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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

47 U.S.C. §230

- 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