



Volume 12

Issue 4 Summer 2014: Symposium - The Cloud:
*Emerging Issues in Business and Intellectual
Property Law*

Article 6

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Recommended Citation

Jordan M. Goodman, Sharon K. Sandeen, Catherine S. Reach & Joshua Sarnoff, *Panel Discussion: The Cloud and Emerging Issues in Business and Intellectual Property Law*, 12 DePaul Bus. & Com. L.J. 471 (2014)

Available at: <https://via.library.depaul.edu/bclj/vol12/iss4/6>

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Panel Discussion: The Cloud and Emerging Issues in Business and Intellectual Property Law

Jordan M. Goodman
Sharon K. Sandeen
Catherine Sanders Reach
Joshua Sarnoff (Moderator)
Janet A. Stiven
Marilyn A. Wethekam

DESALINA WILLIAMS: We are now going to do a panel discussion with all of our presenters from today. You already know the panel. But to introduce Professor Sarnoff quickly, he is a professor here at DePaul. He got his bachelor's degree at MIT and his JD at Stanford. He is the ethical advisor to the Journal of Intellectual Property Law. Without further ado, we will hand it over to Professor Sarnoff.

JOSHUA SARNOFF: Obviously I am on cloud nine after this presentation. I want to open it up to questions, but I thought I would start with one basic thing that seems to be underlying a lot of this; and that is the fact that there is such unequal bargaining power involved in all of these situations that it really raises a number of questions about how people can meaningfully contract even if they are willing to spend the money to hire people like you guys to write these things, which then presumably the service can say we are not going to say yes to.

Let me start with Sharon. Say you have user generated content (UGC) liability. How does the service provider tell the UGC person get off my Cloud? And, conversely, how does that person try to protect their own rights and material, which if they are kicked off they do not know what to do?

SHARON SANDEEN: When you talk about rights, which rights are you talking about?

JOSHUA SARNOFF: Principally, copyrights.

SHARON SANDEEN: Principally, copyrights. I do not know. As I commented on earlier, it is not only a difficult problem; it is an ever-evolving problem because I think the Cloud providers figured out that they were all excited to do this new thing. Then they quickly figured out that once they started doing it there would be some

pushback. So what you see are things changing as we are going. I am hopeful that—particularly with Janet’s comments—that there will be more of an ability to negotiate.

JOSHUA SARNOFF: Okay.

JANET STIVEN: To comment on that, remember we talked about the fact we had the consumer Cloud. That is probably where you see a lot of the issues. And then I’ll say the business Cloud, which is really still emerging. In the consumer setting, you have the bargaining situation, and I guess you are getting products or whatever. The business side is probably more of a level playing field, and people are choosing not to go to the Cloud until they are ready. That is where there is this lower adoption except for non-essential services. I think you want to keep that distinction in mind even as you review the contracts.

JOSHUA SARNOFF: Another question that comes up is you can try to adopt through these contracts obligations to keep these confidential. Could the service providers agree to obligations of confidentiality but disclaim any liability to the breach?

JANET STIVEN: That is the issue I pointed out. If you do not try to reconcile the provisions, I can get it in one place and take it away in the other.

JOSHUA SARNOFF: What would happen in that case? Would it actually be re-characterized as not a meaningful obligation of confidentiality?

JANET STIVEN: Sharon, I’ll let you speak. I do find the issue of making the distinction between the confidentiality and privacy. While they seem related, I think under trade secret law they are different. I will let you speak to that point.

SHARON SANDEEN: There is an idea submission case involving Milton Bradley where basically an idea was submitted, and Milton Bradley knew well enough that they should control that situation. So they tried to get an agreement and disclaim liability, but they did not use the magic words of disclaiming confidentiality. The court said there could still be an implied-at-law duty of confidentiality in that situation. So that is the case I am referring to, suggesting you have to use the correct magic words . . .

JANET STIVEN: To disclaim liability, right?

SHARON SANDEEN: To disclaim liability, to impose a duty. But the other point I think you alluded to Janet—and I wrote an earlier article on terms of service agreements¹—is that it seems to me the

1. Sharon K. Sandeen, *The Sense and Nonsense of Internet Terms of Use Agreements*, 26 *HAMLINE L. REV.* 499 (2003).

provisions in terms of service agreements are inconsistent with one another in a lot of places, almost as if there were multiple people drafting them and they were not talking to each other. That problem persists today as you pointed out. It is almost comical. In one place they will say we have a duty of security, and in the next they will say no, we do not.

JOSHUA SARNOFF: Another question for you, Catherine: is there possible technological solutions to some of these problems even if the law or a contract does not get you there?

CATHERINE SANDERS REACH: Encryption. You encrypt it. You hold the keys. The provider does not have access to the data and cannot get at it, and no one can subpoena it. No one can get access to it unless they have the keys, and that would come to you.

JANET STIVEN: The issue related to encryption and holding the keys is management. You have to have people trained in how to deal with keys otherwise you are back in the same fate of people having access to information that you do not intend to have access.

JOSHUA SARNOFF: One last question for the tax people. What happens when four states say we all have tax liabilities?

MARILYN WETHEKAM: Negotiation now comes in to play.

JORDAN GOODMAN: It is a very real-life situation. That is an actual situation, and it is not only the same transaction. What the Supreme Court has told us is that each state can have their own method of looking at a transaction. One state might say it is where the seller is located. One state says it is where the buyer is located. And they are both right under state law.

So the question is, is there some kind of unfairness that you can argue. In some situations you owe a tax in both places. The opposite is true also. You can have a transaction that is the opposite, and they both disclaim having the tax. The sale is not occurring in either state.

JOSHUA SARNOFF: Any way to protect against that?

SHARON SANDEEN: I have an idea. It IS very interesting when different people in different fields get together. Because, as you were talking, I thought we need a collective rights organization model for taxes where you just dump all the money—this is what we use for copyrights in the music industry where you dump all the money into a pot and then you divvy it out to the stakeholders.

JORDAN GOODMAN: That is great. That has been talked about, putting in a federal sales tax pool and getting rid of all the state tax and divvying it up. They thought about that. Just look at our State of Illinois here. The state level is one thing. Then you got the local. You

got Cook County, the City of Chicago, the RTA. They all want their piece. How do you do that? It goes back to the 1700s when they said we gave enough power to the feds. This is our divine right as a state as a sovereign government to impose taxes and collect it. It is a great idea, but then there is obviously the mechanics of getting it done

MARILYN WETHEKAM: There is an organization that if you end up with five or six depending on how many states are trying to tax the same thing that will work with you to mediate or resolve it. It may not be the best answer, but that is basically what happens. It happens more—you see it sometimes more on the income tax side than the sales tax side.

JANET STIVEN: From the Cloud provider contact, mostly it is coming out that they haven't collected the tax.

MARILYN WETHEKAM: Yes.

JANET STIVEN: It comes up in an audit.

MARILYN WETHEKAM: In an audit. We are talking about companies with a national name. So they are easily recognized when the Department of Revenue of any state walks in the door. So sometimes what you will see is that they have been in and audited the customer and found an invoice, and then make their way in to the provider.

JORDAN GOODMAN: In the acquisition world we see it come up when people buy the latest and greatest website. The buyer does the due diligence, where have you collected, what have you done, have you collected anywhere, and do you have an agreement with Amazon. They want to check in to it, and that's a lot of times where it comes up, too, is on the merger and acquisition side.

MARILYN WETHEKAM: If you going in to a merger and acquisition, you need to protect yourself on whatever your sales contract is. I know you have reps and warranties and corporate guys say we have reps and warranties. You need a taxes reserve.

JOSHUA SARNOFF: Yes? From the audience, please.

AUDIENCE MEMBER: You had mentioned solving the income tax problems through contracts. I was just kind of wondering—I understand the sales tax and how they are kind of—and how you can deal with that. For income tax how do you put a business in charge of whether they owe taxes? I feel from a public policy standpoint that gives them too much power.

MARILYN WETHEKAM: The way the states have been trying to figure out how to source the receipts from, say, a Cloud is they would look at where the benefit was received. So that is point one, where the benefit is received; and there are a couple of other triggers de-

pending upon the state. If you write that trigger in to the contract, like we are going to source everything to where the accounts payable unit is, or however you want to trigger it, that is one way to work around it and maybe limit or mitigate any liability you have from an income tax.

JODRAN GOODMAN: The states are making stuff up as to where these transactions occur because they do not know. I am an advocate of why can't the taxpayers do the same thing. You see aircrafts or large vessels with a lot of tax liability. They structure them saying delivery is going to occur twenty-seven miles offshore in no man's land to avoid taxes—or to legally avoid taxes. So I think even on the income tax concept you can say where a product is being delivered or utilized and go with it.

JANET STIVEN: All because the lawyer would write that twenty-seven mile offshore delivery, in practical effect is it upheld by the courts?

MARILYN WETHEKAM: Pretty much if you can show it on audit. I won't say the Department of Revenue is going to love that because they know what you are doing.

JORDAN GOODMAN: Great question, because if I am delivering a truck or a plane I can prove that the plane was there at this time and we exchanged via contracted ownership of it. It is a little bit more difficult when we were in the Cloud because of the proof. The proof might be that I have one server in one location. That might be the proof that it stays there. But to the extent it is a pretty integrated interest Cloud functionary, it is going to be in one of many places.

MARILYN WETHEKAM: I think if you have two contracting parties who mutually agree, the state may not be happy; but I think you will get there.

JORDAN GOODMAN: Yes?

AUDIENCE MEMBER: I wonder if the panel is familiar with the Aereo case going up to the Supreme Court where they are saying that would have some far-reaching effects for the Cloud computing industry. I personally do not think so. I wonder if anybody on the panel has news on that.

JOSHUA SARNOFF: As far as the definition of public performance, I have not thought it through.

JORDAN GOODMAN: There is a case that was just decided by the U.S. Supreme Court called Daimler Chrysler, which is not a tax case. It is a personal jurisdiction case for the liability. Daimler got sued by some Argentinians for war crimes, and they brought the suit

in California where Daimler Chrysler has subsidiaries performing sales. The question was do the California courts have personal jurisdiction over that litigation because its subsidiaries are operating there, and the U.S. Supreme Court said no because they said they are not physically located there, they did not purposefully avail themselves to the marketplace.

Yes, we turn that into a tax case by saying, Clouds, if you are broadcasting on to the web, are you purposefully availing yourself to any specific market or are you just putting yourself in the stream of commerce? It does not mean that you are being brought in to any particular state just because you have a customer there.

JANET STIVEN: In early days of the Internet, whether it is a static or dynamic site, would you apply the same analytics to that?

JODRAN GOODMAN: Absolutely.

JOSHUA SARNOFF: The premise there, if I recall the facts correctly, is that you had people controlling and uploading their own content and downloading it from a portion of a server, and you could see that the way that the court comes out, not only would have copyright implications, but it could affect all sorts of questions about how much control would then be imposed by the servers themselves in order to avoid copyright liabilities, which could then affect some of these other issues.

Further questions? They are speechless. Well obviously we have had lots of light shed through this Cloud. So let us thank our panelists.

DESALINA WILLIAMS: I would like to give another round of applause to our panelists, and thank you for coming.