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Internet Litigation and the Battle to Protect Intellectual Property Rights

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Important battles that will shape the future of the Internet are under way in courts and legislatures around the globe, as owners of intellectual property (IP) struggle to define the contours of their rights in our increasingly digital world.

Using the three major prongs of IP law — patents, copyrights and trademarks — lawyers and lobbyists are reshaping the legal landscape that controls the Internet. These battles are huge, both in scope and impact. Many spring from technologies that could scarcely have been conceived of a decade ago, and involve hundreds of millions of dollars in royalties and/or revenues.

Patents and porn

The U.S. patent system is being used as a first line of defense (or, some would argue, attack) on Internet business methods and technologies.

For example, a company called Acacia Research is asserting a portfolio of five U.S. and 31 foreign patents that it claims covers virtually all current methods for streaming digital audio and video. Acacia has essentially claimed that any Web site or other system that provides for the transmission of compressed digital video and/or audio infringes one or more patents in its "Digital Media Transmission" portfolio.

Acacia has pursued a novel strategy, filing its first lawsuits against adult video distributors.

To date, Acacia has sued more than 75 adult entertainment companies in the Central District of California, some of which have formed a defense group that is vigorously fighting to have the patents invalidated.

An initial decision on key interpretation issues in the case sent Acacia's stock price down more than 35 percent. This case, however, is far from over and it may be several more years before Acacia's claims are resolved.

Trademarks: The search for fair competition

In the trademark arena, the hottest new issue is commonly referred to as "keywording," and involves one of the most profitable Internet business models yet devised.

Search engines such as Overture and Google have monetized Internet searching by creating "pay-for-placement" markets that serve advertisements based on the search terms — or keywords — entered by the user.

Advertisers bid to have their advertisements displayed when certain keywords are entered. For example, Avis might buy the search term "Hertz," so that when a user enters a search using the trademark "Hertz," an Avis ad will be displayed near the search results.

This issue came to the fore after a decision in a case between Playboy and Netscape. Playboy sued Netscape for selling the keywords "playboy" and "playmate" to adult entertainment companies, then serving up competing companies' ads when users entered those keywords in a search.

The 9th Circuit Court of Appeals reversed the district court's grant of summary judgment for Netscape, and indicated that there could be infringement because the source of the advertisements was not clear.

While this case settled, subsequent cases — including a key declaratory judgment case filed by Google in federal court in San Francisco — continue to define the contours of whether search terms or keywords can be protected under traditional trademark laws, and just what "fair competition" is in this context.

Motion picture and music Internet piracy litigation

While online digital media purchasing services (such as Apple's iTunes(r)) are growing in use and acceptance, the battle to stop piracy continues, and in fact is heating up in the courts.

Early legal attacks on the peer-to-peer networks (such as Kazaa(r) and Grokster(r)) that were being used to facilitate piracy continue, but the music and motion picture industries have supplemented their legal strategy with what can only be described as a grass roots legal campaign.

For example, in June of this year, the Recording Industry Association of America (RIAA) filed 474 lawsuits against individuals in St. Louis, Washington, D.C., and Denver. Since 2003, the RIAA has filed some 3,000 lawsuits against individuals, reportedly settling about 10 percent to 15 percent of such cases for an average of about $3,000 in damages.

Meanwhile, the motion picture studios and the Motion Picture Association of America (MPAA) are battling online piracy with equal vigor, also suing individuals and companies throughout the world.

The effect of these efforts is hard to assess. A Pew Internet & American Life Project survey recently claimed that 6 million people (purportedly one-third of former music downloaders) no longer get their music from peer-to-peer file-sharing sites.

However, in the same survey, 58 percent said they "did not care" about the legal issue of copyright protection on the files that they downloaded.

But surveys cannot tell the whole story. For example, during the one week in July some 1.3 million people reportedly downloaded the popular Kazaa file-sharing software.

These efforts have been costly, time-consuming and, some would argue, demonstrably ineffective. As a result, the recording and motion picture industries are simultaneously working to enact legislation that would promote the growing criminalization of copyright infringement.

In Congress, such bills include HR 4077, the "Piracy and Deterrence and Education Act of 2004"; SB 1932, the "Artists' Rights and Theft Prevention Act of 2003"; SB 2237, the "Protecting Intellectual Rights Against Theft and Expropriation Act of 2004"; HR 3632, the "Anticounterfeiting Amendments of 2004"; and SB 2242, the "Anticounterfeiting Act of 2004."

Global access to the Internet has resulted in the concomitant need for a worldwide legal assault. International illegal downloading continues to grow, and the International Federation of the Phonographic Industry (IFPI) and the recording industry associations in Canada, Denmark, Germany and Italy have also filed lawsuits against ISPs and individuals.

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