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## What Happens When Rules That Were Written To Protect Winnie The Pooh Are Applied To SpongeBob SquarePants?

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Early in October, an article in the *New York Times* caught my attention. It was called "Your Own Affair, More (VCR) or Less (MP3)," and was written by Seth Schiesel (<http://www.nytimes.com/2003/10/02/technology/circuits/02priv.html>). The article was compelling because it highlighted, for the reader who does not live in the madness of these rules every day, how laws that were written to address a specific technology have been applied to newer technologies that weren't even conceived — let alone readily available — at the time they were written. In other words, in this context, the square peg is being forced into the round hole. It doesn't always fit, no matter how hard it's pushed.

The issue of new technologies and existing laws is perhaps nowhere more acute than in telecommunications where the technologies that drive both voice and data are converging on every single level except the legal one. Voice signals are, by definition, analog while data is, by definition, digital. However, within the past 10 years, almost all of the technology that supports voice telecommunications involves the conversion of such signals from analog to digital, or voice to data.

In addition, because during the same time frame cable service evolved from strictly a vehicle for providing multiple entertainment channels to a mechanism for supporting high-speed or broadband Internet access, the regulatory waters got even muddier.

The evolution of these technologies toward each other — either with respect to the actual "nuts and bolts" that make them work or to the services that each provides, have generated significant amounts of legislation and ongoing litigation. The dichotomy in the way that these products and services are currently regulated appears strange given that the underlying technology that drives communications as a whole is digital. That is, the technology is the same, the rules are different. Only with some historical perspective, does it start to make sense.

On Oct. 6, 2003, the U.S. Court of Appeals for the Ninth Circuit tackled one of the stickiest issues in the regulation of cable services and equal access in *Brand X Internet Services v. Federal Communications Commission* (No. 02-70518). While the decision is likely to be appealed by the FCC, the court found that the FCC erred when it decided that cable companies could exclude rivals from selling competing brands of internet service to end users. The issue is whether cable providers, for the purpose of these services, should be regulated in the same way that those entities that provide DSL (digital subscriber loop) are regulated. In short, the court found that cable providers can not deny

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competitive ISPs access to their networks.

Given that DSL and cable modem service are largely equivalent in that both provide high speed Internet access to end users, the impact of this most recent decision will have far-reaching consequences for players in both segments of the market. DSL is provided by telephone companies and is thus governed by communications rules. Cable service has traditionally fallen outside of the boundaries governing both communications and information services as defined by the FCC. Up to this point, cable providers have been subject to a different set of laws and regulations than have their communications and information services siblings.

Some historical perspective will be useful here. At the core of these legal distinctions are the evolving definitions of the words "communications" and "information." Largely as a result of the 1956 consent decree involving AT&T and IBM, the old "Ma Bell" system was precluded from entering the computer or information service business.

This action was a concession to IBM in an effort to ward off cross-subsidization and discrimination by AT&T if the telephone company was to be allowed to enter the computer business. At the time, each aggressively defended its turf. IBM pushed for a constrained definition of what constituted "information services." Conversely, AT&T lobbied for a broad definition of "telecommunications services."

While it would have been virtually impossible for even the most prescient prognosticator to imagine the convergence of these technologies, the bottom line is that as a result of this decree, access to identical information supplied via different delivery mechanisms is regulated differently. Therefore, the Oct. 6, 2003 decision has the traditional telephone carriers claiming victory and the cable companies crying foul.

This most recent decision is likely to benefit consumers by increasing their options for high-speed access, but this is just another round in a marathon fight. It's shaping up to be yet another "clash of the Titans" as the telephone companies and cable providers square off over who will control the "last mile" of high speed access to the Internet.

Stay tuned....

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