subjective) expectation of privacy, and
- 2) That the expectation be one that society is prepared to recognize as reasonable.

Smith v. Maryland (1979)



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- “pen register” – tracks numbers called from a particular phone

Smith v. Maryland (1979)



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- Use of “pen register” is not a search under 4th A
- No legitimate expectation of privacy in phone numbers called

Smith and Katz Together

Legitimate expectation of privacy in contents of messages but not in destination of messages

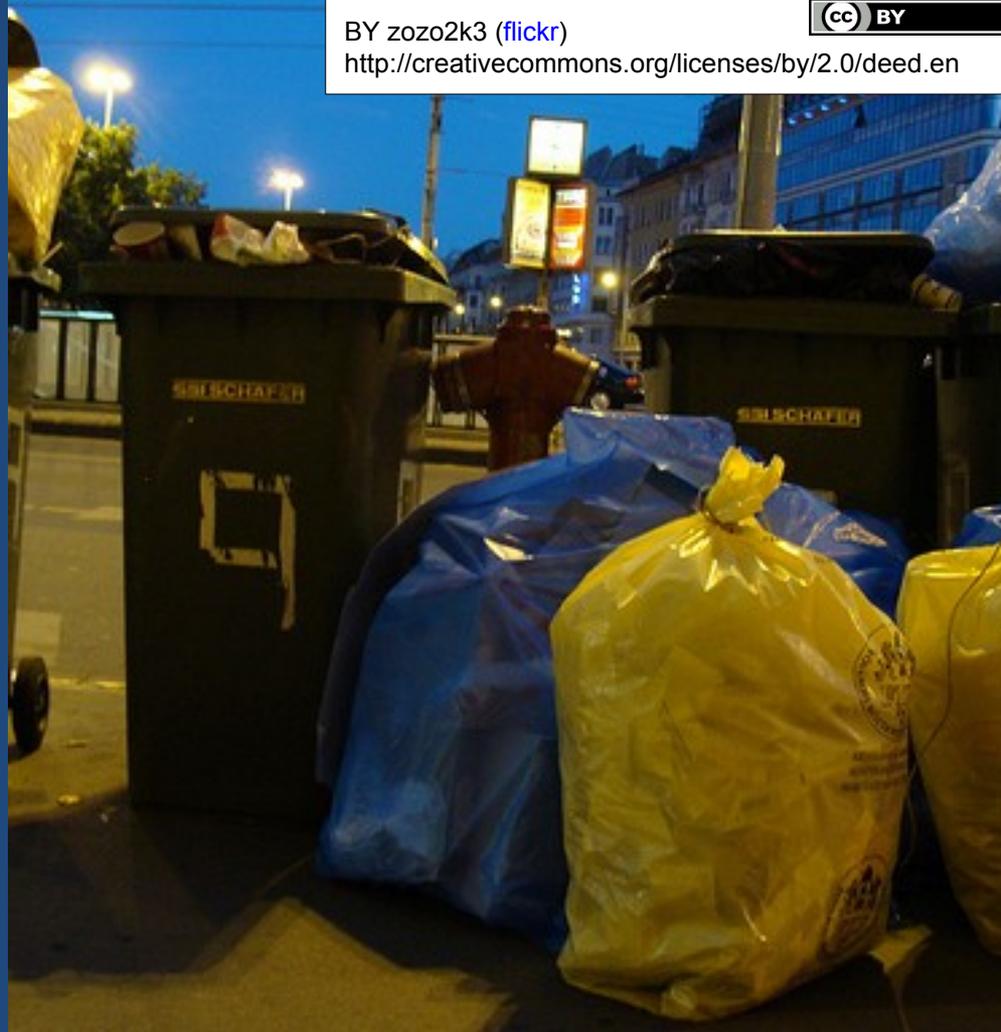
4th Am. Protection of Communications

	Mail	Phone Calls	Emails
No expectation of privacy	“outside of envelope” <i>(Hernandez 2002)</i>	Destination and volume <i>(Katz 1967)</i>	Destination, volume of traffic <i>(Forrester, 9th Cir. 2007)</i>
Expectation of privacy	Contents <i>(Jackson 1877)</i>	Contents <i>(Smith 1979)</i>	Contents <i>(Warshek, 6th Cir. 2008)</i>

“Third Party Doctrine”

- knowingly revealing information to a third party relinquishes Fourth Amendment protection in that information.
- 50's – 60's: informant cases
- 70's: business records cases
- Consistent with communications protections?

Greenwood



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Greenwood

- It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public.
- No legitimate expectation of privacy

4th Am. In Criminal Context

Case	Facts	Legitimate Expectation of Privacy?
U.S. v. Miller	Bank records?	No
U.S. v. Knotts	Location of your car, tracked by attached homing device	No
Oliver v. U.S.	Personal things stored in open fields	No
Dow Chemical v. U.S.	Personal things visible to a police aerial flyover	No

Kyllo (2001)

- Heat imaging device used to detect high-intensity lamps used for marijuana growing
- Court: cannot be used without a warrant (reasonably expectation of privacy that cannot be invaded absent a showing of probable cause)

Kyllo (2001)

The Government also contends that the thermal imaging was constitutional because it did not “detect private activities occurring in private areas...”

Source: *Kyllo v. United States*, 533 U.S. 27 (2001)

The Fourth Amendment’s protection of the home has never been tied to measurement of the quality or quantity of information obtained.

Subpoenas v. Warrants

- Warrant – probable cause
- Subpoena – reasonable grounds
- Why?

Privacy Beyond the 4th: Griswold

- Griswold: Connecticut law prohibiting contraceptives violated a right to marital privacy
 - Privacy is in the “penumbra” of rights in the bill of rights

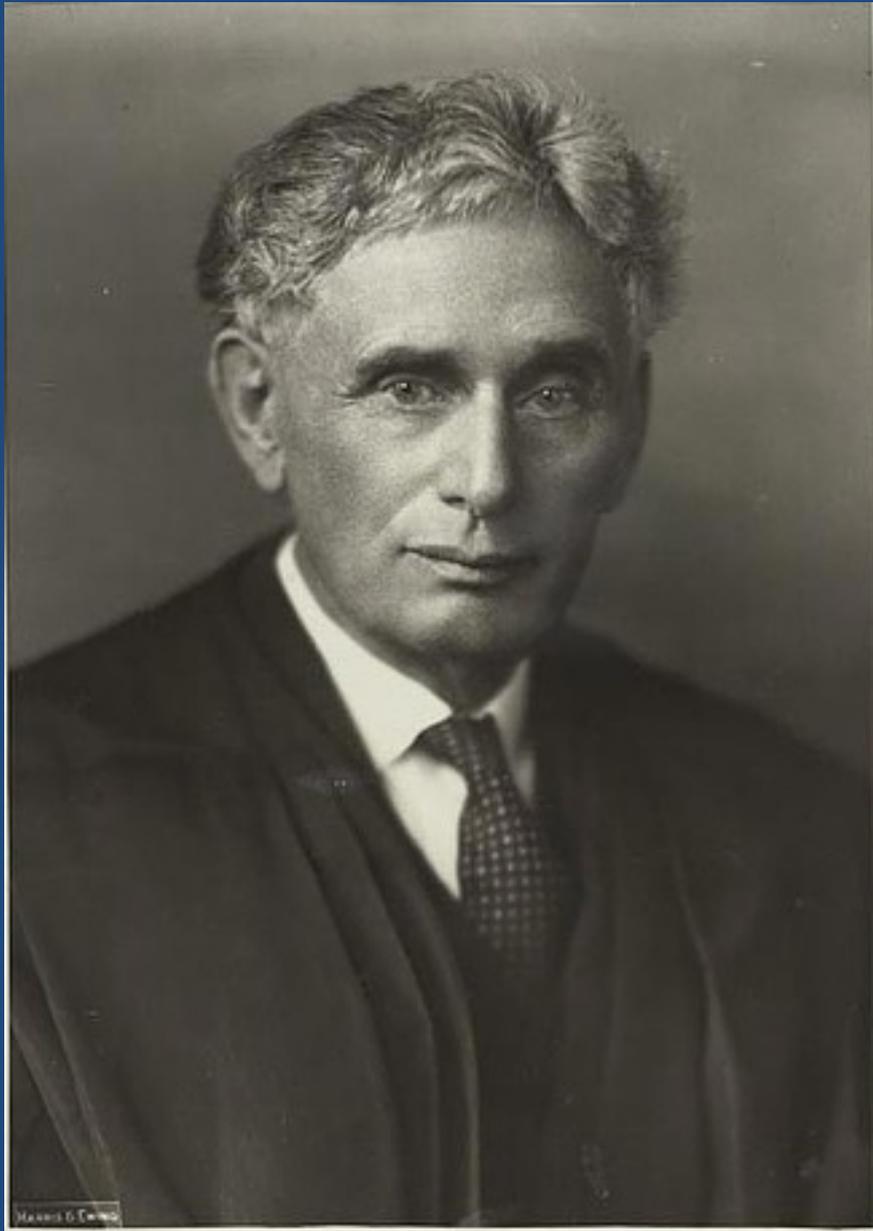
Privacy Beyond the 4th: Roe v. Wade

- Laws regulating abortion in first trimester violated right to privacy in the 14th Amendment's due process clause.
- 14th Amendment: “nor shall any State deprive any person of life, liberty, or property, without due process of law”

Laws Protecting Privacy From Private Interests

Privacy Laws

1890



Source: <http://en.wikipedia.org/wiki/Image:Brandeisl.jpg>

Two new developments concerned Warren and Brandeis.....



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Two new developments concerned Warren and Brandeis.....



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Warren & Brandeis....

“the right to be let alone”

– Borrowed from Michigan justice Thomas Cooley

Warren and Brandeis....

- Contract law insufficient
 - People could take pictures about you or write about you without having to enter into any contract
- Property law insufficient
 - “Where the value of the production is found not in the right to take profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all, it is difficult to regard the right as one of property.”

Source: Warren, Samuel D. and Louis D. Brandeis. "The Right to Privacy." in Harvard Law Review, Vol. IV December 15, 1890 No. 5

Prosser on Torts – 4 Privacy Torts

- 1) Intrusion upon seclusion
- 2) Public disclosure of private facts
- 3) False light or “publicity”; and
- 4) Appropriation

Nader v. GM (1970)



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Federal Statutes

- Wiretapping / Surveillance
 - Omnibus Crime Act 1968
 - Electronic Communications Protection Act 1986
 - FISA
- Personal information
 - HIPAA, Fair Practices Act, Privacy Act 1974, Stored Communications Act, FERPA
- Government Information –
 - FOIA

Statutes

- Address discrete issues
- Respond to problems that pop up
 - Ex) Video Privacy Protection Act (1988)



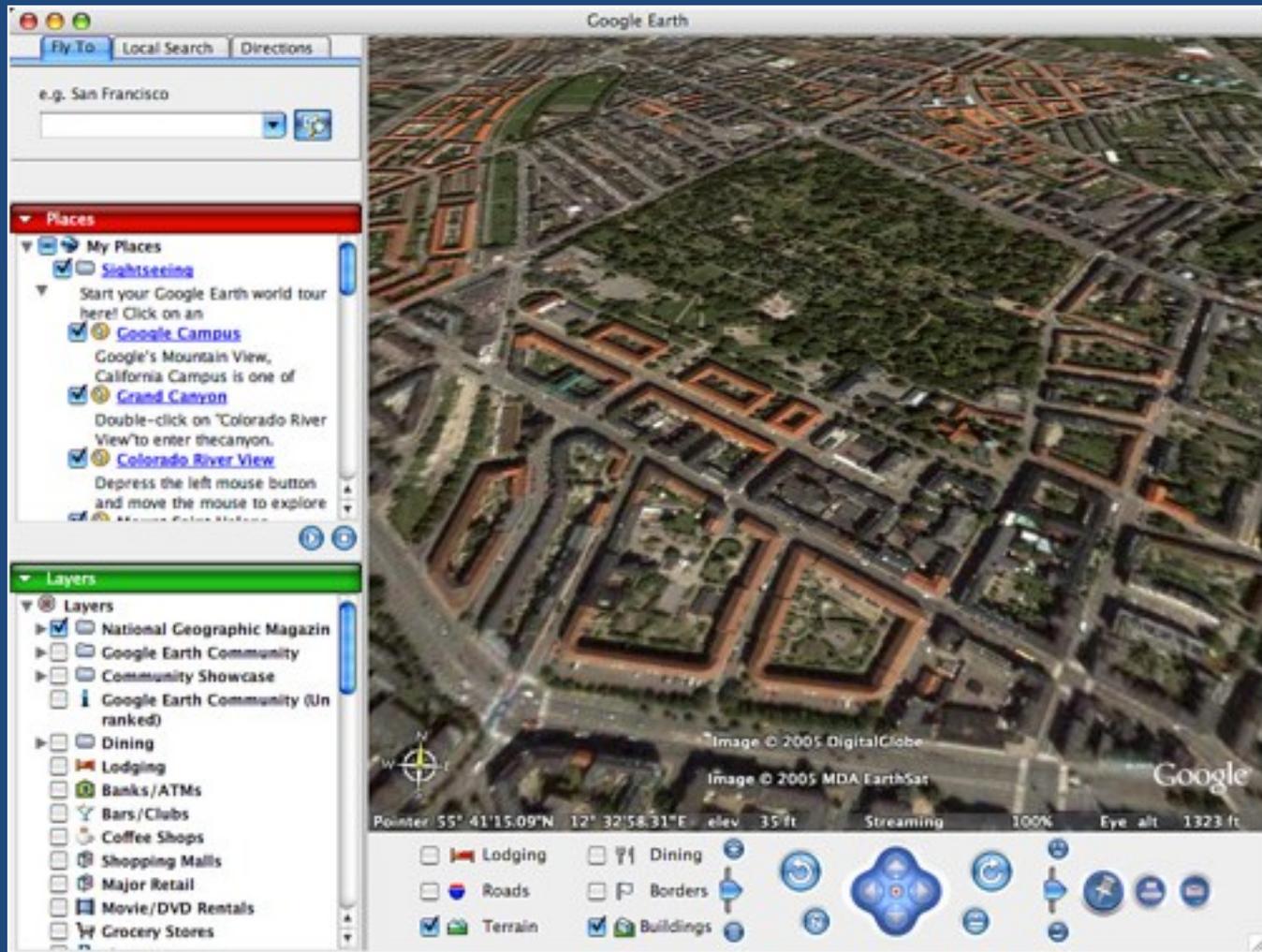
Statutes

- Katz brought about Omnibus Crime Act
- Nixon Administration abuses brought about Privacy Act of 1974
- 9/11 brought about Patriot Act
- One of primary issues is... Should we and can we get a comprehensive national privacy act?

ECPA (1986)

Protection	Exceptions
Who?	Government, private citizen, or system operator:
What's protected:	Cannot intentionally intercept electronic messages; or intentionally use device you know or should know has been intentionally intercepted.
Exceptions:	If system operator gets consent of either the sender or the recipient it can disclose (consent is broad – can be contractual or implied through posting to a public forum)
	If system operator must look at the content of the message to forward it
	If message appears to pertain to the commission of a crime
	Service providers can maintain logs

Self-regulation



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Google Privacy Policy

- <http://www.youtube.com/watch?v=kLgJYBRzUXY>

Problems (Warshek Case)

- Government investigating Target X
- Obtained order requiring IS to turn over Target X's email account
 - order sealed – prohibited ISP from telling Target X
 - based on “reasonable grounds” under Stored Communications Act
- Question was: reasonable expectation of privacy in emails?

Analysis

- If recipient of emails subpoenaed – no expectation of privacy
- If only the subscriber information subpoenaed from ISP – no expectation of privacy
- But here – contents of email subpoenaed from ISP → reasonable expectation of privacy
 - Contractual right of ISP to access emails does not change this (access must occur in ordinary course of business)

Problems (URLs)

- Government subpoenas ISP for URLs visited by Target &
 - No warrant
- Target Y challenges URL evidence on 4th Amendment grounds. Result?

Background Slides

#1 Intrusion Upon Seclusion

- One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be offensive to a reasonable person.

#2 Public Disclosure of Private Facts

- One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

#2 Public Disclosure of Private Facts

- But, courts have recognized that once information is available in a public record, it's freely available.

Bartnicki v. Vopper (2001)

- “The Constitution permits legislatures to respond flexibly to the challenges new technology may pose to the individual’s interest in basic personal privacy.” - Breyer

Source: Bartnicki v. Vopper, 532 U.S. 514 (2001)

#3 False Light

- One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy, if:
 - (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
 - (b) the actor had knowledge or acted in reckless disregard as to the false light of the matter

#4 Appropriation

- One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of privacy.
- Developed into the right of publicity.