

Winter 2011

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Edited by **Jeffrey D. Neuburger**

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COPYRIGHT

Download of Copyrighted Digital Music File Not a Public Performance under Copyright Act

Downloading a copyrighted digital music file does not constitute a public performance under the Copyright Act, the U.S. Court of Appeals for the Second Circuit ruled. The court upheld the lower court ruling that while companies that sell digital music online must pay a royalty fee for the right to make a copy of a work, they need not separately and additionally pay a royalty for downloading the copy. The appeals court found that a digital music file is neither recited, rendered or played within the Copyright Act definition of "perform," nor does downloading "show" a work or make it audible. "The downloaded songs are not performed in any perceptible manner during the transfers; the user must

take some further action to play the songs after they are downloaded," the court commented.

United States v. American Society of Composers, Authors and Publishers, 2010 U.S. App. LEXIS 19983 (2d Cir. Sept. 28, 2010) Download [PDF](#)

Editor's Note: The parties did not dispute that Internet streaming of a digital music file constitutes a public performance of the work. Download [PDF](#)

Transfer of Packaged Software Was a License, Not a Sale, under Copyright First Sale Doctrine

A transaction involving the transfer of packaged software from a developer to a user was a license, not a sale, under the copyright first sale doctrine, the U.S. Court of Appeals for the Ninth Circuit ruled. The appeals court held "a software user is a licensee rather than an owner of a copy where the copyright owner (1) specifies that the user is granted a license; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable use restrictions." The court also noted, among other things, that the developer expressly retained title to the software, prohibited further transfers or leases of the software without the developer's consent, and provided for the termination of the license for unauthorized copying.

Vernor v. Autodesk, Inc., 2010 U.S. App. LEXIS 18957 (9th Cir. Sept. 10, 2010) Download [PDF](#)

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

Developer of Automated Videogame-Playing Program Violated DMCA But Did Not Infringe Copyright

The developer of an automated videogame-playing software program violated the anticircumvention provisions of the Digital Millennium Copyright Act, but is not liable for copyright infringement, the U.S. Court of Appeals for the Ninth Circuit ruled. The court reasoned that game players did not directly infringe the copyright rights of the videogame owner when they used the software in violation of the game's Terms of Use, because the prohibition against the use of such software was a covenant, not a license condition. and therefore gave rise only to a breach of contract claim. Accordingly, the developer was not liable for secondary copyright infringement. However, the court found that the developer had violated the prohibition in DMCA Section 1201(a) against trafficking in technology that circumvents measures deployed by a copyright owner to control access to a copyrighted work.

MDY Industries, LLC v. Blizzard Entertainment, Inc., 2010 U.S. App. LEXIS 25424 (9th Cir. Dec. 14, 2010) Download [PDF](#)

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

Music Downloads and Ringtones Are Licensed, Not Sold, under Royalty Agreement

Sales of music by digital downloads and by ringtones sold through carriers must be accounted to an artist under a royalty contract with a recording company as licenses rather than sales of the music, the U.S. Court of Appeals for the Ninth Circuit ruled. The court concluded that the record company's agreements with the iTunes Store and the wireless carriers fell into the provision in the royalty agreement that specified that the artist receive a percentage of royalties "[o]n masters licensed by us . . . to others for their manufacture and sale of records or for any other uses." The court ruled that the term "license" should be given its ordinary meaning, i.e., "permission to act," and that the agreements qualified as licenses in the ordinary meaning of the term because they gave third parties permission to use the sound recordings to produce and sell permanent downloads.

F.B.T. Productions v. Aftermath Records, 621 F.3d 958 (9th Cir. Sept. 3, 2010) Download [PDF](#)

No Fair Use Defense for Online Post of 21-Page Book Excerpt

The blog posting of images of 21 pages of a soon-to-be-published book is not protected by the fair use doctrine and thus may be temporarily enjoined, a district court ruled. The court noted that the post contained no commentary about the book; therefore it was not for the purpose of criticism, comment, news reporting, teaching, scholarship or research, but rather for the purpose of attracting viewers to the blog. The court further ruled that the use of the excerpt was commercial because it was displayed in conjunction with advertising, and its purpose was to increase traffic to the blog and thereby enhance its attractiveness to advertisers in the future. The court also noted that the book was as-yet unpublished, which further undermined the defendant's fair use claim.

Harpercollins Publishers L.L.C. v. Gawker Media LLC, 2010 U.S. Dist. LEXIS 123624 (S.D.N.Y. Nov. 22, 2010) Download [PDF](#)

Editor's Note: The book in question was authored by political figure Sarah Palin; the case was settled following the court's ruling with an agreement by the defendant to permanently remove the disputed excerpts.

Implied License, Fair Use, Held Meritorious Defenses in Online Newspaper Article Copyright Infringement Action

The implied license and fair use defenses raised by the operator of an online forum are meritorious defenses that warrant reopening a default judgment for copyright infringement, a district court ruled. Examining the statutory fair use factors, the court concluded that it could be found that the third-party user who posted a complete copy of an online news article did so "for the non-commercial purpose of sharing information and not for the purpose of making a profit for the reader or the site," thus the purpose and character of the use factor could favor the operator. The court also concluded that because the article was "primarily informational," the nature of the work factor could be found to favor the Web site owner. The court concluded that the effect of the posting on the market for or value of the original work was a factor that raised issues that would have to be resolved later in the litigation. The court further concluded that the operator

had made a "plausible argument" that the conduct of the original copyright owner of the news article in posting it on the Internet for free, encouraging readers to share the article with others, and permitting users to "right-click" and copy it, gave rise to an implied license.

Righthaven LLC v. Klerks (D. Nev. Sept. 17, 2010) Download [PDF](#)

Editor's Note: Righthaven is an entity that acquires copyright rights in online content for the purpose of bringing similar copyright infringement actions. See <http://www.righthavenlawsuits.com/>. It appears that the Web site owner did not post any DMCA-compliant notices on the site. See also the rulings in other Righthaven lawsuits discussed below.

Excerpting and Linking to Online News Article Protected by Fair Use Doctrine

A blogger's posting of an eight-line excerpt from a 30-line online newspaper article, coupled with a link to the full article on the newspaper Web site, is protected by the copyright fair use doctrine, a district court ruled. Reviewing the statutory fair use factors, the court found that while the blog provided information on the real estate market, the underlying purpose of the blog was to advertise the blogger's real estate business. However, the court found that the remaining factors favored the blogger: the portion of the work that he excerpted was factual in nature; only eight out of 30 sentences were used; he directed readers to the full text of the article; and his use of the copyrighted material was not likely to have an effect on the market for the article, because the portion copied did not contain the author's original commentary and thus did not dilute the market for the work.

Righthaven LLC v. Realty One Group, Inc., 2010 U.S. Dist. LEXIS 111576 (D. Nev. Oct. 19, 2010) Download [PDF](#)

Editor's Note: See also the ruling of another district court judge sitting in the same district in [Righthaven v. Jama](#), No. 2:10-CV-1322 (D. Nev. Nov. 15, 2010) (ordering Righthaven to show cause why the complaint should not be dismissed under the fair use provision of the Copyright Act).

Software Licensor's Contract Prohibition against Automated Download of Support Materials Does Not Constitute Copyright Misuse

A prohibition in a software license agreement against the use of automated tools to download support materials related to the software is not a misuse of copyright, a district court found. The court ruled in a copyright infringement action brought by the licensor against a third-party support provider that allegedly used a licensee's log-in credentials to access the licensor's database in order to download software and support materials. The third-party provider alleged that the contract prohibition against the use of automated tools, coupled with the technical design of the Web site which "makes it impossible for the licensees to identify all of the materials to which they are entitled," effectively required licensees to use the licensor's costly after-market support services. The court concluded that the restrictions were "well within" the licensor's statutory copyright right to control the reproduction and distribution of its copyrighted works.

Oracle USA, Inc. v. Rimini St., Inc., 2010 U.S. Dist. LEXIS 116249 (D. Nev. Oct. 29, 2010) Download [PDF](#)

CONTRACTS

Access to Licensed Software by Attorneys Acting for Benefit of Licensee Breached License Agreement

Use of licensed software by attorneys acting for the benefit of a licensee of the software breached the terms of the license agreement, the U.S. Court of Appeals for the Fifth Circuit ruled. The dispute concerned a license for mortgage loan preparation software and related forms; the licensee argued that the attorneys could only take those actions with respect to the software that the licensee could take itself, and that nothing in the agreement prohibited such access when it was done for the benefit of the licensee. The court noted the numerous express limitations contained in the software license agreement, including provisions prohibiting sublicensing or assignment of rights under the license to third parties, and requiring the licensee to prevent third parties from acting in any way inconsistent with the licensee's obligations under the agreement.

Compliance Source, Inc. v. GreenPoint Mortgage Funding, Inc., 624 F.3d 252 (5th Cir. Oct. 18, 2010) Download [PDF](#)

Prohibition against Web Site Scraping Unenforceable, Where Terms of Use Were Not Readily Accessible

A Web site operator could not enforce limitations on access set forth in its Terms of Use, where the ToU were not displayed on the site in a way in which a reasonable user could be expected to notice them, a district court ruled. The operator alleged that a competitor accessed the Web site in order to scrape its database of event venues, in violation of a provision in ToU stating that access by competitors was unauthorized. The court concluded that the ToU was not binding on the competitor because the competitor did not have actual or constructive notice of the ToU. The court noted that the ToU was only accessible via a link "buried" at the bottom of the first page of the operator's site and in fine print, in a location that required visitors to scroll down to view it. The court also noted that the link led to a page with several categories of Terms of Use, none of which applied to the competitor. The court similarly concluded that the operator failed to meet the standard for determining assent to online terms of use set forth in the Virginia version of the Uniform Computer Information Transactions Act, Va. Code §§ 59.1-501.11 & -501.12, which require that the user have an "opportunity to review" the terms, and that the user engage in conduct indicating assent to the terms.

Cvent, Inc. v. Eventbrite, Inc., 2010 U.S. Dist. LEXIS 96354 (E.D. Va. Sept. 14, 2010) Download [PDF](#)

Early Termination Fee in Contract for Internet Access Not an Invalid Liquidated Damages Clause under California Law

An early termination fee contained in a contract for Internet access services for a defined period is not an invalid liquidated damages clause under Cal. Civ. Code Section 1671,

the U.S. Court of Appeals for the Ninth Circuit ruled. The court found that the early termination fee was not invalid even though the provision resulted in the imposition of a \$200 penalty on the subscriber for terminating a contract two weeks early, when continuing with the contract would have cost the consumer considerably less than the penalty. The court noted that the contract provided the subscribers with a free modem and installation and a lower monthly fee in return for the defined term and early termination fee, and thus the provision should be viewed as an alternative performance provision, not an invalid penalty.

Schneider v. Verizon Internet Services, Inc., No. C 10-0488 MHP (9th Cir. Sept. 27, 2010) (unpublished) Download [PDF](#)

Editor's Note: See also [Hutchison v. Yahoo!, Inc.](#), No. 09-55847 (9th Cir. Sept. 27, 2010) (unpublished) (same).

Contract Right to Unilaterally Change Brokerage Fees by Web Site Posting Subject to Unjust Enrichment Claim

A brokerage agreement that contained a provision permitting the broker to change a customer's brokerage fees by posting on its Web site is subject to an unjust enrichment challenge, a district court ruled. The court denied the brokerage firm's motion to dismiss the unjust enrichment claim, finding that the firm had failed to cite any case under California or New York law that undermined the customers' contention that "a contractual provision that allows a party to unilaterally change the terms of the contract without notice is unenforceable."

Roling v. E*Trade Securities, LLC, No. C 10-0488 MHP (N.D. Cal. Nov. 22, 2010) Download [PDF](#)

Arbitration Provision in Subscriber Agreement Unenforceable Where Not Clearly Incorporated into Clickwrap Services Agreement

An arbitration provision contained in an online Internet services subscriber agreement is not enforceable where the subscriber agreement was not clearly incorporated into the clickwrap services agreement presented to the subscriber at the time the subscriber installed the provider's software, a district court ruled. The court noted that while the clickwrap agreement informed the subscriber of the online location of the subscriber agreement containing the arbitration provision, in order to access it the subscriber would have had to exit the software installation program, then restart the installation process. The court also noted that the inclusion of the arbitration provision was confusing in light of the forum selection provisions in the clickwrap agreement, which specified a judicial forum for disputes arising from the clickwrap agreement.

Grosvenor v. Qwest Communications International, Inc., No. 09-cv-2848 (D. Colo. Sept. 30, 2010) Download [PDF](#)

Under Montana Law, Arbitration Provision in Consumer Internet Access Contract Was Unconscionable and Unenforceable

A mandatory arbitration provision in a contract with a nonbusiness party for Internet access is an unenforceable contract of adhesion, a district court ruled. The court noted that under Montana law, a contract is one of adhesion where it is presented on a "take it or leave it" basis, with no opportunity to negotiate. A contract of adhesion containing such a provision is not enforceable, the court found, where it is not within a party's reasonable expectations or where it is unduly oppressive, unconscionable or against public policy. The court concluded that the plaintiffs had not effectively waived their right of access to the courts and to a trial by jury where they had no opportunity to negotiate, the arbitration provision was not conspicuous and was not explained to them, and the provision "in particular" was not signed by them.

Mortensen v. Bresnan Communications, L.L.C., 2010 U.S. Dist. LEXIS 120603 (D. Mont. Nov. 15, 2010) Download [PDF](#)

Editor's Note: The underlying litigation concerns the defendant ISP's alleged participation in the NebuAd "deep packet inspection" advertising program. The court's December ruling on the defendant's motion for summary judgment dismissing certain of the plaintiff's substantive claims is discussed infra in this newsletter.

CENSORSHIP

Massachusetts Statute Prohibiting Distribution of Electronic Material Deemed Harmful to Minors Likely Violates First Amendment

A Massachusetts statute prohibiting the distribution by electronic means of material deemed "harmful to minors" likely violates the First Amendment and therefore its enforcement should be preliminarily enjoined, a district court ruled. The action was brought by plaintiffs who distributed "sexually frank" material intended for adults by means of generally accessible Internet Web sites, and who argued that they could not discern the ages of users who accessed their sites. The court concluded that the statute was constitutionally defective because it lacked any requirement that the material in question be disseminated to a recipient whom the sender knew to be a minor. The court declined to construe the statute to contain such a requirement, commenting that the revision of a state statute by a federal court would be "inappropriate."

American Booksellers Foundation for Free Expression v. Coakley, 2010 U.S. Dist. LEXIS 114750 (D. Mass. Oct. 26, 2010) Download [PDF](#)

Editor's Note: See also, [American Booksellers Foundation for Free Expression v. Sullivan](#), No. 03:10-cv-0193 (D. Alaska Oct. 20, 2010) (preliminarily enjoining a similar Alaska statute on constitutional grounds).

COMMUNICATIONS DECENCY ACT

CDA Section 230 No Bar to City Enforcement of Ticket Tax Remittance Requirement on Online Vendor

Section 230 of the Communications Decency Act is not a bar to a municipality's requirement that an online ticket auction site collect and remit applicable local amusement taxes from ticket sales on its site, the U.S. Court of Appeals for the Seventh Circuit ruled. The court noted that Section 230 "limits who may be called the publisher of information that appears online," and concluded that publisher status is irrelevant to the issue of liability for a tax. The court also ruled that the tax remittance requirement was not barred by the Internet Tax Freedom Act, 47 U.S.C. § 151, because it was neither multiple nor discriminatory within the meaning of the Act.

City of Chicago v. StubHub!, Inc., 624 F.3d 363 (7th Cir. Sept. 8, 2010) Download [PDF](#)

Forwarding of Allegedly Defamatory E-Mail Protected by Communications Decency Act Section 230

An individual who forwarded an allegedly defamatory e-mail received from another party is protected from liability under Section 230 of the Communications Decency Act, which provides that a user of an interactive computer service cannot be treated as the publisher or speaker of information provided by another information content provider, a district court ruled. The court rejected the argument that Section 230 did not apply because the ultimate source of the defamatory material sent to the individual by the other party may have been a print publication. The court also ruled that the individual had not waived the protection of Section 230 by not raising it in his answer, finding that under the circumstances of the case, permitting the Section 230 defense to be raised on a motion for summary judgment would not cause unfair surprise or prejudice.

Mitan v. A. Neumann & Associates, 2010 U.S. Dist. LEXIS 121568 (D.N.J. Nov. 17, 2010) (unpublished) Download [PDF](#)

Online Auction Site Protected from Liability for Alleged Breach of Auction Rules by Auctioneer

The operator of an online auction site is protected by Section 230 of the Communications Decency Act from claims negligence and tort claims based on allegations that an auctioneer reopened bidding on an auction in violation of the site's rules, a district court ruled. The court found that it was undisputed that the auctioneer was responsible for conducting all aspects of the auction, and that there was no evidence that the site operator posted any information or conducted any actions other than those provided by or at the direction of the auctioneer. Accordingly, the court concluded, the site operator could not be found to be a publisher or a speaker of "information" with respect to the plaintiff's claims.

Simmons v. Danhauer & Associates, LLC, 2010 U.S. Dist. LEXIS 112483 (D.S.C. Oct. 21, 2010) Download [PDF](#)

Editor's Note: The court's CDA Section 230 ruling was an alternate, independent basis for the dismissal of the plaintiff's claims of tortious interference with a contract, aiding and abetting a breach of a fiduciary duty, negligence, unfair trade practices and conversion claims, all of which also were dismissed on the merits as to the site operator.

Online Provider's Selective Deletion and Retention of Third-Party Business Reviews Protected by CDA Section 230

An online business review site is not liable for alleged defamatory comments posted by a third party user of the site, a New York trial court ruled. The court found that the site was protected by Section 230 of the Communications Decency Act from liability for the defamatory comments, and that the site did not lose that protection when it deleted favorable comments about the plaintiff and did not remove the defamatory comments. The court concluded that the selective retention and deletion of comments was an editorial action that did not render the site an "information content provider" within the meaning of CDA Section 230.

Reit v. Yelp! Inc., 2010 NY Slip Op 20362; 29 Misc. 3d 713; 907 N.Y.S.2d 411 (N.Y. Sup. Ct. N.Y.Cty Sept. 7, 2010) Download [PDF](#)

Allegations That Web Site Operator Actively Contributed to Content Survive CDA Section 230 Motion

A complaint alleging that a Web site operator "actively contributes to ... content" on a Web site that contains an allegedly defamatory statement by a third party should not be dismissed pursuant to Section 230 of the Communications Decency Act, a district court ruled. The court noted that the plaintiff also alleged that the operator "acted as 'moderator,' 'legal owner, copyright holder, webmaster/IT person and contributor' to the sites of which the plaintiff complained, and actively contributes to their content." The court concluded that, based upon the plaintiff's allegations, the operator "arguably was an 'information content provider'" within the meaning of Section 230 and thus the complaint should not be dismissed "at this stage of the litigation."

Kruska v. Perverted Justice Foundation Incorporated.Org, 2010 U.S. Dist. LEXIS 126765 (D. Ariz. Nov. 18, 2010) Download [PDF](#)

COMPUTER FRAUD AND ABUSE ACT

Programmer's Computer Access to Steal Employer's Stock Trading Code Not "Unauthorized" under CFAA

A programmer charged with stealing computer source code for a high-speed stock trading platform from his employer in order to benefit one of its competitors did not access the firm's computer network without authorization, or in excess of his authorization, within the meaning of the Computer Fraud and Abuse Act, a district court ruled. The court found that while the programmer's purpose may have been improper and disloyal, intent is not a necessary component of a CFAA violation. The narrower construction of the CFAA is consistent with both the plain language of the Act and its structure and purpose, the court concluded, citing the reasoning in LVRC v. Brekka (9th

Cir. 2009) and rejecting the theory advanced in *International Airport Centers v. Citrin* (7th Cir. 2006) that an employee's authorization to access a computer network is revoked upon the commission of a disloyal act.

United States v. Aleynikov, 2010 U.S. Dist. LEXIS 92101 (S.D.N.Y. Sept. 3, 2010)
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Editor's Note: In December 2010, the defendant was found guilty on the remaining charges under the Economic Espionage Act and the Interstate Transportation of Stolen Property Act. See also *United States v. Suibin Zhang*, 2010 U.S. Dist. LEXIS 123003 (N.D. Cal. Nov. 19, 2010) (dismissing CFAA counts of indictment against employee accused of downloading proprietary documents for benefit of competitor).

ATTORNEY CLIENT

New York Attorneys May Access Public Social Networking Profiles for Litigation Purposes

Attorneys may access publicly available profile pages on social networking sites in order to obtain evidence and impeachment material for use in litigation, the New York State Bar Association Committee on Professional Ethics opined. The Committee specified that an attorney may not use deceptive means to obtain the information, such as "friending" an individual in order to gain access to the non-public portions of their profile or by directing a third party to do so, or by deceptively joining the social network in order to get access to the otherwise public material available on the network.

New York State Bar Association Ethics Opinion No. 843 (Sept. 2010) Download [PDF](#)

See also [New York City Bar Association Ethics Opinion No. 2010-2](#) (Sept. 2010) (attorneys may not resort to deceptive means to access information from social networking sites, but should rely on formal and informal discovery procedures sanctioned by the ethical rules and case law to obtain relevant evidence).

New York Attorney Ethics Opinion OKs Online Data Storage, with Reservations

New York attorneys may use an online data storage system to store and back up client confidential information, provided that they take reasonable care to ensure that the confidentiality of the information is maintained in a manner consistent with an attorney's obligations under New York Rule of Professional Conduct 1.6, the New York State Bar Association Committee on Professional Ethics opined. The Committee referenced the obligation to keep client information confidential, to take affirmative steps to protect confidentiality and to prevent inadvertent disclosures to third parties. The Committee suggested that "reasonable care" may include a requirement that the service provider provide notice to the attorney if served with process requiring the production of confidential information; investigation of the provider's security measures; employing technology to guard against foreseeable attempts to access the information; and measures for securing, transferring and deleting the information when changing providers. The Committee further commented that attorneys have an obligation to stay informed of technological advances that would affect the security of stored information,

and should monitor changes in the law of privilege to ensure that online storage of client information does not result in the loss or waiver of any privilege.

New York State Bar Association Ethics Opinion No. 842 (Sept. 10, 2010) Download [PDF](#)

See also Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, [Opinion No. 2010-200](#) (assessing the ethical issues involved in the establishment and operation of a "virtual law office" and reiterating the need to assure the confidentiality of all client communications, including those conducted electronically).

American Bar Association Ethics Committee Advises on Attorney Web Sites

The American Bar Association Standing Committee on Ethics and Professional Responsibility issued an opinion advising on various ethical issues that may arise with respect to attorney Web sites. Among other things, the opinion reiterates that attorneys must not include misleading information on Web sites, should make sure that legal information provided on a Web site is accurate and current, and should include qualifying statements or disclaimers that characterize the information as general in nature and not constituting legal advice. Additionally, the opinion cautioned that a Web site that invites inquiries from prospective clients may give rise to an attorney-client relationship and attendant confidentiality requirements.

American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion No. 10-457 (Aug. 5, 2010) Download [PDF](#)

Editor's Note: See also *In re Foster*, 45 So. 3d 1026 (La. Attorney Disciplinary Proceeding Oct. 15, 2010) (reprimanding an attorney for failing to properly supervise a law firm employee who posted misleading information on the firm's Web site.)

ELECTRONIC MARKETING

Sender's Liquidated Damages Liability under California Anti-Spam Statute Limited to \$1 Million per Incident

The liquidated damages provision of the California anti-spam statute, which caps liquidated damages at \$1 million "per incident," is a limitation on a sender's liability for each transmission of an actionable message to a single recipient or to multiple recipients, a district court held. The court rejected the putative class action plaintiff's argument that the \$1 million cap in the liquidated damages provision should be interpreted as a limitation on each individual recipient's potential recovery. Accordingly, the court concluded that it did not have subject matter jurisdiction under the federal Class Action Fairness Act of 2005, because the class action plaintiff alleged that the defendant had sent only three actionable e-mails, the potential liability for which could not exceed \$3 million, less than the \$5 million threshold required by the CAFA.

Bank v. Hydra Group LLC, 2010 U.S. Dist. LEXIS 100436 (E.D.N.Y. Sept. 24, 2010) (designated for "online publication only") Download [PDF](#)

Editor's Note: The court noted that if the putative class action plaintiff's interpretation of the statute was accepted, the "bizarre result" would be that the sender would potentially

be liable for \$3 billion in liquidated damages (because the plaintiff alleged that each of the three actionable messages was sent to at least 1 million recipients).

ELECTRONIC COMMERCE

Federal Law Barring Data Pass Marketing Practices Signed into Law

S. 3386, the federal "Restore Online Shoppers' Confidence Act," was signed into law on December 29, 2010. The bill is aimed at so-called data pass marketing practices in which online retailers provide customer payment information to a third-party seller in connection with an offer made to the retailer's customer by the third party at the time of a transaction with the retailer. The Act makes it unlawful for an online merchant to disclose customer payment information to a "post-transaction third party" seller as defined in the Act. The Act also prohibits such third parties from obtaining payment information from the retailer's customer unless the seller "clearly and conspicuously" discloses certain information to the customer, and obtains the "express informed consent" of the purchaser, as defined in the Act.

S. 3386 (111th Cong., 2d Sess. Dec. 29, 2010) [Bill Summary and Status File](#)

First Amendment Bars North Carolina Taxing Authority's Demand for Online Bookseller Records

A state taxing authority's request for information on transactions by an online bookseller with state residents, in connection with a dispute over the bookseller's liability for state sales and use taxes, is barred by the First Amendment, a district court ruled. The court held that the request for records of transactions that include personally identifiable information would disclose the expressive content of the customers' literary, film and music purchases, and would, therefore, "have a chilling effect that implicates the First Amendment." The court also ruled that the disclosure of the information concerning the customers' video and audiovisual purchases was barred by the federal Video Protection and Privacy Act, 18 U.S.C. § 2710.

Amazon.com, LLC v. Lay, 2010 U.S. Dist. LEXIS 1131 (W.D. Wash. Oct. 25, 2010)
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Online Retailers Fail in Facial Constitutional Challenge to New York State Online Sales Tax Law

Amendments to New York State's retail sales tax law aimed at requiring online retailers to collect state sales tax on purchases by New York residents is not facially unconstitutional, a New York appellate court ruled. The retailers challenged the applicability of the sales tax to sales made through their third-party affiliates who are located within the state. The court remanded for consideration of the retailers' "as applied" challenges based upon the Commerce Clause, the Due Process Clause and the Equal Protection Clause.

Amazon.com, LLC v. New York State Department of Taxation and Finance, 2010 NY Slip Op 07823 (N.Y. Sup. Ct. App Div. 1st Dept. Nov. 4, 2010) Download [Opinion](#)

ELECTRONIC RECORDS

E-mail May Satisfy Writing Requirement under New York Real Estate Statute of Frauds

An e-mail may be sufficient to satisfy the New York real estate Statute of Frauds requirement that a conveyance or contract concerning real property be in writing, a New York appellate court ruled. The court concluded that it need not determine whether the transaction in question was one in interstate commerce and thus controlled by the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et seq., or whether it was controlled by the New York Electronic Signatures and Records Act. Rather, the court concluded that the general Statute of Frauds should be, in light of the "vast growth in the last decade and a half in the number of people and entities regularly using e-mail," construed to include records of electronic communications and electronic signatures.

Naldi v. Grunberg, 2010 N.Y. App. Div. LEXIS 7173 (N.Y. Sup. Ct. App. Div. 1st Dept. Oct. 2, 2010) Download [Opinion](#)

Editor's Note: See also [Blake v. Murphy Oil USA, Inc.](#), 2010 U.S. Dist. LEXIS 95847 (N.D. Miss. Sept. 14, 2010) (summarily ruling that an electronic signature is legally effective, and that an arbitration provision in an employment agreement was not procedurally unconscionable because it was signed electronically; citing the Mississippi Electronic Transactions Act, Miss. Code. Ann. § 75-12-13)

PRIVACY

Tort Plaintiff Lacked Reasonable Expectation of Privacy in Social Network Communications

A tort plaintiff lacked a reasonable expectation of privacy in e-mails and other communications shared with third parties on social networking sites, a New York State trial court ruled. The tort defendant sought the discovery for the purpose of impeaching the plaintiff's claims of permanent injury. The court noted that neither of the social networking sites on which the plaintiff communicated guaranteed complete privacy to users, and, further, that they warned users that such information could become publicly available despite the user's privacy settings. The court also concluded that the tort defendant's need for the information outweighed the plaintiff's privacy concerns, and that the information sought was within the scope of permissible discovery under New York law.

Romano v. Steelcase, Inc., 2010 NY Slip Op. 20388 (N.Y. Sup. Ct. Suffolk Cty Sept. 21, 2010) Download [Opinion](#)

Editor's Note: The court commented that it had considered the applicability of the Stored Communications Act to the tort defendant's discovery demand, but the opinion contains no explicit ruling discussing or applying the SCA other than the implicit holding that to allow the requested discovery would not violate the SCA.

Stored Communications Act Bars Civil Discovery Subpoena to E-Mail Service Provider, Absent Consent of Account Holder

The federal Stored Communications Act bars the enforcement of a subpoena directed to an e-mail service provider to obtain the contents of an account-holder's e-mails, absent the consent of the account holder, a district court ruled. The court rejected the argument that the Act does not apply to the account holders because they are foreign citizens, reasoning that the Act applies because the e-mail provider and its servers are located in the U.S. Further, the court ordered the e-mails to be preserved pending the receipt of consent by the account holders, and directed the provider to disclose the date when the accounts were created, the actual names of the account holders provided at the time the accounts were created, and the countries from which the accounts were created.

In re Beluga Shipping GmbH v. Suzlon Energy, 2010 U.S. Dist. LEXIS 104705 (N.D. Cal. Sept. 23, 2010) Download [PDF](#)

Editor's Note: See also Chasten v. Franklin, 2010 U.S. Dist. LEXIS 113284 (N.D. Cal. Oct. 14, 2010) (unpublished) (under the SCA, quashing subpoena directed at the content of e-mails held by an e-mail services provider)

Use of E-Mail Client Rule to Acquire Copies of E-Mail Messages Violates Wiretap Act

An employee who accessed the rule function on his supervisor's e-mail account in order to have copies of the supervisor's e-mail messages forwarded to him violated the provisions of the Wiretap Act that prohibit intentional interception of an electronic communication, the U.S. Court of Appeals for the Seventh Circuit ruled. The court upheld the employee's conviction under 18 U.S.C. § 2511(1)(a), rejecting the employee's argument that because the e-mails were not forwarded to him until they had arrived in his supervisor's e-mail in-box, they were not intercepted within the meaning of the Wiretap Act. The court noted that the evidence showed that the e-mail rule was stored on the employer's e-mail server and operated on e-mail when it arrived on the server, sending a copy of the e-mail to both the supervisor and the employee. Thus, the court reasoned, the copying of the e-mail at the server constituted interception.

United States v. Szymuszkiewicz, 622 F.3d 701 (7th Cir. Nov. 29, 2010)

Editor's Note: The opinion went on (arguably in dicta) to further reason that it did not matter which computer contained the rule that copied the e-mails. The court commented that the "interception" prohibited by the Wiretap Act is the acquisition of the contents of a message by a "device," and under the evidence presented at trial, the relevant "device" was any of three computers: "Infusino's computer (where the rule was set up), the Kansas City server (where the rule caused each message to be duplicated and sent his way), and his own computer (where the messages were received, read, and sometimes stored)." Compare this discussion of the term "device" with the opinion in Healix Infusion Therapy, Inc. v. Healix Health, LLC, discussed below.

E-mails Sent to Transferred Domain Name and Read by New Domain Owner Not Intercepted under ECPA

E-mails that were sent to e-mail accounts connected to a domain name that was transferred pursuant to a settlement agreement, and that were read by the new domain name owner, were not "intercepted" within the meaning of the Electronic Communications Privacy Act, a district court ruled. The court concluded that the e-mails were in electronic storage at the time that they were opened and read by the new domain name owner, and thus they could not be intercepted under the ECPA. Further, the court reasoned that a violation of the ECPA requires that there be an intentional interception of a communication through a "device," and the server upon which the e-mails were stored was not such a device. Finally, the court concluded that the new owner of the domain was a "direct party recipient" of the e-mails directed to the domain and thus did not violate the ECPA by reading them.

Healix Infusion Therapy, Inc. v. Helix Health, LLC, 2010 U.S. Dist. LEXIS 103619 (S.D. Tex. Sept. 30, 2010) Download [PDF](#)

Editor's Note: The court also noted that the settlement agreement provided for the redirection of e-mails sent to accounts held by the prior domain name owner, and directed the prior owner to arrange for the domain register to redirect those e-mails to him, but he failed to make the specified arrangements.

Disclosure of Third-Party Monitoring in ISP Subscriber Agreement, Privacy Policy, Deemed Consent to Interception under ECPA

Disclosures in an Internet service provider's subscriber agreement and privacy policy concerning third-party monitoring of subscriber Internet activity constituted sufficient notice of and assent to the deployment and use of "deep packet inspection" technology, a district court held. In addition to the disclosures in the documents, the court noted, the ISP also separately provided notice to subscribers and gave them an opportunity to opt out of the monitoring. Although the court found that the monitoring constituted an "interception" within the meaning of the Electronic Communications Privacy Act, the subscribers were deemed to have consented to the interception within the meaning of the Act. Accordingly, a related state law claim for invasion of privacy was dismissed as well. The court declined to dismiss the subscribers' claims under the Computer Fraud and Abuse Act and a related state law claim of trespass to chattels, finding that they sufficiently alleged that the monitoring technology altered the privacy and security controls on their computers and thus exceeded authorized access under the CFAA.

Mortensen v. Bresnan Communications, LLC, No. CV 10-13-BLG-RFC (D. Mont. Dec. 13, 2010) Download [PDF](#)

Ninth Circuit Revises Controversial Opinion Limiting Government Searches of Electronically Stored Information

The U.S. Court of Appeals for the Ninth Circuit, sitting en banc, revised its August 2009 opinion addressing warrant applications by law enforcement officials seeking access to electronically stored information. The original opinion set forth mandatory guidelines for such warrants that included 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. In the revised opinion, these guidelines are contained in a concurring opinion stating that district court judges and magistrates must exercise their independent judgment in evaluating such applications, but "heeding this guidance will significantly increase the likelihood that the searches and seizures of electronic storage that they authorize will be deemed reasonable and lawful."

United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162 (9th Cir. as corrected Sept. 13, 2010) Download [PDF](#)

Law Enforcement May Obtain Historical Cell Site Data without Warrant

Law enforcement officials are not ordinarily required under the Stored Communications Act, 18 U.S.C. § 2701 et seq., to obtain a warrant in order to obtain historical cell site data of an individual from a wireless telecommunications provider, the U.S. Court of Appeals for the Third Circuit ruled. In a case of first impression, the court concluded that the government may obtain such information pursuant to the statute by a court order on a showing of less than probable cause, i.e., "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." The court noted that the statute also allows a reviewing judicial authority the option to require a warrant, but that option should be exercised "sparingly."

In re Application of the United States for an Order Directing Provider of Electronic Communications Services to Disclose Records to the Government, 2010 U.S. App. LEXIS 18689 (3d Cir. Sept 7, 2010) Download [PDF](#)

Editor's Note: Compare [In re Application of the United States for Historical Cell Site Data](#), 2010 U.S. Dist. LEXIS 115529 (S.D. Tex. Oct. 29, 2010) (improvements in accuracy of cell-site-based location-tracking compels conclusion that a warrant is required); [In re Application of the United States of America for an Order Authorizing the Release of Historical Cell-Site Information](#), 2010 U.S. Dist. LEXIS 88781 (E.D.N.Y. Aug. 27, 2010) (government application for historical cell site data requires a warrant showing probable cause) and [In re Application of the United States of American for an Order Authorizing the Release of Historical Cell-Site Information](#), 2010 U.S. Dist. LEXIS 136053 (E.D.N.Y. Dec. 23, 2010) (same).

DEVELOPMENTS OF NOTE

Copyright Royalty Judges Adopt Minimum Statutory Licensing Fees for Webcasting

[Federal Register](#): Digital Performance Right in Sound Recordings and Ephemeral Recordings, 75 Fed. Reg. 56873 (Sept. 17, 2010)

Commerce Department Bureau of Industry and Security Revises Export Control Rules Implementing the Wassenaar Arrangement 2009 Plenary Agreements on Dual Use Goods and Technologies

[Federal Register](#): 75 Fed. Reg. 54271 (Sept. 7, 2010)

Ohio Statute Criminalizing Record Pirating Preempted by Copyright Act

[Opinion](#): State v. Boyd, 2010-Ohio-4313 (Ohio Ct. App. Sept. 15, 2010)

Washington State Internet Gambling Ban Survives Constitutional Challenge

[Opinion](#): Rousso v. State of Washington, No. 83840-1 (Wash. Sept. 23, 2010)

Jury Returns \$1.5 Million Copyright Damages Verdict in Third Trial of P2P Filesharing Case

[News Report](#)

Usenet.com Held Liable for \$6.6 Million in Copyright Statutory Damages for Music File-Sharing Service

[Opinion](#): Arista Records LLC et al v. Usenet.com, Inc., 2010 U.S. Dist. LEXIS 96957 (S.D.N.Y. Sept. 16, 2010)

Lime Wire Permanently Enjoined from Infringing Copyrighted Works and Ordered to Disable File-Sharing Functionality

[Opinion](#): Arista Records LLC v. Lime Wire LLC, 2010 U.S. Dist. LEXIS 115675 (S.D.N.Y. Oct. 26, 2010)

Australian Court Rules Newspaper and Magazine Headlines Not Entitled to Copyright Protection

[Opinion](#): Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd [2010] FCA 984 (7 September 2010)

French Court Finds Google and CEO Liable for Defamation for Search Results Associated with Plaintiff's Name

[News Report](#)

Canadian Labor Board Upholds Employer's Right to Dismiss Employees for Negative Social Media Posts

[Opinion](#): Loughheed Imports Ltd. (West Coast Mazda) v. United Food and Commercial Workers International Union, Local 1518, 2010 CanLII 62482 (BC L.R.B.)

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