

Unless otherwise noted, the content of this course material is licensed under a Creative Commons Attribution 3.0 License.
<http://creativecommons.org/licenses/by/3.0/>.

Copyright 2008, Bryce Pilz.

You assume all responsibility for use and potential liability associated with any use of the material. Material contains copyrighted content, used in accordance with U.S. law. Copyright holders of content included in this material should contact open.michigan@umich.edu with any questions, corrections, or clarifications regarding the use of content. The Regents of the University of Michigan do not license the use of third party content posted to this site unless such a license is specifically granted in connection with particular content objects. Users of content are responsible for their compliance with applicable law. Mention of specific products in this recording solely represents the opinion of the speaker and does not represent an endorsement by the University of Michigan.

Internet Regulation By Government and Technology

Class 12 – November 21, 2008

SI 519 / PubPol 688

Bryce Pilz

Fall 2008

Schedule

- 2:10 – Introduction
- 2:20 – Exercise
- 2:30 – Student Presentation: Design Patent Protection
- 2:40 – Student Presentation: Defamation Law
- 2:50 – Current Events
- 3:00 – Net Neutrality
- 3:45 – Break
- 4:00 – Student Presentation: ICANN
- 4:10 – ICANN Discussion

Privacy: Natural v. Property Right

- Last week's exercise:
 - Natural Right: 15
 - Property Right: 2
 - Both: 7
- Thoughts?

Privacy as a Property Right

- Privacy as a property right “is not to demote the role of regulation, or to believe that the ‘market will take care of itself,’ or to question the strong role the government should have to assure privacy. It is simply to recognize that the government is not the only, or often most important protector of human rights.”

Source: Lessig, Lawrence. "Privacy" in Code: Version 2.0. New York: Basic Books, 2006. ([text](#))

Constitutional?

- Would it be constitutional to pass a law creating property rights in private information?

P3P?

- Electronically establishes whether user's permitted uses and sites intended uses of personal data match
- Personal choice, easier than consulting privacy policies on each site, can give more protection than default
- Concerns: too difficult for users to protect information, enforcement, no expiration on data collected

Exercise

Current Events

FTC Hearings:

- The “Evolving IP Marketplace” – beginning Dec. 5
- Examine changes since the 2003 hearings that called for significant patent reform
- Should address the numerous Federal Circuit and Supreme Court decisions since 2003 that have mostly restricted the scope of patent rights

Article One Partners

ARTICLE ONE PARTNERSSM

► RESEARCH REWARD REFORM

BETA Feedback - Earn 50 Points
Report a Bug - Earn 25 Points

Welcome to AOP / Home

LOG IN

REGISTER

Sign up for AOP News:

Refer a friend:

FEATURED PATENT STUDIES

[What is a Patent Study?](#) | [What is a Patent?](#) | [What is Prior Art?](#) | [Where to Find Prior Art?](#)



HEALTHCARE - PHARMACEUTICAL

LIPITOR - PFIZER

The patents and reissue applications relate to the prescription drug Lipitor.

PFE 995

Exp: 12/29/08

\$50,000.00



TECHNOLOGY - SOFTWARE

MUSIC VIDEO GAMES - KONAMI

These patents relate to music based videogames.

KNM 822

Exp: 12/29/08

\$50,000.00



TECHNOLOGY - SEMICONDUCTORS

SEMICONDUCTOR MEMORY DEVICES - RAMBUS

These claims relate to components used in semiconductor memory devices.

RMBS 184

Exp: 12/29/08

\$50,000.00

Article One is not an investment adviser. This Site content does not constitute investment, securities, trading, patent or other advice or recommendation. Article One may have or take trading positions in the companies mentioned on this Site.

HEALTHCARE

TECHNOLOGY

PATENT STUDY RESULTS

FULL LIST

RESPOND TO A STUDY

ENTER AOP COMMUNITY

PROFIT SHARING

TOUR AOP

PUBLIC INTEREST

ARTICLE ONE PARTNERS IS A GLOBAL
COMMUNITY THAT REWARDS MEMBERS
- OUR ADVISORS - FOR DISCOVERING PATENT
VALIDITY EVIDENCE TO LEGITIMIZE U.S. PATENTS

CATEGORIES

-SELECT-

INDUSTRY SECTORS

-SELECT-

EXPIRATION DATE

-SELECT-

SEARCH

ADVANCED SEARCH

PRESS ROOM

www.peertopatent.org
www.uspto.gov

BENEFITS OF A
STRONGER U.S. PATENT

MILESTONES

Press Release

Source: <http://www.articleonepartners.com/welcome.php>

ARTICLE ONE PARTNERSSM

► RESEARCH REWARD REFORM

BETA Feedback - Earn 50 Points
Report a Bug - Earn 25 Points

LOG IN

REGISTER

Sign up for AOP News: name email

Refer a friend: name email

Welcome to AOP / Home / Patent Studies

PATENT STUDIES

Industry	Post ▼	Exp ▼	AOP Code	Title	Award ▼
H	11/17/08	12/29/08	NVS 802	LOTREL - NOVARTIS	\$50,000.00
H	11/17/08	12/29/08	FRX 703	NAMENDA - FOREST LABS	\$50,000.00
T	11/17/08	12/29/08	WIN 222	WIRELESS TRANSMISSIONS - WI-LAN	\$50,000.00
H	11/17/08	12/29/08	PFE 995	LIPITOR - PFIZER	\$50,000.00
H	11/17/08	12/29/08	WYE 579	PROTONIX - WYETH	\$50,000.00
H	11/16/08	12/29/08	Wall 475	ANGIOPLASTY STENT - WALL	\$50,000.00
H	11/16/08	12/29/08	MRK 473	SINGULAIR - MERCK FROSST	\$50,000.00
H	11/16/08	12/29/08	TKPHF 632	PREVACID - TAKEDA	\$50,000.00
H	11/16/08	12/29/08	RHHBY 938	BONIVA - ROCHE	\$50,000.00
T	11/16/08	12/29/08	LSI 335	INTEGRATED CHIP CONSTRUCT - LSI	\$50,000.00
T	11/16/08	12/29/08	NSM 440	ELECTRONICS CIRCUITS AND COMPONENTS - NATIONAL SEMICONDUCTOR	\$50,000.00

RESPOND TO A STUDY

ENTER AOP COMMUNITY

PROFIT SHARING

TOUR AOP

PUBLIC INTEREST

ARTICLE ONE PARTNERS IS A GLOBAL COMMUNITY THAT REWARDS MEMBERS - OUR ADVISORS - FOR DISCOVERING PATENT VALIDITY EVIDENCE TO LEGITIMIZE U.S. PATENTS

CATEGORIES

-SELECT-

INDUSTRY SECTORS

-SELECT-

EXPIRATION DATE

-SELECT-

SEARCH

ADVANCED SEARCH

AOPSM COMMUNITY MILESTONES

Multi-Media Press Release

Source: <http://www.articleonepartners.com/list.php>



Source: http://en.wikipedia.org/wiki/File:NetNeutrality_logo.svg

Net Neutrality

- Notion that owner of a bottleneck facility will discriminate against users of the facility in a socially undesirable way.
 - Scott Hemphill, “Network Neutrality and the False Promise of Zero-Price Regulation”
- Saw this before with railroads, telecommunications, etc.

3 Net Neutrality Principles (ACLU)

- 1) No discrimination against lawful content
- 2) Equal Internet access at an equal price
- 3) Consumer choose network equipment

Telecom Cos. Argument

Baby Bell executives and online companies have been holding a lively debate on the Hill and in the press over the past months. A BellSouth chief technology officer told reporters that his company should be able to charge Yahoo! for having its site load more quickly than Google.¹ The AT&T CEO said that "There seems to be a mentality [on the part of online companies] that they can put more and more through our pipes for free. . . We're the ones who built the network. You cannot make that sort of investment if you can't make a return on the capital. They're more than welcome to use our networks, but if they do, they're going to have to pay. It's not free."

Source: Crawford, Susan P., Network Rules (June 14, 2006).
Cardozo Legal Studies Research Paper No. 159. Available at
SSRN: <http://ssrn.com/abstract=885583>

Pro Net Neutrality Argument

In response, Vint Cerf, one of the creators of TCP/IP, has called on behalf of Google for a “lightweight but enforceable neutrality rule.”⁶ A group of online companies has written to Congress claiming that “The incredible potential of broadband will be severely compromised if network operators are permitted to be the gatekeepers of the Internet, deciding what content, applications and services succeed or fail on the Internet.”⁷ Legislative activity in this area has been intense.⁸

Source: Crawford, Susan P., Network Rules (June 14, 2006).
Cardozo Legal Studies Research Paper No. 159. Available at
SSRN: <http://ssrn.com/abstract=885583>

FCC Background



- Established – Communications Act of 1934
- Regulates all:
 - non-federal gov. use of the radio spectrum;
 - interstate telecommunications;
 - International communications that start or end in U.S.

Source:
<http://en.wikipedia.org/wiki/File:US-FCC>



BY: Joi ([flickr](https://www.flickr.com/photos/joi/))

<http://creativecommons.org/licenses/by/2.0/deed.en>



Blank X (Sup. Ct. 2005)

- Confirmed FCC's act of defining cable broadband as an "information service"
 - Freed cable companies of FCC regulation that would require operators to share networks with competitors
- Gave broad discretion to factual findings of FCC

FCC Formal Complaint Against Comcast

- What was Comcast doing?

“deep packet inspection”

- Monitors customers' TCP connections using deep packet inspection to determine how many P2P uploads
- If too many → Comcast sends reset packet (RST) terminating the connection

Comcast

FN 181:

- “Comcast is essentially behaving like a telephone operator that interrupts a phone conversation, impersonating the voice of each party to tell the other that ‘this call is over, I’m hanging up.’”

Source: FCC Ruling against Comcast, released August 20, 2008, FCC 08-183, page 24, footnote 181. ([text](#))

Comcast's First Argument?

- FCC did not have authority
- How does FCC get authority?

FCC Authority

- Telecommunications Act of 1996 – established policy of “promoting the continued development of the Internet”
- Supreme Court in *Brand X* – confirmed FCC’s regulatory authority under the Telecomm Act
 - FCC then identifies numerous other statutes supporting their authority to regulate

Comcast's Second Argument?

- Adjudication v. Rule-making

Can FCC Adjudicate Here?

- Yes
- Source: FCC Ruling against Comcast, released August 20, 2008 ([text](#))
- P30
 - Internet is new and quickly evolving – FCC declines “codify its judgment into a hard and fast rule”
- P31
 - Networks are complex and practices vary (and Comcast lied) – so hard to capture with a general rule
- P32
 - Case-by-case approach comports with congressional directions and FCC precedent
 - FCC had warned Comcast about this

Resolving the Dispute

- Comcast's network management practice (PP41-42 and 47-48)
 - Good reason for doing it?
 - Minimally intrusive?
- What analysis does this resemble?

FCC Quote on Reasonableness

- “A hallmark of whether something is reasonable is whether a provider is willing to disclose to its customers what it is doing.”

Source: FCC Ruling against Comcast, released August 20, 2008, FCC 08-183, page 32. ([text](#))

Comcast's Mistakes

- Lied to public
- Told FCC it didn't have authority to rule on this
- Contradicted statements in prior litigation admitting FCC jurisdiction (P23)
- Made "absurd argument" (that it merely delays, and does not block) which used "verbal gymnastics") (P44)

Ruling

- Comcast loses
- No damages – has to come clean and stop

September 4, 2008 4:55 PM PDT

Comcast appeals FCC traffic-blocking ruling

Posted by Steven Musil



Font size



Print



E-mail



Share



33 comments

Comcast is appealing a ruling by the Federal Communications Commission that found the broadband provider had illegally blocked some customers' Web traffic.

The appeal, filed Thursday in the U.S. District Court of Appeals in Washington, challenges the FCC's ruling on August 1 that Comcast's **throttling of BitTorrent traffic last year was unlawful**—the first time any U.S. broadband provider has ever been found to violate Net neutrality rules. The FCC issued a cease-and-desist order and required the company to disclose to subscribers in the future how it plans to manage traffic.

"We filed this appeal in order to protect our legal rights and to challenge the basis on which the (FCC) found that Comcast violated federal policy in the absence of pre-existing legally enforceable standards or rules," Comcast executive vice president David L. Cohen said in a statement.

FCC Chairman Kevin Martin said he was "disappointed by Comcast's decision to appeal."



Source: http://news.cnet.com/8301-13578_3-10033376-38.html

Ensure the Full and Free Exchange of Ideas through an Open Internet and Diverse Media Outlets

- **Protect the Openness of the Internet:** Support the principle of network neutrality to preserve the benefits of open competition on the Internet.
- **Encourage Diversity in Media Ownership:** Encourage diversity in the ownership of broadcast media, promote the development of new media outlets for expression of diverse viewpoints, and clarify the public interest obligations of broadcasters who occupy the nation's spectrum.
- **Protect Our Children While Preserving the First Amendment:** Give parents the tools and information they need to control what their children see on television and the Internet in ways fully consistent with the First Amendment. Support tough penalties, increase enforcement resources and forensic tools for law enforcement, and encourage collaboration between law enforcement and the private sector to identify and prosecute people who try to exploit children online.
- **Safeguard our Right to Privacy:** Strengthen privacy protections for the digital age and harness the power of technology to hold government and business accountable for violations of personal privacy.

Jan. 2009 Legislation?

- Byron Dorgan
- 2008 Internet Freedom Preservation Act
 - Mandate FCC investigate whether ISPs block or unreasonably thwart traffic
 - Prohibit ISPs blocking or favoring content or charging content providers additional fees to expedite their offerings



Source: <http://en.wikipedia.org/wiki/File:ICANN.png>

.xxx and more?

- ICM attempt to register .xxx
- Initially accepted, then rejected

E-Mails Suggest Bush Administration Pressured ICANN to Nix '.Xxx' Domain

Wednesday, May 24, 2006

Newly released e-mails allege U.S. government officials pressured a leading Internet authority into voting against creating a kind of red-light district for adult Web sites.

The apparent involvement of the U.S. Department of Commerce, President Bush's chief political operative **Karl Rove** and others is significant.

If true, it means the U.S. government violated terms of a complicated arrangement it has with **ICANN**, the Internet authority that **voted 9-5 two weeks ago** not to OK the .xxx proposal.

Source: <http://www.foxnews.com/story/0,2933,196608,00.html>

.xxx and more?

- ICANN – Independent Review Procedure
 - Issues in resolving disputes concerning a governing body
- New TLD's
 - Process: public review, legal procedures, applications received spring '09?

Nov. 2008 Independent Review

1. Summary of conclusions

Overall, we find the ICANN board is working well given its organisational model and board structure. There are many important issues to discuss and opportunities for improvement but we emphasise that the board is in no sense dysfunctional.

Source: Independent Review of the Board of ICANN: Executive Summary and Recommendations. November 2008. ([full text](#))

Front Running?

9
10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

12 CHRIS McELROY, on Behalf of
13 Himself and All Others Similarly
Situated,

14 Plaintiff,

15 vs.

16 NETWORK SOLUTIONS, LLC, a
17 Delaware Limited Liability Company;
INTERNET CORPORATION FOR
18 ASSIGNED NAMES AND
19 NUMBERS, a California non-profit
Corporation; and DOES 1 through
250, inclusive;

20 Defendants.

Case No.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Source: McElroy vs. Network Solutions, LLC, U.S.
District Court, Central District of California ([full text](#))

Front Running?

grossly inflated domain name registration fees. Unbeknownst to consumers, Network Solutions immediately registers for itself any domain name that consumers provide to Network Solutions in order to determine whether the domain name is available. Network Solutions never informs consumers that it has registered the domain name for itself; instead, Network Solutions tells consumers that their domain name is "available" and offers to register the domain. It is only at this point – after it has secretly registered the domain for itself – that Network Solutions finally reveals what it will charge.

Source: McElroy vs. Network Solutions, LLC, U.S. District Court, Central District of California ([full text](#))

- "Network Solutions is able to perpetuate this course of misconduct only through the acquiescence, tacit approval, and participation of ICANN," the lawsuit said.

Source: McElroy vs. Network Solutions, LLC, U.S. District Court, Central District of California ([full text](#))

ICANN

- Add Grace Period
- Domain name registrar doesn't have to pay registration fee if it cancels within 5 days

Pro's – Con's on ICANN?

ICANN

- Transparency
- Neutrality
- Authority / legitimacy

Alternatives

- U.S. Gov.
- UN Agency
- New non-profit
- Regionalizing control
- International Telecommunications Union (ITU)
- Freeing control to the market