



2018 - Washington Update

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HPA Tech Retreat

Thompson Coburn LLP



Introduction

- Intellectual Property
 - The Congress
 - The Courts
 - Copyright 101
 - The Cases
- Communications – Net Neutrality
- If time, questions; otherwise available at roundtable breakfast tomorrow

Administrative – Legislative Developments

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Library of Congress: Register of Copyright Legislation



- Hint: At your peril – tell Congress you don't want to work for your boss!
- Register of Copyrights Selection and Accountability Act of 2017 (H.R. 1695)
 - Registrar appointed by POTUS
 - Passes House 378-48
 - April – referred to Senate Committee on Rules and Administration
 - Chairman Shelby – “Excuse me?”
- Music Modernization Act – fix this mess please!

Litigation

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Photo credit: Jonathan Satriale

Copyright 101 – In Two Slides



- Stole it from the English
- Constitution gives Congress the power:
 - *To promote the Progress of Science ... by securing for limited times to Authors ... the exclusive Right to their ... Writings*
 - In 1787 Science meant learning
- Protects original expression not ideas – Romeo & Juliette vs. West Side Story

Copyright 101 – Slide Two

■ Bundle of rights:



- Reproduction
- Derivative works – e.g., movies based on a book
- Public Performance/Display



■ 2nd Liability

■ Exceptions & Limitations: Fair use – four factor non-exclusive test

- Nature & character of use (commercial vs. educational or transformative, e.g., parody)
- Nature of the work – fiction vs. factual
- Amount used
- Effect of the use on the value of the work including potential market

■ DMCA – anticircumvention provision and §512 safe harbor



VidAngel 

Disney Enterprises, Inc. v. VidAngel, Inc. (9th Cir. 2017)



- Background: VidAngel appeals trial court loss to 9th Circuit of its unlicensed “filtering” streaming service
- Shocking: Jim files amicus brief supporting Studios: Studios & Jim Win!!!
 - DVD Decryption violated DMCA
 - Server copies infringing
 - Streams infringing public performance
- 9th Circuit rejects VidAngel defenses
 - First Sale
 - Family Movie Act
 - Fair Use
- New VidAngel “system:” seeks declaratory judgment in Utah District Court
- Files for bankruptcy to freeze studio suit
- Just filed appeal of its antitrust loss

Seuss Cases – Version One: Lombardo v. Dr. Seuss Enterprises, L.P. (SDNY 2017)



- Author of *Who's Holiday* play sought declaratory judgment against *How the Grinch Stole Christmas* copyright holder
- You all know *Grinch* story
- *Who's Holiday* features down-and-out 45-year-old Cindy Lou Who, Grinch had impregnated her, she kills him when he abuses her, she's incarcerated, an alcoholic and substance abuser, and lives in a trailer on Mt. Crumpet
- Held a fair use parody – four factor test
 - 1st – transformative parody – parodies the work
 - 2nd – while fiction: fair use sheep/infringing goats
 - 3rd – amount taken reasonably related to purpose of copying
 - 4th – doesn't usurp current market and no impact on potential “traditional, reasonable, or likely to be developed markets”

Suess Cases – Version Two: *Dr. Seuss Enterprises, L.P. v. Comicmix LLC* (SD CA 2017)



- Comicmix creates *Oh, the Places You'll Go Boldly!*
 - Seuss & *Star Trek* Mash
 - Comicmix claims fair use
- Judge's decision – Four fair use factors
 - 1st – Transformative – for Defendant
 - 2nd – Type of work – slightly for Plaintiff
 - 3rd – Amount – neutral
 - 4th – Harm – Court found *Boldly* the type of work Seuss “would in general develop or license others to develop”
- Court: “fair use defense fails as a matter of law”

No Litigation Photo's or Music

Imagine a photograph of Dr. Phil in this space

Please hum the Dr. Phil theme song

Imagine MC introducing Dr. Phil

Peteski Productions, Inc. v. Rothman

(ED TX 2017)



- California civil case by Rothman: false imprisonment, emotional distress, etc. gives lawyers copied 9-sec outtake of day's shoot
- Dr. Phil production company sues in ED TX for infringement
- Judge Gilstrap denies fair use and finds 9-second clip from archive of day's footage for use in CA case infringing
- No fair use
 - 1st – breach of employment agreement weights against purpose & character
 - 2nd – mixed fact/fiction, neutral but unpublished (*Harper & Row*)
 - 3rd – only 9-second clip registered so copied whole work
 - 4th – Plaintiff failed to show market impact
 - Repeats agreement breach: judgment for Plaintiff

Sid Bernstein Presents, LLC. v. Apple Corps Limited (SDNY 2017)



- Hint: Read the Agreement!
- Famous Beatles promoter's LLC claims it owns copyright to Shea concert video
- Bernstein contracted with Beatles' management company – Nems:
 - To supply Beatles and complete show
 - Nems had “sole and exclusive” right to video
 - Bernstein to bar other videographers
- Nems and successors create TV and movies using the “Master Tapes”
- 2015 LLC “learned” of movie registration, LLC attempts to register – Copyright Office says no
- Bernstein LLC claims work for hire, loses suit
- No sanctions—“long shot theory” not necessarily sanctionable

Perfect 10 v Giganews (9th Cir. 2017)

- Perfect 10 sued Giganews for direct and secondary infringement based on Usenet users posting Perfect 10 pictures
- Rejects Perfect 10's argument: *Aereo* eliminated volitional-conduct requirement, instead narrowly interprets Breyer opinion (“looks like cableTV”)
- Found Giganews lacked volitional conduct for direct infringement – passively storing Users' posts, did honor §512 Take Down Notices
- No contributory infringement: Perfect 10 failed to show material contribution or inducement
- Vicarious – no showing of a causal link between infringing conduct and Giganews financial benefit
- Breaking news: *Goldman v. Breitbart* – SDNY demurs

BMG Rights Management (US) LLC v. Cox Communications, Inc. (4th Cir 2018)



- DMCA safe harbor requires ISP to reasonably implement a “policy that provides for the termination in appropriate circumstance” of repeat offenders
- Cox had **13-strike** policy, after receives copyright holder notice:
 - Strike 1 – no action
 - Strikes 2-7 – warning emails
 - Strikes 8-9 – access only to single page: but click to reactivate
 - Strikes 10-11 – suspension, call a techie: who warns again and reactivates
 - Strike 12 – suspended, directed to special techie: another warning and reactivates
 - Strike 13 – suspended, considered for termination, no auto termination
- Also Cox
 - Limited number of notices per day from any copyright holder
 - Counted only one notice per subscriber per day
 - Reset users’ 13-strike counter every six months
- Cox blacklisted notices from BMG because of notice’s settlement offer to infringing subscribers

BMG Rights Management (US) LLC v. Cox Communications, Inc.

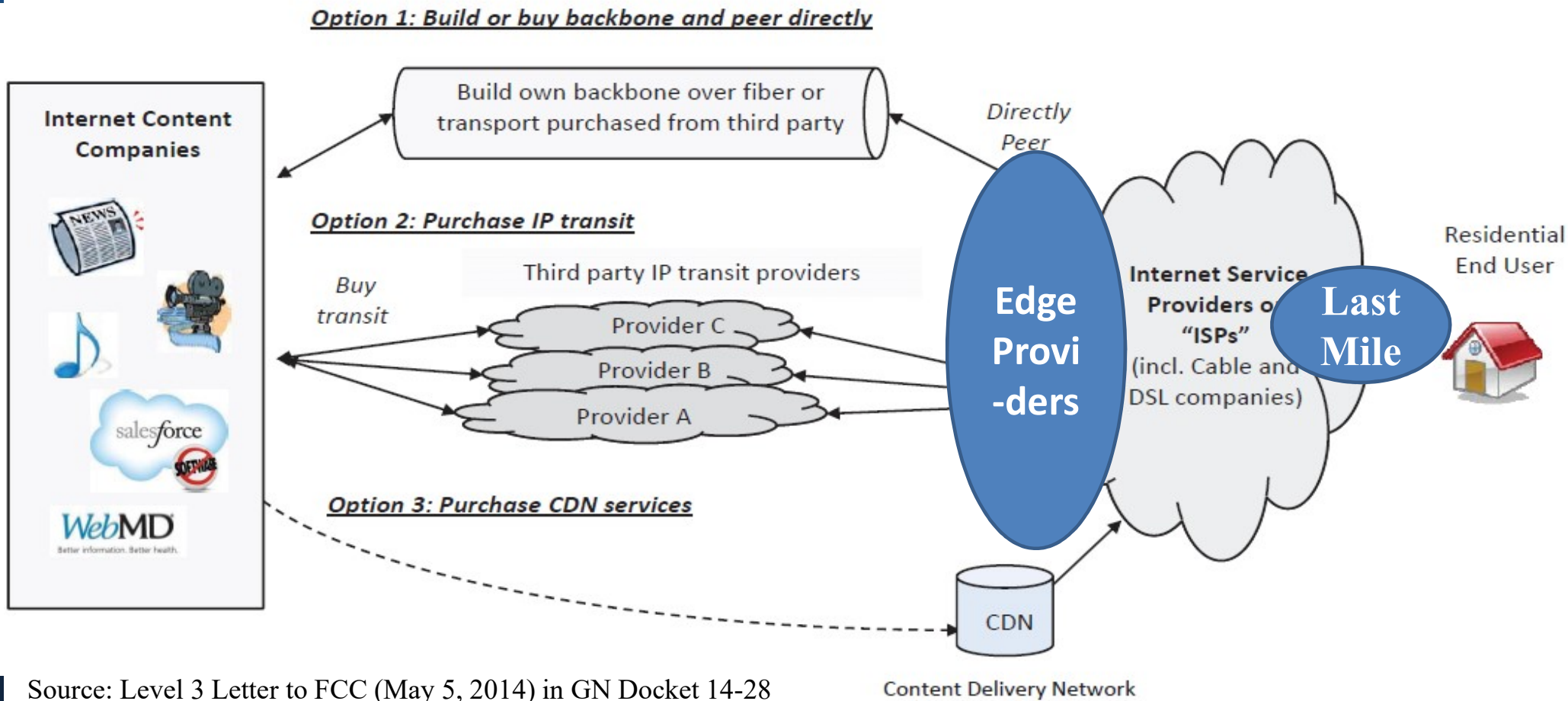


- Trial Court denies DMCA Safe Harbor, finds contributory liability - \$25 million, plus costs and attorneys' fees – Cox Appeals
- 4th Circuit notes: from start of case to Sept. 2012, never terminated a subscriber, *always* reactivated
- After Sept. didn't terminate and reactive, simple didn't terminate
- Careful what your email says “[t]his customer pays us over \$400/month ... [e]very terminated Customer becomes lost revenue.”
- 4th Circuit upholds denial of safe harbor – no reasonable implementation of repeat offender termination policy
- Court remands on contributory infringement jury instruction: not “knew or should have known” but test is “knew or was willfully blind”

7 THINGS YOU CAN STILL DO ON THE INTERNET AFTER NET NEUTRALITY



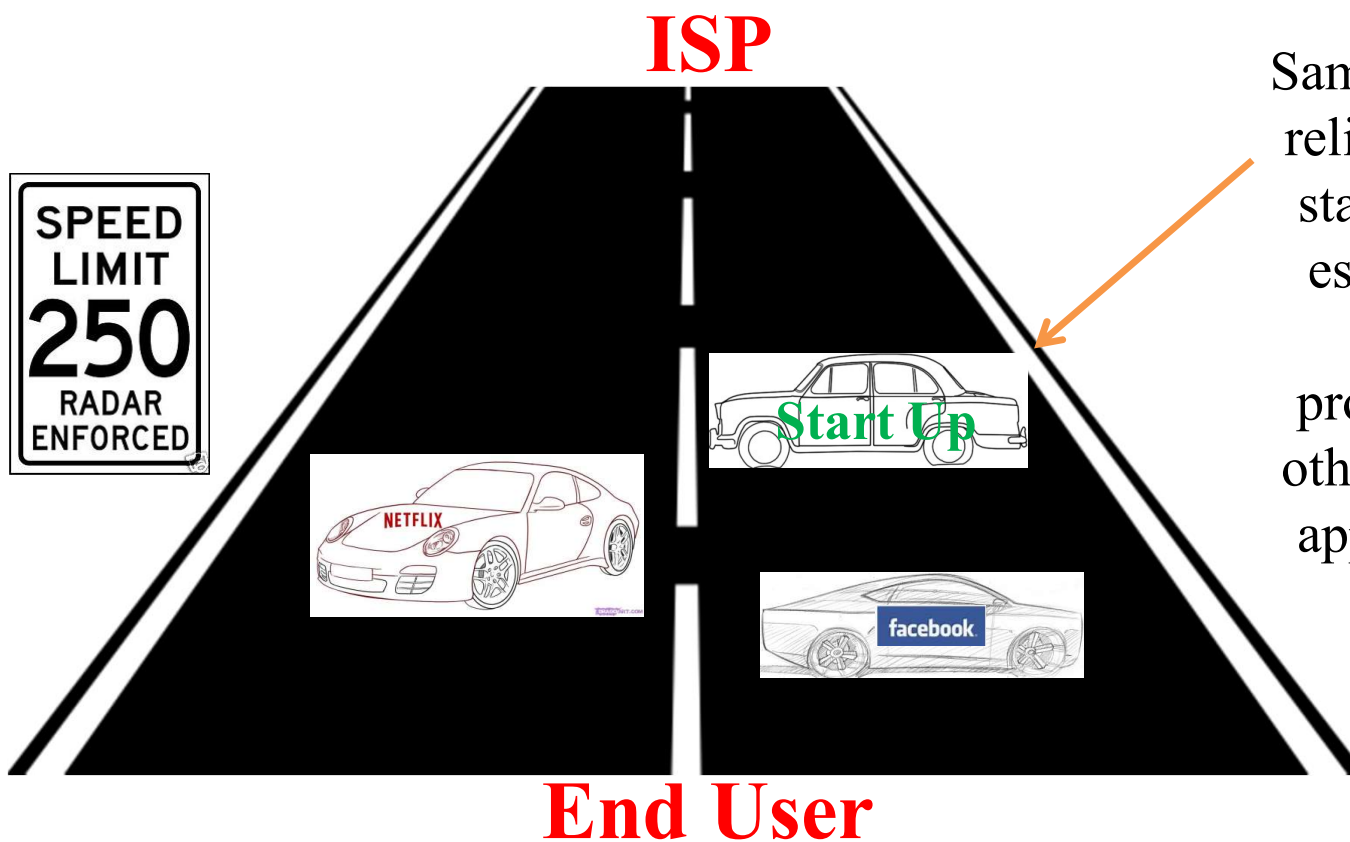
Net Neutrality: Overview of Internet Topography



Source: Level 3 Letter to FCC (May 5, 2014) in GN Docket 14-28

All Traffic Treated Equally by ISPs Under Obama FCC Net Neutrality

All traffic transmitted at the same speed and reliability



Same speed or reliability for startups and established OTT providers or other Internet applications

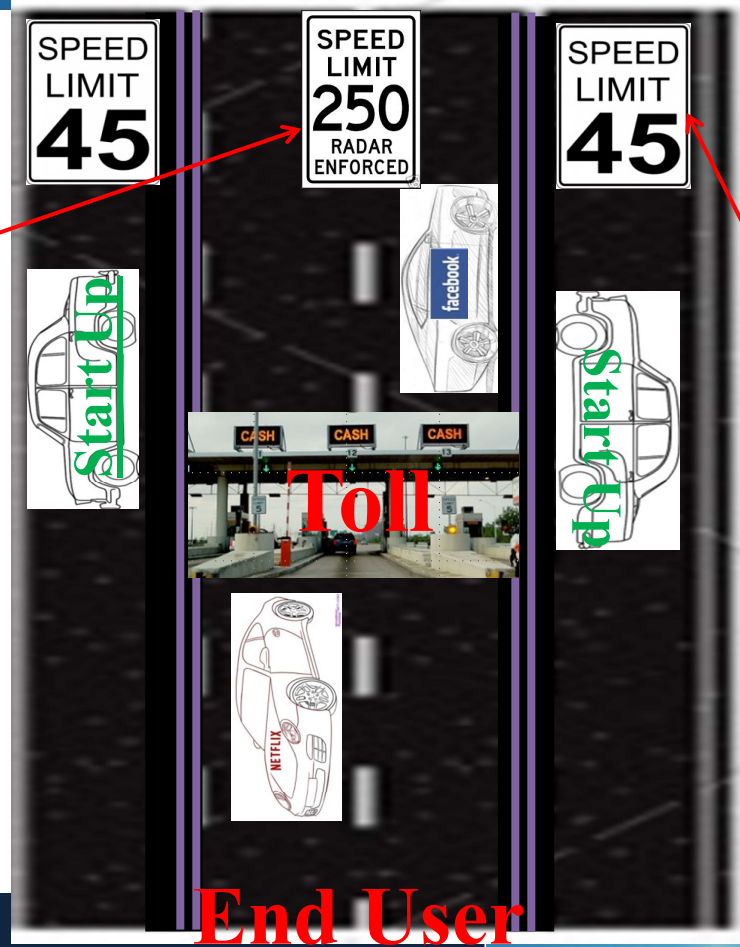
Fast Lanes Without Net Neutrality



ISP

Concern ISPs may create “fast lanes” and allow pay for speed

Concern ISP throttles down other traffic



End User

FCC Net Neutrality Rule – A New Commission



- Last year – Wheeler FCC wins in court, but new Trump FCC
- 3-2 vote Pai FCC repeals Net Neutrality rule that had required ISPs to treat all web traffic equally
- ISPs able to block or slow web traffic – but will have to disclose practices
- Waiting for FCC implementation timetable
- Meanwhile ...

FCC Net Neutrality Rule – Aftermath



- State Attorney Generals and net neutrality advocates petition US Court of Appeals for review
- Some in Congress trying to overturn the Pai Commission vote, others introduce own Net Neutrality bills
- State net neutrality bills
- state procurement rules requiring net neutrality

Digital Copyright

- User-Generated Content (UGC)
 - DMCA "notice & takedown"
 - Duty to police?
- *Viacom v. YouTube*

Thank you

Questions at Roundtable Tomorrow

Thank you



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