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Blinded by the Light: Common Law and the Dangers of Cyberlawyering*

John C. Scheffel**

In June of 1996, the Seventh Circuit Court of Appeals decided an extraordinarily significant case regarding computer technology. The facts of this case represent a cornucopia of issues for cyber-lawyers and are especially relevant for this Internet symposium.¹ In *ProCD, Inc. v. Zeidenberg*,² a fellow named Matthew Zeidenberg copied a database of telephone numbers and addresses onto a website he created and hosted on one of his home computers. Mr. Zeidenberg then went into the business of selling access to this database on a per-use basis.³

The facts in *ProCD* could lead one to speculate about the jurisdiction in which Zeidenberg could be sued for his activities on the web. Other questions also arise: Did his activities violate the publisher's copyright? Did the activities via the web service provider violate someone's copyright? Did subsequent website operators, who relayed the file around the Internet, violate someone's copyright? Did the end-users violate someone's copyright? Further, who should be taxed on the revenues that Mr. Zeidenberg receives? What liability might his friends who linked to the website have for Mr. Zeidenberg's potential bad acts?

* This perspective is adopted from concluding remarks given at the 1998 Pace Law Review Symposium, *Untangling the Web: The Legal Implications of the Internet* at Pace University School of Law on March 20, 1998.

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1. The 1998 Pace University Internet Symposium, *Untangling the Web: The Legal Implications of the Internet*.

2. 86 F.3d 1447 (7th Cir. 1996).

3. See *id.* at 1450.

The Seventh Circuit, in an opinion written by Judge Easterbrook, dealt with the primary matter that was in front of the court on appeal.⁴ The threshold issue was whether the terms contained in the shrink wrap license agreement that was provided with Mr. Zeidenberg's CD-ROM formed a contract between Mr. Zeidenberg and ProCD, the publisher of the CD-ROM.⁵ Remarkably, the Seventh Circuit found the contract binding, becoming the first federal appellate court to uphold a shrink wrap license agreement.⁶ The Court upheld the ProCD license agreement in the face of several federal appellate court and state court opinions that had found the terms of a shrink wrap license agreement not to be part of a contract between the end-user and the publisher.⁷

The extraordinary thing about this case is not the court's determination that shrink wrap licenses are valid; many practitioners have assumed this to be true. The extraordinary thing is that twenty years after shrink wrap licenses became an industry standard, and at least fifteen years since IBM began mass-marketing the personal computer, a federal appellate court was, for the first time, interpreting the meaning of these license provisions. In thinking about cyber-law, or the application of the law to Internet technology, I think the application of the law to computer technology in general is a fine model and a model that I would encourage courts, industry, and practitioners who self-style themselves as cyber-lawyers to think about.

Computers, in one form or another, have been in use for the past 50 years. When computers were first introduced in the mid-1940s, there was not a widely developed or reported body of law on contract issues relating to computer technology. Moreover, copyright issues relating to computer software did not develop for at least 30 years after the introduction of computer technology. During these years, market demand and market forces, such as the mass distribution of PCs and the mass distribution of software, led to an increasing number of computer-related cases being brought into court. Also, issues of copyrighting and contracting became more acute. In deciding cases

4. *See id.* at 1448-49.

5. *See id.*

6. *See id.* at 1455.

7. *See ProCD*, 86 F.3d at 1449.

dealing with the ability to copyright computer software or the appropriate contractual routine regarding the purchase of computer technology, courts applied, without exception, traditional principles of copyright and contract law.

However, in the most recent computer-related cases, courts have relied most heavily upon historical non-computer precedent. After certain, perhaps misguided attempts to define the copyright scheme for computer software, courts have increasingly looked to more traditional factors to determine whether certain media, i.e., radio screenplays, radio plays, and stage dramas, infringed upon one another. This historical analysis has led to, with narrow exception,⁸ the rejection of *sui generis* legislation, the rejection of special consideration for computer technology, and the adoption of historical common law.

I believe that as practitioners in the field of cyber-law, we should follow the historical model. Frankly, I am always scared by the suggestions that we should start from first principles in debating issues relating to cyber-law. Some believe that the Internet is somehow different, and that the Internet provides an opportunity to remake the law. In my classes, nothing troubles me more than this notion. I have moved away from trying to teach much in the area of cyber-law because I get first principle discussions about the Communications Decency Act⁹ from those who neither understand the Act, nor have the First Amendment predicate in order to have that discussion.

This area of cyber-law lends itself to being a mile-wide-and-inch-deep discussion. This, I believe, is a real danger for us. The real danger is that we will allow or create premature and unneeded legislation out of our own desire to regulate the field. For example, one mistake that could be made would be to draft legislation relating to trusted certificate authorities before there *are* any trusted certificate authorities and before there is any market demand or any experience relating to what the standards of liability perhaps should be for trusted certificate authorities. Another mistake would be to regulate the domain name arena whenever we find competing groups of policy au-

8. For example, one exception is the specific provisions of the Copyright Act with regard to linking computer technology with the right to make archival or back-up copies. See 17 U.S.C. § 117 (1998).

9. Pub. L. No. 104-104, 110 Stat. 133 (1996).

thorities coming up with their own competing proposals regarding the control of the domain name registries and the like. Those areas are opportunities, I believe, for great mischief among lawyers and policy-makers who may find it an interesting area to discuss and practice in, but who do not have in mind the interest of individuals or parties seeking to resolve real problems.

At a cyber-law seminar two years ago in Chicago, the Honorable Frank Easterbrook, who wrote the opinion in the *Zeidenberg* case, gave a now well-known presentation.¹⁰ In Judge Easterbrook's view, there is nothing special about cyberspace. In his lecture, he stressed that we, as lawyers, should be careful not to look at issues related to the Internet and focus on their "Internetness." That is, we should not focus on Internet issues that could make cyber-law unique, simply to engender publicity. Rather, Judge Easterbrook believes that we should focus on the fundamental history of the common law and the appropriate legal rules to apply in situations that *happen* to involve the Internet.¹¹

To that end, instead of talking about a "new" type of Internet related law, we should focus on traditional applications of tort law, copyright law, or trademark law. I think that the historical application of those legal principles should be what guides us as practitioners in the cyber-law field. I certainly do not think there is any question that compared to other countries around the world, we have done an admirable job of applying common law, existing copyright, or other intellectual property rules to computer technology. My hope is that in applying those same rules to emerging issues relating to the Internet, we will continue to apply the existing body of law. We should continue to follow the pattern of applying traditional precepts of common law to computer technology and we should resist the temptation to develop a "let's look at the Internet" approach to resolving Internet-related legal issues.

10. See Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207 (1996).

11. See *id.* at 208.