

Weekly Digest (23 August 2010)

By Morris A. Singer

The main stories Law and Content is following for this week are those about net neutrality, patents, Apple and television episode rentals, the RIAA in a couple of different capacities, Oracle v. Google, a new study on industrial Germany and copyright, Facebook Places, privacy, and a few others.

Net Neutrality

There was some more muttering on the Google-Verizon net neutrality proposal this week, including a story about the actual technology that would drive it. Here are some important stories you might not want to miss:

- [Encrypted and obfuscated? Your P2P protocol can still be IDed](#) (25 Aug 2010)
Nate Anderson of Ars Technica details the work of a pair of Swedish security experts that explains how to identify the type of traffic moving across the Internet, even when the content itself is encrypted. This is particularly relevant in the context of net neutrality because identifying the kind of traffic could be a first step toward throttling it.
- [Franken goes ballistic on Verizon, Google, Comcast, and NBCU](#) (24 Aug 2010)
Matthew Lasar of Ars Technica describes Democratic Senator Al Franken's comments at Thursday's public hearing on Internet neutrality.

Patents

Although this blog usually does not cover patents, there were a couple of stories that might be important to readers. First is a major development of the patent systems of the European Community. Second is a new development from Lexmark, which is again trying to use intellectual property to protect its ink. Years ago, Lexmark had used access control measures and the Digital Millennium Copyright Act to attempt to prevent

consumers from refilling ink cartridges. Now, it looks like they're at it again. Here are the two stories:

- [Creation of Common EU Patent System Faces Legal Setback – PCWorld](#) (25 Aug 2010)
Jennifer Baker of IDG News reports that the European Court of Justice might block a common EU patent system for lack of a treaty basis. | I am curious to read the final ECJ opinion to learn how the proposed common EU patent system misses the mark for furthering the common internal market.
- [Lexmark sues 24 cartridge makers over patents | Circuit Breaker – CNET News](#) (24 Aug 2010)
Printer manufacturer Lexmark sues cartridge refillers for patent infringement. | Will this be the next attempt by Lexmark to use creative IP strategies to secure non-IP-based profits (think of Lexmark's use of DMCA)?

Apple

Apple made some waves this week with its attempt to work out television episode rentals. Here is some comprehensive coverage:

- [Apple Continues To Push Networks For 99 Cent Video But Switches To Rentals | paidContent](#) (25 Aug 2010)
Staci D. Ramer of PaidContent argues that Apple's plan to offer TV episode rentals is a compromise from its original plan to offer downloads of the content at \$0.99/each. She examines a subscription plan as an alternative pricing structure for Apple's initiative.
- [Report: Apple in Talks to Offer \\$1 TV Show Rentals | Epicenter | Wired.com](#) (25 Aug 2010)
Ryan Singel of Wired's Epicenter blog reports Apple's plan with Fox/News Corp to bring TV episode rentals to iPad, iPod, iPhone.

Recording Industry Association of America

The Recording Industry Association of America (RIAA) never seems to leave the news. This week, they advocated for using net neutrality as a platform to launch "three strikes" in the U.S. Also, they took some heat for their proposal to require mobile devices contain FM radio receivers:

- [RIAA: Google/Verizon deal needs yet another gaping loophole](#) (23 Aug 2010)
RIAA wants three-strikes to be part of net neutrality.

- [RIAA: U.S. copyright law 'isn't working' | Politics and Law – CNET News](#) (25 Aug 2010)
Declan McCullagh of CNet reports on the Recording Industry Association of America's claim that U.S. copyright law "isn't working" because it places the burden on the content producer to find infringement on the web.
- [CEA calls out broadcasters over cell phone-FM radio wishlist](#) (24 Aug 2010)
Nate Anderson of Ars Technica reports that the Consumer Electronics Association has responded to the Recording Industry Association of America's and the National Association of Broadcasters' lobbying effort to persuade Congress to require FM receivers in all mobile devices.

Oracle v. Google

Continued coverage of Oracle's lawsuit against Google. Lots of rhetoric here:

- [Oracle-Google Suit Attacks Open Source Software | Threat Level | Wired.com](#) (23 Aug 2010)
David Kravets of Wired's blog, Threat Level, review early blogosphere reaction to the Oracle-Google lawsuit over Java and Dalvik.
- [Oracle's Android lawsuit: A Pandora's box of serious evils | Intellectual property – InfoWorld](#) (23 Aug 2010)
Martin Heller of InfoWorld explains the Oracle-Google lawsuit over Dalvik, the Java-like virtual machine in the Android. He lists the patents that Oracle alleges Google infringed.
- [Update: Oracle sues Google over Java use in Android – Computerworld](#) (23 Aug 2010)
According to Gartner analyst Ken Dulaney, the lawsuit could turn on whether "Google did a purely clean-room Java [build] or if they have someone with inside knowledge of the code." This is only partially correct because patent infringement does not depend on actual copying.
- [Open IT Strategies: Last gasp of Sun's semi-openness](#) (23 Aug 2010)
Joel West, on his Open IT Strategies blog quotes a Gartner analyst's note that Google developed its Java-like Dalvik virtual machine using a clean-room environment. This would be a fantastic defense against a claim of copyright infringement, but wouldn't help in a patent action.
- [Oracle Sues Google For Infringing Java Patents](#) (23 Aug 2010)
This article from Bruce Perens contains the text of the patent grant that comes with using Java. || It might be clear why Oracle is suing Google.

- [Oracle Wields Java as a Weapon – PCWorld](#) (23 Aug 2010)
Was Oracle’s intent in buying Sun to turn Sun’s intellectual property, including Java, into weapons against contenders, including Google? Brian Proffitt, of ITworld / PCWorld claims, yes.
- [Oracle’s Fall from Tech Giant to Patent Troll – PCWorld Business Center](#) (23 Aug 2010)
Calling Oracle a patent troll because it acquired sun and then later sued Google over its use of Java. The article appeals to rhetoric, calling Oracle a “Don Quixote,” “Captain Ahab,” and “coula been . . . contender.”
- [Why Oracle was right to sue Google | Developer World – InfoWorld](#) (23 Aug 2010)
A defense of Oracle’s action against Google on the grounds of using patent Oracle’s patent rights to enforce its policy-supported objective of operating system-independence.

Industrial Germany and Copyright

A study by German economic historian Eckhard Höffner may have revealed that weak copyright protection in industrial Germany helped it develop, but Matthew Lasar of Ars Technica argues maybe the picture isn’t so clear:

- [Did weak copyright laws help Germany outpace the British Empire?](#) (24 Aug 2010)
Matthew Lasar of Ars Technica offers a kind rebuttal to German economic historian Eckhard Höffner’s work, summarized in a Der Spiegel review titled “No Copyright Law: The Real Reason for Germany’s Industrial Expansion.”
- [No Copyright Law: The Real Reason for Germany’s Industrial Expansion? – SPIEGEL ONLINE – News – International](#) (20 Aug 2010)
Frank Thadeusz in Der Spiegel summarizes the work of historian Eckhard Höffner, who studied a long-term comparison between industrial Britain and Germany to conclude that a lack of copyright law in Germany enabled the country to more widely distribute knowledge and develop more rapidly.

Facebook Places

Facebook releases its new location tool, and privacy concerns are up:

- [Privacy groups, Facebook already facing off over “Places”](#) (23 Aug 2010)
Jacqui Cheng of Ars Technica explores the privacy debate over Facebook’s new “Places” location tool.
- [How to Protect Your Privacy on Facebook Places | Electronic Frontier Foundation](#) (23 Aug 2010)
Kurt Opsahl of the Electronic Frontier Foundation explains the dangers of Facebook Places, the new “location” package released by Facebook as a competitor to Foursquare, Google Latitude, Loopt, and Gowalla

Privacy

- [Why Online Tracking Isn’t Bad – The Great Privacy Debate – WSJ.com](#) (23 Aug 2010)
Jim Harper of the Cato Institute looks at Microsoft’s decision to make it more difficult for users to opt out of tracking cookies in IE8.
- [Opinion: Nothing New About Privacy Fears](#) (23 Aug 2010)
Carolyn Homer, policy fellow at the Competitive Enterprise Institute, looks at Internet Explorer 8 and Microsoft’s decision to provide a browser instance-specific opt-out for tracking cookies
- [Privacy Isn’t Dead, It’s Evolving](#) (23 Aug 2010)
Ryan Radia of TechLiberation.com notes the evolving standard of user privacy. || Privacy is traded for utility.

Other

- [Googling serendipity: How does journalism fare in a world where algorithms trump messy chance? » Nieman Journalism Lab](#) (25 Aug 2010)
Jim Barnett of Harvard’s Nieman Journalism Lab explores Google’s notion that technology can calculate serendipity, that is, help us to find what we want on the web but do not seek. Barnett warns that financial incentives to the companies producing serendipity might influence the algorithm used to bring us the content. He asks, what happens when a company’s financial considerations are not consumer-driven?
- [Defamation on Facebook: Why a New York Court Dismissed a Recent Suit, Part One in a Two-Part Series of Columns](#) (23 Aug 2010)
Julie Hilden of FindLaw analyzes the recent Facebook defamation suit, explains why both it and the accompanying claim under the Communications Decency Act were dismissed, and argues that future cases will be more difficult to resolve.
- [Supreme Court told P2P users can be “innocent infringers”](#) (24 Aug 2010)
Nate Anderson of Ars Technica describes how Harvard Law professor Charlie Nesson is attempting to bring back the innocent infringer defense in the face of printed copyright notice. In sum, Nesson is arguing that notice printed on the

packaging of a compact disc does not provide notice to a downloader who never sees the package.

- [The Web Is Dead. Long Live the Internet | Magazine](#) (23 Aug 2010)
Chris Anderson and Michael Wolff of Wired Magazine declare the death of the World Wide Web in favor of mobile apps on the Internet.
- [The web dies, the hype lives: What Wired left out of its eulogy » Nieman Journalism Lab](#) (23 Aug 2010)
Jason Fry of Nieman Journalism Lab argues for the importance of the open (wired) web, despite the proliferation and increasing use of closed wireless platforms.
- [The Newsonomics of the FT as an Internet retailer » Nieman Journalism Lab](#) (23 Aug 2010)
The Financial Times pioneered use of the meter, letting casual visitors continue to sample a selected number of articles per month while asking the most engaged readers to pay for unlimited access. Furthermore, the success of the FT not about selling content, so much as knowing as much as possible about your customers.