

Legal Framework

CIS 381

Resources

- http://en.wikipedia.org/wiki/First_Amendment#Freedom_of_speech
- http://en.wikipedia.org/wiki/Fourth_Amendment_to_the_United_States_Constitution
- http://en.wikipedia.org/wiki/Foreign_Intelligence_Surveillance_Act

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- **THIS IS NOT LEGAL ADVICE.** You should not rely on anything I say here to guide you in any specific situation. If you are faced with a legal problem, you should seek advice from a competent attorney. Intellectual property problems can be complex and should be discussed fully with a competent and qualified attorney who represents YOU.

American Legal System and Sources of Law

Federal v. State Systems and Jurisdictional Principles

- **Generally, the federal and state systems coexist and share power**

Federal v. State Systems and Jurisdictional Principles

- **First Exception - any instance where power is granted exclusively to the federal government**

Federal v. State Systems and Jurisdictional Principles

- **Second Exception - any instance where power is exclusively reserved to the states**
 - Power is reserved to the states where the U.S. Constitution fails to grant the power to the federal government

The Federal System

- **System of Limited, Enumerated Powers**
 - Executive, Congressional, Judiciary
 - Checks and balances
- **Constitutional**

The State System

- System of General Police Powers
- Broad Oversight Ability

Sources of Law

- U.S. Constitution
- Statutory Law
- Common Law

The United States Constitution

- Supreme law of the land
- Delegates power to the federal government from the states
- Provides baseline protections for all United States citizens

Statutory Law

- Law made by Legislatures

Common Law

- General Rules of Society and Social Interaction
- a/k/a Decisional Law
 - Found in the written decisions of state courts

Precedence of Laws

- Constitution
 - Statutes
 - Common law

First Amendment (1)

- Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.



First Amendment (2)

- Textually, it prohibits the federal legislature from making laws that:
 - Establish a state religion or prefer certain religion (the "**Establishment Clause**");
 - Prohibit free exercise of religion (the "Free Exercise Clause");
 - Infringe the freedom of speech;
 - Infringe the freedom of the press;
 - Limit the right to assemble peaceably;
 - Limit the right to petition the government for a redress of grievances.

http://en.wikipedia.org/wiki/First_Amendment

But ...

- Espionage Act of 1917 imposed a maximum sentence of twenty years for anyone who caused or attempted to cause "insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States."
- The Sedition Act of 1918 went even farther, criminalizing "disloyal," "scurrilous" or "abusive" language against the government.
- The Smith Act (1940) made punishable the advocacy of "the propriety of overthrowing or destroying any government in the United States by force and violence."
- Patriot Act (2001) and Patriot Act II (2006)

http://en.wikipedia.org/wiki/First_Amendment#Freedom_of_speech

But ...

- The federal government and the states have long been permitted to restrict obscene or **pornographic** speech. While obscene speech generally has no protection under the First Amendment, pornography is subject to little regulation.
 - http://en.wikipedia.org/wiki/First_Amendment#Freedom_of_speech
- Need to explore issues related to obscenity/pornography by on the distribution media.
 - Oral speech, radio, tv, cable, internet
- Defamation, libel and slander

For us

- **Interest in**
 - **Speech**
 - What constitutes a speech act?
 - **Press**
 - What must you do to be classified as a publisher?

Fourth Amendment (1)

- The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.



Fourth Amendment (2)

- The first part provides protection against unreasonable searches and seizures, although historically there have been myriad ways in which unreasonable searches were remedied. Modern jurisprudence has afforded the police officers an incentive to respect the amendment.
- The second section of the amendment provides for the proper issue of warrants. When warrants are issued, there must be probable cause. Probable cause is tested using the "totality of circumstances" test

http://en.wikipedia.org/wiki/Fourth_Amendment_to_the_United_States_Constitution

Privacy

- In *Katz v. United States*, 389 U.S. 347 (1967), the Supreme Court ruled that there is no search unless an individual has an "expectation of privacy" and the expectation is "reasonable"—that is, it is one that society is prepared to recognize.

http://en.wikipedia.org/wiki/Fourth_Amendment_to_the_United_States_Constitution

But ...

- **Foreign Intelligence Surveillance Act of 1978 (FISA)**
 - The President may authorize, through the Attorney General, electronic surveillance without a court order for the period of one year provided it is only for foreign intelligence information; targeting foreign powers as defined by 50 U.S.C. §1801(a)(1), (2),(3) [or their agents; and there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party. [7]
 - The government may seek a court order permitting the surveillance using the FISA court. [Approval of a FISA application requires the court find probable cause that the target of the surveillance be a "foreign power" or an "agent of a foreign power", and that the places at which surveillance is requested is used or will be used by that foreign power or its agent. In addition, the court must find that the proposed surveillance meet certain "minimization requirements" for information pertaining to US persons.
 - Permits the "physical search" of the "premises, information, material, or property used exclusively by" a foreign power. The requirements and procedures are nearly identical to those for electronic surveillance.

http://en.wikipedia.org/wiki/Foreign_Intelligence_Surveillance_Act#Provisions_of_FISA

But ...

- **Patriot Act**

- In special cases covered by FISA (amended by the USA PATRIOT Act), the warrants may come from the Foreign Intelligence Surveillance Court (FISC) instead of a common Federal or State Court. FISC warrants are not public record and therefore are not required to be released. Other warrants must be released, especially to the person under investigation.⁷⁾

- A second complaint against Sneak-and-Peek searches is that the owner of the property (or person identified in business/library records) does not have to be told about the search. There is a special clause that allows the Director of the FBI to request phone records for a person without ever notifying the person. For all other searches, the person must be notified, but not necessarily before the search. The judge providing the warrant may allow a delay in notification when there is risk of: -endangering the life or physical safety of an individual;

- flight from prosecution; -destruction of or tampering with evidence;
 - intimidation of potential witnesses; or
 - otherwise seriously jeopardizing an investigation or unduly delaying a trial.

- http://en.wikipedia.org/wiki/Foreign_Intelligence_Surveillance_Act#Provisions_of_FISA

DoubleClick

- **In April 2000 the FTC brought a complaint against DoubleClick for its practice of collecting information on the internet sites visited by individuals without their knowledge, then using this to direct market ads when the individual visits one of its client's websites.**

Issues

Does DoubleClick have the right to gather the information without consent?

Does DoubleClick have the right to sell the information gathered without the consumer's consent?

Consumer's Core Principles

freedom from intrusion
control of personal information
freedom from surveillance

Framework

- **Consumer Privacy**
 - Privacy is not explicitly named as a right in the U.S. Constitution. The Supreme Court has found such a right in the "penumbra of rights" and many decisions explicitly turn on whether the aggrieved party had a reasonable expectation of privacy under these circumstances
- **DoubleClick's First Amendment Rights**
- **Individual's Fourth Amendment Rights**

IRS Problem

You work for the Information Processing section of the Internal Revenue Service (IRS). The IRS wants to use cookies on its website to track visitors to the site and to collect personal information. It also wants to read information from previously set cookies on the visitor's machine to see what other sites the visitor has viewed. The Federal Bureau of Investigation (FBI) wants the IRS to share this information with the Bureau. You are asked to write the software to implement these functions.
