

Privacy and Information Security Law

Randy Canis

CLASS 1

**Intellectual Property Overview;
Information Privacy Law Introduction pt. 1**

Today's Agenda

- Primary Topics & Skills
 - Class setup
 - Key terms
 - Know meaning of key terms
 - Overview of legal system
 - Associate an activity with a particular branch of government
 - Various types of intellectual property and privacy concepts

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Randy Canis

EDUCATION

- B.S. in Computer Science, University of Missouri-Rolla, 1993-1997
- J.D., University of Missouri-Columbia, 1996-1999

PRACTICE OF LAW

- Associate, Greensfelder, Hemker, & Gale, P.C. 1999-2006
- Associate, Schwegman, Lundberg & Woessner, P.A. 2006-2009
- Of Counsel, Polsinelli Shughart PC, 2009-2011
- Senior Legal Counsel/Assistant General Counsel, Intellectual Property, Express Scripts 2011-Current

TEACHING

- Adjunct Professor, CS Department/Eng Mgt Department
 - Fall 2000 – Current: "Intellectual Property for Computer Scientists a/k/a Computers and the Law"
 - Fall 2002 – Current: "Patent Law"
 - Spring 2010 – Current: "Legal Environment"
 - Fall 2015 – Current – "Privacy and Information Security Law"

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Randy's Patents and Patent Applications

- 8,294,015 Method and system for utilizing a gaming instrument controller
- 8,296,055 Method and system for positional communication
- 8,880,613 System and method for managing mail messages
- One other patent application pending

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Getting to Know You

- Who are you?
- Where are you located?
- What is your background?
- Why are you taking this class?

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Class Introduction

- What is the purpose of this class?
- What will I learn in this class?
- Do I really have to do that much reading?
- Will this class help me meet my personal goals?
- Will I do well in this class?
- Will I have fun in this class?

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Class Introduction

- What times will the class meet from?
 - Tuesdays from 4:00 p.m. -> 6:30 p.m.
- Can I watch the class at home on the Internet?
- How can I participate from my computer?
- What if I can't make the class?
- When do I get to meet you in person?
- Is this class like your other courses?

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Introduction to Law

- Do all lawyers practice law like the lawyers of television?
 - No!
 - How many times have I been to court and dealt with judges?
 - Transactional v. non-transactional law
- What is Intellectual Property?
 - Patents, Trademarks, Copyrights, Trade Secrets, Rights of Publicity, Right of Privacy, etc.
 - Rights developed in intangible property that is protected by law.
- What is the difference between civil law and criminal law?

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Branches of U.S. Government (3)

	Legislative	Executive	Judicial
Body	Congress	Pres & Admin Agencies	Federal Courts
Role	“Make”	“Enforce”	“Interpret”
“Product”	Statutes	Regulations	Case Opinions
Location	U.S. Code	Federal Register and C.F.R.	Case Reporters

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Branches of Missouri State Government

	Legislative	Executive	Judicial
Body	MO Legislative	Governor and State Executive Agencies	State Courts
Role	“Make”	“Enforce”	“Interpret”
“Product”	Statutes	Regulations	Case Opinions
Location	MO Revised Statutes	MO Code Regulations	Case Reporters

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Is Privacy a Constitutional Right?

- The U.S. Constitution does not include the word privacy
- Certain parts of the U.S. Constitution affect privacy
- Certain state constitutions (e.g., California) expressly recognize a right to privacy

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Federal Court Structure

- US Supreme Court (1)
- US Court of Appeals (13)
 - 8th Circuit
 - Federal Circuit
- US District Courts (144); at least 1 per state
 - Missouri - 2 Federal District Courts
 - Eastern District - St. Louis
 - Western District - Kansas City
 - + Federal Bankruptcy Court

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Principal Sources of Legal Authority

- **Statutory Law** – the body of law created by acts of the legislature in contrast to constitutional law and law generated by decisions of courts and administrative bodies.
- **Common Law** – developed from judicial decisions
- **Case Law** – law created by trials and appeals of trials
- **Consent Decree** – judgement entered by consent of the parties where the defendant agrees to stop alleged illegal activity, typically without admitting guilt or wrong doing

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What are our legal sources?

- U.S.C. – United States Code.
- C.F.R. – Code of Federal Registers.
- M.P.E.P. – Manual Patent Examination and Practice

- What is the significance of the aforementioned sources?

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Must Know Terms of the Art

- What is stare decisis?

- What are Secondary Sources?

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Key Definitions

- **Preemption**
 - A superior government’s ability to have its laws supersede those of an inferior government
- **Private right of action**
 - The ability of an individual harmed by a violation of a law to file a lawsuit against the violator

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Key Definitions

- **Statute of limitations**
 - Statutes of the federal government and various states setting maximum time periods during which certain actions can be brought or rights enforced. After the time period set out in the applicable statute of limitations has run, no legal action can be brought regardless of whether any cause of action ever existed.
- **Voir dire**
 - the preliminary examination which the court and attorneys make of prospective jurors to determine their qualification and suitability to serve as jurors.

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Key Privacy Terms

- Notice
- Choice
- Access

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Lawsuit Overview

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Civil Lawsuit: Pretrial Phase

- A. Prospective Plaintiff files suit containing at least one claim for relief
- B. Pleading
- C. Discovery
 - 1. Interrogatories
 - 2. Produce documents, other materials
 - 3. Request for admission
 - 4. Deposition
- D. Pretrial Conferences

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Civil Lawsuit: At Trial

- A. Plaintiff must prove his prima facie case
 - 1. Plaintiff bears the burden of proof
 - 2. Plaintiff must prove the elements
- B. Three Burdens of Proof
 - 1. Preponderance of the evidence (more likely correct than not)
 - 2. Clear and convincing evidence
 - 3. Beyond a reasonable doubt
- C. Defendant's Defense
 - 1. Can negate plaintiff's elements
 - 2. Bears burden to prove affirmative defenses
 - 3. Judge/Jury - apply law to facts

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Civil Lawsuit: Post Trial

- A. Enforce Judgments
- B. Post Trial Motions
 - 1. Cost and Fees
 - 2. New Trial
 - 3. Appeal

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Jurisdiction Basics

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Jurisdictional Requirements

- What is jurisdiction?
 - the power of a court to decide a matter in controversy (i.e., a case)
- What is needed to establish jurisdiction?
 - Authority of the court to hear the case (e.g., original or appellate jurisdiction)
 - Authority of the court over the subject matter (subject matter jurisdiction)
 - Jurisdiction over the parties (personal jurisdiction) or property (in rem jurisdiction) of the suit
 - Proper notice

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Subject Matter Jurisdiction

Diversity Jurisdiction
§ 1332. Diversity of citizenship; amount in controversy; costs

- (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$ 75,000, exclusive of interest and costs, and is between--
- (1) Citizens of different States;
 - (2) citizens of a State and citizens or subjects of a foreign state;
 - (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
 - (4) a foreign state, defined in section 1603(a) of this title [28 USC § 1603(a)], as plaintiff and citizens of a State or of different States. ...

Federal Question Jurisdiction
Cases arising under the Constitution, Acts of Congress or treaties, and involving their interpretation and application

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Power over Person or Property

- **Jurisdiction in personam** – power which a court has over the defendant’s person and which is required before a court can enter a personal or in personam judgment.
- **Jurisdiction in rem** – power of a court over a thing so that its judgment is valid as against the rights of every person in the thing

Black’s Law Dictionary

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Overview of IP

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Types of Intellectual Property

- Unfair Competition
- Right of Publicity
- Trademarks
- Trade Secrets
- Patent
- Copyright

Note: Lay people often erroneously term one type of intellectual property by another name, such as copyrighting a name, patenting a music CD, trademarking an invention, etc.

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Unfair Competition

- The appropriation of business goodwill by false or misleading labeling, or by predatory marketing practices by a competitor with consequent deception among customers about origin of goods or about the comparative quality of goods.

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Right of Publicity

- The right of publicity protects the appropriation of name or likeness of a person for commercial advantage.

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Trademarks

- **A trademark is any word, phrase, symbol, letter or number or any combination used to identify products and distinguish them from products of other companies.**
- Examples: Coca-Cola soft drink, Yahoo! Internet services, American Airlines travel services, etc.

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Other Types of Marks

- **Service mark** – “to identify and distinguish the services of one person ... from the services of others and to indicate the source of the services”
- **Certification Mark** – “to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of such person's goods or services or that the work or labor on the goods or services was performed by members of a union or other organization.”
- **Collective Mark** - indicates membership in a union, an association, or other organization.

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Devices for Trademarks

- **Words** – MICROSOFT for computer software
- **Symbol** – Nike SWOOSH
- **Device** – McDonalds GOLDEN ARCHES, Levis Pocket
- **Sound** – Michael Buffer LET'S GET READY TO RUMBLE, NBC THREE CHIMES

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Trade Secret

- A trade secret is any information that has not been published and that could give a company a competitive advantage.
- Examples: Coca-Cola's secret formula, Google's search engine strategy, AOL's subscriber list

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MO Trade Secret Definition

- (4) "Trade secret", information, including but not limited to, technical or nontechnical data, a formula, pattern, compilation, program, device, method, technique, or process, that:
- (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
 - (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
- 417.453(4)
 - <http://www.moga.mo.gov/statutes/C400-499/417000453.HTM>

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What are the Primary Categories of Trade Secrets?

- The various categories of trade secrets include financial information, organization information, marketing information and technical information.
- Financial information may include profit margins, overhead costs, material costs and supplier discounts.
- Organizational information may include expansion plans, key employee acquisitions, record-keeping information and methods of operation.
- Marketing information includes customer lists, terms of licenses, new product developments and contracts and contract negotiations.
- Technical information includes formulas for producing products, computer software, chemical formulas and processes and methods of manufacture.

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Patent

- A patent grants a limited monopoly over the use of technological idea for a process, machine, item of manufacture, or composition of matter that is novel, useful and nonobvious.
- Patents may not be granted over discoveries of natural phenomena.
- The term of a patent is usually 20 years from the date of the patent application was filed with the United States Patent and Trademark Office.
- The United States is evolving from a first to invent to a first to file patent system.

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Copyright Requirements

- For an author to have a valid copyright in a particular work, the work must
 - (i) be original,
 - (ii) remain fixed in a tangible medium of expression, and
 - (iii) have involved a minimum degree of creativity.

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Originality

- Must:
 - be an original work of the author
 - “a work independently created by its author, one not copied from pre-existing works, and a work that comes from the exercise of the creative powers of the author’s mind, in other words, ‘the fruits of [the author’s] intellectual labor.’”
- Artistic merits are irrelevant,
- The underlying idea of a work is not subject to copyright protection.

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Fixation

- Works must be fixed in a tangible medium of expression to be protected under the Copyright Act.
- Works must be embodied in a tangible form that is “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”
- The requirement for fixation is met when the work can either be directly perceived or perceived with the aid of a machine or other device.

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Torts

- An action arises under torts when one party's allegedly wrongful conduct causes injury to another
- **Intentional** – from intentional acts
- **Unintentional** – often as a result of carelessness

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Tort Overview

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What is a Tort?

- Civil wrongs recognized by law as the grounds for lawsuits
- Wrongs result in injury or harm that is the basis for a claim by the injured party

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Basis of Tort Law

- Basis
 - Wrongs
 - Compensation
 - Compensate those who have suffered a loss or injury due to another person's wrongful act

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Protected Interests

Remedies for:

- Acts that cause physical injury or that interfere with physical security and freedom of movement
- Acts that cause destruction or damage to property
- Acts that violate intangible interests including personal privacy, family relations, reputation, and dignity

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Tort Categories

- **Intentional torts** – Actor intended the consequences of his or her act or knew with substantial certainty that specific consequences would result from the act.
- **Negligent torts** – actor's actions were unreasonable unsafe
- **Strict liability torts** – do not depend on degree of carelessness of the actor, but rather by whether a particular action caused damage

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Intentional Infliction of Emotional Distress

An intentional act that amounts to extreme and outrageous conduct resulting in severe emotional distress to another

- 1) Conduct was intentional or reckless
- 2) Conduct was extreme and outrageous
- 3) Conduct caused the plaintiff's emotional distress
- 4) Emotional distress was severe

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Defamation

- Defamation occurs when one's words reflect negatively upon another person's integrity, character, good name and standing in the community and those words tend to expose the other person to public hatred, contempt or disgrace. ... Defamation includes both libel and slander.
- **Libel** – writing or other permanent form
- **Slander** – orally
- See Missouri Bar's News Reports Handbook.

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Invasion of Privacy

- **Appropriation of identity** – using a person's name, picture or other likeness for commercial purposes without permission
- **Invasion into an individual's affairs** – eavesdropping by wiretap, unauthorized scanning of a bank account, compulsory blood testing, and window peeping
- **False light** – publication of information that places a person in false light
- **Public disclosure of private facts** – publicly discloses private facts about an individual that an ordinary person would find objectionable or embarrassing

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Negligence

- Acts that depart from a reasonable standard of care and create an unreasonable risk of harm to others
- Factors
 - 1) That the defendant owed a duty of care to the plaintiff
 - 2) That the defendant breached that duty
 - 3) That the plaintiff suffered a legally recognizable injury
 - 4) That the defendant's breach caused the plaintiff's injury

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Duty of Care

- People are free to act as they please so long as their actions do not infringe on the interests of others
- Courts consider the nature of the action (outrageous or commonplace), the manner in which the act is performed (heedlessly or cautiously), and the nature of the injury (serious or slight) in determining whether a duty of care has been breached.

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Final First Day Thoughts

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Reading the Course Text

- How should you read the text?
- Should you take notes?
- Do you need to know case names?
- How much time will it take to read the cases?
- What happens if I don't read a case and I am called on during class to discuss it?
- Online legal dictionary - <http://dictionary.lp.findlaw.com/dictionary.html>

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Legal Reasoning

- 1) Identify facts and issues with case
- 2) Identify applicable law(s)
- 3) Determine how law(s) apply to the facts and issues of the case

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***Program
Completed***

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