

# THE DAILY RECORD

LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## Big news in the wireless world

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Three newsworthy events in the telecom legal/regulatory world have provided me with all sorts of material for this column.

For purposes of clarification, none of them have anything to do with what beaches are hot this spring break, the start of baseball season or the plight of the eight U.S. Attorneys and the Attorney General.

The first of these stories is the recent classification of wireless broadband as an information service, the second is the issue of wireless phone use on planes and the third is the recently issued injunction against Vonage for violating Verizon's patents.

This latest action, although far from affecting the provision of VoIP services, may have a lasting and profoundly negative impact on Vonage's ability to remain economically and technologically viable.

### Wireless broadband as an information service

Perhaps the greatest danger of legislation is that those who draft it don't always understand the entity they are attempting to regulate. In fairness, those drafters, like the rest of us, don't usually have the prescient knowledge to know in what direction and in what time frame technologies will evolve.

Although much effort, analysis and litigation have involved the distinction between how the terms "information service" and "telecommunications service" are defined, the bottom line, as those who monitor the bills of these services know, is that these distinctions have become largely arbitrary.

However, for legal as opposed to technical purposes, these distinctions are critical. Federal law requires that "telecommunications services," which have evolved from the traditional voice telecommunications services, are subject to much heavier regulatory burdens than "information services," which evolved from data services.

As an example, traditional VoIP, classified as an "infor-

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mation service," is not subject to the same breadth and amount of taxes, surcharges and fees as traditional voice services. Given that this fee burden is often 20 percent more than actual usage costs, the distinction is one factor driving end users, both residential and commercial, away from traditional landline voice services.

This background is relevant and timely because the FCC's actions in a Declaratory Ruling (FCC 07-30) on March 22 classified wireless broadband Internet services as "information services" under the Communications Act, thus placing such services on equal footing with other broadband services, including cable modem service, DSL and Broadband over Powerline (BPL) Internet access service.

### Cellphone use on planes

In late March, a great deal of attention was also given to the issue of whether the FCC would permit the use of cell phones on planes.

While, apparently, the commission received volumes of mail insisting the annoyance factor weighs heavily against changing the current rules, from a legal perspective the issues really depend on how key terms will be defined. That is, according to an unnamed but historically reliable source, how the FCC chooses its words in the prohibition will determine how the issue is ultimately resolved.

If the FCC's ruling explicitly prohibits voice service on aircraft, it is likely the ban will continue. However, if the FCC relies upon technical definitions of types of services, the issue will be much less clear, and, therefore, much more thorny.

Interestingly, while Boeing developed and implemented a wifi system (called Connexion) on some planes, and while Lufthansa initially employed the service, both have decided against wider deployment.

Cost factors aside, while the technology exists to support such links, the fact is that onboard digital communication involves communication between the device and a satellite. For voice conversations this means a delay on both ends, making such conversation challenging, at best, even if it is permitted.

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The practicality of voice communication on planes, even if the legal definitions were accommodating to the service, is therefore limited, although those who have had the unfortunate experience of sitting next to a coast to coast yapper on airphones, will probably take great comfort in the ruling.

## **Vonage**

Very briefly, the injunction granted to Verizon barring Vonage from using technology protected by Verizon patents, will weaken Vonage's market position. The injunction was granted following a jury award to Verizon of \$58 million in addition to monthly royalties based upon Vonage's improper use of patent-protected technologies belonging to Verizon.

The court recently executed the order and considered the merits of a stay of the injunction during the course of a likely appeal by Vonage. A stay would allow Vonage to continue to operate using the relevant technologies.

In an interesting twist, and certainly as a direct result of

the outcome of the jury verdict, on April 2, Vonage notified the SEC that it would not file its 10-K form in a timely manner because of uncertainty over its future.

In 2006, according to its filed 8K form, Vonage spent more than \$365 million on marketing. This figure represents, according to the company's own postings, about twice the amount it spent on providing services, including funds for research and development.

Perhaps the decision-makers who allocated Vonage's fiscal pie should have talked to those who held similar positions at Pets.com. Remember how great those ads were? It's too bad there's no longer a company to fund them.

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