Internet Law Updates (Sept. 2006)

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Overview

● Search Engine Law
  – Copyright
  – Trademark
  – Algorithmic choices
  – Click fraud
  – Access to search engine logs

● Blog Law

● 47 U.S.C. §230

● Online Content Wars

● Network Neutrality

● Adware/Spyware
Search Engines and Copyright

- Search engines are giant copying machines
  - Prima facie violation of 106
  - Main defenses: fair use and implied license

- Attacks on Google’s practices
  - Google “Cache” (Field)
  - Google Images (Perfect 10)
  - Google Groups (USENET) (Parker)
  - Google News (AFP)
  - Google Print/Library (Author’s Guild; AAP)

- Open issues
  - Are search engines just acting on users’ behalf?
  - Is displaying copyright snippet an infringement?
  - How do advertising programs change the fair use analysis?
Search Engines and Trademark

- Prima facie case of trademark infringement for keyword triggering
  - Plaintiff must prove
    - Ownership of valid TM
    - Defendant’s use in commerce
    - Likelihood of consumer confusion
  - Defendant can then show defenses
    - E.g., fair use, functionality and printer/publisher protection

- Search engines make trademark use in commerce by keyword triggering
  - Most recent: 800-JR Cigar v. GoTo
  - But—adware cases
  - But—no SJ on confusion

- Advertisers’ use in commerce = ?
  - Edina Realty = yes
  - Merck v. Mediplan = no
  - Keyword metatag cases are going strong
Search Engine Algorithmic Choices

- Search engine results ordering determined by proprietary algorithms

- Placement decisions are challenged for 2 principal reasons
  - Placement has sociopolitical consequences ("bias")
  - Placement has economic value

- Legal attacks on search engine algorithmic discretion
  - KinderStart v. Google

- Will courts/legislatures assume algorithm-regulating function?
  - Global Online Freedom Act of 2006
Click Fraud

- Many online advertisements are priced on per-click basis
- Some clicks aren’t “legitimate”
  - Competitive click fraud
  - Publisher click fraud
- Some advertisers believe they pay for illegitimate clicks
- Google and Yahoo have settled lawsuits, but grumbling persists

Practice pointers
- If you’re selling clicks
  - Make sure you love your definition of “clicks”
  - Keep advertisers happy
- If you’re buying clicks
  - Negotiate the definition of “clicks”
  - Adjust bids to reflect expected illegitimate clicks
Search Engine Logs

- Search engines logs contain valuable and personal data

- Everyone wants the logs
  - The government (Gonzales v. Google)
  - Private litigants

- Will Congress get in the act?
  - Eliminate Warehousing of Consumer Internet Data Act of 2006

- Practice pointers
  - Privacy policies should plan for third party disclosures
  - But, fight back against requests!
Blogs

- Blogs are big news...
- ...but blog-related lawsuits are rare
- There is no separate “blog law”...
- ...but blog-specific legal concerns
  - Employee blogging
  - Pseudonymous blogging and “Doe” lawsuits
  - Co-blogging
47 U.S.C. §230

- 47 U.S.C. §230(c)(1): “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

- Elements
  - Provider or user of ICS
  - Publisher/speaker claims
  - Information provided by another ICP
Defendants routinely win §230 cases on motion to dismiss

2006 plaintiff-favorable §230 cases
- 11th Circuit cases (Almeida, Whitney)—editing may matter
- 800-JR Cigar—questioning if website is ICS
- Anthony v. Yahoo—website allegedly added its own content and falsely marketed user content
- Landry-Bell—website allegedly added its own content

Pending: Barrett v. Rosenthal
- Decision expected by early December
- My prediction: California will adopt Zeran precedent
Online Content Wars

- **Software vendor liability**
  - Most vendors shut down
  - Investor liability question unresolved yet

- **File sharer liability**
  - ~20,000 individual P2P lawsuits filed
  - Most have resulted in plaintiff win (see, e.g., BMG v. Gonzalez)
  - But courts may rein in plaintiff tactics
  - Copyright owners aren’t taking advantage of pre-release registration mechanism

- **Open issue: what constitutes “distribution”?**
  - Movement of physical goods; movement of digital bits; or making files available for public access?
Network Neutrality

- **Issue:** can Internet access providers price discriminate for carrying “bits”?
- **Battle lines**
  - Website operators // consumer advocates // “IWTBF” crowd
  - Telcos // libertarians // economists
- **Arguments against price discrimination**
  - Internet access business is duopoly
  - Charging websites for faster service is “double dipping”
  - Internet norms have flourished without per-bit pricing
- **Arguments for price discrimination**
  - Congestion pricing is necessary/economically efficient
  - Users expect IAPs to discriminate against some bits (ex: spam)
  - Website operators are being hypocritical
- **Congress is paralyzed**
Adware/Spyware

- **Defined**
  - Adware = client-side software that displays ads
  - Spyware = client-side software that reports back user behavior
  - **MANY CLIENTS ARE IN ADWARE/SPYWARE BUSINESS**

- **Legislation**
  - New federal law
  - State “intentionally deceptive” laws
  - Utah and Alaska

- **Key lawsuits**
  - Class action lawsuits
  - FTC
  - Spitzer

- **Key open issues**
  - What disclosures must be made more prominently than in EULA?
  - Installation = trespass to chattels?
  - Software vendor liability for distributor actions
  - Liability of advertisers for ads running on illegally-installed software