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Law, Technology and Business Strategy

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Technology Law and Electronic Media Update

The House Judiciary Committee Approves Draft Database Protection Law. January 21, 2004. The legislation creates a federal cause of action for knowingly making available to others without authorization a "substantial part" of a database. Finding liability is a three part test: (i) the database was created at "substantial" cost or effort, (ii) unauthorized "making available in commerce" causes "displacement or the disruption of … sales, licenses, advertising or other revenue…" and (iii) "free rid[ing]" would reduce the incentive of plaintiff to continue to maintain the database. The legislation includes a number of industry specific exemptions, including a prior acts exemption and an exclusion of computer programs from the definition of database. The legislation expressly preempts state law on the matter. Damages, willfulness and injunctive relief may apply.
Comment: It is not clear to what extent derivations from a database are permissible or how the "substantial" tests are to be interpreted.

Trademark Infringement Claim for Use as Search Engine Keyword Reinstated. January 24, 2004. The Ninth Circuit Court of Appeals reversed a lower court's finding of summary judgment that had cleared Netscape of infringement of Playboy Enterprises' trademarks "playboy" and "playmate." Netscape had sold ad placements to competing un-branded adult content web-sites based on a search user's input of those words. This decision continues to uphold the new, controversial doctrine of "initial interest confusion." The court reserved its option to rule differently with regard to banner ads with clear competitive branding or comparative advertising. As a result, the long-running lawsuit was settled, the terms not undisclosed.
Comment: The court's limited holding and the concurring opinion that questions the viability of "initial interest confusion," indicates that this area of the law continues to be unsettled. With the growing stature of the search engine business, i.e. the much anticipated Google IPO, search engine business models will have to be carefully considered. Google itself is subject to similar lawsuits in this area.

Copyright Office Sets Digital Sound Recording Performance Royalties. February 6, 2004. These royalties accrue under the compulsory licensing of sound recordings for performance over the Internet, i.e. streaming. The complex rate structure covers a variety of different business models and payment schemes, including, for music, an option to pay either .077 cents (7.7 hundredths of a cent) per stream of a song, 1.04 cents per hour for music programming, 11% of revenues with a 27 cent per month per subscriber minimum. Other minimum fees ranging from $500 per year to $10,000 per year apply. Fee collection and distribution will be administered by SoundExchange, a division of the RIAA.

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Music Industry Row Develops Over Publishing Fees in Germany. February, 2004. It is reported that the International Federation of Phonographic Industries (IFPI) has filed suit in Germany to reduce royalties payable for record sales from the current 9.09% to 5.5% of retail price. Most interesting is that this reduction includes 1% as a subsidy for a fund that fights piracy and also to subsidize copyright protection technology, the former being something the music publishing industry already supports and the latter typically the province of the labels. Comment: This severe reduction in music publishing royalties may delay the expansion of legitimate digital music distribution in Europe.

Open Mobile Alliance Launches New Content DRM Initiative for Mobile Devices. February 3, 2004. The OMA industry group, whose membership is a technology industry who's who, announced a new digital rights management (DRM) system for protecting digital music, video and software from illegal file sharing over mobile devices. In tandem, the group has formed a licensing body called the Content Management License Administrator, led by Nokia Corp., Intel Corp., Panasonic Consumer Electronics Inc. and Samsung Electronics Co.
Comment: The OMA content management system still has to be adopted by members of the entertainment industry in order for it to become viable. The question of who handles the content licensing and how compliance and audit will work are likely to be thorny issues.

Justice Department, FBI and DEA Seek Delay in VOIP Regulation. February 5, 2004. It is reported that the Department of Justice, also acting on behalf of the FBI and Drug Enforcement Agency, has requested that the F.C.C. delay issuing rules regulating telephone service over the Internet (VOIP) until the F.C.C. determines how law enforcement will be able to tap VOIP conversations.
Comment: It is difficult to see what this delay would achieve: many VOIP industry participants do not want the F.C.C. to regulate these services anyway, and private VOIP networks may be exempt from regulation. It is traditional telephone companies that are hoping that F.C.C. regulation will force VOIP services to maintain mandatory service levels and pay subsidies-- something VOIP participants hope to avoid.

TiVo Sues Echostar for Patent Infringement. January 5, 2004. The lawsuit is over U.S. Patent No. 6,233,389 for a "Multimedia time warping system" that "allows the user to store selected television broadcast programs while the user is simultaneously watching or reviewing another program." The patent cites prior art that also uses a microprocessor system to provide similar functionality, but states that the TiVo architecture "utilizes an approach that decouples the microprocessor from the high video data rates, thereby reducing the microprocessor and system requirements which are at a premium."
Comment: One expects an aggressive posture from TiVo with regard to similar functionality provided in competitive satellite and cable set top boxes. However, the patent claims may be limited to the specific TiVo machine architecture, not the entire concept of using digital data buffers to provide simultaneous playback, rewind and fast forward while the program is being recorded.

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Join us as Ted Sabety moderates a panel on *Open Source: Effective Strategies for Licensing, Development, and Valuation,* presented by the New York Software Industry Association. The event will be held on February 26, 2004 from 6 - 8 p.m. at IBM, 590 Madison @ 57th Street, 12th Floor, New York City. Visit www.nysia.org for more information.

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