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## **Technology Law and Electronic Media Update** **June 1, 2004**

**New York State Public Service Commission Rules that Voice over IP service is a "telephone company" subject to state utility regulations for operation in support of the public interest. May 19, 2004.** The New York State commission ruling, that a telephonic service delivered over the internet is subject to their jurisdiction, appears to be in conflict with a federal court ruling in Minnesota involving the same company, Vonage. In that case, the court classified Vonage as an information service provider exempt from Minnesota state regulation of telephone companies.

Comment: As VOIP continues to grow in importance, one can expect that state regulators are going to grab for replacement revenue for that lost as POTS (plain old telephone service) begins to decline.

**Nanosys, a Nanotechnology Startup with No Products or Market, Files to go Public. May 27, 2004.** This is mostly an intellectual property play. The company has garnered a large position of 200 patents and pending patent applications, mostly through the exclusive licensing of patents from universities that have been researching nanotechnology materials. That said, the S-1 statement contains disclosures including: "[t]o date, we have not developed any commercially available products..."; "[w]e do not anticipate that our first products will be commercially available for at least several years, if at all." "and [w]e do not know when a market for these nanotechnology-enabled products will develop and we cannot reasonably estimate the projected size of any market that may develop." The company has burned through \$20 Million since its inception in 2001, but did receive revenues in 2003 of \$3 Million, as against \$12 Million in expenses. Presumably, this was revenues from licensing the I.P.

Comment: Some pundits in the nanotechnology space look at this IPO as the bell weather for a new era of tech IPO, that is, it's the "Netscape of nanotechnology." It is likely that the IPO route for nanotechnology startups will become common because of the greater investment necessary to make a viable nanotech product as compared to software.

**Microsoft Finally Releases Janus, its new Copy Protection Technology for Portable Devices, May 3, 2004.** After a year of delay, Microsoft has announced that its new DRM for portable devices will be released in beta the first week of June. Code named Janus, the technology apparently permits subscription based download services to transfer copies into portable devices whereby the device honors an expiration time, and further, permits "license chaining" which apparently deactivates the original copy when activating the downstream copy. Rio, Napster/Roxio and other subscription based services have announced adoption of the technology.

Comment: Because this technology requires a hardware implementation, it will be some time before devices are on the market that can take advantage of it. If Microsoft has a stable code release and no further delays, it may make the Christmas 2004 market, which is essential to compete with Apple's i-Pod.

**Apple declines to license out iPod technology to Real Networks and others. April 22, 2004.** Real Networks, whose efforts in the on-line music space predate Apple's on the order of years, has recently adopted a somewhat open source model in order to compete against the Microsoft Media Player. Their overture to Apple to do the same, in order to effectuate portability of content between rival devices, was rejected.

Comment: The result is not surprising. Apple i-Tunes is predominant but it makes money on the player, not the music, so opening their technology to the same pricing competition in player equipment that the originators of DVD are suffering is suicide.

**Intel Sued for Patent Infringement Regarding Microprocessor Upgrade Clocking Scheme. May 20, 2004.** The patent, U.S. 5,506,981, which issued in 1996, is directed toward "An accelerator board for use in replacing the microprocessor of a slow speed system board with a microprocessor operating at a higher clock speed." The claims cover a device that creates a faster clock pulse using a slower clock pulse where the faster clock pulse is phase locked with the slower one. The phase lock is necessary so that the data transfer from the faster microprocessor onto the backplane of the slower motherboard is transparent to the motherboard logic. The suit has been brought by Toronto-based All Computers.

Comment: The rapid replacement of desktop PC by thin notebooks, where upgrading the microprocessor chip is less likely, makes the impact on Intel less substantial.

**In the SCO Case, the Free Software Foundation Refuses to Disclose, IBM Seeks Declaratory Judgment and SCO Buys Out an Investor. May 20, 2004.** The Free Software Foundation, the originators of the GPL open source license, have refused to respond to a subpoena by SCO to provide internal memoranda that interpret the meaning of the GPL license terms. The GPL license, widely recognized as containing vague language over critical substantive aspects, is part of the dispute between IBM and SCO because IBM has counterclaimed against SCO that it is in breach of the GPL by charging fees for Linux. In another development, IBM has sought declaratory judgment on SCO's copyright claims which, in their view, are unsupported as a result of finding in discovery that there is no substantially similar code. In another development, SCO bought out BayStar's preferred

stock for \$23 Million in cash and common shares, which represented a \$40 Million investment last October.

Comment: Some of us in the legal community would welcome adjudication of the GPL language.

**FBI Investigating Theft of Cisco Source Code. May 18, 2004.**

It is reported that the Federal Bureau of Investigation is investigating how portions of Cisco's IOS software, which drives its switch products, appeared on a Russian website in source code form.

Comment: This development is interesting in light of the misappropriation litigation between Cisco and Hunwei, a Chinese competitor found to have used Cisco code verbatim in its competitive switch products. A misappropriation claim may be defeated if the trade secret status of the code was compromised by a third party.

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