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Law, Technology and Business Strategy

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Technology Law and Electronic Media Update

California Supreme Court Rules in De-CSS Case that Trade Secret Law Trumps First Amendment, August 25, 2003: California's Supreme Court, reversing a lower appellate court, decided that an injunction prohibiting dissemination by a website operator of the De-CSS "hack" of DVD encryption did not violate the First Amendment. Reasoning that "[b]ecause the injunction does not purport to restrict DVD CCA's trade secrets based on their expressive content, the injunction's restrictions … 'properly are characterized as incidental to the primary' purpose of California's trade secret law—which is to promote and reward innovation and technological development and maintain commercial ethics." The court remanded the case for a determination that the injunction was otherwise legally justified.
Comment: It will be interesting to see if the injunction survives remand due to the widespread dissemination of DVD copying software products in legitimate sales channels to those who do not know or have reason to know that De-CSS was a misappropriation of the DVD trade secret.

SCO Shows (Some of) the Goods, IBM Counter sues, August 19, 2003: In a troubling development for open-source Linux enthusiasts, SCO reportedly has divulged certain parts of the alleged 829,000 lines of source code found within Linux that not only are identical, but also include identical comments and spelling errors. SCO also announced licensing fees for the disputed intellectual property: $ 699 per machine for servers and (it's been reported) $199 for individual desktops. Meanwhile, IBM filed a countersuit against SCO alleging that SCO's products infringe four IBM patents. In addition, Red Hat, a software and services company whose products and services are based on Linux, filed suit against SCO for unfair competition and trade libel, among other claims, based on the fact that SCO issued written warnings to Red Hat users alleging that Linux contains proprietary code belonging to SCO.
Comment: SCO's presentation sounds intriguing: apparently, identical source code that included identical comments and spelling errors was the "smoking gun" successfully used by Cisco Systems against Huawei in their case earlier this summer asserting similar misappropriation of Cisco's source code by Huawei. Cisco won an injunction against Huawei.

Microsoft Faces $521 Million Jury Verdict for Patent Infringement by Internet Explorer Plug-Ins, August 11, 2003: A jury found in favor of the University of California for a patent that essentially covers browser plug-ins. The patent, U.S. Patent No. 5,838,906, claims a method with "… a browser application, that parses a first distributed hypermedia document … wherein said embed text format is parsed by said browser to automatically invoke said executable application to execute on said client workstation in order to display said object and enable interactive processing of said object within a display area …." Microsoft will appeal.
Comment: Microsoft may face an uphill battle: the filing date of the application is October, 1994, which predates the first release of Internet Explorer and is only 15 months after the draft release of

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HTML itself. In light of the method claim, it would appear that plug-in software makers and distributors as well as content distributors whose web-pages invoke plug-ins should consider this development. Expect a cash settlement.

Efforts to Adopt UCITA Abandoned, August 8. 2003: The National Conference of Commissioners on Uniform State Laws (NCCUSL) has decided to stop the state by state approval process for the Uniform Computer Information Transactions Act (UCITA) due to continued "wide-ranging opposition" to its terms. Many considered the act to place too much power in the hands of software companies at the expense of their customers.
Comment: Because Maryland and Virginia have already adopted UCITA as statutory law, choice of law provisions in software licenses and customer contracts should continue to be scrutinized.

FCC Lifts Interoperability Requirement for Video on AOL Instant Messenger, August 28, 2003: The Federal Communications Commission lifted the requirement that AOL's instant messaging services interoperate with those of its competitors, including Microsoft and Yahoo's, in order for AOL to offer video services as part of AOL's IM services. The decision was the result of AOL's petition claiming that substantial competition in the IM market rendered the requirement unnecessary. The FCC concluded that the market for IM services was "stable" and "competitive" due to the fact, among others, that Yahoo and Microsoft did not interoperate either, and that AOL's market share had dropped to 58%.
Comment: It will be interesting to see whether AOL will now assert its patent that appears to claim central aspects of instant messaging. Microsoft probably received a license as part of their deal with AOL-Time Warner earlier in the summer.

MPEG Group Releases XML Specification for Digital Rights Management Interoperability, July 29, 2003: The MPEG Rights Expression Language (REL) and Rights Data Dictionary (RDD) specifications, components of the MPEG-21 Multimedia Framework, both progressed to Final Draft International Standard (FDIS) status. The FDIS status means that technology and media companies are more likely to rely on the specifications. The REL standard appears largely derived from ContentGuard's XrML 2.0.
Comment: An XML based standard for specifying usage rights in digital content is a positive development, in theory. However, in light of the dominant position of one or two media delivery formats, it is not clear how relevant such a development will be to the notion of DRM interoperability.

OD2 Offers All 5 Major Label Downloads Using Microsoft Windows Media 9, August 14, 2003: Peter Gabriel's OD2, which has licenses from all five of the major record labels plus many independents, will be distributed primarily in Europe through MSN Music Club and Tiscali offering individual tracks for €0.99 (US $1.11).

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Comment: This may establish OD2's position as the leading online music distributor in Europe. However, OD2 will also be subject to intense competition from Apple, which enjoys profits on its iPOD music device, and also plans to introduce its iTunes service into Europe by next year.

Wave Systems to provide security functionality to IBM PC and Intel chips. August 4, 2003: Wave Systems announced deals with IBM and Intel to incorporate Wave's security hardware and software within certain IBM PCs as part of IBM's Digital Security Subsystem and to embed Wave's hardware in future Intel motherboards that are compliant with the Trusted Computing Group standards. Wave Systems was a contemporary of IBM and InterTrust in the early days of DRM development. Since that time, it has broadened its technology to more general trusted computing applications.
Comment: This may presage stronger network security through hardware based authentication protocols that are independent of Windows or IP. This also makes possible hardware based security for copyright protection technologies that are more robust than firmware based schemes. Consider also the announcement of Phoenix Technologies and Orbid Corp. to embed encryption key management into the PC BIOS.

Rise of "Dark-Net" Music Piracy: AOL pulls new NullSoft freebie and Grokster to get DRM (July 29, 2003):
In an astounding repeat of history, it is reported that NullSoft (the originators of Gnutella and an AOL-TW subsidiary) released to the public a tool called "Waste" that permits P2P file sharing where the content and messages are fully encrypted, the keys only available by personal invitation and IP addresses obfuscated by the tool. After releasing the source code (as they did with Gnutella) AOL stepped in and had the tool removed from their website (as they did with Gnutella). In a related development, Grokster is incorporating UK-based vendor Softwrap's DRM into its functionality as well.
Comment: The rise of "Dark Net" piracy that is aimed at avoiding surveillance of peer-to-peer activity by third parties (e.g. the RIAA) is gaining steam. One wonders about AOL and NullSoft.

Federal Court Rules Against Website Fair Use, (August 26, 2003): The Third Circuit decided that the use of short movie clips by a website cataloging movie information was not a fair use of the movie copyright. In Video Pipeline vs. Buena Vista, (3rd Cir. August 26, 2003), an important fact was that the counterclaim plaintiff sold licenses for movie trailers, which competed with the website's use. In contrast, the 9th Circuit had ruled in Kelly v. Arriba Soft Corp. that a free search engine that displayed thumbnail versions of images extracted from a copyrighted website was a "transformative" fair-use.

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