

COURSE OUTLINE

version date: 1/1/00

ARST 593E: Seminar: Issues in Cyberspace Law

3 credits; open to graduate students in SLAIS and LAW

Term two, Tuesdays 9-12, Rm. 839

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* Instructor Information

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* Course Description

This course is intended as an introductory survey of the more prominent legal issues which have arisen with the growth of electronic media, with focus on the Internet. The choice of topics to be covered will be primarily set in advance (as described below), and partially influenced by the backgrounds and preferences of the students in attendance. Certain to be discussed will include the growth of the domain name system, issues surrounding freedom of speech, copyright/trademark, privacy, and jurisdictional disputes in global e-commerce. Reflecting its placement in the SLAIS curriculum, the course will also specifically include a focus on (i) certain archival aspects of the cyberspace medium, including an in-depth look at law pertaining to electronic recordkeeping; and (ii) issues affecting libraries and the control of content, including the matter of screening, filtering, or rating information. Additions to the curriculum will be determined both by student choices for projects, as well as news and events occurring in real time during the pendency of the course.

The objectives of the course are three-fold. First, the course will serve to provide an understanding of the nature of cyberspace. Because the development of law in this area often includes discussion of, if not turns on, the technical aspects of the new medium, the course will not shy away from devoting attention to the "inner workings" of how the Internet functions on a technical level. On the other hand, the nature of cyberspace will also be explored at the highest conceptual levels of abstraction, including discussing what the role of the law should be in developing cyberspace, what are the appropriate metaphors for conceptualizing cyberspace, and whether traditional legal doctrines and categories are adequate as the new medium develops.

The second objective of the course will be to provide an accurate survey of the most important legal issues affecting the development of cyberspace. The primary means of doing so will be reading actual court case decisions and secondary material surrounding the legal issues. Students will be encouraged to find additional source materials online.

Third, given the professional interests and background of the instructor in having litigated a number of highly visible cases on behalf of the U.S. government, another objective of the course will be to impart a greater understanding of the policymaking process at government's highest levels, especially when public institutions are faced with confronting serious legal challenges involving relevant issues. For purposes of balance, students will be encouraged to find examples relevant to the topics to be discussed which arise out of Canadian and other international law.

*** Prerequisites / Course Restrictions**

Enrollment in the course is generally restricted to students who have completed the core in the Archival studies program in SLAIS, and students in UBC law school. Students who wish to take this course outside of their degree program must obtain permission of their Faculty Advisor, SLAIS, and myself. Auditing is permitted, in accordance with SLAIS guidelines. There are no other course prerequisites; however, students are expected to be able to access e-mail as well as the Internet. Updated assignments will be forwarded via the equivalent of a class e-mail "listserv" maintained by the instructor. Internet, and particularly, Web access will be highly desirable in order to fully participate in class readings and discussions, as well as to conduct research related to the assigned term paper.

*** Course Materials**

There is no textbook. A custom course package will be available in the bookstore, covering a portion of each week's reading assignments as listed below. Additional reading materials will be prepared a week or two in advance and distributed in class or via e-mail from the instructor. Also, recommended reference materials for optional reading will be made available in the SLAIS reading room on a weekly basis. As useful background texts for the first several classes, the following books will be found in the reading room after January 4, 2000:

*Ethan Katch, Law in a Digital World (Oxford 1995)
Katie Hafner, Where Wizards Stay Up Late: The Origins of the Internet
(Simon & Schuster 1996)*

Finally, students are encouraged to share with the class additional sources of relevant material discovered from their own on-line text searches.

*** Class Policies**

+ Attendance. Except as noted below, no formal attendance will be taken, but absences can't help but be mentally noted by the instructor. For administrative reasons, SLAIS has asked that the instructor note who is in attendance during the first two weeks of class. Given that the class will only be held once a week, students should make every effort to attend, and to arrive on time.

+ Taping. *No classes may be taped without the instructor's specific permission, which will not be given except in extraordinary circumstances.*

+ Class Participation and Discussion. *Active class discussion and collaboration will be encouraged. However, the instructor also holds very strong — and unusual — views on this topic: absent highly special circumstances, the instructor will not specifically request, direct, or "call upon" a particular student to respond to a pending question (i.e., discussion questions will be open for anyone to answer). The instructor understands that silence does not mean lack of active interest in a discussion topic, but encourages everyone to participate actively and to the degree they feel comfortable in doing so.*

+ Preparation. *This is a heavy reading course, involving sometimes grappling with difficult technical and legal issues. However, other than required texts, the instructor expects students to choose to read only a portion of the many recommended optional reading materials. Reading assignments may include hyperlinks to online sites; in such cases, students have the responsibility of either reading online, or downloading to printed form as they wish.*

+ Class Format. *Informal. A variety of formats may be employed, including: occasional use of lecture by the instructor; full class discussion; break-out into small groups followed by presentations to the full group; and volunteered individual presentations on one or more special topics based on online research. Towards the end of the semester, students will be expected to present the details of their completed term project to the class. A field trip to an ISP and/or a guest lecturer may be included.*

+ Course Requirements and Grading. *There will be no tests or exams. This course is in the nature of a writing seminar, with each student required to submit a complete, substantial research and writing project involving one aspect of cyberspace law. Students should aim for writing approximately 25 pages (or the electronic equivalent), not counting footnotes, citations, and/or references. Before the mid-term break, students will be asked to submit a suitable topic proposal related to the course for instructor approval. (A list of possible topics will be given out in the first class.) The deadline for submission of projects will be no later than 5 p.m. on the Thursday of the week prior to the week when the student is scheduled to make his or her project presentation, for copying and distribution to class members on the Friday before the scheduled class. (The instructor will work out the final schedule of class presentations during the mid-term break and post it at that time.)*

In addition, the instructor expects to hand out a take-home uniform final assignment, in the nature of a required essay of not more than 10 pages in length.

Grades will be predominantly based on the term project (60%), but will also include the final essay (20%) and class discussion (20%). Positive contributions made to class discussion on an ongoing basis will enhance the student's grade; however, a student's failure to make contributions to class discussion will not detract from the grade. Repeated, unexcused absenteeism from class will result in deductions taken from the final grade.

* **Withdrawals**

Students wishing to withdraw from this course without any record on their transcript must do so before Tuesday, January 18, 2000. Students wishing to withdraw from this course with a withdrawal standing of "W" on their transcript must do so before Friday, February 11, 2000.

* **Office Hours Policy**

Office hours are Wednesdays, 3 pm - 5 pm. and Thursdays, 10:30-12, for walk-in. Other times may be available if reservations are made in advance by e-mail or phone.

* **Course Syllabus/Reading Assignments**

This outline covers some, but not all, of the topics to be examined during the semester, and provides legal and Web references, including citations to Westlaw and preliminary links (URLs) to sites on the World Wide Web of interest. The instructor encourages students to provide additional links to materials of relevance and interest to the class. During most classes, the instructor will hand out a list of questions and additional reading and other assignments for the next class (with copies of what is handed out also available on the e-mail class list).

*Note: (H) indicates text found in Custom Course Outline handout
(R) indicates text will be on reserve in SLAIS reading room*

Topic 1. Introduction & Internet 101, Part 1

Discussion of seminar requirements, students' background and interests, and possible writing topics. Will begin substantive overview of the history and architecture of cyberspace, including technical aspects of the medium.

Required reading:

(H) *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), read "Findings of Fact" only, at pages 830 thru 849

Optional readings:

(R) *Leiner et al., "A Brief History of the Internet" (1997)*
<<http://www.isoc.org/internet-history/brief.html>>

Jeffrey K. MacKie-Mason and Hal Varian, Economic FAQs about the Internet (1994)
(1995) <<http://www.virtualschool.edu/mon/Economics/VarianInternetEconomics.html>>

Topic 2. Internet 101, Part 2: Architecture & Governance

Continue discussion of architecture of cyberspace, with special focus on the evolution of the domain name system; current issues surrounding governance of the Internet, including examination of ICANN.

Required readings:

RFC 1591: Domain Name System Structure

<<http://www.pmg.lcs.mit.edu/cgi-bin/rfc/view?1591>>

- (H) *Lockheed Martin v. Network Solutions*, 985 F. Supp. 949 (C.D. Cal. 1997), aff'd, — F.3d — (9th Cir. Oct. 25 1999)
- (H) *PGMedia v. Network Solutions Inc. & Nat'l Science Foundation*, 51 F.Supp.2d 389 (S.D.N.Y. 1999)
- (R) U.S. Dep't of Commerce, "Management of Internet Names and Addresses, Statement of Policy," 63 Fed. Reg. 31,741 (June 10, 1998)

Browse the following sites:

<http://www.icann.org>

<http://www.w3c.org>

<http://www.ietf.org>

<http://www.ntia.doc.gov>

Optional readings:

- (R) *Lessig, Reading the Constitution in Cyberspace*, 45 Emory L.J. 869 (1996)
< <http://www.law.emory.edu/ELJ/volumes/sum96/lessig.html> >
- (R) *Reidenberg, Governing Networks and Rule-making in Cyberspace*, 45 Emory L. J. 912 (1996)
< <http://www.law.emory.edu/ELJ/volumes/sum96/reiden.html> >
- (R) *Reidenberg, "Lex Informatica: The Formulation of Information Policy Rules Through Technology"*, 76 Texas L. Rev. 553 (1998),
< <http://www.si.umich.edu/~presnick/reidenberg> >

"A Framework for Global Electronic Commerce," The White House, July 1, 1997

< <http://www.ecommerce.gov/frameworkr.htm> >

Topic 3: Electronic Recordkeeping, Metadata, and Virtual Archives

Will discuss key cases involving recordkeeping in cyberspace, with special focus on e-mail retention, forms of metadata

Required reading:

- (H) *Armstrong v. Executive Office of the President*, 810 F. Supp. 335 (D.D.C.), *aff'd*, 1 F.3d 1274 (D.C. Cir. 1993) (read both district and circuit court opinions)
- (H) *Public Citizen v. Carlin*, 2 F. Supp.2d 1 (D.D.C. 1997), *reversed*, 184 F. 3d 900 (D.C. Cir. 1999) (read both district court and circuit court opinions)
- (H) J.R. Baron, "E-mail Metadata in a Post-Armstrong World," Paper in Metadata '99: Third IEEE Computer Society Metadata Conference, < <http://computer.org/conferen/proceed/meta/1999/papers/83/jbaron.html> >
- (H) Charles N. Faerber, "Book versus Byte: The Prospects and Desirability of a Paperless Society," 17 J. Marshall J. Computer & Ino. L. 797 (1999)

Optional reading:

- (R) Jeff Rothenberg, "Ensuring the Longevity of Digital Documents," *Scientific American* (Jan. 1995)

NOTE: Term project outlines due at start of class

Topic 4: Privacy, Anonymity, Consumer Protection

Topics covered to include audit trails, transactional data, anonymous remailers, cookies; U.S. and international privacy initiatives; international data flows

Required reading:

- (H) Anne Wells Branscomb, "Anonymity, Autonomy and Accountability: Challenges to the First Amendment in Cyberspaces," 104 Yale L.J. 1639 (1995)

U.S. Dep't of Commerce, Privacy, and Electronic Commerce (June 1998)

< <http://www.doc.gov/ecommerce/privacy.htm> >

OECD Guidelines

< <http://www.oecd.org/dsti/sti/it/secur/prod/PRIV-EN.HTM> >

European Union Directive 95/46/EC

< <http://europa.eu.int/comm/dg15/en/media/dataprot/law/dir9546.htm> >

Browse the following sites:

< <http://e-com.ic.gc.ca/english/index.html> >

Optional reading:

- (R) *Tom S. Onyshko et al., "Privacy and the Internet: Recent Developments in Canada, U.S. and Europe," 4 No. 2 Cyberspace Lawyer 2 (1999)*
- Principles of Consumer Protection for Electronic Commerce: A Canadian Framework (August 1999)*
<http://strategis.ic.gc.ca/ca0.1185e.html>
- (R) *Federal Trade Comm'n, "Privacy Online: A Report to Congress," June 1998*
- (R) *"Web of Deception: Threats to Children From Online Marketing," report by Center for Media Education (Washington, D.C. 1996)*
- (R) *Susan E. Gindin, "Lost and Found in Cyberspace: Informational Privacy in the Age of the Internet," 34 San Diego L. Rev. 1153 (1997)*
- (R) *Froomkin. "Flood Control on the Information Ocean, Living With Anonymity, Digital Cash, and Distributed Databases," 15 U. Pitt. J. of Law and Commerce 395 (1996)*
 < <http://www.law.miami.edu/~froomkin/articles/ocean.htm> >

Topic 5: Security, Encryption

Required reading:

- (H) *Bernstein v. Dep't of Justice, 922 F. Supp. 1426 (N.D. Cal. 1996), aff'd in relevant part, 176 F.3d 1132 (9th Cir. 1997)*

Hearings before the Subcomm. on Constitution, Federalism and Property Rights of the U.S. Senate Comm. on Judiciary, 105th Cong., 2d Sess. March 17, 1998 (Testimony of Cindy Cohn)

< http://www.eff.org/pub/Legal/Cases/Crypto_export/Bernstein_DoJ/19980317.testimony >

- (R) *Michael Foomkin, "The Metaphor Is the Key: Cryptography, the Clipper Chip and the Constitution, 143 U. Penn. L. Rev. 709 (1995)*

Optional reading:

RSA Cryptography FAQ

< <http://www.rsasecurity.com/rsalabs/faq/> >

- (H) *Michael Froomkin, "The Essential Role of Trusted Third Parties In Electronic Commerce," 75 Oregon L. Rev. 49 (1996)*

Topic 6 (2 classes): Free Speech, Content Control, Ratings and Filters

Can "low value" content in cyberspace (pornography; hate speech; bomb-making) be regulated?; how filtering policies affecting libraries and other public institutions are evolving

Class 1

Required reading:

- (H) *Text of U.S. Communications Decency Act (1996)*
< http://www.cdt.org/policy/freespeech/12_21.cda.html >
- (H) *ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996) (see Topic 1 section)*
- (H) *Reno v. ACLU, 117 S. Ct. 2329 (1997)*
- (H) *Text and Legislative History of U.S. Child Online Protection Act (1998)*
- (H) *ACLU v. Reno II, 31 F.Supp.2d 473 (E.D. Pa. 1999)*
- (H) *ALA v. Pataki, 969 F.Supp. 160 (N.D.N.Y. 1997)*
- (H) *Charles Nesson and David Marglin, "The Day the Internet Met the First Amendment: Time and the Communications Decency Act," 10 Harv. J. L. Tech. 113 (1996)*

Optional Reading:

- (R) *Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996)*
- (R) *Anthony L. Clapes, "The Wages of Sin: Pornography and Internet Providers," 13 No. 7 Computer Law 1*
- (R) *Dawn A. Edick, "Regulation of Pornography on the Internet in the U.S. and the United Kingdom: A Comparative Analysis," 21 Boston College International and Comparative L. Rev. 437 (1998)*

Eugene Volokh, "Freedom of Speech, Shielding Children, and Transcending Balancing," 1997 Sup. Ct. Rev. 141

< <http://www.law.ucla.edu/faculty/volokh/shield.htm> >

Class 2

Board of Education v. Pico, 457 U.S. 853 (1982)

< <http://caselaw.findlaw.com/scripts/getcase.pl?navby=case&court=US&vol=457&page=853>>

- (H) *Mainstream Loudon v. Board. of Trustees of Loudoun County Library, 2 F.Supp.2d 783, 24 F.Supp.2d 552, (E.D. Va. 1998)*

Ann Beeson & Chris Hansen, "Fahrenheit 451.2: Is Cyberspace Burning?"
< <http://www.aclu.org/issues/cyber/burning.html> >

- (H) *Paul Resnick, et al. , "PICS: Internet Access Controls Without Censorship"*
< <http://www.w3.org/WWW/PICS/iacwc.htm> >

Web site advocating library filtering
<http://www.filteringfacts.org/da-main.htm>

Jonathan D. Wallace, "Purchase of Blocking Software By Public Libraries Is Unconstitutional"

< <http://www.spectacle.org/cs/library.html> >

Browse following sites:

< <http://www.cyberpatrol.com> >

< <http://www.xstop.com/index.html> >

< <http://www.websense.com/hottopics/freq.html> >

Optional reading:

- (R) *Kimberly S. Keller, "From Little Acorns Great Oaks Grow: The Constitutionality of Protecting Minors from Harmful Internet Material in Public Libraries," 30 St. Mary's L.J. 549 (1999)*
- (R) *R. Polk Wagner, "Filters and the First Amendment," 83 Minn. L. Rev. 755 (1999)*

Topic 7: Jurisdiction, Part 1; Gambling; other crimes

The law of "minimum contacts" to establish jurisdiction; conflicts in laws on an international scale; state and country attempts to regulate illegal activities

Required reading:

Asahi Metal Industry v. Superior Court, 480 U.S. 102 (1987)

Burk, Jurisdiction in a World Without Borders, 1 Va. J.L. & Tech. 3 (Spring 1997)

< http://vjolt.student.virginia.edu/graphics/vol1/home_art3.html >

- (H) *Pierre Trudel, "Jurisdiction Over The Internet: A Canadian Perspective," 32 Internat'l Lawyer 1027 (1998)*
- (H) *Compuserve, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996)*

- (H) *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996)
- (H) *Benusan Restaurant Corp. v. King*, 126 F.3d 25 (2d Cir. 1997)
<<http://www.jmls.edu/cyber/cases/blue2.html>>
- (H) *Playboy Enterprise v. Chuckleberry*, 939 F. Supp. 1032 (S.D.N.Y. 1996)
< <http://www.jmls.edu/cyber/cases/playmen.txt> >
- (H) *Zippo Manufacturing Co. v. Zippo Dot Com*, 952 F. Supp. 1119 (W.D. Pa. 1997)
< <http://www.bna.com/e-law/cases/zippo.html> >

Optional reading:

- (R) *Joanna B. Bossin, Note & Comment, What Constitutes Minimum Contacts in Cyberspace after CompuServe, Inc. v. Patterson: Are New Rules Necessary for a New Regime?*, 13 Ga. St. U. L. Rev. 521 (1997)
- (R) *Marc L. Caden & Stephanie E. Lucas, "Accidents on the Information Superhighway: On-line Liability and Regulation," 2 Rich.J.L. & Tech. 3 (1996)*
- (R) *Michael Adler, "Cyberspace, General Searches and Digital Contraband: The Fourth Amendment and the Net-Wide Search," 105 Yale L.J. 1093 (1995).*
- (R) *Henry Perritt, "Jurisdiction in Cyberspace," 41 Villanova L. Rev. 1 (1996)*

Topic 8: Copyright, Trademark, and "Information Ownership"

Required readings:

- Dan L. Burk, "Trademarks Along the Infobahn: A First Look At The Emerging Law of Cybermarks," 1 Richmond J.L. & Tech. 1 (1995)*
< <http://www.urich.edu/~jolt/v1i1/burk.html> >
- I. Trotter Hardy, "Contracts, Copyright and Preemption in a Digital World," 1 Richmond J.L. & Tech. 2 (1995)*
< <http://www.urich.edu/~jolt/v1i1/hardy.html> >
- (H) *Kimberly Hancock, "Canadian Copyright Act Revisions," 13 Berkeley Tech. L. J. 517 (1998)*
- (H) *Religious Technology Center v. Netcom*, 907 F. Supp. 1231 (N.D. Cal. 1995), *later opinion*, 907 F. Supp. 1361 (N.D. Cal. 1995)
- (H) *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993)

Optional readings:

- (R) *Sheldon Burshtein, "Surfing the Internet: Copyright Issues in Canada," 13 Santa Clara Computer & High Tech L.J. 385 (1997)*
- (R) *Richard Pearse, "Library Open-Distribution Systems and Copyright Infringement in Canada and the United States," 86 Law Libr. J. 399 (1994)*
- (R) *Jane C. Ginsburg, "Putting Cars on the 'Information Superhighway': Authors, Exploiters, and Copyright in Cyberspace," 95 Colum. L. Rev. 1466 (1995)*

Cohen, Some Reflections on Copyright Management Systems and Laws Designed to Protect Them, 12 Berkeley Tech. L.J. 161 (1997)

< <http://www.law.berkeley.edu/journals/btlj/articles/12-1/cohen.html> >

Stefik, Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us To Rethink Digital Publishing, 12 Berkeley L.J. (1997)

< <http://www.law.berkeley.edu/journals/btlj/articles/12-1/stefik.html> >

David W. Maher, Trademark Law on the Internet--Will It Scale? The Challenge to Develop International Trademark Law, 16 J. Marshall J. Computer & Info. L. 3 (1997)

EFF "Intellectual Property Online Patent, Trademark, and Copyright Archive

http://www.eff.org/pub/Intellectual_property/

Topic 9: Defamation, harrasment, spamming, linking, framing
Rules governing defamation, harrassment, annoyance in cyberspace; e-mail spamming; and linking and framing within domain name system

Required reading:

- (H) *Keeton v. Hustler, 465 U.S. 770 (1984)*
- (H) *Cubby v. Compuserve, 776 F. Supp. 135 (S.D.N.Y. 1991)*
- (H) *Stratton Oakmont, Inc. v. Prodigy Services Co.,*
- (H) *Zeran v. America Online, Inc., 958 F. Supp. 1124 (E.D. Va. 1997)*
- (H) *Blumenthal v. Drudge and AOL, 992 F. Supp. 44 (D.D.C. 1998)*
- (H) *Cyber Promotions, Inc. v. America Online, Inc., 948 F. Supp. 436 , (E.D. Pa. 1996) (see pp. 447 & 456 especially)*

< www.jmls.edu.cyber/1998-2/syllabus.html > **linking, framing**

Browse following sites:

< <http://help.mp3.com/help/rookie> >

< <http://www.annoy.com> >

Optional reading:

- (R) *Comment, "Applying the Fair Use Defense in Traditional Trademark Infringement and Dilution Cases To Internet Meta-tagging or Linking Cases," 7 George Mason L. Rev 787 (1999)*

Topic 10: Jurisdiction, Part 2: Role of Law, Deep Questions About The Future of The Internet

Is there a law of cyberspace? ; convergence; future cyberspace applications and emerging issues

David Johnson & David Post, "Law and Borders--The Rise of Law in Cyberspace," 48 Stan. L. Rev. 1367 (1996)

< http://www.cli.org/X0025_LBFIN.html >

Lawrence Lessig, "Constitution and Code," 27 Cumberland L. Rev. 1 (1996-7)

John Perry Barlow, "Is There A There In Cyberspace?"

< http://www.eff.org/pub/Publications/John_Perry_Barlow/HTML/utne_community.html >

Optional Reading:

- (R) *Jack L. Goldsmith, "Against Cyberanarchy," 65 U. Chi. L. Rev. 1199 (1998)*

Topic 11 (2 weeks): Student term projects.