

Technology Law and Electronic Media Update

AT&T and Time Warner Each Announce Voice over IP (VOIP) Service, December 10, 2003:

AT&T and Time Warner Cable will offer telephone service over high-speed internet connections. In Time Warner's case, the service will be offered to their cable-modem users, and in AT&T's case, the service will be carried over their proprietary data network as well as the Internet itself. Time Warner had completed a pilot launch in Maine that started in May. At the same time, the F.C.C. is considering what regulations to apply to VOIP, for example, whether VOIP services must collect fees to subsidize rural telephone service, pay taxes and other fees as current traditional phone companies do.

Comment: These two announcements will lend steam to the growing adoption rate of Internet based telephony, and will interact with the F.C.C.'s interest in exempting Internet service over cable television from competition rules (See below).

F.C.C. Adopts Verbatim Proposed Digital Television Plug and Play Regulations, November, 2003:

The F.C.C. adopted without any significant modification the copyright protection scheme proposed to the Commission by the cable television industry and the consumer electronics industry. The rules limit serial copying of television programming to that permissible under several specified "business models" and also further prohibit output of the digital video except as an encrypted signal. The rules leave open the question of the analog hole and do not completely resolve questions about downstream uses of the permitted copies. The mandated encryption technology, DFAST, is provided under a private agreement. At present, the personal computer has been excluded from being a licensee and therefore will not operate as a cable DTV receiving device. While only paying lip-service to the concerns the music publishing industry, the Commission approved free, unencrypted access to the digital audio soundtrack, unlike the treatment of the digital video. The "encoding rules" prohibit any additional copyright protection from being added to a digital television signal while the DFAST license permits output of digital audio "in the clear."

Comment: This result leaves the music industry vulnerable to theft of the digital soundtrack. The growing popularity of music delivery services like i-Tunes, where songs are purchased a la carte, means it will be a Hobbesian choice to either promote an artist's song through music video when the result may be widespread piracy of the digital television soundtrack or not to promote through music video and limit exposure to the artist's potential hit.

Canadian Copyright Regulators Impose Levy on Portable Music Players, December 12, 2003:

The Copyright Board of Canada interpreted Canadian copyright law to require that portable music players like the Apple iPod are subject to levies of up to "\$25 for each recorder that can record more than 10 Gbs of data." Finding that "almost half of all tracks copied originate from the Internet," the Board concluded that "making a copy of a CD of the latest release by the hottest star to give to one's friend is still an infringing action [as well as] distributing this same copy to friends online." The levy



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is collected to recompense rights holders for personal copies that are technically exempted from infringement liability.

Comment: This decision has been misinterpreted in the press as legalizing uploading but making downloading illegal. It would appear that any use of a peer-to-peer network to make unauthorized distributions in Canada is prohibited. But the Board's comments are probably dicta: the proceeding was only to determine whether to levy and for how much.

The Federal Ninth Circuit Court of Appeals Overturns F.C.C. Exemption of Internet over Cable Television from Competition Rules. October 6, 2003: The F.C.C. had exempted cable television operators operating as high speed internet service providers from providing competing ISP's access to their plant by classifying the service as an "information service," not a "telecommunications service." This limited the ability of consumers to select ISP's other than the cable operator itself. The court construed the Telecommunications Act of 1996 to categorize high-speed Internet service over cable as a "telecommunications service." Apparently, the 9th Circuit decision will be appealed.

Comment: In light of the increase in telephone service provided over the Internet (see above), it may be difficult to argue that high-speed Internet service is not telecommunications service. The alternative, which is to exempt the web but apply competition rules to VOIP will be complex.

Tim Berners Lee, "inventor" of the Web, convinces U.S. P.T.O. to reexamine the browser plug-in patent that Microsoft was found to infringe with Internet Explorer. December, 2003: The U.S. Patent and Trademark Office will reexamine U.S. Patent No. 5, 838, 906. Microsoft is currently subject to a jury verdict of infringement and several hundred million dollars in damages. Microsoft has announced that it will issue an upgrade to Internet Explorer that radically changes how its browser will react to embedded objects that require ancillary software in order to be displayed or operated. Because this extensive change in functionality would render millions of multi-media or Java equipped web-pages inoperable, Tim Berners-Lee publicly requested that the U.S. P.T.O. reexamine the patent for validity, and filed additional prior art that allegedly voids the patent.

Comment: So much for my prediction of a cash buy-out-- that seemed a less risky and cheaper solution which would provide Microsoft a gate-keeper position. Of course, if the infringed patent claims are upheld, expect a cash settlement.

Virginia Prosecutors Arrest Two for Felonious Spamming, December 8, 2003: Virginia state prosecutors charged two men with violating the Virginia statute prohibiting use of "... a computer or computer network with the intent to falsify or forge electronic mail transmission information in any manner in connection with the transmission of unsolicited bulk electronic mail" The statute sets the felony standard at 10,000 messages in 24 hours or 100,000 in 30 days. If convicted, the spammers face 5 years in prison. Virginia's long-arm statute establishes jurisdiction over those

"[u]sing a computer or computer network located in the [state]..." AOL is headquartered in Virginia and a substantial amount of Internet traffic passes through the state.

Comment: Not surprisingly, Virginia, the home of AOL, is a very ISP friendly state, with very strong anti-spam and anti-hacking criminal statutes.

European Court of Justice Strikes Hard with Data Protection Directive, November 2003: The European Court of Justice found that a personal website that, without consent, identified personal acquaintances and information about them breached the directive. Apparently, the creation of a publicly accessible but personal website is not exempt from the directive. In this case, members of a church group were identified by another church member on a web page constructed as part of a computer class.

Comment: This case indicates that companies doing business in Europe should be very strict about use of customer information.

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