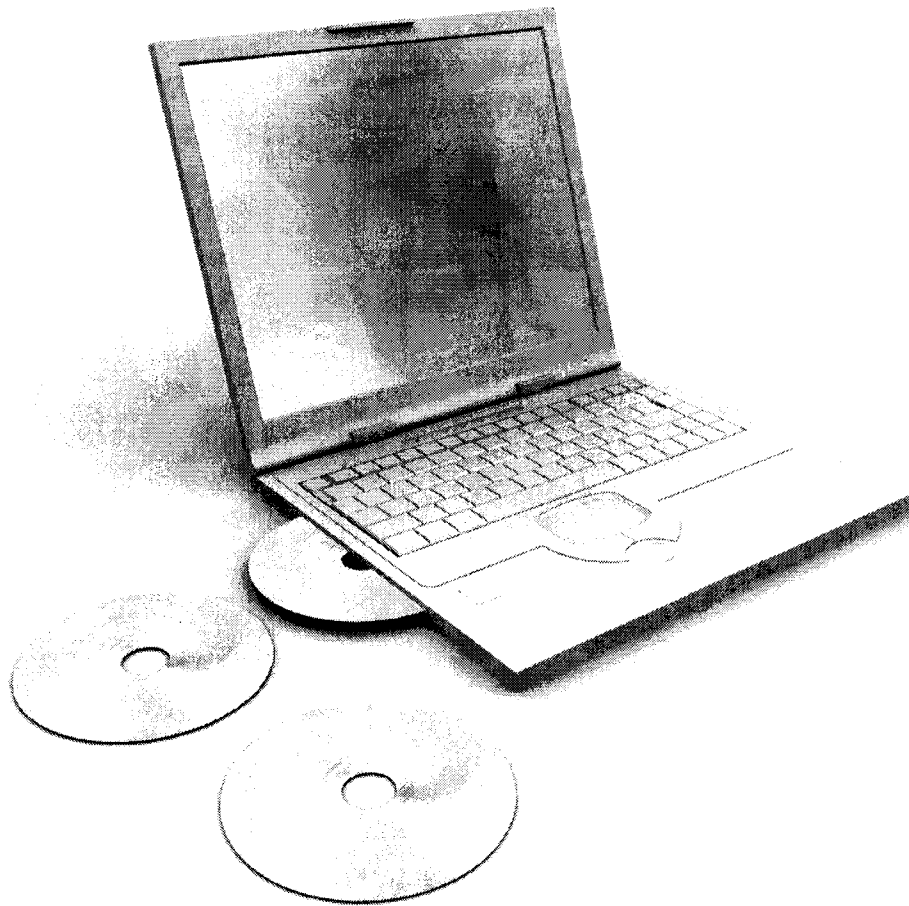


# The Internet & the Law

Current Issues for Civil, Criminal,  
& Transactional Practitioners



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*The Internet & the Law*  
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**December 2010 - Nashville**

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**Old Laws – New Tech –  
It's Still Rock and Roll to Me!**

Defining the Internet and  
Its Legal Environment

**Kelly L. Frey, Sr., Esq.**

# OLD LAWS – NEW TECH – IT'S STILL ROCK AND ROLL TO ME!

by Kelly L. Frey, Sr.<sup>1</sup>

We are continuously bombarded with new technology. From advertising claims about new computer capabilities to the perceived necessity for lawyers to use social media to reach out to their clients to the addictive behavior of lawyers in checking their Blackberries and iPhones – we have become cybernetic.<sup>2</sup>

But the laws that govern our new cybernetic, automated lives don't change at the same rate as the underlying technology. This creates a bit of cognitive dissonance among attorneys, especially older attorneys that did not spend their teenage years texting on cell-phones, clued to the Xbox or Playstation, or being able to touch-type on computer keyboards.

Some lawyers have adapted to our new world. Some lawyers have resisted this persistent invasion of technology into the practice of law. Regardless, our clients are immersed in technology and despite our personal predisposition our professional duty is to learn as much as possible about these new technologies and understand how they can affect the rights and responsibilities of our clients.

The intent of this of this section is to set a baseline for understanding the principles that others will be articulating throughout this publication. Some of this section is history. Some is explanation. The goal, however, is to add some context to the discussions of law and technology and to demonstrate that regardless of how new the technology may be, classic legal principles and analysis still apply.

## **Let's Start at the Very Beginning – It's a Very Good Place to Start: The PC**

There was a time before the personal computer. In that era, technology was the province of scientists it was far from clear that evolving digital technology would have any serious impact on our personal lives. In fact, leaders of the digital world during that era doubted if more than a few hundred people would bother with buying a computer.<sup>3</sup>

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<sup>2</sup> According to Wikipedia (our pre-eminent source of information in the digital environment) cybernetics is "where action by the system in an environment causes some change in the environment and that change is manifest to the system via information, or feedback, that causes the system to adapt to new conditions: the system changes its behavior." I look at my Blackberry and change my behavior – therefore, I participate in a cybernetic system. Sometimes the cybernetic feedback loop with my Blackberry includes being negatively reinforced by my lovely wife, especially on weekends – which again leads to a change in the environment (and usually requires flowers to get the environment back to a steady state).

<sup>3</sup> "I think there is a world market for maybe five computers." IBM Chairman Thomas Watson, 1943. Equally as illustrative is a quote by former Microsoft Chairman Bill Gates in 1981 (the year of that IBM introduced its PC); "640K [memory] ought to be enough for anybody."

While such sentiments may evoke laughter now, anyone who used the first 8086-chip based PCs fitted with a Disk Operating System (DOS) and two eight inch floppy disks running at a clock speed of 4mHz (each capable of a miniscule 360K storage capacity, smaller than most of the single page text documents we process today) can understand the skepticism during that time of doing anything "valuable" on the first PCs.

At its core, a personal computer (PC) consists of a central processing unit (CPU). The CPU is made up of digital logic circuits that execute the instruction sets supplied by the operating system and software applications (see below). CPUs are typically described with respect to clock speed (presently in the gigahertz or GHz range), manufacturer (e.g. Intel), and model or type (Centrino Mobile). The clock speed determines the maximum speed at which the PC will operate (actual speed may be slower depending upon a number of factors). While competing manufacturers produce substantially similar types of CPUs, the capabilities of each may be slightly different (sufficiently to require familiarity with the specific operational requirements that will be required of the CPU – for example, ability to operate via a wireless or mobile network system). Some types of CPUs require specifically designated operating system software, although most mass-marketed PCs typically run the Microsoft Windows system, the Apple operating system, or some variation of available open source systems.

Random access memory (RAM) is the integrated circuitry that stores intermediate processing steps for the PC. RAM comes in variety of forms and typically in increments of 512 mega-bytes (512 million bytes of storage). The more RAM available, typically the faster the PC will operate (within the absolute constraints of the CPU, the internal connections within the computer, graphics capabilities, size of datastream, etc.).

Storage devices now come in a variety of forms, but can be segregated into fixed and removable devices. Fixed devices include the familiar “hard drive” that is configured to run at a specified number of revolutions per minute (rpm) and contains storage for applications, files, and intermediary processing activities. Removable devices range from the now archaic “floppy disk” (storing 1.4 megabytes of information) to CD/DVD and the current “flash” or “thumb” drives (that provide digital solid state memory in the gigabyte range). Typically higher capacity, higher speed storage devices provide increased operational usage. Information is stored on these devices with respect to directories that relate the physical position of the information on the device to a virtual file name and type. Unless specifically removed, information stored on a fixed or removable device will reside there indefinitely, even if a user issues a “delete” instruction for a specific file name (and is subject to the new rules of federal procedure with respect to discovery).<sup>4</sup>

Video performance of a PC is determined by the size and character of the monitor, as well as the memory devoted specifically to graphic performance. The greater the dedicated

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<sup>4</sup> See generally, Completed Rules Amendments at <http://www.uscourts.gov/rules/archive.htm> with respect to amendments to Fed. R. Civ. P. 16, 26, 33, 34, 37 and 45. A “delete” command only deletes the logical association between the file name and the data stored on the device – not the data itself. Digital experts can “forensically image” all of the data on a device (including all pieces of information that have not been specifically over-written by the PC during operation). As memory size increases, this means more and more unwanted, deleted, and potentially damaging digital information becomes available via discovery.

graphic memory, the faster the display can perform. Video performance can also be described based upon user-perceived characteristics (such as pixel size, screen size, and type of monitor).

Additional capabilities of the PC are determined by “slots” and bus speed. The greater the number of slots, the more (and more varied types) of additional devices that can be attached to the PC (i.e. more printers, storage devices, input devices, etc.) The higher the Bus speed, the more quickly information is conveyed through the slots.

Additional configurable components include sound, keyboard, monitor, etc. (and battery/battery life or weight for laptop computers).

Servers tend to be high-end processor units with multiple ports that allow connection to other servers and control devices. "Server farms" consists of multiple series that provide extensive capabilities for storage and processing, either onsite at the owner's facility or "off-site" at premises owned by third parties. Off-site locations are particularly problematic for corporate use, as they provide the opportunity for issues related to physical security, disaster recovery, intrusion by third parties, etc. (all issues beyond the physical control of the corporate user, but for which the corporate user as primary liability). The newest terminology being used to describe large storage facilities is "cloud computing" – basically just a lot of processors sitting at a third party site.

While all computer hardware devices (PCs to servers to high end supercomputers) are chattels that are covered under basic personal property laws. However, on occasion, especially when purchasing hardware and software/services together where the cost of hardware is only a small fraction of the total purchaser price, other laws will control (see below).

### **Then You Add the "Special Sauce": The Software**

No computer functions without software – the set of operating instructions that tell the hardware in the PC what must be done to achieve a defined goal. There are several different levels of computer software (see below). However, they are all subject to basic federal intellectual property law.

Computer software can be protected under copyright, patent and/or trade secret laws.

Software is explicitly mentioned as a type of intellectual property that is protectable under U.S. copyright law.<sup>5</sup> This means that from the moment of creation, original software code is owned exclusively by the author of the software and the code can only be used with the author's explicit permission.<sup>6</sup> Rights in software not explicitly granted by the author are reserved to the author. If the software license doesn't explicitly provide for a specific use, that use by the licensee is prohibited.<sup>7</sup>

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<sup>5</sup> 17 U.S.C. §101 added the definition of “computer program” in 1980 and §117 explicitly limits exceptions to the exclusive rights of the copyright owner of computer programs.

<sup>6</sup> See Chapter 1, *supra*.

<sup>7</sup> 17 U.S.C. §106 and §106a defines the rights reserved to a copyright owner (with the limited exceptions set out in other sections of the Copyright Act).