

Syllabus

Law of Cyberspace – Fall 2009

Prof. Post

Introduction

With the emergence of the global communications network, we can access, store, and transmit vast amounts of digital information, at absurdly low cost, and without apparent regard for geographic boundaries. This digital revolution raises fundamental questions about the content, and application, of existing legal rules to novel phenomena and transactions. This course explores some of the legal and policy issues that arise as more and more conduct migrates to the network, including questions about sovereignty and jurisdiction, the regulation of online “speech,” and the control over information on the network (including questions about “privacy” interests that may attach to that information, and the ownership and protection of intellectual property rights in it). We will not, however, structure our examination of these issues around the traditional legal doctrinal categories (*e.g.*, Personal Jurisdiction in Cyberspace; the First Amendment in Cyberspace; Copyright Law in Cyberspace; etc.), but rather around a number of broader conceptual themes that cut across specific areas of doctrine. This will, I hope, enable us both to explore some jurisprudential and policy questions that apply broadly to a wide range of legal questions arising on the network, and to discuss the ways that the study of “cyberlaw” forces us to question and to re-examine some of the premises that underlie our thinking about the law, and the way that the law operates, in “realspace.”

Course Logistics

Class Meetings. The class meets Mondays 4:00 – 5:50, in Room _____

Contact

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Email: David.Post@temple.edu
Office Hours: Tuesday 9-10 AM, Thurs. 1-3 PM

Feel free to contact me by email if you’d like to make other arrangements to schedule a meeting, or to discuss class materials, or for any other reason, at any time. (Please put the words “CYBERLAW COURSE” in the subject line of your email so that I can more easily find it and respond to it).

Papers

Read my “Writing Guidelines,” available on Blackboard and at

<http://www.temple.edu/lawschool/dpost/Guidelines.pdf>.

It is always difficult, in a class of this size, for me to give your writing as much individualized attention as I’d like. Most of what I know about writing I’ve put in those Guidelines, so please consider them part of the assigned reading for this class.

Choose one of the following topics – please let me know by our third class (Sept. 14) which of the topics you have chosen.

1. A memorandum of points and authorities arguing for reversal of the court’s judgment in one of the following cases:

Fair Housing Council v. Roommate.com, 521 F.3d 1157 (9TH CIR. 2008)
Cartoon Network et al. v. Cablevision, 536 F.3d 121 (2D CIR. 2008)
Hageseth v People (CA App 2007)

2003)

Recording Industry Ass'n of America v. Verizon Internet Services, 351 F.3d 1229 (DC Cir

Universal City Studios v. Remeirdes, 111 F.Supp 294 (SDNY 2000)

Intel v. Hamidi, 71 P.3d 296 (CA 2003).

Bragg v. Linden, 487 F.Supp.2d 593 (ED Pa. 2007)

2. Assume that Temple University President Ann Weaver Hart has directed the Temple Information Technology Department to develop and implement a policy of randomly intercepting and inspecting all (a) electronic mail sent through the Temple mail servers and (b) requests for web pages, by students, faculty, and staff, to determine whether any of its users are engaging in unlawful activity (including copyright infringement and transmission of child pornography). Temple General Counsel has asked you for a memorandum on the legality of this project under State and Federal Law.

3. What (if anything) can Congress do, consistent with Constitutional limitations, to regulate the availability of pornographic (but not "obscene") material distributed over the web or by email? Include a proposed statutory formulation that would meet Constitutional objections.

4. You have been invited to a symposium at which Judge Easterbrook will present an updated version of his paper on the "Law of the Horse," and you have been asked to submit an article for that symposium with your reflections on Easterbrook's original article.

5. Your client, Adult Entertainment, Inc., a large distributor of sexually explicit content, would like to set up and operate a .SEX top-level domain, and has asked you for a memorandum summarizing the steps it needs to take in order to do that. In addition, on the expectation that ICANN will not approve any application for this TLD, the client would like to know whether an adverse decision by ICANN can be challenged in federal court on grounds that ICANN's proedures violate federal antitrust laws.

6. Your client is planning to develop a web site at which registered users, for a fee, can order cellphone ringtones, consisting of snippets of well-known popular songs, and have those ringtones delivered directly to the user's cellphone. The client would like a summary of its obligations under the Copyright Act for these activities.

7. Your client, Comcast, Inc., has asked for a memorandum summarizing and evaluating the current proposals before the FCC regarding imposition of a duty of "net neutrality" on Internet Service Providers, paying particular attention to the impact of these proposals on Comcast's ISP business.

8. Has ICANN's Uniform Dispute Resolution Procedure been a success? A failure? A little of both?

9. You are the legislative aide to Sen. Jim Justice, who was recently elected to the Senate from the State of Nevada. He has asked you for a memorandum summarizing the current state of State and federal regulation of Internet gambling, and for an evaluation of the ways in which Congress could strengthen existing prohibitions on all forms of such activity.

10. Your client, the Association of African-American Police Officers of Philadelphia, is considering bringing a lawsuit against the operators of the website at Domelights.com. Domelights.com is a "social networking/community discussion" site, run by a sergeant in the Philadelphia P.D. (in his off-duty time), at which police officers can discuss topics of mutual interest. A number of discussion threads on the site have included racially derogatory comments and jokes, and your client would like a memorandum describing (a) the likelihood that it could prevail on obtaining an injunction against operation of the site on the grounds that it is creating a "hostile work environment" under federal civil rights laws, and (b) the strength or weakness of

Domelights.com's likely assertion of immunity under section 230 of the Communications Decency Act.

Logistics. Your drafts are due October 5 (Draft 1), November 9 (Draft 2), and December 7 (Final). **Please note:** "draft" is not a euphemism for "sloppy, unedited, un-proofed work slapped together at the last minute." A good draft should, at a minimum, show the basic structure of the argument you are going to be making, with as much supporting analysis/argument as you can muster. There can be – there inevitably will be – large gaps in that analysis; that's what makes it a draft. But all of the usual rules regarding submission of written work apply, and whatever you express in a draft should be expressed as well as you can express it.

Please deliver papers to me in hard-copy and via email. If at all possible, I would prefer that you use Adobe PDF as the file format. Please label your file as follows:

FIRSTNAME-LASTNAME-cyberlaw-DATE.pdf [PDF file] or
FIRSTNAME-LASTNAME-cyberlaw-DATE.doc [Microsoft Word file]

(e.g., Mary Smith's Word file for Draft #1 would have the filename "Mary-Smith-cyberlaw-10012007.doc").

Readings

All readings are from Bellia, Berman & Post, *Cyberlaw: Problems of Policy and Jurisprudence in the Information Age (THIRD Edition)* (West, 2007), except as indicated.

Class 1, Aug 24: Introduction to the Course; Law in Cyberspace, and the Law of the Horse

Casebook, Chapter 1 (All) [Required]

Additional Reading (recommended but not required)

Some basic understanding of how the Internet actually works is indispensable for understanding the legal issues raised by Internet activities. In addition to the required reading in Chapter 1(C) of the Casebook (“Internet Basics”), there are many excellent resources for obtaining more information, at different levels of technical detail; you might find it useful to browse through some of these references, either now or as we proceed during the semester.

1. Much of Part One (“Chaos”) of my book *In Search of Jefferson’s Moose: Notes on the State of Cyberspace* consists of a detailed description of some of the basic architectural features of the Net. See, esp., Chapters 3, 4, and 5.
2. The Internet Society website has a number of useful documents, including:

A [Brief History of the Internet](http://www.isoc.org/internet/history/brief.shtml) <<http://www.isoc.org/internet/history/brief.shtml>> (this is written by a number of the early Internet pioneers -- Barry M. Leiner, Vinton G. Cerf, David D. Clark, Robert E. Kahn, Leonard Kleinrock, Daniel C. Lynch, Jon Postel, Larry G. Roberts, Stephen Wolff – and is quite readable and useful); and

[What is the Internet?](http://www.isoc.org/internet/) <<http://www.isoc.org/internet/>>

3. Other good resources include:

The Complete “Findings of Fact” in [ACLU v. Reno I, 929 F.Supp. 824 \(E.D. Pa. 1996\)](http://www.eff.org/Censorship/Internet_censorship_bills/HTML/960612_aclu_v_reno_decision.html), http://www.eff.org/Censorship/Internet_censorship_bills/HTML/960612_aclu_v_reno_decision.html. This was one of the first Internet-related case to reach the federal courts, and the court took the opportunity to spell out, in considerable detail, many of the architectural features of the Internet.

Richard Griffiths, [History of the Internet, the Internet for Historians](http://www.let.leidenuniv.nl/history/ivh/frame_theorie.html) <http://www.let.leidenuniv.nl/history/ivh/frame_theorie.html>

4. Two outstanding books on the early history of the Internet:

Katie Hafner & Matthew Lyon, *Where Wizards Stay Up Late* (1998) [which also has a nice website at <http://www.simonsays.com/titles/0684812010/>]

Janet Abbate, *Inventing the Internet* (1999)

Class 2, Aug. 31: Metaphor and Analogy

Casebook, Chap 2 [You may skip pp. 54-57]

NO CLASS MONDAY SEPTEMBER 7

Class 3, Sept. 14: Geography & Sovereignty, I

- A. The Yahoo! case: Casebook pp. 94 – 98, and Post, “Governing Cyberspace: Law” 884 – 895 [as noted, this paper is derived from Chapter 11 of *Jefferson’s Moose*]

B. Jurisdiction to Prescribe: Casebook, Chapter 3(B)

Class 4, Sept 21: Geography & Sovereignty, II

Casebook, Chapter 3(C) and 3(D)

Class 5, Sept 28: Who Regulates? Private vs. Public Regulation

Regulation by private contract

Casebook, pp. 295 – 297
Casebook, Chapter 4(B)(1) (“Automated Standardized Contracts”)
Case book, pp. 300 – 307 [on the formation of ICANN]
Register.com v. Verio, 356 F.3d 393 (2D CIR. 2004)

Class 6, Oct. 5: Private vs. Public Regulation, II

Controlling Spam

Casebook, pp. 317 - 327

Constitutional Limitations on Private Action

Casebook, Chapter 5(B)

Class 7, Oct 12: Private vs. Public Regulation, III

Regulating Media Entities: Casebook, pp. 351 – 373
Net Neutrality [materials to be handed out/posted on Blackboard prior to class]

Class 8, Oct. 19: Legal and Technological Regulation

Casebook, Chapter 4(A) & 4(C)

Class 9, Oct. 26: Review – No New Reading

Class 10, Nov. 2: Speech, I

Casebook, Chap. 6A

Class 11, Nov. 9: Speech II

Casebook, Chap 6B & 6C

Class 12, Nov. 16: Intermediaries, I

Casebook, Chapter 7(A)(1) (“Liability for Defamatory Content”) [pp. 481 – 511]
Fair Housing Council v. Roommate.com, 521 F.3d 1157 (9TH CIR. 2008)
Barrett v. Rosenthal, 146 P.3d 510 (CA 2006)

Class 13, Nov. 23: Intermediaries, II

Casebook, Chapter 7(A)(2) (“Copyright Liability”) and 7(B)(3) (“Trademark Liability”)

Class 14, Nov. 30: TBD

December 7 Final Paper due