

October –  
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**in this issue**

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Edited by **Jeffrey D. Neuburger**

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## COPYRIGHT

### Copying and Modifications to Proprietary Operating System to Enable Use on Third-Party Hardware Infringed Copyright and Violated DMCA

A computer manufacturer's copying of a proprietary computer operating system and its modification of the operating system to enable it to run on the manufacturer's computers infringed copyright and violated the anticircumvention provisions of the Digital Millennium Copyright Act, a district court ruled. The court concluded that the copying and modification infringed the copyright owner's rights of reproduction, distribution and creation of derivative works. With respect to the distribution right, the court rejected the argument that the sale of computers loaded with the modified operating system was protected by the first sale doctrine, because the copies created by the manufacturer were not "lawfully made" within the meaning of Copyright Act § 109. The court ruled that it was irrelevant that the manufacturer included with each computer a DVD purchased from the copyright owner containing the unmodified operating system, because the copyright

owner claimed infringement of the distribution right with respect to the modified copies, not the unmodified copies. The court also concluded that the copying and modification of the computer operating system violated the anticircumvention provisions because the manufacturer had used decryption software to circumvent an encryption feature of the unmodified operating system that was intended to prevent running the operating system on third-party hardware.

Apple, Inc. v. Psystar Corp., 2009 U.S. Dist. LEXIS 106142 (N.D. Cal. Nov. 13, 2009)  
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**Editor's Note:** In the above opinion the court reserved ruling on whether Apple was entitled to a preliminary injunction. On December 1, Apple and Psystar filed a document reflecting a settlement of certain issues in the above litigation. The document indicates that Psystar agreed to pay \$ 2.7 million in damages for infringement and cease selling computers with Apple's Mac operating system pre-installed.

### **Record Company Surveillance of Peer-to-Peer Network Users to Investigate Copyright Infringement Protected from CFAA, ECPA claims by Noerr-Pennington Doctrine**

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Record companies' use of a third-party provider of surveillance technology to investigate copyright infringement on peer-to-peer networks is protected under the Noerr-Pennington Doctrine from claims that such surveillance violated the Computer Fraud and Abuse Act, the Electronic Privacy Protection Act and other statutes and common law doctrines, a district court ruled. The court found that the Noerr-Pennington Doctrine applied to the use of the MediaSentry surveillance technology to identify the IP addresses of computers connected to peer-to-peer networks and from which copyrighted files were downloaded. The court rejected the argument of the plaintiff, who had been sued by the record companies in an infringement action, that the record companies' infringement actions were objectively baseless and, therefore, not entitled to the protection of the doctrine, noting that similar actions brought against other individuals for the same conduct had been concluded favorably to the record companies.

Andersen v. Atlantic Recording Corp., 2009 U.S. Dist. LEXIS 106390 (D. Ore. Nov. 12, 2009) [Download PDF](#)

### **Software Vendor's Failure to Provide Means to Recover Licensed Copies of Software Rendered Transaction a Sale of a Copy**

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Copies of software that were transferred to a purchaser upon payment of a single fee, subject to a license that provided for perpetual possession of the copies by the purchaser and that provided no means by which the vendor could regain possession of the copies, were subject to the copyright first sale doctrine, a district court ruled. Consequently, the court ruled, a party who acquired the copies from the original purchaser was entitled to sell them in an online auction. The court concluded that styling the transaction as a license was irrelevant to the issue of whether the transaction was a mere license or whether it constituted a sale within the meaning of § 109(a) of the Copyright Act.

Vernor v. Autodesk, Inc., 2009 U.S. Dist. LEXIS 90906 (W.D. Wash. Sept. 30, 2009)  
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**Editor's Note:** In analyzing the first sale doctrine, the court analyzed a series of Ninth Circuit Court of Appeals panel opinions construing subsection 109(a) and concluded that because the opinions were conflicting, the court was obliged to follow the earliest of the three opinions, *United States v. Wise* (9th Cir. 1977), even though following the later opinions would yield a different result. This ruling is further discussed on the [New Media and Technology Law blog](#).

### **Photographs Displayed on German Web Site Accessible in the United States Not “Published” in the United States**

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Photographs created by a Swedish photographer and displayed for sale on the Web site of a Germany art gallery were not published in the United States within the meaning of the Copyright Act and the Berne Convention, a district court ruled. Noting that the issue was one of first impression, the court rejected the argument of the defendants that because the works were displayed on the Internet and were visible all over the world, they were simultaneously published in Germany and in the United States, and therefore the copyright owner was required to register the works with the U.S. Copyright Office in order to maintain an infringement action in a U.S. court. The court held that such a construction of the Copyright Act and the Berne Convention was inconsistent with the purpose of the Convention because it would impose U.S. copyright registration formalities on the authors of foreign works merely upon the posting of an image on the Internet.

*Moberg v. 33T LLC*, 2009 U.S. Dist. LEXIS 93402 (D. Del. Oct. 6, 2009) [Download PDF](#)

### **Wireless Communications Company Need Not Obtain Public Performance License for Sales of Ringtones**

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A wireless communications company that sells ringtones derived from copyrighted musical recordings is not required to obtain public performance licenses covering the underlying musical compositions, a district court ruled. The court concluded that the transmission of ringtones by the company to a subscriber does not constitute a transmission of a performance to the public within the meaning of § 101 of the Copyright Act because, among other reasons, the company's transmission to a subscriber was only capable of being received by the subscriber, not by the public. The court rejected the theory advanced by ASCAP that the transmission of ringtones to subscribers was the first step in a chain of events that led to the subscribers playing ringtones to the public. Relying on the Second Circuit ruling in *Cartoon Network v. CSC Holdings* (2d Cir. 2008), the court held that the transmission of the ringtones did not “cause” a public performance to take place. The court further rejected the argument that when a subscriber plays a ringtone on a cellular phone, a public performance takes place, rendering the company secondarily liable for such public performance. The court concluded that a subscriber's use of a ringtone as an alert to incoming calls is not a “public performance” because such use does not normally occur in public, and when it does, it does not occur with the expectation of profit.

*In re Application of Cellco Partnership*, 2009 U.S. Dist. LEXIS 95630 (S.D. N.Y. Oct. 14, 2009) [Download PDF](#)

### **Web Site Designer and Web Site Owner Jointly and Severally Liable for Infringement of Copyrighted Images Used in Web Site Redesign**

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A firm that redesigned a company's Web site and hosted the site on its servers is directly liable for infringement of copyrighted images incorporated in the redesigned Web site, a district court ruled. The court also found that the Web site owner was vicariously liable for infringement of the images because the company used the images for financial gain, i.e., the marketing of its business, and because its employees were responsible for approving changes to the site and thus it had the right and ability to stop the infringement. Because both the design firm and the company contributed to the infringement, the court concluded that they were jointly and severally liable. The court declined to enter judgment on the issue of wilfulness, however, because the copyright owner had failed to show how the images came into the possession of the design firm or the company, and failed to establish its contention that the images contained a watermark that had been removed.

Corbis Corp. v. Starr, 2009 U.S. Dist. LEXIS 79626 (N.D. Ohio Sept. 2, 2009) [Download PDF](#)

### **DMCA § 512(c) Safe Harbor for Third Party Content Protects Video Upload Site from Copyright Infringement Liability**

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A video upload site that hosted infringing videos is protected from liability for copyright infringement by § 512(c) of the Digital Millennium Copyright Act because the site operator satisfied all of the elements of the statutory safe harbor from liability for material provided by third parties, a district court ruled. The court concluded that when the site acquired actual knowledge of allegedly infringing materials it expeditiously removed the content. Among the arguments that the court rejected was the plaintiffs' theory that the statutory "actual knowledge" requirement was satisfied by the general knowledge that the site had that it was hosting a category of content that was subject to copyright protection. The court also concluded that the site operator had adopted and reasonably implemented a policy for terminating the subscriptions of repeat copyright infringers, within the meaning of § 512(c).

UMG Recordings, Inc. v. Veoh Networks, Inc., 2009 U.S. Dist. LEXIS 86932 (C.D. Cal. Sept. 11, 2009) [Download PDF](#)

### **Transfer of Licensed Software Pursuant to Corporate Reorganization Infringed Copyright, Where Licensor Permission Was Not Obtained**

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A corporation's transfer of licensed software to a newly formed entity as a result of a corporate restructuring infringed copyright where the corporation failed to obtain permission of the software licensor for the transfer, the U.S. Court of Appeals for the Sixth Circuit ruled. The court reiterated its ruling in PPG Industries, Inc. v. Guardian Industries Corp. (6th Cir. 1979) that as a matter of federal law, a copyright license is presumed to be non-assignable and non-transferable in the absence of an express provision to the contrary. The court noted that the software license in question contained a provision that required the express written permission of the licensor prior to transfer, and that, as a matter of federal preemption, this provision could not be overcome by a provision in a state corporate merger statute that deemed all property of a corporate to vest in the surviving corporate entity following a statutory merger.

Cincom Systems, Inc. v. Novelis Corp., 581 F.3d 431 (6th Cir. Sept. 25, 2009) [Download PDF](#)

## DOMAIN NAMES

### Previously Identified Cybersquatter Not Entitled to Good Faith Defense under ACPA

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A domain name registrant who has been adjudicated a cybersquatter in prior, unrelated domain name disputes may not claim that he had a “reasonable belief” under the Anticybersquatting Consumer Protection Act that his use of a potentially infringing domain name was lawful, the U.S. Court of Appeals for the Ninth Circuit ruled. In upholding the district court finding that the registrant had registered and used the disputed domain name in bad faith, the appeals court noted that the registrant never used the domain name in connection with a bona fide offer of goods and services, that he used the domain name to generate revenue by providing links to the plaintiff’s competitors, and that he had offered to sell the domain name to the plaintiff for as much as \$72,500. The court also noted that the registrant had been the losing respondent in two domain name arbitration proceedings and had been adjudicated a cybersquatter by another district court in a similar case. The court commented that the registrant “has made his cybersquatter bed and now cannot persuasively challenge the district court’s conclusion that he must lie in it.”

Lahoti v. Vericheck, Inc., 2009 U.S. App. LEXIS 25132 (9th Cir. Nov. 16, 2009) [Download PDF](#)

**Editor’s Note:** The Court of Appeals did not uphold the district court’s ruling on that the plaintiff’s “verichack” mark was distinctive and legally protectable rather than generic, and remanded for reconsideration of that issue.

### English Court Declares Registrar of Gambling Domain Name Need Not Comply with Seizure Order of Kentucky State Court

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A domain name registrar incorporated under English law need not comply with a seizure order issued by a Kentucky state court in a forfeiture proceeding instituted by the Kentucky Attorney General with respect to domain names used to host gambling sites, the England and Wales High Court of Justice ruled. Analyzing English law applicable to the enforcement of foreign judgments, the deputy judge of the High Court concluded that the State of Kentucky was not entitled to immunity from the proceedings in the High Court because it was not exercising or manifesting any authority of the U.S. federal government in undertaking the seizure proceeding to enforce Kentucky anti-gambling laws. The court also ruled that declaratory relief should be granted even though the Commonwealth of Kentucky had not attempted to enforce the seizure order, because the continued use of the domain name was important to the domain name registrant’s business, and there was uncertainty whether the seizure order would ultimately be enforced.

Safenames Ltd & Anor [2009] EWHC 2529 (Ch) (16 October 2009) [Download](#)

**Editor’s Note:** As the court noted, the validity of the seizure order of the subject domain name, along with numerous gambling-related domain names held by various parties, is being litigated in the Kentucky state courts. The domain name holders prevailed in their challenge to the validity of the seizure order before the Kentucky Court of Appeals in Interactive Media Entertainment and Gaming Association, Inc. v. Wingate, 08 - CI - 01409 (Ky. Ct. App. Jan. 20, 2009), but that ruling currently is on appeal to the Kentucky Supreme Court.

## TRADEMARKS

### **Allegation that Competitor Purchased Trademark as Advertising Keyword Sufficiently Pleads Lanham Act “Use in Commerce”**

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A manufacturer's claim that a competitor purchased its trademark term as a search engine advertising keyword sufficiently alleged a “use” of the trademark “in commerce” within the meaning of the federal Lanham Act, a district court ruled. The court concluded that the manufacturer's Lanham Act and related claims against the competitor should not be dismissed on summary judgment because the resolution of whether there was in fact a “use in commerce” required the resolution of factual issues. The court also concluded that the manufacturer had sufficiently pleaded a likelihood of consumer confusion by alleging that the competitor's advertisements appeared next to search engine results generated through the use of the manufacturer's trademark term. The court found that even though the competitor's advertisement did not mention the plaintiff manufacturer's trademark, a consumer could be misled into thinking that the advertisement was associated with the manufacturer, even if only momentarily, which would be sufficient initial interest confusion under the Seventh Circuit ruling in *Promatek Industries, LTD v. Equitrac Corp.* (7th Cir. 2002).

*Morningware, Inc. v. Hearthware Home Products, Inc.*, 2009 U.S. Dist. LEXIS 106615 (N.D. Ill. Nov. 16, 2009) [Download PDF](#)

## ONLINE CONTENT

### **Denial of Access to Private Web Site Related to Condominium Association Did Not Violate Condominium Owner's Right to Free Expression under New Jersey Law**

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A condominium owner's right to free expression under the New Jersey constitution was not violated when his previously posted letter of resignation from the condominium board was removed from a privately owned Web site that was maintained for and made available to members of the condominium association, and he was denied further access to the Web site, a New Jersey appellate court ruled. The court noted that although restrictions on speech on private property may be actionable as an infringement of the right of free expression under certain circumstances, those circumstances were not present. The court found that the Web site was private, intangible property that was not open to the public at large, that the administrators of the Web site maintained the unilateral authority to allow or restrict posting on and access to the Web site, and that the owner's expressional rights were not unreasonably restricted because he had other means of communicating his message to other property owners.

*Baskerville v. Society Hill at Droyers Point Condominium Association*, 2009 N.J. Super. Unpub. 2846 (Super. Ct. App. Div. Nov. 16, 2009) (unpublished) [Download](#)

### **CDA § 230 Protects Online Ad Provider from Liability for Public Nuisance Claims Stemming from Illegal Activity**

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Section 230 of the Communications Decency Act protects online ad provider craigslist from civil liability under a theory of public nuisance, for illegal activity stemming from the erotic services advertisements posted on its site, a district court ruled. The court found that § 230, even as narrowly interpreted by the U.S. Court of Appeals for the Seventh Circuit, bars holding the ad provider liable for advertisements posted by users, even if



those advertisements are used to facilitate illegal acts. The court concluded that the legal theory proffered by the county sheriff plaintiff in the case would require treating the service as if it posted the offending ads itself, in contravention of the prohibition in CDA subsection 230(c)(1) that a provider may not be treated as the speaker or publisher of the information provided by a user.

Dart v. Craigslist, Inc., 2009 U.S. Dist. LEXIS 97596 (N.D. Ill. Oct. 20, 2009) [Download PDF](#)

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### **CDA § 230 Protection Not Negated by Service Provider's Claim of Ownership Interest in User Information**

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A service provider's claim of immunity for defamatory information posted by users is not compromised by the provider's claim in its terms of use to an ownership interest in information provided by its users, a New York trial court ruled. The court ruled that ownership of content claimed to create liability "plays no role in the Act's statutory scheme." The court concluded that the plaintiff's complaint should be dismissed because there was no allegation that the service provider "had any had in creating the content" complained of.

Finkel v. Facebook, Inc., 2009 N.Y. Misc. LEXIS 3021 (N.Y. Sup. Ct N.Y. Cty Sept. 16, 2009) [Download PDF](#)

**Editor's Note:** The court did not cite nor quote from the particular provision in the Facebook's terms of use on which the plaintiff relied in arguing that the provider claimed an "ownership interest" in user provided information posted on its site.

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### **Online Gaming Forum Featuring Virtual Homes and Public Spaces Not a "Company Town" for First Amendment Purposes**

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An online gaming forum that provided users access to virtual spaces such as virtual "homes" and a virtual "mall" utilized by a substantial number of other users is not equivalent to a "company town" that performs municipal functions for First Amendment purposes, a district court ruled. The court dismissed a user's claim that his ban from the forum, allegedly due to multiple violations of the agreement governing his use of the provider's computer network, violated his First Amendment rights. The court concluded that the provider did not behave similarly to a company town by performing the municipal functions, nor did the provider have any structural or functional nexus to government. The court commented that in providing virtual spaces to its users the provider was "merely providing a robust commercial product," and did not perform the "full spectrum of municipal power" or stand in the shoes of the state.

Estavillo v. Sony Computer Entertainment America, 2009 U.S. Dist. LEXIS 86821 (N.D. Cal. Sept. 22, 2009) [Download PDF](#)

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### **Critical Statements on Consumer Complaint Web Site Were Non-Actionable, First Amendment Protected Opinion**

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A student's critical comments about a summer educational program, posted to a consumer complaint Web site, were non-actionable, First Amendment-protected speech because they reflected his experiences in dealing with the program and his personal opinion about the quality of the services that he received, a New York State court judge

ruled. The court noted that under New York law, “in the context of statements pertaining to consumer advocacy, courts have been loathe to stifle someone’s criticism of goods or services,” which are a matter of legitimate public concern. The court also dismissed the plaintiff’s claims against Xcentric Ventures, the operator of the consumer complaint site, on the ground that the plaintiff had failed to plead with particularity the general assertion that Xcentric had created defamatory headings for the student’s postings to the site, and on the ground that Xcentric was protected from liability for the student’s critical comments by § 230 of the Communications Decency Act.

*Intellect Art Multimedia v. Milewski*, 24 Misc. 3d 1248A (N.Y. Sup. Ct. N.Y. Cty Sept. 15, 2009) [Download PDF](#)

**Editor’s Note:** Also worth noting is the court’s ruling that it could properly assert long-arm jurisdiction over the Web site operator Xcentric Ventures; that ruling is summarized below under the topic “JURISDICTION.”

## PRIVACY

### **Attorney-Client Privilege Waived by Imputed Knowledge of Employee and Employee’s Attorney of Employer E-Mail Monitoring**

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Knowledge of employer monitoring of workplace e-mails can be imputed to an employee and the employee’s attorney, thus their communications via the employee’s workplace e-mail address were not subject to the attorney-client privilege, a district court ruled. The court found that knowledge of such monitoring could be imputed to the employee with respect to messages sent by her to the attorney because it was “unreasonable for any employee in this technological age -- and particularly an employee [who received actual notice of such monitoring] -- to believe that her e-mails, sent directly from her company’s e-mail address over its computers, would not be stored by the company and made available for retrieval.” The court further found that knowledge of such monitoring could be imputed to the employee’s attorney with respect to messages that he sent to the employee because the e-mail address to which he sent the messages “clearly” put him on notice that he was sending to the employee’s work address. The court commented that workplace e-mail monitoring “is so ubiquitous that [the attorney] should have been aware that the IHFA would be monitoring, accessing, and retrieving e-mails sent to that address.”

*Alamar Ranch, LLC v. County of Boise*, 2009 U.S. Dist. LEXIS 101866 (D. Idaho Nov. 2, 2009) [Download PDF](#)

### **Federal Court Lacks Article III Jurisdiction over Class Action Alleging Increased Risk of Identity Theft from Data Security Breach**

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A federal court lacks subject matter jurisdiction over a class action alleging an increased risk of identity theft occurring as a result of a data security breach at a prescription processing company of which the plaintiff was a subscriber, because the plaintiff failed to show an injury-in-fact, a district court ruled. The court noted that the U.S. Supreme Court has ruled that in order to satisfy the Article III “case or controversy” requirement, the injury alleged by a plaintiff must be “actual or imminent,” and not “remote, speculative, conjectural, or hypothetical.” The court further noted that the plaintiff had not alleged that his personal information had in fact been stolen and used, only that as a result of the



security breach, his personal information was “at an increased risk of identity theft crimes, fraud, abuse and extortion.”

Amburgy v. Express Scripts, Inc., 2009 U.S. Dist. LEXIS 109100 (E.D. Mo. Nov. 23, 2009) [Download PDF](#)

**Editor’s Note:** The court also noted that there is a split amongst federal courts on the issue of Article III jurisdiction over such claims, but pointed out that even courts that have exercised jurisdiction over such claims have nevertheless dismissed the complaints for failure to state a claim. See, e.g., Pisciotta v. Old Nat’l Bancorp, 499 F.3d 629 (7th Cir. 2007).

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### Software Distributor Not Liable under ECPA for Spouse's Use of Keylogger Software to Monitor Husband's Online Communications

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The distributor of “keylogger” software designed to intercept online communications is not liable under the Electronic Communications Privacy Act to a husband whose wife installed the software on his computer and used it to monitor his communications, a district court ruled. The court found that the plaintiff had failed to show that the distributor intentionally sought to divulge his private communications in violation of the ECPA. The court rejected the argument that the requisite intent was established by evidence indicating that third parties had marketed the distributor’s software for the purpose of determining whether a spouse was cheating, because it was undisputed that the distributor had ceased marketing the software in that manner. The court pointed out that the distributor had established that the agreement pursuant to which it licensed the software contained an express provision prohibiting its use other than with permission of the owner of a computer or the individual being monitored, and commented that the distributor “had every right to expect that its software should be used in accordance with the licensing agreement it provides.”

Hayes v. Spectorsoft Corp., 2009 U.S. Dist. LEXIS 102637 (E.D. Tenn. Nov. 3, 2009) [Download PDF](#)

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### Where Warrant Failed to Specify Crimes for Which Evidence Was Sought, Search of E-Mail Account Violated Fourth Amendment

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The search of a suspect’s Web mail account pursuant to a warrant that failed to specify the crimes as to which law enforcement officials sought evidence violated the Fourth Amendment specificity requirement, a district court ruled. In ruling that e-mail evidence obtained via the search must be suppressed, the court held that the specificity requirement of the Fourth Amendment was violated even though the affidavit prepared and submitted by law enforcement officials specified the suspect’s alleged crimes, because the affidavit was not attached to and specifically referenced in the warrant itself. Having concluded that the failure to incorporate the suspect’s alleged crimes into the warrant was dispositive of the issue of validity, the court declined to take a position on whether the search procedure proposed by the Government in the warrant was valid, noting the conflicting opinions of federal courts upon the subject of computer search protocols, including United States v. Comprehensive Drug Testing, Inc. (9th Cir. Aug. 26, 2009).

U.S. v. Cioffi, 2009 U.S. Dist. LEXIS 99409 (E.D. N.Y. Oct. 26, 2009) [Download PDF](#)

**Editor's Note:** This opinion was generated in the widely publicized prosecution of two hedge funds managers who were charged with crimes in connection with the multi-billion-dollar collapse of the funds. Their trial ended in a jury verdict of acquittal, mooted any Government appeal of the above adverse ruling.

## UNAUTHORIZED ACCESS

### General Allegations of Violations of the CFAA Insufficient, Where Specific Provisions of the Act Are Not Enumerated

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A complaint containing a general allegation that an employer suffered a loss in excess of \$5,000 when employees stole proprietary information from its computers and “scrubbed” computer hard drives to conceal their activity is insufficient to state a claim under the Computer Fraud and Abuse Act because it fails to identify the specific subsection of the Act which the employer claims was violated, a district court ruled. The court concluded, among other things, that the employer failed to allege that the employees accessed the computers “without authorization” within the meaning of the Act. The court noted that while the Eleventh Circuit has not interpreted the term, other courts in the circuit have concluded that an employee's access to an employer's computer is “without authorization” under the Act “only where initial access is not permitted.” In contrast, the court noted, in making out claims of trade secret infringement, the employer had alleged that the employees had proper access to the highest levels of its trade secrets and proprietary and confidential business information.

Mortgage Now, Inc. v. Stone, 2009 U.S. Dist. LEXIS 110222 (N.D. Fla. Nov. 24, 2009)  
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**Editor's Note:** On the scope of the CFAA in employee trade secret misappropriation cases, see also the ruling in [Bro-Tech Corp. Thermax, Inc.](#), 2009 U.S. Dist. LEXIS 80636 (E.D. Pa. Sept. 3, 2009) (adopting the “less capacious view” of the meaning of “authorization” with respect to employee access to files, but allowing a claim that employees may have deleted or altered files they may not have been authorized to delete or alter).

## ONLINE MARKETING

### Doctor's Facsimile Newsletter Containing Bona Fide Medical Information, Directed at Personal Injury Attorneys, Not Actionable Advertising under TCPA

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A doctor's facsimile newsletter containing bona fide medical information of interest to personal injury attorneys did not constitute actionable advertising within the meaning of the Telephone Consumer Protection Act, a district court ruled. The court noted that the newsletter was sent on a regular schedule, the text changed from issue to issue, and only one-seventh of the space in each newsletter was devoted to advertising the doctor's medical practice. The court also noted that the newsletter was sent by the doctor's practice in its own name and on its own behalf, and that it was sent to specific, regular recipients that were logged in its records as being willing to receive faxes from the practice. With respect to the advertising, the court noted that the TCPA requires a sender to include contact information in the fax, that the inclusion of such information should not be construed as advertising, and that regulations promulgated by the FCC specified that incidental advertising does not convert a faxed communication into an advertisement.

Holmes v. Back Doctors, Ltd, 2009 U.S. Dist. LEXIS 97592 (S.D. Ill. Sept. 10, 2009)  
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### **CEO of “Scareware” Software Marketing Firm May Be Individually Liable for Federal Unfair and Deceptive Trade Practices Charges**

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The chief executive officer of a firm that used deceptive, “scareware” tactics to market computer security software may be liable for unfair and deceptive trade practices under the Federal Trade Commission Act, a district court ruled. The court concluded that the FTC's complaint adequately alleged that the CEO participated in the scareware scheme through his personal handling of the company's finances, including his management of merchant accounts with payment processors that were made difficult by the high number of credit card chargebacks and complaints from customers of the firm. The court also noted that the complaint alleged that the CEO used his own credit card to place some of the advertisements utilized in the scheme, and that his knowledge of the scheme could be inferred from its massive nature relative to the very small size of the enterprise. The court further noted that the CEO deposited millions of dollars of proceeds from the scheme in his personal bank account and that of his father, and that both had been accused of embezzling those funds from the firm. Those allegations were sufficient to support a conclusion that the CEO had a direct incentive to participate in the scheme and that he personally profited from it.

Federal Trade Commission v. Innovative Marketing, Inc., 2009 U.S. Dist. LEXIS 84358 (D. Md. Sept. 16, 2009) [Download PDF](#)

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### **Federal CAN-SPAM Act Does Not Preempt California Song-Beverly Act Restriction on Collection of Personal Information in Credit Card Transaction**

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A customer's claim that the collection of her e-mail address in the course of a retail credit card transaction violated the California Song-Beverly Act is not preempted by the federal CAN-SPAM Act, a district court ruled. The court noted that the Song-Beverly Act prohibits the collection of “personal information that is unnecessary to complete” a credit card transaction, and that language can encompass an e-mail address. Such a construction of the Song-Beverly Act does not fall within the preemption provisions of the CAN-SPAM Act, the court concluded, because the Song-Beverly Act does not “expressly regulate any Internet activity, let alone the use of ‘electronic mail to send commercial message.’” The court further concluded that the Song-Beverly Act falls within the limitation on the CAN-SPAM preemption provision, in that it is a state law that is “not specific to electronic mail.”

Powers v. Pottery Barn, Inc., 177 Cal. App. 4th 1039; 99 Cal. Rptr. 3d 693 (Cal. Ct. App. 4th Dist. (Sept. 21, 2009) [Download PDF](#)

## **CONTRACTS**

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### **Under Maryland Law, Assent to Clickwrap License Agreement Containing Forum Selection Clause Constitutes Consent to Jurisdiction in the Forum**

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Under Maryland law, a business owner's assent to an online clickwrap license agreement containing a forum selection clause also constituted assent to personal jurisdiction in the same forum, a district court ruled. The court noted that it was undisputed that the business owner registered as an affiliate of the plaintiff in order to gain access to code

that enabled the embedding of the plaintiff's videos on the business owner's Web site, and that the registration process required the business owner to assent to the license agreement containing the clause. The court further noted that clickwrap agreements such as that utilized by the plaintiff were "routinely" upheld by courts, and that there was no showing that the forum selection clause was unreasonable, unfair or unjust.

LTVN Holdings, LLC v. Odeh, 2009 U.S. Dist. LEXIS 103075 (D. Md. Nov. 5, 2009)

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### Forum Selection Clause in Web Site Clickwrap Terms of Use Is Enforceable against Consumers

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A forum selection clause contained in a Web site clickwrap terms of use is enforceable in a consumer contract under New York law, a district court ruled. The court concluded that the forum selection clause was reasonably communicated to the user, was "mandatory" (as opposed to permissive), and it covered the claims asserted in the complaint, and thus the clause was presumptively enforceable. The court also concluded that the plaintiffs had not shown that their complaint fell into any of the limited exceptions to the presumption. Among other points, the court said that neither the fact that a forum selection clause was in a contract of adhesion, nor that its enforcement would result in fewer remedies being available to the plaintiff, was a basis for rebutting the presumption.

Brodsky v. Match.com LLC, 2009 U.S. Dist. LEXIS 101167 (S.D. N.Y. Oct. 28, 2009)

[Download PDF](#)

**Editor's Note:** This case clearly provides that a forum selection clause in a well-drafted clickwrap terms of use will be enforced under New York law. The court expressed an understanding of the business and policy rationale for this principle: "It is perfectly reasonable for Match – in operating a website and service accessible to users anywhere in the country – to have decided that any disputes about its website and services should be litigated in Texas, the State in which it is headquartered and where all of its employees reside. Indeed, as a website and service provider, Match would appear to have no practical alternative than to include a forum selection and choice of law clause in its user agreement, since otherwise Match could potentially be subject to suit in any of the fifty states arising from its website or service." It is noteworthy, however, that this case involved terms of use that the user had to affirmatively accept. In a case involving passive terms of use that do not require an affirmative act of acceptance, a plaintiff might argue that such terms of use are not "reasonably communicated."

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### Non-Disparagement Clause in Online Clickwrap Agreement Enforceable in Breach of Contract Action

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A non-disparagement clause in an online clickwrap agreement between a direct sales company and an applicant for a position as a "marketing executive" is enforceable in a breach of contract action by the company against the applicant, a district court ruled. The court found that a contract was formed when the applicant visited the company's site, was given access to the company's policies and procedures containing the non-disparagement clause, and then clicked the "I accept" box. The court concluded that it was irrelevant to the formation of the contract that the applicant later asserted that he had no intent to in fact perform the functions of a marketing executive, and that at the time he entered into the agreement he had launched a Web site with information about the company and its products. The court rejected the argument that the non-disparagement

clause was unenforceable because it exceeded the reasonable expectations of the parties, concluding that the clause was not “bizarre or oppressive,” and that the company had no knowledge of the applicant's intent not to adhere to the non-disparagement clause at the time he assented to it. The court further found that the clause was not procedurally or substantively unconscionable, nor did it result in an unconstitutional restriction of the applicant's freedom of speech.

Free Life International, Inc. v. American Educational Music Publications, Inc., No. 07-2210 (D. Ariz. Oct. 1, 2009) [Download PDF](#)

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### **Arbitration Provision Unenforceable, Where Online Retailer's Link to Browsewrap Terms and Conditions Was Not "Prominently Displayed"**

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A Web site customer did not have constructive notice of the site's terms and conditions of use, including an arbitration provision, where the link to the terms was not “prominently displayed,” a district court ruled. The court pointed out that the link to the terms was located at the bottom of the site and could not be seen without scrolling down to the bottom of the screen. Further, the court noted, the customer was not prompted to review the terms and conditions during the checkout process when she effectuated the purchase that was at the heart of her lawsuit. Consequently, the court concluded, the Web site owner was not entitled to enforce the arbitration provision contained in the terms.

Hines v. Overstock.com, Inc., 2009 U.S. Dist. LEXIS 81204 (E.D. N.Y. Sept. 4, 2009) [Download PDF](#)

**Editor's Note:** This opinion is more fully discussed in this post on the [New Media and Technology Law blog](#).

## **ELECTRONIC RECORDS**

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### **Attorney's Representation That E-Mailed Notice of Judgment Was Not Received Is Insufficient to Overcome Evidence of E-Mailing by Clerk**

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An attorney's representation to the court that he did not received notice of entry of a final judgment is insufficient to overcome evidence that the clerk transmitted the judgment to the e-mail address specified by the attorney to the court and that every other notice sent to that address by the court and by opposing counsel had been received. The court declined the attorney's request to reopen the time period for appeal that had expired, finding that there was no evidence upon which to predicate a conclusion that the e-mail notice system had malfunctioned on the day the notice was transmitted to the attorney. The court noted that the court's e-mail system was programmed to send the notice, and that the attorney's e-mail system was programmed to receive it, and that “[u]sing my common sense, I know that, except in science fiction, computers do not have minds of their own and that they only do what they were programmed to do.”

Drain v. Virtual Geosatellite Holdings, Inc., 2009 U.S. Dist. LEXIS 102366 (D. D.C. Nov. 3, 2009) [Download PDF](#)

**Editor's Note:** In contrast to the ruling in Drain, in [Shuey v. Schwab](#), No. 08-4727 (3d Cir. Nov. 3, 2009) (unpublished), the U.S. Court of Appeals for the Third Circuit held that a district court should not have summarily rejected a motion to reopen an action where the plaintiff's attorney claimed that an e-mailed notice had been inadvertently directed to

an e-mail spam folder. The appeals court remanded for a hearing on the merits of the plaintiff's claims and an analysis of the factors required to be considered before dismissing claims or refusing to lift default judgments.

### **Under West Virginia FOIA, Personal E-Mails of Public Official Not “Public Records” Subject to Disclosure**

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Under the West Virginia Freedom of Information Act, the personal e-mails of a public official, sent and received via a government computer system, are not “public records” subject to disclosure, the West Virginia Supreme Court of Appeals ruled. The court concluded that while e-mail communications fall within the statutory definition of a “writing,” a writing constitutes a “public record” under the Act only if it contains “information relating to the conduct of the public's business....” The court noted that the majority of courts construing the public records acts of other states have similarly ruled that a public official's personal e-mails are not subject to disclosure. The court rejected the argument that it should examine the “public interest context” of the e-mails in determining whether they should be disclosed, finding that the determination of the status of personal e-mails should be made by examining their content, not the context surrounding their transmission.

The Associated Press v. Canterbury, 2009 W. Va. LEXIS 109 (W. Va. Nov. 12, 2009)  
[Download PDF](#)

## **JURISDICTION**

### **Consumer Complaint Web Site Sued for Defamation and Products Liability Subject to Specific Jurisdiction in New York**

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Xcentric Ventures, owner of the “RipoffReport” consumer complaint Web site on which a dissatisfied consumer posted allegedly defamatory messages concerning a summer education program, is subject to specific jurisdiction in New York courts pursuant to N.Y. C.P.L.R. § 302(a)(1), a New York State court judge ruled. The court concluded that the Xcentric was transacting business within New York on the basis of the high level of interactivity of the site, the undisputed fact that users could freely exchange information between one another, and the Web site owner's “alleged role in manipulating user's information and data, and Xcentric's solicitation of companies and individuals to ‘resolve’ the complaints levied against them on RipoffReport.” The court further concluded that the exercise of jurisdiction comported with due process because the state “has an interest in providing a forum to redress the harms that flow from alleged defamatory statements directed to readers within its borders, even if plaintiff is a nonresident of New York.”

Intellect Art Multimedia v. Milewski, 24 Misc. 3d 1248A (N.Y. Sup. Ct. N.Y. Cty. Sept. 15, 2009) [Download PDF](#)

## **DEVELOPMENTS OF NOTE**

### **Social Networking Site Settles Charges with New York, Texas Attorneys General over Access to Member E-Mail Addresses**

[News Coverage](#)



## **[Ninth Circuit Upholds CAN-SPAM Act against Vagueness Challenge in Appeal of Criminal Conviction for Sending Sexually Explicit Spam](#)**

[Opinion](#) - United States v. Kilbride, 584 F.3d 1240 (9th Cir. Oct. 28, 2009)

## **[Constitutional Challenge to Utah Child Registry Act Withdrawn](#)**

[News Coverage](#)

## **[Federal Trade Commission Updates Guidelines on Endorsement in Advertising to Address Blogs and Social Networks](#)**

[Press Release](#)

## **[Federal Trade Commission Releases Strategic Five-Year Plan for Enforcement, Rulemaking](#)**

[Plan](#)

## **[Children's Brand Owner Agrees to Pay \\$250,000 to Settle FTC COPPA Charges](#)**

[Press Release](#)

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