

New Media, Technology and the Law

Newsletter

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Edited by

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COPYRIGHT

RealNetworks "RealDVD" Product Violates DMCA and Breaches Contract with DVD Content Protection Organization

The production and distribution of the RealNetworks "RealDVD" product that enables users to copy DVDs protected by the Content Scrambling System (CSS) copy protection system likely violates the anticircumvention provisions of the Digital Millennium Copyright Act and constitutes a breach of its license with the DVD CCA organization that administers the system, a district court ruled. The court found that the organization and the motion picture studio plaintiffs had established a likelihood of success on the merits of their statutory and contractual claims, and preliminarily enjoined RealNetworks from manufacturing or distributing the RealDVD product. Among other things, the court

concluded that by enabling users to copy DVDs protected by the CSS system to their hard drives in a manner that negated the need to have the physical DVD disk present in a drive when the DVD was played, RealDVD circumvented the CSS system in violation of the DMCA. The court also found that the RealDVD product circumvented the additional ArccOS and RipGuard levels of copy protection utilized by the movie studios to prevent unauthorized copying. The court rejected RealDVD's argument that the manufacturing and distribution of the product, which it intended to be used by consumers for making backup copies of lawfully purchased DVDs, was protected by the fair use defense.

RealNetworks, Inc. v. DVD Copy Control Association, Inc., 2009 U.S. Dist. LEXIS 70503 (N.D. Cal. Aug. 11, 2009) [Download PDF](#)

Editor's Note: In finding that RealNetworks breached the license agreement with the DVD CCA, the federal district court distinguished the 2007 ruling by a California trial court in *DVD Copy Control Association v. Kaleidescape, Inc.* that a set of specifications provided after the CSS license agreement was executed were not binding on a licensee of CSS because the specifications that the licensee was alleged to have breached were not part of the license agreement. The ruling that the federal district court declined to follow was reversed by the California Court of Appeals on the following day. See discussion below of the appeals court ruling in *DVD Copy Control Association v. Kaleidescape, Inc.*

Specification Document Defining Authorized Uses of CSS Copy Protection Technology, Provided After License Was Executed, Held Binding on Licensee

A “General Specifications” document that defined the manner in which a licensee could utilize CSS DVD copy protection technology but was supplied to the licensee of the technology after the license was executed is nevertheless binding on the licensee, the California Court of Appeals ruled. The appeals court concluded that in executing the license, the licensee expressly agreed to comply with specifications governing the use of the technology, knowing that the specifications would not be supplied until after the agreement was executed. The court also found that the licensee, which manufactured and distributed a DVD copying product that the DVD CCA licensing organization claimed was in violation of the disputed specifications, was aware that in assenting to be bound by the later-supplied specifications it was taking the risk that its planned product would not comply with the specifications. Thus, although the license was an adhesive contract, the court reasoned, the limitations contained in the later-supplied specifications were within the reasonable expectations of the licensee.

DVD Copy Control Association, Inc. v. Kaleidescape, Inc., 176 Cal. App. 4th 697; 97 Cal. Rptr. 3d 856 (Cal. Ct. App. 6th Dist. Aug. 12, 2009) [Download PDF](#)

Individualized Internet Radio Station “Webcasting” Service Not an “Interactive Service” Required To Pay Individual Music Licensing Fees

An Internet radio “webcasting” service that permits users to create individualized radio stations with content affected by user ratings of songs, artists and albums is not an “interactive service” required to pay royalties for each individual song played via the service under Copyright Act §114(j)(7), the U.S. Court of Appeals for the Second Circuit ruled. Upholding a jury verdict in favor of the service provider on the issue of interactivity, the court concluded that because the service did not provide copyrighted sound recordings on request, and it did not transmit a program specially created for the user, the service was not an “interactive service” as defined in §114(j)(7). Consequently, the court found, the service need only pay the statutory licensing fee set by the Copyright Royalty Board.

Arista Records, LLC v. Launch Media, Inc., 2009 U.S. App. LEXIS 18843 (2d Cir. Aug. 21, 2009) [Download PDF](#)

Copy of Software Loaded into Computer RAM Sufficiently Fixed for Copyright Infringement Claim

The automatic loading of software code into computer RAM when computers were rebooted created a “copy” that was sufficiently fixed to support a claim for copyright infringement, the U.S. Court of Appeals for the Fourth Circuit held. The appeals court followed the ruling of the Ninth Circuit in *MAI Systems Corp. v. Peak Computers, Inc.* (9th Cir. 1991) that loading of copyrighted software into computer RAM creates an infringing copy. The defendant, a former licensee of the software, argued that it had removed almost all copies of the plaintiff’s software pursuant to a settlement agreement, that a few copies were inadvertently overlooked, that the software was loaded automatically and not deliberately when the computers were booted, and that the software was not accessed for any business purpose. The court upheld the lower court ruling granting judgment in favor of the former licensee on the issue of wilfulness, but found that the licensee’s conduct was sufficiently volitional to support a finding of infringement. The court noted that the original loading of the software onto its computers by the licensee, the actions of its employees in rebooting the computers, and the licensee’s failure to remove all of the infringing copies pursuant to the settlement agreement were volitional acts.

Quantum Systems Integrators, Inc. v. Sprint Nextel Corp., 2009 U.S. App. LEXIS 14766 (4th Cir. July 7, 2009) (unpublished) [Download PDF](#)

Copyright Management Provision of the DMCA Not Limited to Notices in Digital Form

The copyright management provision of the Digital Millennium Copyright Act applies to a handwritten copyright notice on an architectural rendering because the “plain language” of the provision is not limited to notices that are digitally placed on a work, a district court ruled. The architect’s complaint alleged that his copyrighted architectural drawing had been

posted on a Web site by real estate agents who were seeking to sell the residence depicted in the drawings, and who erroneously designated one of the agents as the author of the work. The court emphasized that the DMCA defines “copyright management information” as “any of the [enumerated] information conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form.” The phrase “including in digital form,” the court concluded, “removes any doubt that notices in digital form are covered, but in no way limits the definition to notices made in digital form.”

Fox v. Hildebrand, 2009 U.S. Dist. LEXIS 60886 (C.D.Cal. July 1, 2009) [Download PDF](#)

Editor’s Note: Another district court similarly ruled on this issue in *McClatchey v. Associated Press*, 2007 WL 776103 (W.D. Pa. 2007) (cropping out title, copyright notice and author’s name from photo print violated the copyright management provision of the DMCA). But see *IQ Group, Ltd. v. Wiesner Publishing, LLC*, 409 F. Supp. 2d 587, 596 (D.N.J. 2006) (provision applies only to an automated copyright management system).

Blogger’s Use of Photographs of Executives in Critical Parody of Company Protected by Fair Use Doctrine

A blogger’s unauthorized use of photographs of executives copied from Web sites in a campaign criticizing the company and its business practices is protected by the fair use doctrine, a district court held. The blogger used the photographs to create offensive postcards that he mailed to the plaintiff’s employees and client. The court found that the use of the photographs without alteration was transformative because the photographs were used in a different context from their original promotional purpose, which transformed them into a new creation, citing *Perfect 10, Inc. v. Amazon.com Inc.* (9th Cir. 2007). The court also found that the use of each image in its entirety was reasonable because the use of lesser portions would have undermined the defendant’s purpose to use the photographs to mimic a “WANTED” poster. In summary, the balance of these and the remaining fair use factors favored the blogger’s use, the court concluded. The company’s defamation claims against the company also were dismissed under the California Anti-SLAPP statute.

Sedgwick Claims Management Services, Inc. v. Delsman, 2009 U.S. Dist. LEXIS 61825 (N.D. Cal. July 17, 2009) [Download PDF](#)

TRADEMARKS AND DOMAIN NAMES

Addition of “Dot-Com” Suffix to Generic Term Does Not Impart Registerability to Claimed Trademark

The term “Hotels.com” is generic for hotel information and registration services and the addition of the “dot-com” suffix to the term does not impart registerability as a trademark,

the U.S. Court of Appeals for the Federal Circuit ruled. The court agreed with the analysis of the Trademark Trial and Appeals Board that pointed to numerous examples of the term “hotels” included in the domain names of other Web sites providing hotel information and reservation services as evidence that the term is understood by consumers to identify a Web site that provides such services. The TTAB also concluded that this evidence supported the conclusion that there is a “competitive need” for other Web sites providing services similar to those of the applicant for the use of the term.

In re Hotels.com, L.P., 2009 U.S. App. LEXIS 16178 (Fed. Cir. July 23, 2009) [Download PDF](#)

No “Bad Faith Intent to Profit” under ACPA in Former Trademark Owner's Defensive Renewal of Unused Domain Name

A former trademark owner's renewal of a domain name including its abandoned trademark terms does not constitute “bad faith intent to profit” under the Anticybersquatting Consumer Protection Act, the U.S. Court of Appeals for the Eleventh Circuit ruled. The appeals court rejected the argument that the renewal of the domain name to prevent it from being used by competitors was a “unique circumstance” that justified a finding of bad faith under the statute, stressing that there was no showing that the former trademark owner had any “intent to profit” through the renewal of the domain name. The appeals court also rejected the argument that the alleged ability of the former trademark owner to “monitor the value and viability of Internet traffic” using the domain name was also a “unique circumstance” justifying a finding of bad faith.

Southern Grouts & Mortars, Inc. v. 3M Co., 2009 U.S. App. LEXIS 16600 (11th Cir. July 23, 2009) [Download PDF](#)

Cyberpiracy Damages under ACPA Not Duplicative of Trademark Infringement Damages

A jury award of statutory damages under the Anticybersquatting Consumer Protection Act is not duplicative of an award of damages under the Lanham Act because the ACPA explicitly provides that such awards are “in addition to” other civil remedies, the U.S. Court of Appeals for the Eleventh Circuit ruled. The court also found that the damages were not duplicative because the statutory elements required to establish claims under the respective statutes, as well as their purposes, are different. The court pointed out that an award under the ACPA is intended to penalize, while an actual damages award under the Lanham Act is intended to compensate a plaintiff for injuries and losses.

St. Luke's Cataract and Laser Institute, P.A. v. Sanderson, 2009 U.S. App. LEXIS 15268 (11th Cir. July 9, 2009) [Download PDF](#)

ONLINE CONTENT

Identity of Anonymous Tipster to Software & Information Industry Association Anti-Piracy Program May Be Subject to Disclosure in Defamation Action

A company accused of copyright infringement by an anonymous tipster who submitted information on the Web site of the Software & Information Industry may be entitled to obtain discovery of the identity of the tipster in order to pursue a defamation claim against the tipster, the District of Columbia Court of Appeals ruled. The court considered the standards that various courts have applied to attempts to unmask the identity of anonymous parties accused of making defamatory statements, and adopted the approach of the Supreme Court of Delaware in *In re Cahill* (Del. 2005). In ordering the matter remanded to the trial court, the appeals court held that the plaintiff company must show (1) that it has adequately pleaded all of the elements of a defamation claim; (2) that reasonable efforts have been made to notify the anonymous party of the proceedings; (3) that the anonymous party has been given a reasonable amount of time to respond to the proceeding; (4) that the plaintiff has proffered sufficient evidence to create a genuine issue of material fact as to each element of the underlying claim that is within its control; and (5) that the information is important for the plaintiff to proceed with the lawsuit. The court emphasized that once such a showing has been made, a court need not undertake a balancing analysis of the competing interests of the parties, nor need the plaintiff show that it has exhausted other avenues by which to identify the anonymous party.

Solers, Inc. v. Doe, 2009 D.C. App. LEXIS 342 (D.C. Ct. App. Aug. 16, 2009) [Download PDF](#)

Anonymous Blog Posts Imputing Promiscuity to Professional Model Not Mere "Trash Talk" under Defamation Law

Blog posts that referred to a professional model as a "skank" and a "ho" were statements capable of a defamatory meaning, and were no less defamatory for having been made on a blog, a Supreme Court judge in New York ruled. The court rejected the argument of the anonymous blogger who made the posts that the court should find as a matter of law that a blog is a "modern day forum for conveying personal opinions, including invective and ranting," and that consequently the statements on the "Skanks of NYC" blog concerning the plaintiff should be considered mere hyperbolic "trash talk." The court found that the plaintiff model had established a prima facie case of defamation, and therefore was entitled to compel pre-action disclosure of information about the identity of the blogger under N.Y. C.P.L.R. 3102(c).

In re Application of Cohen, 2009 NY Slip Op 29369; 2009 N.Y. Misc. LEXIS 2302 (N.Y. Sup. Ct. N.Y. Cty Aug. 17, 2009) [Download PDF](#)

Editor's Note: This ruling is further discussed on the [Proskauer New Media and Technology Law blog](#).

Nursing Student's Vulgar Blog Post Did Not Violate Nursing School Standards of Professionalism or Violate Confidentiality Agreement

A nursing student's "vulgar" blog post describing the birthing process of an unidentified patient she was required to follow as part of her course work did not justify her dismissal from the nursing school because the post neither violated the school's standards of professionalism nor its confidentiality requirements, a district court held. The court found it unnecessary to address the student's First Amendment and Due Process arguments challenging her dismissal, concluding that the school's professionalism standards did not extend to the blog post because it was not created or used in any professional context, it was written without any clearly intended audience and was posted on the student's personal MySpace page. The court also found that the post did not violate the school's confidentiality requirements because it did not contain information that could lead to the discovery of the patient's identity.

Yoder v. University of Louisville, 2009 U.S. Dist. LEXIS 67241 (W.D. Ky. Aug. 3, 2009)
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Author of Posts to Web Site Forum Not Entitled to New Jersey Press Shield Law Protection

An individual who made allegedly defamatory posts to Web site forums concerning the product and executives of an Internet company is not entitled to the protection of the New Jersey press shield law because she was not involved in any way with any "news media for the purpose of gathering ... or disseminating news for the general public," a state trial court ruled. The court noted that while New Jersey's press shield law has been liberally interpreted, the New Jersey Legislature did not intend the shield law to apply to Internet postings that were made by often anonymous individuals who needed to supply only an e-mail address in order to post and were not subject to fact-checking and editorial review. The court also ruled that although defamatory Internet posting are somewhat comparable to spontaneous oral statements because of their instantaneity, such postings should not be considered "slander" for purposes of determining damages.

Too Much Media, LLC v. Hale, 2009 N.J. Super. Unpub. LEXIS 2291 (N.J. Super. Ct. App. Div. June 30, 2009) (unpublished) [Download PDF](#)

Search Engine Not Liable for Individual's Lanham Act Claims Arising from Search Results

A search engine is not liable for an individual's Lanham Act false endorsement claims based on search results returned from a search of her personal name, a district court ruled.

The plaintiff individual claimed that her name, which was unique to her, had commercial value that was harmed by the false association with pornographic and other objectionable sites that were returned by the search engine when her name was searched. The court concluded that while the individual claimed that her name had commercial value, she was not engaged in, nor did she indicate an intent to engage in, the commercial marketing of her identity and thus she lacked prudential standing to assert a false endorsement claim. The court further ruled that there was no likelihood of confusion arising from the association of the objectionable Web sites with her name, because no person accessing the links returned in the search results could reasonably conclude that the plaintiff endorsed the products that were being offered on those sites. The court also found that the search engine was entitled to immunity from the plaintiff's claims as an interactive computer service, even though the plaintiff's claims were "nominal intellectual property claims."

Stayart v. Yahoo! Inc., 2009 U.S. Dist. LEXIS 78242 (E.D. Wisc. Aug. 28, 2009)

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Editor's Note: The court's discussion of immunity under Section 230 of the Communications Decency Act is arguably *dicta* because the dismissal of the plaintiff's trademark claims on the merits would seem to negate the need to consider such a defense. Although the court acknowledged that trademark claims fall within the statutory exception to Section 230 immunity as "intellectual property" claims, the court appeared to reason that because the trademark claims were substantively deficient, they did not fall within that exception and were thereby barred on that basis. Referring to CDA Section 230(e)(2), which provides that Section 230 shall not be "construed to limit or expand any law pertaining to intellectual property," the court stated: "Immunizing Yahoo! from Stayart's claims would not limit the laws pertaining to intellectual property because Stayart does not state a valid intellectual property claim."

CDA Section 230 Protects Web Site Operators from Bare Allegation of Conspiracy with Posters of Alleged Defamatory Statements

Section 230 of the Communications Decency Act protects the operators of a Web site from a civil conspiracy claim based on allegations that the operators conspired with users who posted allegedly defamatory statements on the site's message board, a district court ruled. The court noted that the plaintiffs' complaint made no specific allegations detailing the alleged conspiracy other than the operation of the message board. The court further noted that the complaint contained no allegations that the operators themselves made any statements concerning the plaintiffs, nor did the complaint contain any defamation claim against the Web site operators.

Cornelius v. DeLuca, 2009 U.S. Dist. LEXIS 72812 (E.D. Mo. Aug. 18, 2009) [Download](#)

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CDA Section 230 Protects Search Engine from Liability for Alleged Fraudulent Advertisements

Section 230 of the Communications Decency Act protects a search engine from liability for harm claimed by individuals who clicked on allegedly fraudulent advertisements generated by keyword advertising, a district court ruled. The plaintiff alleged that because the Google search engine's "Keyword Tool" suggested keyword search advertising terms to advertisers such as those that placed the allegedly fraudulent advertisements, the search engine was involved in "creating or developing" the advertisements. The plaintiff specifically alleged that the Keyword Tool suggested the word "free ringtone," coupled with Google's knowledge of problems with unauthorized charges in the mobile phone industry, rendered the tool "neither innocuous or neutral." The court ruled that the "Keyword Tool" is a "neutral tool" that did "nothing more than provide options" to advertisers that they could accept or reject at their discretion. In holding that the plaintiff's amended complaint should be dismissed, the court reiterated its prior similar ruling dismissing plaintiff's original complaint.

Goddard v. Google, Inc., 2009 U.S. Dist. LEXIS 67203 (N.D. Cal. July 30, 2009)

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British High Court Rules Search Engine Is Not Liable for Defamatory Statements in Search Engine Results

A search engine is not liable for defamatory statements in a "snippet" of a Web site forum post returned in search engine results, the UK High Court of Justice, Queen's Bench, ruled. The court concluded that under common law principles of defamation, the search engine is not a "publisher" of the statements contained in such a snippet because responsibility for publication requires some "mental element," and search results are generated automatically by computer programs, without any input from the search engine's officers or employees. The court also noted that the search engine had taken steps to block the offending content from appearing in search results returned in the UK once it had been notified of their defamatory nature. Although these efforts were imperfect due to the nature of the technology, the court concluded it was not possible to charge the search engine with liability on the basis of "authorisation, approval or acquiescence" in the statements.

Metropolitan International Schools Limited v. Designtecnica Corp., [2009] EWHC 1765 (QB) (July 16, 2008) [Download](#)

ELECTRONIC DIRECT MARKETING

Standing To Bring Civil Action under CAN-SPAM Requires Provider To Show “Substantial Actual Harm” from Spam

A party claiming to be a “provider of Internet access service” who is “adversely affected” by unsolicited commercial e-mail messages must show “substantial actual harm” resulting from such messages in order to have standing to bring a civil action under the federal CAN-SPAM Act, the U.S. Court of Appeals for the Ninth Circuit ruled. The court ruled that the plaintiff had failed to meet the standard because he failed to show such factors as the hiring of additional personnel, technical concerns such as bandwidth usage or impairment of Internet connectivity or integrity, or other expenditures necessarily attributed to such messages. The court found that the plaintiff’s claimed harms related almost entirely to preparation for litigation, and “not to the operation of a bona fide service.” The court also concluded that the plaintiff failed to establish that in providing free e-mail accounts to a small group of individuals, he was a “provider of Internet access service” within the meaning of the Act. The court dismissed the plaintiff’s claims under the Washington State anti-spam statute, finding that the statute was not confined to claims involving either fraud or deceit, therefore the statute was preempted under the express preemption provision of the CAN-SPAM Act.

Gordon v. Virtumundo, Inc., 2009 U.S. App. LEXIS 17518 (9th Cir. Aug. 6, 2009)

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Editor’s Note: This ruling is discussed more fully on the Proskauer [New Media and Technology Law blog](#).

No CFAA Violation in Transmission of Unwanted Text Messages to Cellular Phones

A proposed class action complaint alleging that a financial services information company continued to send text messages to the reassigned cellular telephone numbers of former subscribers failed to state a claim under the Computer Fraud and Abuse Act, a district court ruled. The court concluded that the plaintiff’s allegations that the text messages slowed the operation of wireless devices, consumed bandwidth and depleted the memory of the devices were insufficient to establish that the company “obtained information” from the devices in violation of the CFAA. The court also concluded that these allegations were insufficient to establish that the proposed class members suffered any damage that was cognizable under the statute. The court held, however, that the \$5,000 threshold for establishing “loss” under the statute could be met by aggregating losses suffered by multiple devices owned by multiple individuals. The court declined to dismiss the complaint, however, and granted the plaintiff 30 days leave to amend.

Czech v. Wall Street on Demand, Inc., 2009 U.S. Dist. LEXIS 59172 (D. Minn. July 10, 2009) [Download PDF](#)

ELECTRONIC COMMUNICATIONS PRIVACY

Ninth Circuit Limits Government Searches of Electronically Stored Information

In an appeal involving government access to electronically stored results of laboratory drug tests for illegal steroid use, the U.S. Court of Appeals for the Ninth Circuit set out guidelines to be followed by law enforcement officials when seeking access to electronically stored information generally. In an opinion for the majority of an en banc panel of eleven judges, Judge Kozinski wrote that orders allowing searches of computers and other electronic devices must contain safeguards against government access to information outside the scope of the order. The guidelines include requirements for government waiver of the plain view doctrine, segregation and redaction of material by special personnel or independent experts, disclosure of the risks of information destruction, requirements that search protocols limit access only to information for which probable cause has been shown, and return of lawfully possessed information.

U.S. v. Comprehensive Drug Testing, Inc., 2009 U.S. App. LEXIS 19119 (9th Cir. Aug. 26, 2009) [Download PDF](#)

Allegations That an Employee Used Employer's Laptop To Access and Delete Employer's Data and Access Adult Web Sites Not Actionable under Stored Communications Act

Allegations that an employee used an employer-provided laptop to access adult Web sites and to access and delete the employer's data stored on the laptop are not actionable under 18 U.S.C. § 2701 et seq., a district court ruled. The court found that the Stored Communications Act (also referred to as the Stored Wire and Electronic Communications Act) prohibits unauthorized access to an “electronic communications service,” which is defined as “any service which provides to users thereof the ability to send or receive wire or electronic communications.” The court concluded that the proposed claims were insufficient because they constituted a “formulaic recitation” of the statutory elements. The court also concluded that the proposed SCA claims were insufficient because they failed to allege that the employee accessed the employer's electronic communications system. The court found that the neither the employee's access to the employer's laptop nor the use of the laptop to access adult Web sites via the use of the employer's laptop constituted unauthorized access to the employer's electronic communications service.

Thule Towing Systems, LLC v. McNallie, 2009 U.S. Dist. LEXIS 60367 (E.D. Mich. July 15, 2009) [Download PDF](#)

No Warrant Required under Stored Communications Act for Government Access to E-Mail Messages Stored on Web Mail Provider's System for Less Than 181 Days

The Stored Communications Act does not require the Government to obtain a warrant to access opened e-mail messages stored on a Web mail provider's system for less than 181 days and may obtain such e-mails via a trial subpoena, a district court ruled. The court found that e-mail messages received on a Web-based e-mail system are distinguishable from e-mail messages received on non-Web-based systems because users of Web mail typically read their messages online and keep them in online storage, while users of non-Web-based systems typically download their messages. Consequently, under the SCA, the court reasoned, the requirements for access to Web-based e-mail messages are those that apply to the provision of storage or computer processing services, not those that apply to retention of e-mail for backup purposes. Under the SCA provisions applicable to storage and computer processing services, the court concluded, only a trial subpoena, not a warrant, is required.

United States v. Weaver, 2009 U.S. Dist. LEXIS 60297 (N.D. Ill. July 15, 2009) [Download PDF](#)

COMPUTER FRAUD AND ABUSE ACT

Criminal Charges for Creating Fictitious Profile on Social Networking Site Dismissed for Contravening Void for Vagueness Doctrine

Misdemeanor charges under the Computer Fraud and Abuse Act for intentionally violating a Web site's terms of service contravene the constitutional "void for vagueness" doctrine and must be dismissed, a district court ruled. The court granted the defendant's motion to vacate her conviction on misdemeanor charges of accessing a protected computer without authorization or in excess of authorization when she accessed a social networking site, created a fictitious profile, and used the false profile to communicate with an underage girl. The court found that the application of the CFAA under the circumstances ran afoul of the void for vagueness doctrine because a person of "common intelligence" would not be on notice that the breach of a service contract could be a crime under the CFAA.

U.S. v. Drew, 2009 U.S. Dist. LEXIS 85780 (C.D. Cal. Aug. 28, 2009) [Download PDF](#)

Act of Employee Disloyalty Does Not Render Employee Access to Employer's Computer "Without Authorization" under CFAA

An employee's access to an employer's computer network does not become "without authorization" within the meaning of the Computer Fraud and Abuse Act by virtue of the employee's intent to commit an act of disloyalty to the employer, the U.S. Court of Appeals for the Ninth Circuit ruled. The court concluded that under the plain language of the

relevant terms in the CFAA, an employee's access to an employer's computer network is authorized when the employer gives the employee permission to use it. The court found that there is no statutory language to support the contention that authorization terminates when an employee determines to act contrary to the interest of an employer, rejecting the position taken by the U.S. Court of Appeals for the Seventh Circuit in *International Airport Centers v. Citrin* (7th Cir. 2006).

LVRC Holdings LLC v. Brekka, No. 07-17116 (9th Cir. Sept. 15, 2009) [Download PDF](#)

Editor's Note: This ruling is further discussed on the [New Media and Technology Law blog](#). Note also the ruling below in *Vurv Technology v. Kenexa Corp.*, where a district court ruled similarly to the Ninth Circuit on an employer's CFAA claim, but recognized a claim under the Georgia Computer Systems Protection Act.

No CFAA Claim against Departed Employees for Pre-Departure Computer Access, but Georgia Law Supports Such a Claim

Access by employees to their employer-issued laptops was not unauthorized under the Computer Fraud and Abuse Act by virtue of the employees' decision to leave the employer and work for a competing company, a district court ruled. The court concluded that an employee's pre-departure access to an employer's computer occurs "without authorization" or in excess of authorization within the meaning of the Act only where "initial access was not permitted." The court noted, however, that unauthorized access after the employees had actually left the employer was also alleged, and to that extent their access was actionable under the CFAA. The court also considered the employer's claims under the Georgia Computer Systems Protection Act, finding that the employer had sufficiently alleged "use" of the laptop "without authority" under the Georgia Act. Precedent in the Georgia appellate courts, the district court noted, supported the conclusion that under the Georgia statute the employee's use was without authority after the employees formed the intent to leave the employer and join a competitor.

Vurv Technology, LLC v. Kenexa Corp., 2009 U.S. Dist. LEXIS 61623 (N.D. Ga. July 20, 2009) [Download PDF](#)

SOFTWARE

Tenth Circuit Returns SCO v. Novell UNIX Code Ownership Dispute to District Court for Jury Trial

In the closely watched *SCO v. Novell* dispute over ownership of certain intellectual property in UNIX source code that was the subject of a 1995 transaction, the Tenth Circuit remanded the case to the district court for, finding that summary judgment should not have been granted on the issue of ownership. The disputed code is at the heart of SCO's related

copyright litigation alleging that IBM contributed some of the disputed code to the Linux operating system. The *SCO v. Novell* and *SCO v. IBM* cases are part of a complicated series of litigations that commenced in 2003 when SCO claimed that the copyrights in the UNIX code that it acquired as a result of a transaction with Novell in 1995 were infringed by IBM and users of the Linux OS. When Novell publicly stated that SCO did not acquire the copyrights as a result of the 1995 transaction, SCO sued Novell for slander of title, and the district court granted summary judgment in favor of Novell on the issue of ownership. While the Tenth Circuit concluded that the issue of copyright ownership should not have been resolved on summary judgment, it did uphold the judgment entered in favor of Novell and against SCO on the issue of unpaid royalties due under the 1995 transaction.

The SCO Group, Inc. v. Novell, Inc., 2009 U.S. App. LEXIS 18987 (10th Cir. Aug. 24, 2009) [Download PDF](#)

Editor's Note: The appeals court ruling is discussed more fully on the [New Media and Technology Law blog](#).

Software Licensee Not Entitled to Preliminary Injunction Requiring Perpetual Service or a Source Code Escrow Deposit

A software licensee under a perpetual, fully paid-up license is not entitled to a preliminary injunction requiring the licensor either to provide service perpetually for a set price or to deposit the software source code with an escrow agent, a district court ruled. The licensor argued that because the term of the software license was “perpetual” it was entitled to the relief sought under the terms of the license when the parties were unable to agree upon terms for the continuation of a maintenance services after the initial term provided in the license had expired. The court concluded that the licensee had not met its burden of showing a likelihood of success on the merits of its claim that the terms of the license agreement supported its entitlement to the relief sought.

Peter Kiewit Sons' Inc. v. Atser, L.P., 2009 U.S. Dist. LEXIS 58888 (D. Neb. July 10, 2009) [Download PDF](#)

Editor's Note: In denying the licensee’s motion for a preliminary injunction, the court noted that it had previously granted preliminary injunctive relief requiring the licensor to transfer the object code of the licensed software and certain other related materials to a server available to the licensee.

CONTRACTS

Inclusion of Terms and Conditions of Sale in Online Contract via Hyperlink Not Procedurally Unconscionable

The incorporation of a limitation of damages clause in terms and conditions of sale available via a hyperlink displayed during an online ordering process was not procedurally unconscionable, a district court ruled. In a dispute between commercial parties, the court concluded that the terms and conditions were conspicuous within the meaning of the Uniform Commercial Code where the hyperlink leading to them was in underlined blue contrasting text and was displayed three times during the ordering process. The court further noted that attention was specifically brought to the terms and conditions by a reference in the directions for the “final order step” of the ordering process.

PDC Laboratories, Inc. v. Hach Co., 2009 U.S. Dist. LEXIS 75378 (C.D. Ill. Aug. 25, 2009) [Download PDF](#)

Editor's Note: This case is the latest in a line of cases that clarify the definition of “conspicuous” in the Uniform Commercial Code. In concluding that hyperlinked terms were sufficiently conspicuous, the court relied upon the opinion in *Hubbert v. Dell Corp.*, 359 Ill. App. 3d 976, 835 N.E. 2d 113 (5th Dist. 2005), an opinion involving a consumer transaction, referring to it as “the leading authority in 'hyperwrap' cases.”

Alleged Fraud and Duress by Licenser Does Not Negate Forum Selection Clause in Software Licensing Agreement

A forum selection clause in a software license agreement is not rendered unenforceable by claims that the agreement was procured by fraud and duress on the part of the licenser, a district court ruled. The licensee claimed that it entered into the agreement as a result of misrepresentations on the part of the licenser about its product, and as a result of duress stemming from the defects in its existing system that the licenser's product was intended to replace. The court ruled that a forum selection clause is presumptively valid, and that the clause would be rendered unenforceable for fraud or overreaching only if the inclusion of the forum selection clause in the agreement was the product of such conduct.

Northwest Direct Teleservices, Inc. v. Touchstar Software Corp., 2009 U.S. Dist. LEXIS 60539 (D. Ore. July 14, 2009) [Download PDF](#)

Forum Selection Clause in Domain Name Registration Agreement Applies To Disputes between Registrant and Third Parties

The forum selection clause in a domain name registration agreement applies to litigation brought against a domain name registrant by a third party claiming trademark infringement and cybersquatting, a district court ruled. The court found that it was

undisputed that the registrant agreed to the domain name registration agreement containing a forum selection clause, and the clause specified that “disputes concerning the use of any domain name registered with” the registrar would be conducted in the U.S. District Court in Arizona. The court found that the fact that the plaintiff was not a party to the registration agreement did not render it unenforceable because the registrant was bound by its terms even if the plaintiff was not.

Productive People, LLC v. Ives Design, 2009 U.S. Dist. LEXIS 57194 (D. Ariz. June 18, 2009) (unpublished) [Download PDF](#)

DEVELOPMENTS OF NOTE

FTC and HHS Issue Proposed Breach Notification Rule for Electronic Health Information

[FTC Press Release](#) [HHS Press Release](#)

FTC Obtains TRO against U.S. Internet Seller Alleged To Deceptively Sell Electronics Products to UK Consumers

[FTC Press Release](#)

Microsoft Obtains Stay of Patent Injunction against Distribution of Microsoft Word Software

[News Coverage](#)

Federal Court Strikes Down Some Louisiana Ethics Rules Restricting Attorney Internet Advertising

[Opinion](#). Public Citizen, Inc. v. Louisiana Attorney Disciplinary Board, 2009 U.S. Dist. LEXIS 67244 (E.D. La. Aug. 3, 2009)

Second Circuit Remands Nassau County Litigation against Online Hotel Room Sites over Payment of Local Taxes for Reconsideration of Class Action Status

[Opinion](#): County of Nassau, New York v. Hotels.com, 2009 U.S. App. LEXIS 17748 (2d Cir. Aug. 11, 2009)

Attorney Fee Award in Web Site Accessibility Settlement Supported by Adoption of Disability Modifications by Other Web Sites

[Opinion](#): National Federation of the Blind v. Target Corp., 2009 U.S. Dist. LEXIS 67139 (N.D. Cal. Aug. 3, 2009)

Print On Demand Bookseller May Proceed in Antitrust Lawsuit against Amazon.com

[Opinion](#): Booklocker.com, Inc. v. Amazon.com, Inc., 2009 U.S. Dist. LEXIS 76352 (D. Me. Aug. 26, 2009)

Copyright Office Announces Rulemaking on Mandatory Deposit of Online Electronic Works

[Copyright Office Notice](#)

Appeals Court Upholds Copyright Royalty Judges on Webcasting Rates but Rejects Minimum Fee

[Opinion](#): Intercollegiate Broadcast System, Inc. v. Copyright Royalty Board, 2009 U.S. App. LEXIS 15401 (D.C. Cir. July 10, 2009)

Appeals Court Upholds Copyright Royalty Judges on Rates for Satellite Radio But Remands on Rate for Ephemeral Copies

[Opinion](#): SoundExchange, Inc. v. Librarian of Congress, 571 F.3d 1220 (D.C. Cir. July 7, 2009)

Michigan Court Rules Amended to Address Blogging and Twittering Jurors

[Rule Amendment](#)

New York Attorney General Files Suit against Social Networking Site Claiming Fraudulent Access to User E-Mail Contacts

[Attorney General Press Release](#)

Plastic Surgery Franchise Settles New York Deceptive Practices Charges over False Internet Reviews

[Attorney General Press Release](#)

Dish Network Settles with 46 States over Do-Not-Call and Sales Practices Complaints for \$6 Million

[News Coverage](#)

Second Circuit Upholds New York Prohibition against Direct Sales of Wine

[Opinion](#) Arnold's Wines, Inc. v. Boyle, 571 F.3d 185 (2d Cir. July 1, 2009)

Electronic Frontier Foundation Issues Report on Locational Privacy

[Report](#): "On Locational Privacy, and How to Avoid Losing it Forever"

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