IP ISSUES POSED BY CLOUD COMPUTING

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RANGE OF POSSIBILITIES

• Very little effect
• Renewed importance of trade secrecy
• Licensing/contracts will take care of all issues
• CFAA & DMCA anti-circumvention rules will be more important than © or trade secrecy
• Temporary buffer copies as surrogate for exclusive rights that don’t match new biz models
• Erosion of first sale, fair use
• Some big surprise will happen
LITTLE EFFECT?

• For information-rich resources that are in the cloud, IP may well be irrelevant

• Technology sometimes replaces IP (e.g., CSS protecting DVD movies, access controls to online databases)

• Role of IP is mainly to regulate information resources that are available “in the wild,” that is, available in a way that allows them to be copied and sold in the marketplace
ROLE OF TRADE SECRECY?

- J.H. Reichman: challenge for IP law to respond appropriately to information-rich products, such as computer software & biotechnology innovations, because they bear the know-how required to make them on or very near the surface of the product in the market
  - Trade secrecy has traditionally protected applied know-how necessary to make valuable products because this know-how could generally be kept inside the factory walls, much of it not easily reverse-engineered
  - Software & biotech innovations bear their know-how on the face of the product, vulnerable to market-destructive copying, easily reverse-engineered and then copied
  - Proposed sui generis form of protection for applied know-how, a kind of “portable trade secrecy” protection to give lead-time to innovators
- Software as a service, other information-rich resources in the cloud seem to reverse the know-how-on-the-face pattern, renew importance of secrecy as form of IP protection for software, other information-rich resources kept in the cloud
  - Will it be possible to reverse-engineer these resources?
  - Will it be possible to develop interoperable products without the cloud-vendor’s consent?
LICENSING?

• To the extent that firms entrust their information resources to cloud service providers, a license or contract will be in place that will set forth terms on which the resources will be processed, etc.

• IP law may inform some terms
  – e.g., trade secrecy norms as to limits on uses that can be made of information resources based on the purposes for which the resources were made available
  – e.g., © norms may inform limits on copying, distribution of information resources provided
CFAA & DMCA ANTI-CIRC?

• Information resources in the cloud may look like rich targets for hackers
• Security issues discussed earlier today already
• Some of the same kinds of considerations will affect IP-protected information resources in the cloud
• © & trade secrecy, as such, may not be all that useful to deter hacking
• CFAA: gaining unauthorized access to computing resources, exceeding authorized access
• DMCA anti-circumvention rules: bypassing technical protection measures that copyright owners use to protect access to, or uses, of their works
TWISTING © TO GET RESULTS?

• Symposium last week at University of Amsterdam on software, compatibility, & IP law
• ? raised there: should processing software in the cloud be treated as a communication to the public?
• Old ? in U.S. legislative history of 76 Act: should computer program processing be considered a public performance?
• NO! That is goofy
• To be expected: RAM-type temporary copying will be asserted as a basis for a challenge
  – Big fight over how “temporary” the copying is cf. definition of “copy”
NON-DISPLAY USES?

• Google has scanned 12M + books
• So far displaying only “snippets” of book contents
  – Unless RH gives permission for more
  – Unless work is in the public domain
• But G makes “non-display” uses of in-© books in the corpus
  – To refine search technologies
  – To develop
  – Proposed settlement would give them a license to make non-display uses of all books owned by the settling class
  – Underlying presumption: © owners only entitled to control “display” uses (e.g., making contents available for reading)
  – Are non-display uses fair uses?
NON-DISPLAY AS FAIR?

• If GBS settlement is not approved, may find this out
• Copying of whole books, said to be necessary to index them, make non-display uses
  – G certainly has a commercial purpose in mind
• Is this “transformative”? Maybe in the sense that it is a use of ©’d works for a different purpose, but caselaw on this is mixed
• Not supplanting demand for existing markets for the in-© works, but is this a new market that © owners should be able to control?
  – Andrew DeVore for Arlo Guthrie et al: we don’t even know what non-display uses G is making of ©’d works
• Will G and other cloud computing providers make non-display uses of works owned by others?
EROSION OF USER RIGHTS?

• Google Book Search settlement imagines “consumer purchase model”
  – Out-of-print books to be sold either at price set by RHs or at algorithmic prices ranging between $1.99 & $29.99 with so-many-% in each of 12 bins—average of $8.65 per book, which is higher than might expect
  – Books will only be accessible in the cloud
  – “Owners” cannot download them
  – Limits on # of pages that can be printed out
  – Limits on annotations that you can be make of your book
  – Limits on annotation-sharing with others
  – Can’t lend the book to anyone, can’t sell it, can’t lease it, can’t give it away, can’t share it
  – Not really “consumer purchase,” which suggests you actually own something, but a “single user license access model”
  – Publishers’ dream: G to sell you a book which you cannot effectively take possession of!
• Fair use, first sale rights under © law effectively eroded
BIG SURPRISE?

• Advances in technology have often been creatively used by some in disruptive ways that led to IP challenges
  – Peer-to-peer file-sharing technologies
  – Bots to “scrape” data from websites, as in eBay v. Bidders Edge

• Seems likely to me that cloud computing may give rise to similar disruptions that will give rise to creative uses of IP laws
  – But hard for me to predict what will be the next big thing in this space