

NOTE TO THE READER: The Fall, 2005 class will be different from the Fall, 2004 class in two material respects. First, digital rights management (Part II of the 2004 syllabus) will not be covered. Second, the class will meet once per week, rather than twice per week. Consequently, to accommodate for the reduction class time, some of the material listed in the 2004 syllabus will not be covered.

Privacy And Security Law In The Digital Age

Phil Weiser And Phil Gordon

Fall, 2004

The digital age presents a variety of challenges to consumers, service providers, and employers. None are more difficult than protecting the privacy of employee and customer data and communications, ensuring the security of computer and communications systems, and complying with the complex patchwork of state and federal constitutional provisions, statutes, and regulations concerning privacy and security. This course will introduce students to the evolving legal framework governing information management and the basic technologies that have been the impetus behind its evolution. In so doing, this course will examine delve into the constituent elements of this legal framework, including common law and constitutional privacy principles, the Federal Wiretap Act, the Telecommunications Act of 1996, the HIPAA Privacy and Security Rule, the Gramm-Leach-Bliley Act, and the European Union Data Protection Directive.

The course expectations will revolve around active class participation and a final exam. For especially effective class participation, students may be awarded up to 3 extra points on their grade. To structure class participation, students will be placed “on call” for at least two weeks of the course. (Students can also participate “on-line” through TWEN, which will also facilitate easy access to the reading.).

I. INTRODUCTION (Week 1)

- A.** The technological architecture of the information age (Tues, Aug 24th)
 - 1.** John Perry Barlow, A Declaration of Independence in Cyberspace, <http://www.eff.org/~barlow/Declaration-Final.html>
 - 2.** Charles C. Mann, Taming The Web, <http://www.pbs.org/wgbh/pages/frontline/shows/porn/special/taming.html>
 - 3.** Robert Gellman, Future History Reports on Internet’s Demise, http://gcn.com/23_16/tech-report/26347-1.html
- B.** The values implicated in privacy, security, and DRM (Thurs, Aug 26th)
 - 1.** Alan Davidson, Testimony on P2P, Privacy and Security, <http://www.cdt.org/testimony/030515davidson.shtml>

2. Mike Godwin, A Review of Code and Other Laws of Cyberspace, http://www.oreilly.com/news/lessig_0100.html
3. Lawrence Lessig, The Architecture of Privacy, http://www.lessig.org/content/articles/works/architecture_priv.pdf

PART I: PRIVACY

II. THE ROOTS OF PRIVACY (Week 2)

A. THE FOURTH AND FOURTEENTH AMENDMENTS: PROTECTION FROM STATE REGULATION (Tues, Aug 31)

1. Sherry Colb, The Supreme Court Hears The Texas Sodomy Case, http://writ.news.findlaw.com/scripts/printer_friendly.pl?page=/colb/20030326.html

Refresher on *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down state statute prohibiting the use of contraceptives) & *Lawrence v. Texas*, ___ U.S. ___, 123 S.Ct. 2472 (2003) (striking down Texas statute criminalizing consensual sodomy and overruling *Bowers*).

2. *Kyllo v. United States*, 533 U.S. 27 (2001)

B. THE COMMON LAW ROOTS OF THE RIGHT OF PRIVACY (Thurs, Sept 2)

1. Restatement (2d) Torts §§652A – 652E (1976)
2. *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985)
3. *Robert C. Ozer, P.C. v. Borquez*, 940 P.2d 371 (Colo. 1997)
4. *Doe v. High-Tech Institute, Inc.*, 972 P.2d 1080 (Colo. App. 1998)

III. Regulatory Agency Oversight of Privacy (Week 3)

A. The FCC (Tues, Sept 7)

1. CALEA
 - a. 18 U.S.C. §2522
 - b. *United States Telecom Assn. v. FCC*, 227 F.3d 450 (D.C. Cir. 2000)
 - c. Declan McCullagh & Ben Charny, FBI Adds To Wiretap Wish-list, CNET News.com, available at http://news.com.com/FBI+adds+to+wiretap+wish+list/2100-1028_3-5172948.html.

2. THE TELECOMMUNICATIONS ACT, Protections For Customer Proprietary Network Information
 - a. 47 U.S.C. §222
 - b. US West v. FCC, 182 F.3d 1224 (10th Cir. 1999)
- B.** Self Regulation (W3C) and FTC Oversight (Sept 9) (Phil W)
1. P3P – An Analysis of P3P Deployment, available at <http://www.research.att.com/projects/p3p/p3p-census-may03.pdf> (skim)
 2. CDT Analysis of P3P, <http://www.cdt.org/privacy/pet/p3pprivacy.shtml>
 3. Tim Muris, Protecting Consumer’s Privacy, <http://www.ftc.gov/speeches/muris/privisp1002.htm>
 4. In The Matter of Microsoft Corp.,
 - a. Complaint, <http://www.ftc.gov/os/2002/12/microsoftcomplaint.pdf>
 - b. Analysis of proposed consent order, <http://www.ftc.gov/os/2002/08/microsoftana.htm>

>>Writing assignment for Week 4, Class 1

IV. STATUTORY PROTECTION OF PRIVACY (Week 4)

- A.** THE FEDERAL WIRETAP ACT, 18 U.S.C. §§2510-2520 (Sept 14)
1. 18 U.S.C. §§2510(5); 2511(1)(a), (c), (d); 2511(2)(a)(i); 2511(d); 2515; 2518 (skim),
 2. USA v. Councilman, <http://www.ca1.uscourts.gov/pdf/opinions/03-1383-01A.pdf>
 3. Watkins v. L.M. Berry & Co., 704 F.2d 577 (11th Cir. 1983)
- B.** THE STORED COMMUNICATIONS ACT, 18 U.S.C. §2701-2711 (Sept 16)
1. 18 U.S.C. §§2701-04
 2. Konop v. Hawaiian Airlines, Inc., 302 F.3d 868-880 (9th Cir. 2002)
 3. The Patriot Act -- The Rutherford Institute’s Analysis of the Patriot Act, http://www.rutherford.org/documents/pdf/tri_analysis_of_usa_pat_act.pdf (and pen-and-trace regime, 18 U.S.C. §§3121-3127)

V. HEALTH CARE and FINANCIAL INFORMATION (Week 5)

- A.** HIPAA (Sept 21)

1. OVERVIEW
 2. HIPAA PRIVACY RULE, 45 C.F.R. pt. 164.501-.534
 - a. The HIPAA Hook: Medical Flexible Spending Accounts and Employee Assistance Programs Pull Fully-Insured Employers into the HIPAA Privacy Compliance, available at <http://www.littler.com/nwsltr/BenefitsInsight.htm>
 - b. Compliance Options for Employers Facing the HIPAA Transaction Rule's October 16, 2003 Compliance Deadline, available at http://www.littler.com/nwsltr/Insights_9_03.htm
 - c. Confronting the HIPAA Compliance Challenge, available at http://www.littler.com/nwsltr/Insights_12_02.htm
 3. HIPAA SECURITY RULE, 45 C.F.R. pt. 164.302 - .318
 - a. 45 C.F.R. pt. 164.302-164.312 (published at 65 Fed. Reg. 8374-8379 (Feb. 20, 2003))
- B.** GRAMM LEACH BLILEY ACT, 15 U.S.C. §§6801-09 (Sept 23) (READING TO BE ADDED)
1. Background
 2. Defining A Covered "Financial Institution"
 3. Implications For Covered Financial Institutions
 4. Implementing Regulations -- The FTC's Safeguard Rule, 16 C.F.R. pt. 313

VI. THE EUROPEAN PRIVACY REGIME(Week 6) (Phil G)

- A.** The E.U. Directive and the Patriot Act (Sept 28) (Phil G)
1. THE E.U. DATA PROTECTION DIRECTIVE
 - a. In re Lindvist, Case C-101/01 (European Court of Justice Nov. 6, 2003)
 - b. The Next Great Trans-Atlantic Voyage: European Laws Protecting Human Resources Data Arrive On America's Shores, 2 Privacy & Security Law Report 759, 785 (July 14, 2003)

- c. Safe Harbor Privacy Principles Issued By The U.S. Department Of Commerce On July 21, 2000, available at <http://www.export.gov/safeharbor/SHPRINCIPLESFINAL.htm>

PART II: DIGITAL RIGHTS MANAGEMENT

VII. Digital Rights and Wrongs (Week 7)

- A. Introduction and the Broadcast Flag (Oct 5)
 - 1. Articles in Wired (www.wired.com/wired/archive/11.02/kazaa_pr.html; www.wired.com/wired/archive/11.02/sony_pr.html; www.wired.com/wired/archive/11.02/dirge_pr.html)
 - 2. Pam Samuelson, DRM and, or, vs. The Law, http://www.sims.berkeley.edu/~pam/papers/acm_v46_p41.pdf
 - 3. CDT Analysis of the Broadcast Flag, <http://www.cdt.org/copyright/broadcastflag.pdf>
- B. The Kazaa Case and P2P (Oct 7)
 - 1. MGM Studios, Inc. v. Grokster Ltd., 259 F. Supp. 2d 1029 (C.D. Cal. 2003).

VIII. The Regulatory Regimes for Digital Content (Weeks 8 & 9)

- A. The Audio Home Recording Act of 1988 (Oct 12)
 - 1. Recording Industry Association of American v. Diamond Multimedia Systems, Inc., 180 F.3d 1072 (9th Cir. 1999).
- B. The Digital Millenium Copyright Act's Anti-Circumventions Provisions and the Right to Hack? (Oct 14)
 - 1. United States v. Elcom Ltd., 203 F.Supp.2d 1111 (N.D. Cal. 2002).
 - 2. Universal City Studios, Inc. v Corley, 273 F.3d 429 (2d Cir. 2001).
- C. ISPs and Their Responsibilities Under the DMCA (Oct 19)
 - 1. RIAA v. Verizon, 351 F.3d 1229 (D.C. Cir. 2003)
- D. Shrinkwrap Licenses and Agreements (Oct 21)
 - 1. ProCD v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996)
 - 2. Sprech v. Netscape Comms. Corp., 306 F.3d 17 (2d Cir. 2002)

IX. Class Project on DRM and Fair Use: An Attainable Balance? (Week 10) (Oct 26 and Oct 28)

Reading For Project:

A. Proposed Measures

1. Hollings Bill, (see Declan McCulloch, What Hollings Bill Would Do, Wired, <http://www.wired.com/news/politics/0,1283,51275,00.html>); see also Paul Boutin, The U.S. Prepares To Invade Your Hard Drive, Salon.com, http://www.salon.com/tech/feature/2002/03/29/hollings_bill.
2. Berman Bill, (see Declan McCulloch, Hollywood Hacking Bill Hits House, CNET.com, <http://news.com.com/2100-1023-946316.html?tag=politech>); see also section-by-section analysis, <http://www.politechbot.com/docs/berman.coble.p2p.analysis.072502.html>; Berman's statement, <http://www.politechbot.com/docs/berman.coble.p2p.statement.072502.html>
3. Levy Measure, (see William Fisher, A Royalty Plan For File Sharing, CNET.com http://news.com.com/2102-1071_3-1024856.html); see also EFF, A Better Way Forward, http://www.eff.org/share/collective_lic_wp.pdf.
4. The Induce Act (see Statement of Orrin Hatch, <http://www.lessig.org/blog/archives/floor.pdf>)
5. Boucher Bill to Amend DMCA (see Declan McCullagh, The Hill's Property Rights Showdown, CNET.com, http://news.com.com/The+Hill's+property+rights+showdown/2008-1025_3-5243241.html?part=rss&tag=5243241&subj=news.1025.20);

B. Debate Over The Impact of File Sharing

1. Professor Strumpf P2P Analysis, see <http://www.unc.edu/~cigar/> (skim)
2. Professor Liebowitz Analysis of Compulsory License Schemes, <http://www.utdallas.edu/~liebowit/intprop/complpff.pdf>
3. EFF Analysis, http://www.eff.org/IP/DRM/cfp_fair_use_and_drm.pdf
4. Committee for Economic Development, Promoting Innovation and Economic Growth, http://www.ced.org/docs/report/report_dcc.pdf
5. Copyright and Digital Media in A Post-Napster World, <http://cyber.law.harvard.edu/home/uploads/254/2003-05.pdf>

The Class will be divided up into the following interest groups:

- (1) RIAA
- (2) Computer Industry
- (3) Consumer Groups
- (4) Verizon
- (5) The Association of American Libraries
- (6) American Society of Composers, Authors and Publishers

The first three groups will present on Tues (with a 15 presentation and 10 minutes for questions each). The second three will present on Thurs. Twenty page written testimony shall be due from all groups on Thurs, Oct 21 at 5 pm (and shall be penalized 5 points for each day late).

PART III: SECURITY

X. Information Security (Week 11)

A. GENERAL SECURITY PRACTICES and REQUIREMENTS (Nov 2)

1. Statement of FTC on Information Security,
<http://www.ftc.gov/os/2004/06/040616cybersecuritytestimony.pdf>
2. The State of Corporate Security – Deloitte Touche Report, available
<http://www.deloitte.com/dtt/cda/doc/content/Global%20Security%20Survey%202003.pdf> (skim)

B. GOVT and CORPORATE RESPONSES (Nov 4) (Doug Sicker)

1. GOVERNMENTAL SECURITY ISSUES -- National Strategy to Secure Cyberspace, http://www.whitehouse.gov/pcipb/cyberspace_strategy.pdf (skim)
2. In The Matter of Eli Lilly and Co., www.ftc.gov/ops/2002/01/lillycmp.pdf
3. Mary M. Calkins, Note, They Shoot Trogan Horses, Don't They? An Economic Analysis of Anti-Hacking Regulatory Models, 89 Geo LJ 171 (2002) (skim).

XI. ID Theft and the CFAA (Week 12)

A. ID THEFT (Week 11) (Nov 9)

1. FTC Statement on ID Theft,
<http://www.ftc.gov/os/testimony/040615idtheftssntest.pdf>
2. Phishing on Rise In US, CNET News.com,
http://news.com.com/Gartner%3A+Phishing+on+the+rise+in+U.S./2100-7349_3-5234155.html

3. Terri M. Solomon, Philip L. Gordon, and Lslie J. New, Incidence of Workplace Identity Theft Signals Need for Proactive Measures, *New York Law Journal* (Dec. 15, 2003).

B. COMPUTER FRAUD AND ABUSE ACT, 18 U.S.C. §1030 (Nov 16)

1. Statutory Structure

- a. Protections For Private Corporations, 18 U.S.C. §1030(a)(2)(C), (a)(5)(A)
- b. Limitations On Private Enforcement, 18 U.S.C. §1030(g)

2. Leading Cases

- a. *Theofel v. Farey Jones*, 341 F.3d 978 (9th Cir. 2003)
- b. *EF Cultural Travel BV v. Zefer*, 318 F.3d 58, 61 (1st Cir. 2003)

XII. Spam (Week 13)

A. Common Law Responses (Nov 18)

1. *Intel Corp. v. Hamidi*, 2003 Cal. LEXIS 6543 (Cal. Aug. 20, 2003)
2. *Ferguson v. Friendfinders, Inc.*, 115 Cal. Rptr.2d 258 (Cal.App. 2002).

B. CAN-SPAM (Nov 11)

1. FTC Report to Congress on Do Not Spam List, (skim)
<http://www.ftc.gov/reports/dneregistry/report.pdf>
2. Tim Muris, The Federal Trade Commission and the Future Development of U.S. Consumer Protection Policy (Aug. 19, 2003), available at <http://www.ftc.gov/speeches/muris/030819aspen.htm>

>>>For those not personally familiar with good anti-spam habits, see *Why Am I Getting All This Spam?*, CDT Report,
<http://www.cdt.org/speech/spam/030319spamreport.pdf>

XIII. First Amendment and Child Online Protection Act (COPA) (Week 14) (Nov. 23)

- A.** *Ashcroft v. American Civil Liberties Union*, 124 S.Ct. 2783 (2004).

XIV. Wrap-Up

- A.** State Initiatives (Nov 30)

1. Utah Spyware Law

- a.** Utah Code Ann. Sec. 13-40-102 (definitions); 13-40-201 (prohibited conduct).
- b.** Judicial Decision (<http://www.benedelman.org/spyware/whenu-tah/pi-ruling-transcript.html> (preliminary injunction ruling))

2. California Privacy and Security Law

- a.** Cal. Civ. Code sec. 1798.85 (prohibition against certain uses of social security numbers)
- b.** Cal. Civ. Code sec. 1798.82 (notice of security breach)
- c.** Cal Civ. Code sec. 22575 (privacy policy); sec. 22577 (privacy policy)

B. Review (Dec 2)

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