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Cyberspace & the Law: Privacy, Property, and Crime in the Virtual Frontier

Nicole M. Murphy

Foreword

Cyberspace & the Law: Privacy, Property, and Crime in the Virtual Frontier

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Internet use has drastically increased. The application of traditional legal concepts to the virtual world has led to various controversies as judges and policy makers try to deal with unexpected and uncharted issues. This symposium took place during the same year the *Minnesota Law Review* debuted *Headnotes*—its online companion journal—and its capability to stream online the symposium presentations. This symposium topic is thus timely and widely relevant, as the Internet affects people's lives no matter their age or occupation; in many ways it is a frontier of legal ambiguity with sometimes devastating consequences for users. But the Internet also allows for many benefits and its reach is continually growing. The Federal Communications Commission (FCC) is currently seeking to expand Internet services and speed because of its belief that "[b]roadband can be the great enabler that restores America's economic well-being and opens doors of opportunity for all Americans to pass through, no matter who they are, where they live, or the particular circumstances of their individual lives."[1] Google's recent decision to stop censoring Chinese Google

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1. Federal Communications Commission (FCC), Broadband Opportunities for Rural America, http://wireless.fcc.gov/outreach/index.htm?job=broadband_home (last visited Apr. 10, 2010) (quoting FCC Commissioner Michael Copps).

searches by redirecting search queries through Hong Kong[2] signals one area of controversy between cyberspace and the law. Google's actions are in violation of Chinese censorship laws and the Chinese government is well-known for censoring other Internet programs like Facebook, Twitter, and YouTube.[3] But while technology is being suppressed in China, Haiti recently became the largest-ever mobile donation recipient—over eight million dollars in the days after its devastating earthquake.[4] And in regards to digital property, courts are again entertaining the idea that once a news story is broken, the original source may have exclusive rights in that news for a limited period of time.[5] These brief examples demonstrate how the Internet and our prior methods of acting are merging in new and sometimes disruptive ways. In general, the law has not done well in keeping up with technological advances.

The objective of the 2009 Cyberspace & the Law Symposium was to bring internationally known speakers together to discuss the most interesting topics at the intersection of cyberspace and the law related to privacy, property, and crime. Panelists were selected by the *Law Review* staff with thoughtful input from our faculty advisor and other professors. Each panel was designed to demonstrate diversity in ideas and geography. After months of preparation the Symposium included a spirited keynote address by Chief Judge Alex Kozinski of the Ninth Circuit Court of Appeals followed by three distinguished panels: Intellectual Property in Cyberspace; Internet Privacy, Anonymity, and Free Speech; and Cybercrime.

Chief Judge Alex Kozinski began his keynote address by cautioning the attendees about how technology is changing both how we live and, more importantly, how we perceive ourselves and others. Kozinski presented examples of how technology increases the "fishbowl" effect of individuals' actions becom-

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2. Mike Masnick, *Google Approach in China: Redirect to Hong Kong*, TECHDIRT, Mar. 22, 2010, http://techdirt.com/articles/20100322/1428518660.shtml.

3. Annalyn Censky, *Google Blames China's 'Great Firewall' for Outage*, CNNMONEY.COM, Mar. 30, 2010, http://money.cnn.com/2010/03/30/technology/google_china/index.htm.

4. CBS/Associated Press, *Text Msg Donations for Haiti Set Records*, CBSNEWSTECH, Jan. 15, 2010, http://www.cbsnews.com/stories/2010/01/15/tech/main6099375.shtml.

5. Mike Masnick, *Hot News Is Back: Court Blocks Website from Reporting the News*, TECHDIRT, Mar. 19, 2010, http://techdirt.com/articles/20100319/1214338635.shtml.

ing more public and timeless. For example, an individual home once thought to be private may now be seen through Internet satellite maps; similarly, information put on the Internet may never disappear due to the ability of programs like the Way-Back Machine. He also discussed privacy and its relation to the Fourth Amendment. Specifically, an individual is not able to declare what information is private, but the Fourth Amendment only protects those items for which judges agree there exists a legitimate expectation of privacy. Kozinski illustrated how new technologies decrease the levels of legitimate expectations of privacy because they come into common use in a society that is much less protective of privacy than even twenty-five years ago. He cautioned that if as a society we acquiesce to this publicizing of private matters through public cell phone conversations, blogging, and reality television shows, we become our own enemy to privacy; judges, legislators, and law enforcement will take notice and may adopt society's example of protecting less privacy.

The Symposium's first panel was Intellectual Property in Cyberspace. Professor Pamela Samuelson of the University of California at Berkeley introduced the evolution of the Google Book Search (GBS) project and the current proposed class action settlement. Samuelson addressed GBS's potential advantages and also its areas of concern—highlighting the need to avoid a potential Google monopoly and instead suggesting a public book digitization project, similar to the human genome project.

Professor Thomas Cotter of the University of Minnesota Law School presented his paper on transformative use and suggested a move away from a fair use definition dominated by transformative use. Instead, he suggested looking at the cognizable harm associated with unauthorized use. Professor Daniel Burk of the University of California-Irvine was unable to attend, but in his Article he suggests that trademarks on the Internet have two distinct attributes: communicative, representative of the good to an Internet user; and functional, recognized as an address by a computer. He proposes to use the trademark doctrine of functionality to resolve cybermark disputes.

Professor Fisher of the Harvard Law School disagreed with both Cotter's suggestion to downplay transformative use as a key determination for fair use and parts of Samuelson's presentation. Fisher presented numerous examples of what he called

"distributed creativity," examples of user modifications to tangible and intangible products. Fisher discussed different rights owners' responses to such modifications ranging from acceptance to prevention. He proposes interpreting intellectual property rights in a manner that encourages user innovation—increasing efficiency, distributed justice, and human flourishing.

Sherrese Smith, Legal Advisor for Media, Consumer, and Enforcement Issues for Chairman Genachowski at the Federal Communications Commission (FCC), began our second panel on Internet Privacy, Anonymity, and Free Speech. Smith introduced four key areas of the Internet privacy debate: (1) user generated content; (2) cloud computing; (3) behavioral advertising or targeting; and (4) Deep Packet Inspection (DPI). She articulated that many Internet users are uncomfortable with decreased privacy when they are present in the alternative real world. Additionally, Smith discussed the lack of adequate laws in the area of online privacy. She introduced the four principles promulgated by the FCC to help influence behavioral advertising. Finally, Smith offered a solution, suggesting that Internet businesses be open about their policies regarding their use and collection of consumer information as society transitions from the old media world to the new media world.

Professor Jane Kirtley of the University of Minnesota School of Journalism and Mass Communication presented further analysis in one area of user generated content—anonymous posting on news organization websites. Kirtley described the recent trend of cases involving plaintiffs seeking to unmask anonymous posters to news websites. She highlighted the lack of uniformity in state and federal courts in determining when this information should be released by the organizations. Many news organizations and journalists are using state reporter shield laws to defend against providing anonymous commenters' identities. However, Kirtley expressed concern that this practice is inappropriate and will dilute the current protection that journalists have gained through history for themselves and their confidential sources—unlike anonymous posters whom journalists do not know.

Finally, in the third panel, Cybercrime, Professor Paul Ohm of the University of Colorado Law School illustrated the structural differences between police investigations in the physical world and those taking place online—investigations building up evidence and reducing potential suspects in the

real world compared to online investigations where evidence points to one IP address or the next lead. Armed with this idea, Ohm argued that probable cause will, in the vast majority of online cases be satisfied and encourages future legislative debates to focus on other areas like notice or identifying other methods of investigation before allowing more intrusive investigation.

Professor Orin Kerr from George Washington University Law School presented on the Computer Fraud and Abuse Act (CFAA). Kerr outlined the evolution of the CFAA from preventing egregious computer crimes to the current potential illegality of almost all Internet uses. He suggested that courts now have the responsibility to narrowly interpret CFAA to escape void for vagueness constitutional challenges. Kerr endorsed rejecting two courts' recent broad interpretations of CFAA.

Professor Christopher Slobogin of Vanderbilt University Law School responded to Kerr's criticism of his book *Privacy at Risk: The New Government Surveillance and the Fourth Amendment*. Slobogin's book proposes broadening the Fourth Amendment's search definition to include all methods of police investigation. Slobogin described a proportionality principle that requires increased police justification proportional to the intrusiveness of the search. He utilized positive law and empirical studies of public sentiment to demonstrate the intrusiveness of various investigative techniques. Using these intrusiveness findings and the proportionality doctrine, Slobogin suggested that courts would be better equipped to determine what justification standards should be required to obtain information currently considered outside of the Fourth Amendment.

The articles contained in this issue demonstrate the panelists' attempt to address concerns that cross multiple areas of cyberspace: privacy, property, and crime. It is the *Minnesota Law Review*'s desire that this symposium discussion will fuel future evolution in the development of law in the cyberspace context.