

Computer and Internet Law

Summary. This course explores the unique legal issues and controversies that have arisen from the widespread use of modern communications technologies such as computers and the internet.

The advanced communications technologies we take for granted today were scarcely more than science fiction a generation ago, so it is perhaps fitting that the metaphors we have deployed to describe this new world (particularly the notion of “cyberspace” from which your casebook draws its title) have been drawn from the writings of such science fiction authors as William Gibson, Bruce Sterling, and Neal Stephenson. In little more than a generation, however, these technologies have become pervasive parts of our daily existence, their absence as difficult for many of us to imagine as life without electricity or running water.

From file-sharing to identity theft, from defamation to e-commerce, legal doctrines that evolved in what we might call the “offline world” have struggled to adapt themselves to the new technological environment. The process has been haphazard, and the results highly dependent upon the foresight and sophistication of the particular decisionmakers (courts, legislators, international bodies, and so forth) who have tackled the problem. As you will see, many of the major debates (even over such foundational issues as “what is the internet?” and “what is computer and internet law?”) are very, very far from being resolved. The goal of this course is to introduce you to these ongoing debates—and to encourage you to participate.

Introduction to Intellectual Property Law or its equivalent (taken either previously or contemporaneously) is a required course prerequisite. To refresh your recollection, however, we will briefly review the pertinent intellectual property doctrines before tackling the corresponding materials in this course.

Textbook and Course Materials.

- **Required Text:** Ku & Lipton, *Cyberspace Law: Cases and Materials* (2nd ed. 2006) (“**Casebook**”). The casebook is available in the Tangeman University Center or DuBois bookstores or online at <http://lawschool.aspenpublishers.com/>. You should review the notes following each assigned case in addition to the text of the cases themselves.
- Additional course materials will be handed out in class or made available for pickup (“**Handout**”).

Grading. Your course grade will be based on two components.

- Final Examination: 75%. Details concerning the format of the exam will be provided later in the course.
- Course Participation: 25%. Your course participation grade includes in-class participation as well as an online component, the details of which will be discussed during class.

Office Hours. Office hours will be held Thursdays 9 a.m. to noon, or by appointment. Please contact my assistant, Huda Kebede, at 556-9133, to schedule an appointment.

Course Syllabus

Part 1: Introduction—Law and the Internet

- Excerpt from Ku, *Open Internet Access and Freedom of Speech* (Casebook, pp. 1–4).
- Excerpt from Easterbrook, *Cyberspace and the Law of the Horse* (Casebook, pp. 4–7).
- Excerpt from Lessig, *The Law of the Horse* (Casebook, pp. 7–10).
- Excerpt from Ku, *A Brave New Cyberworld* (Casebook, pp. 10–12).

Part 2: Regulating the Internet

I. Utopianism and Realism

- Barlow, *A Declaration of the Independence of Cyberspace* (Casebook, pp. 15–17).
- Excerpt from Goldsmith & Wu, *Who Controls the Internet?* (Handout, pp. 1–2).
- Excerpt from Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons* (Casebook, pp. 17–23).

II. Personal Jurisdiction

A. Background

- Problem 1.0 (Casebook, pp. 26–28).
- The Supreme Court and Due Process (Casebook, pp. 28–29).

B. “Purposeful Availment” Online

1. Generally

- *Inset Systems, Inc. v. Instruction Set, Inc.* (Casebook, pp. 30–32).
- *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* (Casebook, pp. 32–36).
- *ALS Scan, Inc. v. Digital Service Consultants, Inc.* (Casebook, pp. 37–40).

2. Tortious Conduct

- *Bochan v. La Fontaine* (Casebook, pp. 42–46).
- *Oasis Corp. v. Judd* (Casebook, pp. 46–47).

3. Presence Within the Forum

- *Amberson Holdings LLC v. Westside Story Newspaper* (Casebook, pp. 49–50).
- *United States v. Thomas* (Casebook, pp. 50–51).
- Note: The Anti-Cybersquatting Consumer Protection Act (ACPA) (Casebook, p. 52).
- *Cable News Network LP v. Cnnnews.com* (Casebook, pp. 52–55).
- *Fleetboston Financial Corp. v. Fleetbostonfinancial.com* (Casebook, pp. 55–57).

C. Contractual Forum Selection and Choice of Law

- *Carnival Cruise Lines, Inc. v. Shute* (Casebook, pp. 58–62).
- *Caspi v. The Microsoft Network, LLC* (Casebook, pp. 62–65).

III. Regulatory Authority

A. Background

- Problem 2.0 (Casebook, p. 66).

B. State Regulation

1. Utopianism Revisited?

- *Voyeur Dorm, LC v. City of Tampa* (Casebook, pp. 66–68).

2. Taxation

- Note: Due Process and the Dormant Commerce Clause (Casebook, pp. 69–70).
- *Quill Corp. v. North Dakota* (Casebook, pp. 70–74).

- Note: Taxing the Internet (Casebook, pp. 74–75).
- 3. Speech
 - *American Libraries Association v. Pataki* (Casebook, pp. 76–81).
- 4. Spam
 - *Washington v. Heckel* (Casebook, pp. 81–87).
- C. International Regulation
 - *Dow Jones & Co. v. Gutnick* (Casebook, pp. 88–94).
 - *Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc.* (Casebook, pp. 95–97).
 - *La Ligue Contra le Racisme et L'Antisemitisme v. Yahoo!, Inc.* (Casebook, pp. 97–99).

Part 3: Speech in Cyberspace

I. A New Form of Speech?

- Excerpt from Branscomb, *Anonymity, Autonomy, and Accountability* (Casebook, pp. 101–04).

II. Regulation of Content

A. Background

- Note: Content Regulation (Casebook, pp. 107–08).
- Problem 3.0 (Casebook, p. 108).

B. Indecency

- *Reno v. ACLU* (Casebook, pp. 108–18).
- *Ashcroft v. ACLU* (Casebook, pp. 119–28).

C. Filtering

- *United States v. American Library Association, Inc.* (Casebook, pp. 128–35).
- *Mainstream Loudoun v. Board of Trustees of the Loudon County Library* (Casebook, pp. 135–39).
- *Mainstream Loudoun v. Board of Trustees of the Loudon County Library* (Casebook, pp. 139–43).

III. Anonymity

A. The Right to Speak Anonymously

- Problem 4.0 (Casebook, p. 144).
- *Talley v. California* (Casebook, pp. 144–46).
- *McIntyre v. Ohio Elections Commission* (Casebook, pp. 146–49).
- *ACLU v. Miller* (Casebook, pp. 149–51).

B. The Right to Remain Anonymous

- *In re Subpoena Duces Tecum to America Online, Inc.* (Casebook, pp. 152–54).
- *Doe v. 2TheMart.com, Inc.* (Casebook, pp. 154–57).
- *In re Verizon Internet Services, Inc.* (Casebook, pp. 158–62).

- *McVeigh v. Cohen* (Casebook, pp. 162–64).
- Note: Anonymity and the ECPA (Casebook, pp. 164–66).

IV. Access to Cyberspace

A. The Precedential Background

- Problem 5.0 (Casebook, p. 167).
- *Miami Herald Publishing Co. v. Tornillo* (Casebook, pp. 168–71).
- *Turner Broadcasting System, Inc. v. FCC* (Casebook, pp. 171–82).
- *Pruneyard Shopping Centers v. Robins* (Casebook, pp. 183–86).

B. Open Access

- *Comcast Cablevision of Broward Co., Inc. v. Broward Co.* (Casebook, pp. 187–91).
- *AT&T Corp. v. City of Portland* (Casebook, pp. 191–92).
- Note: The Open Access Debate (Casebook, pp. 192–93).

V. Internet Service Provider Liability for Speech

A. Common-Law Liability for Distribution or Publishing

- Problem 5.1 (Casebook, p. 194)
- *Cubby, Inc. v. CompuServe, Inc.* (Casebook, pp. 195–97).
- *Stratton Oakmont, Inc. v. Prodigy Services Co.* (Casebook, pp. 198–201).

B. Liability After the Communications Decency Act

- Statute: 47 U.S.C. § 230 (Casebook, pp. 201–203, note 4).
- *Zeran v. America Online, Inc.* (Casebook, pp. 203–08).
- *Blumenthal v. Drudge* (Casebook, pp. 208–11).
- *Doe v. MySpace, Inc.* (Handout, pp. 3–4).

VI. Code as Speech

- *Bernstein v. U.S. Department of Justice* (Casebook, pp. 213–17).

Part 4: Content as Property in Cyberspace

I. Trademarks, Domain Names, and Metatags

A. Domain Names and Trademark Law

- Discussion (a short Lanham Act refresher) & Problem 6.0 (Casebook, pp. 221–24).

1. Traditional Trademark Law

- *Panavision Int'l, L.P. v. Toeppen* (Casebook, pp. 225–27).
- *Planned Parenthood Federation of America, Inc. v. Bucci* (Casebook, pp. 228–32).
- *Brookfield Communications, Inc. v. West Coast Entertainment Corp.* (Casebook, pp. 234–38).
- *Hasbro, Inc. v. Clue Computing, Inc.* (Casebook, pp. 238–41).

- *Lockheed Martin Corp. v. Network Solutions, Inc.* (Casebook, pp. 242–45).
- 2. Anti-Cybersquatting Law
 - Discussion (Casebook, pp. 246–48).
 - *Sporty’s Farm L.L.C. v. Sportsman’s Market, Inc.* (Handout, pp. 5–10).
- 3. Private Dispute Resolution
 - Uniform Domain Name Dispute Resolution Policy (Casebook, pp. 250–52).
 - *Springsteen v. Burgar* (Casebook, pp. 253–60).
 - *Sallen v. Corinthians Licenciamentos LTDA* (Handout, pp. 11–16).
- 4. Domain Names as Speech
 - *Playboy Enterprises, Inc. v. Terri Welles, Inc.* (Casebook, pp. 264–67).
 - *Planned Parenthood Federation of America, Inc. v. Bucci* (Casebook, pp. 267–69).
 - *Lamparello v. Falwell* (Handout, pp. 17–20).
- B. Metatags and Search Engines
 - *Brookfield Communications, Inc. v. West Coast Entertainment Corp.* (Casebook, pp. 277–79).
 - *Playboy Enterprises, Inc. v. Terri Welles, Inc.* (Casebook, pp. 279–81).
 - *Playboy Enterprises, Inc. v. Netscape Communications Corp.* (Casebook, pp. 282–85).
- C. Are Domain Names Property?
 - *Network Solutions, Inc. v. Umbro International, Inc.* (Casebook, pp. 287–89).
 - *Kremen v. Cohen* (Casebook, pp. 289–93).

II. Copyright in Cyberspace

- A. Overview
 - Discussion (Casebook, pp. 293–95).
 - Excerpt from Samuelson, *The Copyright Grab* (Casebook, pp. 295–99).
 - Excerpt from Dyson, *Intellectual Value* (Handout, pp. 21–24).
 - Problem 7.0 (Casebook, pp. 299–300).
- B. Copyright Infringement
 - 1. What Conduct is Infringing?
 - *MAI Systems Corp. v. Peak Computer, Inc.* (Casebook, pp. 301–04).
 - *Live Nation Motor Sports, Inc. v. Davis* (Handout, pp. 25–26).
 - *Twentieth Century Fox Film Corp. v. Cablevision Systems Corp.* (Handout, pp. 27–31).
 - 2. Who is an Infringer?
 - *Playboy Enterprises, Inc. v. Frena* (Casebook, pp. 316–18).
 - *Religious Technology Center v. Netcom Online Communications Services, Inc.* (Casebook, pp. 318–24).
 - *A&M Records, Inc. v. Napster, Inc.* (Casebook, pp. 327–34).
 - *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.* (Casebook, pp. 335–41).
 - 3. Fair Use
 - Discussion & Problem 7.1 (Casebook, pp. 350–51).
 - *Sony Corp. of America v. Universal City Studios, Inc.* (Casebook, pp. 352–64).

- *UMG Recordings, Inc. v. MP3.Com, Inc.* (Casebook, pp. 365–67).
- *A&M Records, Inc. v. Napster, Inc.* (Casebook, pp. 367–71).
- *Perfect 10, Inc. v. Amazon.com, Inc.* (Handout, pp. 32–37).
- *BMG Music v. Gonzalez* (Casebook, pp. 384–86).

C. Beyond Copyright: Outlawing Circumvention Technologies

- Discussion (Casebook, pp. 386–88).
- *RealNetworks, Inc. v. Streambox, Inc.* (Casebook, pp. 388–93).
- *Universal City Studios, Inc. v. Reimerdes* (Casebook, pp. 393–403).
- *Chamberlain Group, Inc. v. Skylink Technologies, Inc.* (Casebook, pp. 407–16).

III. Patents in Cyberspace

- Discussion & Problem 8.0 (Casebook, pp. 426–29).
- *Diamond v. Diehr* (Casebook, pp. 429–34).
- *In re Alappat* (Casebook, pp. 435–40).
- *Amazon.Com, Inc. v. Barnesandnoble.com, Inc.* (Casebook, pp. 441–45).

IV. Alternatives to Property

- Excerpt from Boynton, *The Tyranny of Copyright?* (Handout, pp. 38–43).
- Excerpt from Zittrain, *Normative Principles for Evaluating Free and Proprietary Software* (Handout, pp. 44–46).
- Excerpt from Benkler, *The Wealth of Networks* (Handout, pp. 47–50).
- *Wallace v. International Business Machines Corp.* (Handout, pp. 51–52).
- Excerpt from Wagner, *SCO Receives Poisonous Reception at Ivy* (Handout, p. 53).

Part 5: Privacy

- Discussion & Problem 10.0 (Casebook, pp. 473–77).

I. Privacy of Communications

A. Privacy and New Technology

- *Olmstead v. United States* (Casebook, pp. 478–82).
- *Kyllo v. United States* (Casebook, pp. 482–87).

B. Intercepting Communications

1. Government Monitoring

- Discussion (Casebook, pp. 488–90).
- *United States v. Hambrick* (Casebook, pp. 490–93).
- *United States v. Charbonneau* (Casebook, pp. 494–96).
- *Steve Jackson Games, Inc. v. United States Secret Service* (Casebook, pp. 497–501).
- Note: Government Monitoring from Carnivore and the NSA (Casebook, pp. 504–07).

2. Private Monitoring

- *Smyth v. Pillsbury Co.* (Casebook, pp. 507–09).
- *Fraser v. Nationwide Mutual Ins. Co.* (Casebook, pp. 510–12).
- *Konop v. Hawaiian Airlines, Inc.* (Casebook, pp. 513–18).

C. Encryption

- *Bernstein v. United States Department of Justice* (Casebook, pp. 519–20).
- Note: The Battle over Encryption (Casebook, pp. 521–22).

II. Data Privacy

- Discussion & Problem 11.0 (Casebook, pp. 522–23).

A. Government Collection and Disclosure

- *Whalen v. Roe* (Casebook, pp. 524–27).
- Privacy Act of 1974 (Casebook, pp. 528–29).

B. Private Collection and Disclosure

- *Dwyer v. American Express Co.* (Casebook, pp. 531–34).
- *In re DoubleClick Inc. Privacy Litigation* (Casebook, pp. 536–43).
- EU Directive on Data Protection (Casebook, pp. 544–49).

C. Technological Protections for Privacy?

- Note: P3P (Casebook, pp. 551–53).
- Excerpt from Mayer-Schönberger, *Beyond Copyright* (Handout, pp. 54–57).

Part 6: Network Ownership and Access

- Problem 12.0 (Casebook, pp. 555–56).

I. Statutory Prohibitions Against Illegal Access

- Computer Fraud and Abuse Act (Casebook, pp. 556–57).
- *United States v. Morris* (Casebook, pp. 558–60).
- *Shurgard Storage Centers, Inc. v. Safeguard Self Storage, Inc.* (Casebook, pp. 562–64).
- *In re DoubleClick Inc. Privacy Litigation* (Casebook, pp. 565–68).
- *Moulton v. VC3* (Casebook, pp. 568–70).
- *America Online, Inc. v. National Health Care Discount, Inc.* (Casebook, pp. 570–74).

II. Common-Law Trespass

A. Access to Users

- *Marsh v. Alabama* (Casebook, pp. 575–77).
- *State v. Shack* (Casebook, pp. 578–82).
- *CompuServe, Inc. v. Cyber Promotions, Inc.* (Casebook, pp. 582–88).
- *Intel Corp. v. Hamidi* (Casebook, pp. 588–98).

B. Restricting Access to Data

- *eBay v. Bidder's Edge, Inc.* (Casebook, pp. 599–604).

Part 7: Private Ordering of Cyberspace

- Discussion & Problem 13.0 (Casebook, pp. 607–09).

I. Forming Contracts Online

- *ProCD, Inc. v. Zeidenberg* (Casebook, pp. 610–14).
- *Specht v. Netscape Communications Corp.* (Casebook, pp. 615–19).
- *Internet Archive v. Shell* (Handout, pp. 58–60).
- Note on Electronic Self-Help (Casebook, p. 620).

II. Limitations Upon Private Ordering

- *Cohen v. Cowles Media Co.* (Casebook, pp. 621–24).
- *Vault Corp. v. Quaid Software Ltd.* (Casebook, pp. 625–28).
- *ProCD, Inc. v. Zeidenberg* (Casebook, pp. 628–30).
- *United States v. Microsoft Corp.* (Casebook, pp. 632–45).