2008-09

PubPol 688/SI 519 - Intellectual Property and Information Law, Fall 2008

Pilz, Bryce

http://hdl.handle.net/2027.42/64966
Schedule

- 2:10 – Introduction
- 2:20 – Exercise
- 2:30 – Student Presentation: Design Patent Protection
- 2:40 – Student Presentation: Defamation Law
- 2:50 – Current Events
- 3:00 – Net Neutrality
- 3:45 – Break
- 4:00 – Student Presentation: ICANN
- 4:10 – ICANN Discussion
Privacy: Natural v. Property Right

• Last week’s exercise:
  – Natural Right: 15
  – Property Right: 2
  – Both: 7

• Thoughts?
Privacy as a Property Right

- Privacy as a property right “is not to demote the role of regulation, or to believe that the ‘market will take care of itself,’ or to question the strong role the government should have to assure privacy. It is simply to recognize that the government is not the only, or often most important protector of human rights.”

Constitutional?

• Would it be constitutional to pass a law creating property rights in private information?
P3P?

• Electronically establishes whether user’s permitted uses and sites intended uses of personal data match

• Personal choice, easier than consulting privacy policies on each site, can give more protection than default

• Concerns: too difficult for users to protect information, enforcement, no expiration on data collected
Exercise
Current Events
FTC Hearings:

• The “Evolving IP Marketplace” – beginning Dec. 5
• Examine changes since the 2003 hearings that called for significant patent reform
• Should address the numerous Federal Circuit and Supreme Court decisions since 2003 that have mostly restricted the scope of patent rights
**FEATURED PATENT STUDIES**

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<th>HEALTHCARE - PHARMACEUTICAL</th>
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<td>The patents and reissue applications relate to the prescription drug Lipitor.</td>
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### Patent Studies

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Net Neutrality

• Notion that owner of a bottleneck facility will discriminate against users of the facility in a socially undesirable way.
  – Scott Hemphill, “Network Neutrality and the False Promise of Zero-Price Regulation”

• Saw this before with railroads, telecommunications, etc.
3 Net Neutrality Principles (ACLU)

• 1) No discrimination against lawful content

• 2) Equal Internet access at an equal price

• 3) Consumer choose network equipment
Baby Bell executives and online companies have been holding a lively debate on the Hill and in the press over the past months. A BellSouth chief technology officer told reporters that his company should be able to charge Yahoo! for having its site load more quickly than Google. The AT&T CEO said that "There seems to be a mentality [on the part of online companies] that they can put more and more through our pipes for free... We're the ones who built the network. You cannot make that sort of investment if you can't make a return on the capital. They're more than welcome to use our networks, but if they do, they're going to have to pay. It's not free."
In response, Vint Cerf, one of the creators of TCP/IP, has called on behalf of Google for a “lightweight but enforceable neutrality rule.” A group of online companies has written to Congress claiming that "The incredible potential of broadband will be severely compromised if network operators are permitted to be the gatekeepers of the Internet, deciding what content, applications and services succeed or fail on the Internet." Legislative activity in this area has been intense.
FCC Background

• Established – Communications Act of 1934

• Regulates all:
  – non-federal gov. use of the radio spectrum;
  – interstate telecommunications;
  – International communications that start or end in U.S.

Blank X (Sup. Ct. 2005)

• Confirmed FCC’s act of defining cable broadband as an “information service”
  – Freed cable companies of FCC regulation that would require operators to share networks with competitors

• Gave broad discretion to factual findings of FCC
FCC Formal Complaint Against Comcast

• What was Comcast doing?
“deep packet inspection”

• Monitors customers’ TCP connections using deep packet inspection to determine how many P2P uploads

• If too many → Comcast sends reset packet (RST) terminating the connection
FN 181:

• “Comcast is essentially behaving like a telephone operator that interrupts a phone conversation, impersonating the voice of each party to tell the other that ‘this call is over, I’m hanging up.’”

Comcast’s First Argument?

• FCC did not have authority

• How does FCC get authority?
FCC Authority

• Telecommunications Act of 1996 – established policy of “promoting the continued development of the Internet”

• Supreme Court in *Brand X* – confirmed FCC’s regulatory authority under the Telecomm Act
  • FCC then identifies numerous other statutes supporting their authority to regulate
Comcast’s Second Argument?

• Adjudication v. Rule-making
Can FCC Adjudicate Here?

- Yes
- Source: FCC Ruling against Comcast, released August 20, 2008 (text)
- P30
  - Internet is new and quickly evolving – FCC declines “codify its judgment into a hard and fast rule”
- P31
  - Networks are complex and practices vary (and Comcast lied) – so hard to capture with a general rule
- P32
  - Case-by-case approach comports with congressional directions and FCC precedent
    • FCC had warned Comcast about this
Resolving the Dispute

• Comcast’s network management practice (PP41-42 and 47-48)
  – Good reason for doing it?
  – Minimally intrusive?

• What analysis does this resemble?
FCC Quote on Reasonableness

• “A hallmark of whether something is reasonable is whether a provider is willing to disclose to its customers what it is doing.”

Source: FCC Ruling against Comcast, released August 20, 2008, FCC 08-183, page 32. (text)
Comcast’s Mistakes

• Lied to public
• Told FCC it didn’t have authority to rule on this
• Contradicted statements in prior litigation admitting FCC jurisdiction (P23)
• Made “absurd argument” (that it merely delays, and does not block) which used “verbal gymnastics”) (P44)
Ruling

- Comcast loses
- No damages – has to come clean and stop
Comcast appeals FCC traffic-blocking ruling

Comcast is appealing a ruling by the Federal Communications Commission that found the broadband provider had illegally blocked some customers' Web traffic.

The appeal, filed Thursday in the U.S. District Court of Appeals in Washington, challenges the FCC's ruling on August 1 that Comcast's throttling of BitTorrent traffic last year was unlawful—the first time any U.S. broadband provider has ever been found to violate Net neutrality rules. The FCC issued a cease-and-desist order and required the company to disclose to subscribers in the future how it plans to manage traffic.

"We filed this appeal in order to protect our legal rights and to challenge the basis on which the (FCC) found that Comcast violated federal policy in the absence of pre-existing legally enforceable standards or rules," Comcast executive vice president David L. Cohen said in a statement.

FCC Chairman Kevin Martin said he was "disappointed by Comcast's decision to appeal."

Ensure the Full and Free Exchange of Ideas through an Open Internet and Diverse Media Outlets

- **Protect the Openness of the Internet:** Support the principle of network neutrality to preserve the benefits of open competition on the Internet.

- **Encourage Diversity in Media Ownership:** Encourage diversity in the ownership of broadcast media, promote the development of new media outlets for expression of diverse viewpoints, and clarify the public interest obligations of broadcasters who occupy the nation's spectrum.

- **Protect Our Children While Preserving the First Amendment:** Give parents the tools and information they need to control what their children see on television and the Internet in ways fully consistent with the First Amendment. Support tough penalties, increase enforcement resources and forensic tools for law enforcement, and encourage collaboration between law enforcement and the private sector to identify and prosecute people who try to exploit children online.

- **Safeguard our Right to Privacy:** Strengthen privacy protections for the digital age and harness the power of technology to hold government and business accountable for violations of personal privacy.
Jan. 2009 Legislation?

• Byron Dorgan

• 2008 Internet Freedom Preservation Act
  – Mandate FCC investigate whether ISPs block or unreasonably thwart traffic
  – Prohibit ISPs blocking or favoring content or charging content providers additional fees to expedite their offerings
.xxx and more?

• ICM attempt to register .xxx

• Initially accepted, then rejected
E-Mails Suggest Bush Administration Pressured ICANN to Nix '.Xxx' Domain

Wednesday, May 24, 2006

Newly released e-mails allege U.S. government officials pressured a leading Internet authority into voting against creating a kind of red-light district for adult Web sites.

The apparent involvement of the U.S. Department of Commerce, President Bush's chief political operative Karl Rove and others is significant.

If true, it means the U.S. government violated terms of a complicated arrangement it has with ICANN, the Internet authority that voted 9-5 two weeks ago not to OK the .xxx proposal.

Source: http://www.foxnews.com/story/0,2933,196608,00.html
.xxx and more?

• ICANN – Independent Review Procedure
  – Issues in resolving disputes concerning a governing body

• New TLD’s
  – Process: public review, legal procedures, applications received spring ’09?
1. **Summary of conclusions**

Overall, we find the ICANN board is working well given its organisational model and board structure. There are many important issues to discuss and opportunities for improvement but we emphasise that the board is in no sense dysfunctional.

Front Running?

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHRIS McELROY, on Behalf of Himself and All Others Similarly Situated,

Plaintiff,

vs.

NETWORK SOLUTIONS, LLC, a Delaware Limited Liability Company; INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California non-profit Corporation; and DOES 1 through 250, inclusive;

Defendants.

Case No.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Source: McElroy vs. Network Solutions, LLC, U.S. District Court, Central District of California (full text)
Front Running?

grossly inflated domain name registration fees. Unbeknownst to consumers, Network Solutions immediately registers for itself any domain name that consumers provide to Network Solutions in order to determine whether the domain name is available. Network Solutions never informs consumers that it has registered the domain name for itself; instead, Network Solutions tells consumers that their domain name is "available" and offers to register the domain. It is only at this point – after it has secretly registered the domain for itself – that Network Solutions finally reveals what it will charge.

Source: McElroy vs. Network Solutions, LLC, U.S. District Court, Central District of California (full text)
"Network Solutions is able to perpetuate this course of misconduct only through the acquiescence, tacit approval, and participation of ICANN," the lawsuit said.

Source: McElroy vs. Network Solutions, LLC, U.S. District Court, Central District of California (full text)
ICANN

• Add Grace Period

• Domain name registrar doesn’t have to pay registration fee if it cancels within 5 days
Pro’s – Con’s on ICANN?
ICANN

• Transparency

• Neutrality

• Authority / legitimacy
Alternatives

• U.S. Gov.
• UN Agency
• New non-profit
• Regionalizing control
• International Telecommunications Union (ITU)
• Freeing control to the market