Law and Disorder: Revision of Laws Affected by the Internet

September 23, 2014

- The webcast will begin at the top of the hour.
- There is no audio being broadcast at this time.
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- An archive of this webcast will be available on the WCET website next week.
Law and Disorder: Revision of Laws Affected by the Internet

September 23, 2014
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Archive, PowerPoint, and Resources available next week.
Questions from the Audience

- If you have a question during the presentation, please add your questions to the chat box. We will monitor the chat box and have time for Q&A at the end of each section.
Moderator

Richard Katz

Consultant,

Richard N. Katz and Associates
Presenter

Tracy Mitrano
Principal
Mitrano and Associates, LLC
Internet

World-Historical Phenomenon

The introduction of the Internet represents the tipping point for economic, social, political, cultural and ideological transformation.

Global Information Economy
Lessig Lesson on the Internet

Dynamic interaction among four principal factors:

Technology
Law
Market
Social Norms
Five Key Areas of Law

- Copyright
- Computer Fraud and Abuse Act
- Electronic Communications Privacy Act
- Consumer Privacy Law
- Communications Law
Copyright

- Definition: holder has rights to copy, distribute, display and perform ...
- Scope: original work in a tangible medium
- Terms:
  - Individual: 70 years + life, corporation 95 years
- Damages
  - Span from least impactful at $750 to $250,000 per infringement
Cases and Market Adjustments

- Duke
- Thomas
- BU
- Settlement Letters
- HEOA
- iTunes and Netflix
- Disparity of the law remains the same
Copyright Reform

1. Limit Scope
2. Limit Terms
3. Re-imagine Registration
4. Differentiate between personal and profitable infringement in damages
5. Create Orphan Works
6. Codify transformative into fair use exceptions
7. End I.S.P. discrimination
8. Add substantive law to DMCA for content owners
9. Expand licensing for users
10. Recognize distinctions between developed and developing countries in copyright treaties
Computer Fraud and Abuse

- **Definition:** no breaking electronically into “protected computers”
  - i.e. don’t hack a computer connected to a networked system

- **Purpose**
  - Provide criminal penalties for breaking into banking and financial transactions managed through networked systems
  - Used for all form of security violations of and on devices connected to the Internet
Cases

- Robert Morris
- Bradley/Chelsea Manning
- Aaron Schwartz
- (Probably) Edward Snowden
Computer Fraud and Abuse Reform

- Distinguish financial fraud from security incident
- Identify the type and degree of security violation
- Map punishment to the nature of the crime
  - Intent
  - Purpose
  - Effect
- Create explicit exceptions for innovation and research
Electronic Communications Privacy Act

- *Olmstead* 1928
  - No 4th Amendment for telephone
- *Katz* 1967
  - 4th Amendment for telephone
- Omnibus Safe Streets and Crime Control Act 1968
  - Applying Katz, makes a distinction between metadata and content for telephony
- Electronic Communications Privacy Act 1986
  - Adds “data networking” i.e. Internet, but does not distinguish between the technology per 4th A.
Houston, We Have a Problem!

If the central concept of this law is to map 4th Amendment jurisprudence to electronic communications, including the Internet, the current version of this law fails to meet that goal.

Telephony and Internet technologies have different “metadata,” i.e. tracking information. The use of Internet Protocol addresses, which sometimes links to web pages, can offer content for less than probable cause, the legal standard.
USA-Patriot Act of 2001, as amended

- Exacerbated this problem because it lowered even more the legal showing by which law enforcement could collect metadata: a letter filed with a clerk.
- True for both regular Title III, criminal courts, and for the FISA (Foreign Intelligence Surveillance Act) “secret” Court.
- Partially explains why section 215 of FISA is so controversial
  - Section 215 used to obtain “billing” records
Snowden Disclosures

- Under these laws, is it illegal for the National Security Agency (NSA) to collect all telephone metadata?
  - Untested by the courts, but not on its face a clear violation given the “war on terrorism” that at least since World Trade Center and September 11 events involves domestic surveillance
Snowden Disclosures

- Under these laws, including FISA, which is an *ex parte* proceeding, is it illegal for the NSA to request of Internet companies the content of postings and communications ... the Prism Program?
- “In sum, a significant purpose of the electronic surveillance must be to obtain intelligence in the United States on foreign powers (such as enemy agents or spies) or individuals connected to international terrorist groups. To use FISA, the government must show probable cause that the ‘target of the surveillance is a foreign power or agent of a foreign power.’”
Electronic Surveillance Reform

- Revise the ECPA to map technology to the 4th Amendment
  - Especially important with Voice over IP!
- Revise FISA for same jurisprudence
  - The standard by which it is triggered for NSA letters
    - “reasonable suspicion” “significant persons”
  - Network effect among correspondents
    - How many degrees of separation?
Questions about Electronic Surveillance Reform

- Will revision of the foundational legislation (ECPA, FISA), plus legal “privacy” specialists oversight (Obama proposal) balance out the immunity provided to communications companies?
- What about technological oversight?
- Are “secret,” ex parte courts commensurate with a democratic polity?
Consumer Privacy Law

- **Facebook**
  - Pushing out personal information without notice to users
    - Beacon Program
      - Tremendous user pushback
  - Switching up privacy settings without notice
    - At sometime great personal consequence to users
      - “I had a great day! I did not feel like killing one of my students!”
Federal Trade Commission

Fined Facebook for “deceptive practices” and has placed them on notice that going forward they MUST as a matter of the settlement provide notice to users of setting changes or any new business configuration that would push information about users out from “private” to “public” settings …
Federal Trade Commission
“Privacy Policy”

- Pre-exists the settlement with Facebook, and still is in existence
- Requires a transactional website to include a privacy policy
  - But it does not require any particular substance to the policy
  - For example, the privacy policy could say:
    - “We will sell your personally identifiable information to the highest bidder!”
Federal Trade Commission
“Privacy Policy”

- Moreover, the ruling allows the entity hosting the site to change the privacy policy at any time
  - So long as their practices are in compliance with the policy posted at that time
- Altogether, this rules leaves the user with more uncertainty and may undermine the very core concept that the F.T.C. is designed to protect for consumer: “deceptive trade practices.”
Consequently, for Facebook

- Their “privacy policy” is no longer even called a privacy policy but points instead to a data use policy
  - Which essentially says that Facebook will do whatever it wants with your data, but it will, per the F.T.C. agreement, provide notice before changing privacy settings or pushing out personal information
    - But it won’t tell you when you are a subject of a study!!!
Google

- **Google Street View**
  - Information gathering generally, without notice, and without recourse
    - German sanctions
  - Picking up extra information from open WiFi
    - “Engineer Doe” ... Marius Milner
  - F.T.C.
    - “Nothing wrong” but obstructed justice

- “Right to be forgotten:
  - European concept, in effect since this summer
  - Must request ...
  - Cannot circumvent by going to google.com IF your IP address is the European Union.
Google

- Privacy Policies
  - Differed over a range of applications confusing users ... and leading to possible “deceptive practices”
    - Never mind that there was a more significant difference between this consumer range and enterprise applications!
  - Small sanction, $25K, and promise to harmonize the policies
Gmail Litigation

- Current case in the Federal District Court
- Question: does data mining violate ECPA?
- Raises the question of new technologies and the relationship to both surveillance and consumer privacy law
- Has revealed that Google did NOT turn off the data mining function on enterprise accounts
- A case, and a judge, Koh, to watch!
Communications Law

- Arose originally out of telephony and radio technologies
- Congress passes communication law; the Federal Communications Commission oversees regulations
- Significant for the Internet, beginning with its categorical definition
  - Is it an information service? A utility?
Definition Matters!

- For governance
  - F.C.C. v. Comcast and F.C.C. v. Verizon
    - Both cases declared that under the current communications law and definition of the Internet, the F.C.C. did not have the authority to impose restrictions or sanctions on telecommunication providers practices of bandwidth shaping
  - Consequently, the Commission has issued a proposal through administrative law to correct this problem.
Current F.C.C. Proposal
“Fast Track” and “Net Neutrality”

Fast Track
- Requires an understanding of the architecture of the Internet ... which engineers and computer scientists now call “2.0”
- May, or may not, affect consumers use or speeds

Net Neutrality
- Exists as a principle, but not a rule
- The proposal includes it, and should address consumers concerns about “Fast Track” and need for clear “net neutrality” or “open Internet” rules.
Conclusion: The Challenge

The Internet, not merely as a “technology” but as a world historical phenomenon, has greatly disrupted intellectual property, network security, privacy and communications law. Everyday this challenge plays out in our global political economy in time-honored ways: through the economic, social and political machinations of nation-states, corporations and the world’s “winners and losers.”
Conclusion: The Opportunity

The opportunity in this period of extraordinary disruption and change is that it provides us with the chance to ask foundational questions about governance and social relations, to rethink our identity as a democratic republic in a complex global environment whose players do not share those values.

As we address international Internet governance we can revisit our own principles. In revising domestic law, we have an opportunity to weave in fairness and justice into our pursuit for ordered liberty.
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