Regulating Spyware:
The Limitations of State “Laboratories” and the Case for Federal Preemption

April 1, 2005

Professor Peter S. Menell
Berkeley Center for Law & Technology
University of California at Berkeley School of Law
Substantive Issues
- Privacy
- Intellectual Property
- Contracting

Governance Issues
- Who?
  - Federalism
- How?
  - Regulatory Design
Spyware: Federalism Issues

• Theory

• Unfair Competition Law
Federalism

“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)
Unfair Competition Law

There is no part of the law which is more plastic than unfair competition, and what was not reckoned an actionable wrong 25 years ago may have become such today.”

*Ely-Norris Safe Co. v. Mosler Safe Co.*, 7 F.2d 603 (2d Cir. 1925), *rev'd on other grounds*, 273 U.S. 132 (1927)

Unfair competition law is an area “where angels fear to tread” due to the lack of harmonization among states.

“Since most cases involve interstate transactions, perhaps some day the much needed federal statute or uniform laws on unfair competition will be passed.”

*American Safety Table Co. v. Schreiber*, 269 F.2d 255, 271 (2d Cir. 1959) (Medina, J.)
Unfair Competition Law

Why do angels fear to tread?
Unfair Competition Law: Evolution

Early 1800s 1914 1938 1946 1960s 1980

- TM Act ®
- FTC Act
- Mini FTC Acts
- Common Law
- FTC Act
- evaluation of unfairness
- Federal
- Unfairness
- Deception
- Lanham Act
- §43(a) unfair competition
- Unfairness
- Deception
Unfair Competition Law: Federalism Issues

“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)

- controlled
- isolated
- identical starting conditions
Are the Laboratories Controlled and Isolated?
or do they contaminate other laboratories?
Spyware/Unfair Competition Law

Are the Laboratories Controlled and Isolated?
or do they contaminate other laboratories?

Case Study

CLARIA
A Leader In Online Behavioral Marketing

WhenU.com
The Leader in Contextual Marketing
Are the Laboratories Controlled and Isolated? or do they contaminate other laboratories?

Internet-Related Activities: Personal Jurisdiction

- Long Arm Statute
- Due Process/Minimum Contacts

Least Common Denominator Implication

National Law = Law of Most Restrictive State
Spyware: Federalism Issues

Theory

“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”

- public choice/capture

States as Laboratories of Experimentation
Federal Regulation
International Laboratories of Experimentation and Innovation
Federal Preemption: Internet-Related Activities
Unfair Competition Law and Internet-Related Activities

State Law Claims