



THE BERKMAN CENTER CYBERL@W CLINIC

The Berkman Center’s Cyberlaw Clinic engages Harvard Law students in a wide range of real-world litigation, licensing, client counseling, advocacy, and legislative projects and cases, covering a broad spectrum of Internet, new technology, and intellectual property legal issues. The Berkman Clinic was the first of its kind and today continues its tradition of innovation in this area. Clients have included individuals, small start-ups, nonprofit organizations, internal Berkman Center projects, groups of law professors, and government entities.

BACKGROUND

The Cyberlaw Clinic’s director and teaching team have carefully crafted the program to be broad-based both in its clients and its substantive and practice opportunities. The bulk of the Clinic’s cases and projects fall into a handful of key areas, including counseling and legal guidance for complex open access, digital copyright and fair use issues; litigation and amicus and other advocacy to protect online speech and anonymity; legal resources and advice for citizen journalists; software and music licensing and contract advice, especially regarding Creative Commons and other “open” licenses; patent reexamination requests for overly broad technology patents; and guidance and amicus advocacy for effective but balanced protection of children in the areas of social networking, child pornography and online exploitation.

EXAMPLES OF MAJOR CASES AND PROJECTS

Over the last several years, students’ clinical work has been increasingly integrated into the cutting-edge, public policy-oriented research projects underway at the Berkman Center. Students have provided substantial legal representation to:

- The StopBadware.org project, a “Neighborhood Watch” campaign aimed at fighting badware – computer code that harms the machines of users or steals private information. Students provide legal guidance on a variety of new initiatives, monitor and help minimize potential liability risks, and respond to legal threats; past students submitted to the Federal Trade Commission a formal complaint against the maker of a particularly dangerous malware application.

- The OpenNet Initiative's path-breaking study of worldwide Internet filtering and censorship. Students traveled to Russia, Thailand, and Singapore on joint missions with the HLS Human Rights Clinic to examine filtering and censorship conditions and practices. Students also prepared and sent FOIA requests and analyzed the responses and undertook comparative legal research on statutes and regulations that require search engines to censor the Internet.
- The Berkman Center's work on the Principles on Free Expression and Privacy project, which involves intensive work with Google, Microsoft, Yahoo!, human rights groups, activist investors and others to develop a code of conduct for operations in regimes that impose censorship and surveillance on the Internet.
- The Citizen Media Law Project, originally a clinical project in collaboration with the Center for Citizen Media and now a standalone initiative with major funding from the Knight Foundation. Students representing CMLP work to develop research and advocacy on free speech, newsgathering, intellectual property, and other legal issues related to citizen media and to provide legal training and resources for individuals and organizations involved in citizen media. Students have helped to develop tools for citizen journalists that include a legal threats database to document and analyze risks associated with online publication and a comprehensive, state-by-state legal guide for issues related to newsgathering, intellectual property issues, and special risks associated with covering elections' and amicus advocacy. Future work contemplates representing individual citizen journalists in defending against legal threats related to their reporting.
- Berkman's Global Voices Online project, for which students provided legal advice on topics related to defamation, copyright, the complexities of implementing Creative Commons licenses, and challenges posed by online syndication, as well as nonprofit entity status and governance issues.

While these in-house projects provide a substantial range of hands-on opportunities, the bulk of the Clinic's work continues to be from outside the Center, including:

- Creative Commons
- Boston's Isabella Stewart Gardner Museum
- The Electronic Frontier Foundation
- The Harvard Faculty of Arts & Sciences
- MIT
- Several groups of major intellectual property and Internet law professors
- The National Center for Missing and Exploited Children
- The Massachusetts Information Technology Division
- Various state and local computer crime and child exploitation prosecutors
- The Citizen Lab at the Munk Centre for International Studies at the U. of Toronto
- Public Radio Exchange
- Radio Open Source, among many others.

The Clinic also has periodically collaborated with EFF, the Center for Democracy and Technology, Public Citizen and the cyberlaw clinics at Stanford and other law schools.

SELECT CURRENT PROJECTS:

- Drafting, on behalf of the Citizen Media Law Project, portions of an amicus brief submitted on February 26, 2008 in the *Wikileaks* case by a coalition of media organizations that also included the Reporters Committee for Freedom of the Press, *Los Angeles Times*, Gannett, Associated Press, and Society of Professional Journalists. The brief urged the court to vacate its extremely broad previous injunctions against Wikileaks and its domain registrar on First Amendment and CDA § 230(c) grounds.
- Helping conceptualize and develop the Berkman Center's lead role in the just-announced Internet Safety Technical Task Force. The Task Force, comprised of more than 20 leading Internet businesses and organizations including AOL, AT&T, Comcast, Facebook, Google, Microsoft, MySpace, NCMEC, Symantec, Verizon and Yahoo!, is a central element of the Joint Statement on Key Principles of Social Networking Safety announced in January 2008 by MySpace and the Attorneys General Multi-State Working Group on Social Networking, and will focus on identifying effective online safety tools and technologies that can be used by many companies across various technical platforms.
- Assisting the Harvard University General Counsel's office in reviewing and implementing guidance for the Faculty of Arts & Science's recently adopted policy requiring open access for all faculty scholarly publications; and for University compliance with the recent NIH open access mandate.
- Drafting an amicus brief on behalf of anti-spyware organizations like StopBadware and the Anti-Spyware Coalition in *Zango v. Kaspersky*, on appeal in the Ninth Circuit, regarding CDA 230(c)(2) issues.
- Working with a non-profit public-radio client to provide content licensing assistance to and copyright fair use analysis in connection with its various digital content distribution activities and a new user-uploaded content initiative.
- Assisting in the representation of an individual convicted of impairing the morals of minors through pornography viewed on a PC, based on faulty forensic analysis and testimony. Our efforts, in part, contributed to grant of new trial.

- Providing legal guidance and license drafting and review to an entity that is developing an archive of musical performances that are available for download or reuse through Creative Commons and/or other sharing-friendly licensing schemes, including assessments of the scope of streaming licenses from Sound Exchange and/or other musical rights societies.
- OpenNet Initiative – researching and drafting FOIA-type letter requests to various countries re: their filtering lists and practices.
- Working with several area prosecutors to research and prepare a set of best practices (with our own cautionary and rights-protective gloss) for schools to follow re: computers, computer and internet use policies, cooperation with law enforcement, etc., including drafting an exemplar use policy.
- Assisting a non-profit group in its advocacy efforts to protect kids from easy access to purchasing prescription narcotics online without prescriptions. Researching possible legislative approaches to availability of narcotics for sale online without prescription, including analysis of the value of and tactics for imposing responsibility on various intermediaries. Drafting proposed legislation.
- Assisting a major public broadcaster with research, preparation of conference papers and possible legislative proposals regarding the special treatment afforded public broadcasting by the Copyright Act.

SELECT PAST PROJECTS:

The broad range of doctrinal and practice areas students can experience in the Cyberlaw Clinic is illustrated by some additional examples of cases and projects from previous semesters. During the last several years, Berkman clinical students, among other projects:

- Researched and drafted portions of the Podcasting Legal Guide: Rules for the Revolution in conjunction with Creative Commons and the Stanford Center for Internet and Society.
- Prepared and submitted to the Massachusetts Supreme Judicial Court an amicus brief on behalf of the National Center for Missing & Exploited Children in *Commonwealth v. Bryant*, a criminal appeal relating to statutory and constitutional limits on seizing and searching computers. The SJC affirmed the trial court, the result sought in the amicus brief, but did not reach the computer search issue.

- Helped secure an important victory for free speech on the Internet by assisting in defending against RICO and defamation claims brought by a “spiritual-healing” group against two former members of the group who had started a web site devoted to revealing its true nature. Students drafted legal arguments in a summary judgment motion and reply memorandum that helped persuade a federal court to throw out the case, *Gentle Wind Project v. Garvey* (D.Maine). When the case was re-filed in state court, Berkman students continued our representation by preparing draft jury instructions and assisting with other facets of trial preparation; the plaintiffs finally abandoned their claims and settled the case on our clients' terms shortly before the scheduled trial date.
- Helped protect critical online speech by submitting *amicus* briefs to the Fourth Circuit in *Lamparello v. Falwell*, and the Ninth Circuit in *Bosley Medical Institute v. Kremer*, on behalf of two groups of intellectual property law faculty, urging the important principle that, consistent with First Amendment values, use of a trademark as a domain name to identify a “gripe” or critical commentary website must occur in a commercial context before it can violate federal trademark laws.
- Assisted the Isabella Stewart Gardner Museum in Boston with copyright and other legal issues in its innovative free classical music podcast series, "The Concert," which allows listeners to download and freely share previously unreleased performances from the Museum's live concert programs. In particular, we helped the Gardner release all the podcasts under a "Share Music" license from Creative Commons.
- Prepared claim charts, researched prior art and began preparing requests to seek reexamination of four of the “Ten Most Wanted” patents in the Electronic Frontier Foundation's Patent Busting Project. EFF filed the first of these reexam requests with the Patent Office on January 31, 2008.
- Advised Creative Commons regarding updating its generic CC license as a US jurisdiction-specific license, as part of its International Commons effort.
- Assisted The Citizen Lab at The Munk Centre for International Studies at The University of Toronto in assessing licensing issues, including distribution of source code under a GPL (General Public License), for its Psiphon software, a censorship circumvention tool that will allow internet users in countries that censor internet content to bypass censorship filters and restrictions with the cooperation of psiphon network participants.
- Acted as “moot” judicial law clerks to two Federal Circuit judges and one Ninth Circuit judge, drafting an extensive bench memorandum and assisting the judges in preparing for and hearing oral arguments in a moot court program, “The Scope of ‘Derivative Works’ as Applied to Software,” at the University of Washington.

- Collaborated with the Open Net Initiative and the Harvard Law School Human Rights Program and Clinic to explore various legal issues as parts of the ONI's ongoing investigation, analysis and reporting on Internet filtering, surveillance, and censorship by governments around the world. Students made winter-term trips to Russia, Singapore and Thailand for first-hand fact-gathering and research on these issues.
- Assisted several prosecutors' offices with research and briefing regarding a variety of computer search & seizure and electronic evidence issues.
- Reviewed and advised a client on a complex digital distribution/podcasting sublicensing agreement.
- Helped prepare comments for submission to the Copyright Office regarding issues raised by so-called "orphan works," – copyrighted works whose owners are difficult to locate – including whether legislative, regulatory or other solutions to the uncertainty surrounding ownership of such works might be warranted.
- Helped prepare a letter to a U.S. Magistrate seeking to participate, on behalf of the Electronic Frontier Foundation as *amicus curiae*, in a lawsuit to object to plaintiffs' attempts to compel discovery of the identities of anonymous posters to a website run by the defendant.
- Assisted Harvard Law School professors Terry Fisher, John Palfrey, and Jonathan Zittrain in preparing an *amicus* brief to the Supreme Court of the United States in *MGM Studios, Inc. v. Grokster Ltd.* which was cited approvingly in Justice Breyer's concurring opinion.
- Drafted an international license for use by a nonprofit organization that digitizes and distributes materials to visually handicapped users to assist its efforts to secure permission from publishers to make content available to such users.
- Advised recording artists on how the Copyright Act's termination of grants provision might affect their ability to exploit or authorize others to use their works.
- Worked with the Information Technology Division of the Commonwealth of Massachusetts to develop legal guidance for software contracting matters, to craft new software contracting legislation and to evaluate legal issues regarding other ITD software initiatives.
- Drafted model copyright statutes for a developing country.
- Advised arts publishing organizations on novel fair use and public domain issues in traditional and electronic publishing.

- Advised a small Internet radio service and music provider regarding the copyright implications of contemplated changes in its methods for offering music for listening and sale over the web.
- Prepared and submitted an *amicus* brief in a federal copyright case involving P2P networks, *Capitol Records v. Alaujan*, (D. Mass. 2003), that assisted the district court in balancing the competing claims of the plaintiffs and defendants in such cases.

ENROLLING FOR 2008-09

To enroll in the Cyberlaw Clinic for the 2008-09 academic year, you must participate in the HLS online clinical enrollment registration, available through MyPlan from 9:00 am on Monday, April 9 until 5:00 pm on Tuesday, April 10, 2007. For the coming year, you may enroll in the Cyberlaw Clinic through one of the following substantive courses:

Definite:

- *Palfrey & Malone* – Practical Lawyering in Cyberspace (Fall)
- *Nesson* – Cyberone (Fall)
- *Sacco & Rosenfeld* – Child Exploitation, Pornography, & the Internet (Spring)

Pending:

- *Palfrey* – Venture Capital & the Technology Startup (Winter)
- *Palfrey* – International Internet Law (Spring)

FOR MORE INFORMATION:

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