



IP Mississippi



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Supreme Court Decides Bilski

The Supreme Court recently affirmed a lower court's ruling that a risk-hedging method is not patentable. The case, Bilski v. Kappos, was highly anticipated by many in the intellectual property field because Bilski provided the Supreme Court with an opportunity to establish new tests for patentability. The old test, machine-or-transformation, only allowed an invention to be patented if it was a machine or if it physically transformed an object. In its rationale, the Supreme Court did acknowledge that the machine-or-transformation test is outdated and inappropriate with respect to modern technology. The Court, however, refused to offer a new test, allowing lower courts much leeway as they attempt to find an appropriate test for patentability.

White House Proposal to Protect IP

In June, the newly formed Office of the United States Intellectual Property Enforcement Coordinator announced a new plan to promote the enforcement of American intellectual property rights. The plan is designed to coordinate all federal departments that have a role in the protection of intellectual property rights. The strategy encompasses over thirty concrete recommendations.

As part of the plan, attempts will be made to ensure that the federal government and federal contractors do not purchase or use counterfeit products. Other recommendations are designed to stop the flow of counterfeit pharmaceuticals and other infringing goods into the country and increase cooperation between countries to prevent the flow of such goods.

"IP Mississippi" is a publication of the Mississippi Law Research Institute designed to keep educators and administrators at Mississippi universities aware of current happenings in the world of intellectual property.

The Mississippi Law Research Institute is a division of the University of Mississippi School of Law. The IP Group is composed of two attorneys, William T. Wilkins and A. Meaghin Burke. For more information, please visit the website at <http://www.mlri.olemiss.edu>, or feel free to contact the IP Group at (662) 915-7775.

Wide-Reaching Patent Invalidated

In August, a jury invalidated a wide-reaching software patent. U.S. Patent No. 6,411,947 claimed a system of responses to natural language queries in online customers' emails. Bright Response owns the patent and sued several companies, including Google and Yahoo! for violating the patent. The jury invalidated the entire patent because inventorship was improperly attributed. The United States Patent and Trademark Office is currently re-examining the patent.

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IP News of Note

- Paul Allen, co-founder of Microsoft, has sued several major corporations (including Google, Apple, Yahoo!, and eBay) for allegedly violating four patents owned by Allen's Interval Licensing. The patents relate to online commerce and online news updates.
- H.R. 5980, a bill designed to encourage the repatriation of jobs in America, has several provisions related to patent law. These provisions would, among other things, prevent the publication of pending patent applications and give priority to applications made by institutions of higher education.
- WEHCO Media has contracted with Righthaven LLC to protect its news content. Righthaven files suit on behalf of its clients who believe that their copyrights have been infringed by bloggers. WEHCO Media owns the Arkansas Democrat-Gazette and many other newspapers and cable stations throughout the South.
- Oracle has sued Google, alleging that the Android mobile operating system violates Java's open source license. Oracle acquired ownership of Java in January, when Oracle bought out Sun Microsystems. Android is currently the third most popular mobile operating system.
- TechRadium, a company that owns several patents related to emergency mass notification, has sued the micro-blogging service Twitter for patent infringement of three patents owned by TechRadium. TechRadium previously sued Blackboard of California over the same three patents. That litigation was dropped after Blackboard agreed to license the patents.
- The Supreme Court recently settled a long-disputed point of law with its Reed Elsevier v. Muchnick decision. The Second Circuit of Appeals had held that the federal courts lacked subject matter jurisdiction over a copyright infringement settlement because not all the works at issue were registered with the United States Patent and Trademark Office. The Supreme Court reversed, holding that registration was not a jurisdictional requirement.

DMCA Exemptions Handed Down

The Digital Millennium Copyright Act (DMCA) was designed to discourage the unauthorized use of copyrighted material by instituting harsh punishments against those who would circumvent anti-copying measures on protected media. Several advocate groups, such as the Electronic Frontier Foundation, however, argue that the DMCA acts to prevent the fair use of copyrighted material and that enforcement of the DMCA has a chilling effect on legal speech.

Every three years, the United States Copyright Office hands down some exemptions to the DMCA in an attempt to strike a balance between the protection of copyrighted material and the legitimate, fair use of such materials. This year, six exemptions were handed down. Of particular importance to educators is the motion picture exemption which allows educators to include clips of motion pictures into presentations that are designed for criticism or comment. The Copyright Office also decided that mobile phone software could be circumvented so long as the circumvention was undertaken to enable interoperability of software applications.

AN INTRODUCTION TO NET NEUTRALITY

By R. Garrett McInnis

The Mississippi Law Research Institute is pleased to introduce R. Garrett McInnis, a second-year law student who is working with the department through the Public Service Internship Program at the University of Mississippi School of Law. Garrett is from Hattiesburg and received his Bachelor of Science from the University of Mississippi in the field of pharmaceutical sciences.

What is net neutrality?

Net neutrality is a policy concept advocating limitless internet provision and use with respect to Internet Service Providers (ISPs), cable companies, and governmental regulating agencies. The idea was first articulated by Tim Wu, a professor at the Columbia Law School, in his publication titled *Network Neutrality: Broadband Discrimination*. Wu's definition of Net Neutrality is "best defined as a network design principle. The idea is that a maximally useful public information network aspires to treat all content, sites, and platforms equally."

The New York Times further explains that "currently, Internet users get access to any Web site on an equal basis. Foreign and domestic sites, big corporate home pages and low-traffic blogs all show up on a user's screen in the same way when their addresses are typed into a browser." Net Neutrality backers aim to ensure this equal basis does not change. Maintenance of such equality has been publicly supported by the Federal Communications Commission (FCC). In 2005, the FCC issued its Internet Policy Statement, which contained these four points of interest supporting net neutrality:

- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to access the lawful Internet content of their choice.
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to connect their choice of legal devices that do not harm the network.
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to competition among network providers, application and service providers, and content providers.

An additional fifth point is currently being considered by the FCC that would allow Internet Service Providers to discriminate against certain services and applications.

What are the arguments against Net Neutrality?

Many Internet Service Providers have pushed for movement away from Net Neutrality. It is their belief that the industry should be free from regulation in order to allow for technological innovation. Furthermore, these opponents of Net Neutrality argue that "tiering" (charging higher prices to customers in order to gain better levels of internet service) is necessary in order for ISPs to recover financially from their creative ventures.

Another argument levied against Net Neutrality stems from the ill-prepared nature of the current internet to handle growth. Massive amounts of bandwidth are being currently used by video sites such as YouTube, MySpace, and personal blogs. By allowing ISPs to charge companies such as YouTube for utilizing the

provider's network, more broadband networks could be built. Net Neutrality opponents believe this will allow for much greater innovation by future users of the internet.

What have the courts said about net neutrality?

In May of 2010, the Comcast Corporation, the nation's largest internet provider, brought suit against the FCC. Comcast claimed that the FCC did not have the authority to enforce the tenets of Net Neutrality promulgated in 2005. The United States Court of Appeals for the District of Columbia ruled that the FCC's rules "cannot support its exercise of ancillary authority over Comcast's network management practices", a serious blow to the proponents of Net Neutrality. Since this ruling, the FCC has vowed to not stop the fight for net neutrality and has changed its strategy. The FCC is now looking to reclassify internet carriers under the umbrella of communications so that they can be regulated under the same set of rules as traditional telephone networks.

What is the Google and Verizon settlement?

Google, along with a coalition of other large internet companies, has staunchly supported Net Neutrality since the debate first emerged. These companies coalesced and formed SavetheInternet.com to detail their beliefs about this hot topic. Still, this did not prevent Google from taking a recent controversial stance on Net Neutrality.

Just this month, Google and Verizon, made headlines by teaming up to propose their own solution to the current debate. The settlement outlines two guidelines used by both parties when working towards the solution:

1. Users should choose what content, applications, or devices they use, since openness has been central to the explosive innovation that has made the internet a transformative medium.
2. America must continue to encourage both investment and innovation to support the underlying broadband infrastructure; it is imperative for our global competitiveness.

The proposal offered by the two industry giants is described as a "suggested legislative framework" where Net Neutrality would be maintained in full on all internet, save for two exceptions. First, certain "additional, differentiated online services," such as "health care monitoring, advanced educational services, or new entertainment and gaming options" would not be regulated. Second, the Google-Verizon settlement proposes that all wireless internet be deregulated.

Google defended its apparent change of position by explaining that in order to ensure a foundation that allows for maximum ingenuity, wireless carriers must be able to control their services as they see fit, especially when it comes to generating revenue.

The proponents of Net Neutrality are especially upset at the possibility of a "fast lane" separate from the public internet. This would allow websites to pay a fee to the ISP, gaining them access to faster loading internet service than the public internet. Others argue that the entire future of the internet is wireless, so a proposal to only regulate the wired internet does very little, if anything, to further Net Neutrality. Finally, there is a concern in this group about the privacy of the public with respect to a loss of Net Neutrality. Recently, the Wall Street Journal did a story detailing the top fifty United States websites and the amount of information each gleaned from their sites' visitors. Much of the chronicled information was used to match up an internet user with advertisements based on previous activity. Net Neutrality supporters say that if the internet is deregulated, web users will lose even more privacy than has already occurred as sites like Google sell off more of the public's information.