

New Media, Technology and the Law

Newsletter

May 2009

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COPYRIGHT

Anti-Plagiarism Service Archiving of Student Works for Comparison is Fair Use

The archiving of student term papers and other works by an anti-plagiarism service employed by the students' educational institutions is a fair use under copyright law, the U.S. Court of Appeals for the Fourth Circuit held. The court noted that the purpose of archiving the papers in digitized form in the service's online database was to permit comparison with other works subsequently submitted to the service and thereby determine whether the subsequent works were plagiarized. Among other determinations with respect to fair use, the court concluded that the archiving was a transformative use because it "was completely unrelated to expressive content and was instead aimed at detecting and discouraging plagiarism."

A.V. v. iParadigms, LLC, 2009 U.S. App. LEXIS 7892 (4th Cir. Apr. 16, 2009) [Download PDF](#)

Editor's Note: Because it upheld the lower court's ruling on fair use, the appeals court did not address the students' challenge to the enforceability of a clickwrap agreement that the students executed in order to submit their papers to the service. That issue is discussed in [this post](#) on the Proskauer New Media and Technology Law blog.

Retention of Copyrighted Software in Computer RAM During Period of Software Use Creates a "Potentially Infringing Copy"

A potentially infringing copy of copyrighted computer software was created each time the software was used, by virtue of the retention of a copy of the software in computer random access memory (RAM) during the period the software was being used, a district court ruled. The court relied upon the opinion of the Court of Appeals for the Second Circuit in *Cartoon Network LP LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) finding that the embodiment requirement in 17 U.S.C. § 101 is met "where the program remained in the RAM for at least several minutes ... or where the program remained in the RAM until the computer is shut off."

SimplexGrinnell LP v. Integrated Systems & Power, Inc., 2009 U.S. Dist. LEXIS 30657 (S.D.N.Y. Mar. 31, 2009) [Download PDF](#)

Editor's Note: A petition for certiorari was filed in the U.S. Supreme Court in the *Cartoon Network* case in October 2008. Numerous briefs were thereafter filed by parties seeking amicus status. In January 2009 the U.S. Supreme Court invited the Solicitor General to file a brief expressing the view of the United States on the issue raised in the petition, but to date that brief has not been filed.

Federal District Court Lacks Discretion to Permit Webcasting of Court Proceedings

A federal district court in Massachusetts lacked the authority to permit webcasting of court proceedings, given the contrary expression of policy by the U.S. Judicial Conference and the Local Rules of the District of Massachusetts, the U.S. Court of Appeals for the First Circuit ruled. The lower court had given permission to the defendant in a closely watched file-sharing case to "narrowcast" the hearings on pending motions in the case to a site at the Harvard Law School, and then subsequently webcast to a broader online audience. The appeals court rejected the defendant's argument that webcasting could be permitted despite the policy and the rules because neither explicitly prohibited Internet transmission, speaking only of "television" and "radio and television coverage." The court commented that the intention of the Judicial Conference to forbid all broadcasting of district court proceedings in civil cases was "transparently clear."

In re Sony BMG Music Entertainment, 2009 U.S. App. LEXIS 8084 (1st Cir. Apr. 16, 2009) [Download PDF](#).

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

DOMAIN NAMES

Tenant Who Used Domain Name for Public Housing Tenant Gripe Site Had "Right or Legitimate Interest" under UDRP

A tenant who registered the domain names formerly used by the complainant public housing development when they lapsed, and then used them for a "gripe site" directed at exposing deficiencies in the maintenance of the development, had a "right or legitimate interest" in the domain names under the Uniform Domain Name Dispute Resolution Procedures, an arbitrator concluded. The arbitrator noted that there is a divergence of views in decisions under the UDRP with respect to the use of domain names to provide "genuine criticism" of a complainant, and agreed with prior decisions finding that "such use is neither inherently incompatible with the UDRP, nor always permitted by the UDRP" and must be evaluated based on the circumstances. The arbitrator found that although not all relevant factors weighed in favor of the tenant, he had a "legitimate right" to use the domain names because he registered and used the domain names "genuinely for the purpose of criticizing," he believed the criticism to be well-founded, and he was not seeking commercial gain.

Midland Heart Ltd v. Black (WIPO Mar. 30, 2009). [Download PDF](#)

Ruling against Alleged Typosquatter Vacated for Failure to Apply Proper Standards under ACPA

A district court's grant of a preliminary injunction under the Anticybersquatting Consumer Protection Act against the registrant of domains that contained misspellings of the plaintiff's trademark must be vacated due to errors in the court's application of the ACPA, the U.S. Court of Appeals for the Fifth Circuit ruled. The appeals court found that the district court failed to consider whether the "typosquatter" was entitled to the benefit of the ACPA "fair use" safe harbor because the domain names included individual generic terms that correctly reflected the content contained on the Web site to which the domain names were directed. The appeals court also found that the district court erred in finding that the plaintiff had a likelihood of success on the merits based on a "likelihood of consumer confusion" rather than a determination that the domains were "confusingly similar," and because the district court failed to describe how the use of the domain names would injure the plaintiff.

The Southern Co. v. Dauben Inc., 2009 U.S. App. LEXIS 7993 (5th Cir. Apr. 15, 2009) [Download PDF](#)

TRADEMARKS

No Trademark First Sale Defense for Goods Resold in Online Auction Without Original Warranty

A reseller who removed original serial numbers from goods and auctioned them on eBay is not entitled to the trademark first sale defense, where the removal of the serial numbers prevented auction purchasers from obtaining warranty coverage from the original manufacturer, a district court ruled. The court found that the removal of the serial numbers and consequent loss of warranty coverage rendered the goods a "materially different product" from that distributed by the original manufacturer and caused consumer confusion that damaged the trademark holder's good will. The court also concluded that the disclosure included in the online auction listing was not sufficient to shield it from liability for trademark infringement. The court found that the evidence produced by the original manufacturer, the trademark holder, demonstrated that auction purchasers thought that they had purchased goods including a warranty despite the reseller's disclosure.

Beltronics USA, Inc. v. Midwest Inventory Distribution, LLC, 2009 U.S. App. LEXIS 8233 (10th Cir. Apr. 9, 2009) [Download PDF](#)

ONLINE CONTENT

Claim That Web Site Operator Promised, Then Failed, to Remove Defamatory Third-Party Content Survives CDA Section 230(c)(1) Challenge

A plaintiff's claim that the operator of a Web site promised to remove defamatory content posted by a third party, but failed to do so promptly, is not barred by Section 230(c)(1) of the Communications Decency Act, the U.S. Court of Appeals for the Ninth Circuit ruled. The appeals court concluded that Section 230(c)(1) does not bar an action against an interactive service provider for breach of a promise to remove content, because, by making the promise, the service provider expressed a "manifest intention to be legally obligated" to remove the defamatory content. The court rejected the plaintiff's claim for negligent undertaking under Oregon law, however, finding that the imposition of a legal obligation to remove content, in the form of a duty under tort law, would treat the provider as a publisher in contravention of Section 230(c)(1). The appeals court remanded the case for further proceedings, including consideration of whether the breach of promise claim was precluded under Section 230(c)(2) of the CDA.

Barnes v. Yahoo!, Inc., No. 05-36189 (9th Cir. May 7, 2009) [Download PDF](#)

Under Single Publication Rule, "Substantial Modification" of Web Site Content May Restart Statute of Limitations

The single publication rule applies to defamatory material posted to a Web site, but the statute of limitations may be restarted if the Web site content is "substantially modified," a district court ruled. The court noted that the defendant established by affidavit that the defamatory statements were first placed on the subject Web site more than two years prior to the date that the lawsuit was filed, thus placing the posting of the statements outside the statute of limitations. The court concluded, however, that the plaintiff was entitled to pursue discovery to determine whether there were any other changes to the content of the Web site "that would constitute substantial modification."

Salyer v. The Southern Poverty Law Center, Inc., 2009 U.S. Dist. LEXIS 35226 (W.D. Ky. Apr. 23, 2009) [Download PDF](#)

Editor's Note: The opinion is ambiguous as whether any substantial modification to any part of the subject Web site would constitute republication of the defamatory statements, or whether any such modifications would have to pertain to the defamatory statements. It was the plaintiff's position, reflected in the Memorandum in Opposition (filed Feb. 6, 2009), that discovery would reveal whether the defamatory statement were subsequently published in other formats, or were republished by virtue of updating or other alterations to the Web site, or whether the defendant undertook any actions aimed at gaining a new audience for the statements, such as by linking to the statements in other parts of the Web site or by inducing other parties to post or link to the statements on the Internet.

No Privacy Claim for MySpace Essay Reprinted in Newspaper

An author who posted an essay on her MySpace page has no cause of action for public disclosure of private facts against the person who copied it and sent it to a local newspaper for publication, a California appeals court ruled. The court found that the essay was not a "private fact" because no reasonable person would have an expectation of privacy regarding material published to a publicly available page on a social networking site such as MySpace. The court rejected the argument that the contents of the essay remained a private fact because the essay was removed after several days and the author only intended it to reach a limited audience. The court commented that the posting of the essay "was not so obscure or transient that it was not accessed by others."

Moreno v. Hanford Sentinel, Inc. (Cal. App. 5th Dist. Apr. 2, 2009) [Download PDF](#).

Editor's Note: The ruling is discussed more fully in [this post](#) on the PBS MediaShift blog.

First Amendment Not Violated by Non-Renewal of Hearing Officer's Contract, Where Officer's Blog Raised Potential Questions as to Impartiality

The content of a special education hearing officer's blog, in which she expressed opinions on topics that pertained to the types of issues that were raised in the matters to which she might be assigned, justified the non-renewal of her contract, a district court ruled. The district court concluded that the non-renewal did not violate the officer's First Amendment rights, because the questions as to her impartiality had the potential to disrupt the operations of the state agency for which she conducted the hearings. The court noted that in at least two cases, attorneys had threatened to file recusal motions on the basis of the officer's blog entries, and that the possibility that actual recusal motions might be filed in those and other cases could hamper the agency's ability to efficiently and effectively resolve appeals.

Stengle v. Office of Dispute Resolution, 2009 U.S. Dist. LEXIS 35612 (M.D. Pa. Apr. 27, 2009) [Download PDF](#).

COMPUTER CRIME

CFAA Indictment Upheld Charging Employee with Copying Proprietary Information for Use in Competitive Enterprise

An indictment alleging that a former employee accessed an employer's computer network to copy proprietary information for use in a competitive enterprise states an offense under the Computer Fraud and Abuse Act, a district court held. The court upheld an indictment charging a violation of 18 U.S.C. § 1030(a)(4), finding that the element of "intent to defraud" could be found in the employee's "knowing access of electronic records for uses outside their intended purpose." The court also rejected the defendant's argument that because 18 U.S.C. § 1030(a)(4) had never been addressed in the criminal context the indictment should be dismissed under the rule of lenity. The court found that there was "ample authority" in civil cases construing this section to conclude that the CFAA was violated by the employee's access to the employer's confidential and proprietary information to advance his own competitive enterprise.

United States v. Nosal, 2009 U.S. Dist. LEXIS 31423 (N.D. Cal. Apr. 13, 2009) [Download PDF](#)

No Violation of Colorado Computer Crime Law Where Defendant Did Not "Use" Computer within the Meaning of the Statute

A securities salesman on whose behalf sales brochures that facilitated illegal securities transactions were created and printed on a computer did not "use" a computer in connection with those sales within the meaning of the Colorado computer crime statute. The appeals court vacated the salesman's computer crime conviction, finding that the record showed that the salesman's use of a computer was "sparse" and "remote and attenuated at best." The

court further noted that the record showed that neither the defendant nor other salesmen were involved in generating the sales brochures or sending them to prospective investors. The court found that in the absence of a complicity theory on the part of the prosecution, the statute required proof beyond a reasonable doubt that the salesman personally used a computer.

People v. Robb, 2009 Colo. App. LEXIS 572 (Colo. Ct. App. Div. 3 Apr. 16, 2009)

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PRIVACY

FTC Says COPPA Rule Review Scheduled for 2010 Will Include Consideration of Children's Use of Smartphones

The FTC released a staff report on the "Mobile Commerce Marketplace on April 22, commenting that the increasing use of smartphones by children presents "unique privacy challenges." The Commission stated that it would seek to examine these challenges in its review of rules implementing the Children's Online Privacy Protection Act scheduled for 2010. The report also addressed mobile marketplace issues such as disclosures to consumers concerning the cost of mobile services, and the impact of unwanted mobile text messages, malware and spyware.

FTC Staff Report: Beyond Voice: Mapping the Mobile Marketplace (April 2009)

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CONTRACTS

Web Site's Reservation of Unilateral Right to Modify Online Terms of Use Renders Contract Illusory

An arbitration provision in online terms and conditions is unenforceable, where the Web site operator reserved the unilateral right to modify the terms and conditions and did not limit the effectiveness of any such modifications to future disputes, a district court held. The court concluded that under Texas law, the failure to limit the applicability of any modifications to future disputes rendered the arbitration provision illusory. The court noted that the terms and conditions stated that modifications "will be effective immediately upon posting," and concluded that "the natural reading of that clause does not limit application of the modifications to earlier disputes."

Harris v. Blockbuster Inc., (N.D. Tex., Apr. 15, 2009) [Download PDF](#)

No Third Party Beneficiary Status under Web Site Terms of Use Absent Intent to Benefit Third Parties

Under California law, a user of a Web site cannot claim third-party beneficiary status under the Web site Terms of Use ("ToU") absent a showing that users are intended beneficiaries of the ToU, a district court ruled. The court refused to grant a preliminary injunction sought by a user of the Craigslist Web site seeking to enjoin allegedly harmful conduct on the part of another user in violation of the applicable ToU. The court enumerated several factors in finding that the plaintiff user had failed to establish a probability of success on the merits of its third-party beneficiary claim: that the wording of the ToU suggested that the ToU was creating rights and duties only between the user and Craigslist; that the ToU indicated that a user's "only recourse" was limited to termination of the service; that the ToU requested users to report violations to it and therefore "strongly" suggested an intent to preclude user resort to litigation; and that the specific provision that the plaintiff claimed was violated was intended for the benefit of Craigslist, not other users, as it prohibited any unreasonable or disproportionate load on the Craigslist infrastructure.

Jackson v. American Plaza Corp., 2009 U.S. Dist. LEXIS 35847 (S.D.N.Y. Apr. 28, 2009)

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

E-Mail Notice of Revocation Ineffective Where Contract Specified Written Notice and Either Hand Delivery or Mail with Proof of Delivery

An e-mail notice sent by a purchaser to revoke acceptance of allegedly non-conforming goods was not effective where the contract between the parties specified that the notice be written, and either be hand-delivered or mailed with proof of delivery, a district court ruled. The court also rejected the argument that the seller orally waived the written notice requirement, finding that the contract specified that changes to the agreement could only be made "in a written document signed by both parties."

Valspar Refinish, Inc. v. Gaylord's, Inc., 2009 Minn. LEXIS 74 (Apr. 23, 2009) [Download](#)

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JURISDICTION

Presence of Unauthorized Copies of Copyrighted Material on Web Site Accessible in New York Does Not Establish Specific Jurisdiction

The presence of unauthorized copies of copyrighted material on a Web site hosted outside New York but accessible in New York, where the copyright owner's principal place of business was located, does not establish specific jurisdiction under the New York long-arm

statute, a district court ruled. The plaintiff copyright owner sought to establish jurisdiction under N.Y.C.P.L.R. 302(a)(3)(ii), which provides for jurisdiction in New York for tortious acts performed outside New York that cause injury to person or property within New York. The court found that in a case alleging copyright infringement, the injury to the copyright owner occurs where the infringement occurs, not where the copyright owner is located. The court noted that the plaintiff recognized that "in the case of web sites displaying infringing material the tort is deemed to be committed where the web site is created and/or maintained," citing *Freeplay Music, Inc. v. Cox Radio, Inc.*, 2005 U.S. Dist. LEXIS 12397 (S.D.N.Y. June 23, 2005).

Penguin Group (USA), Inc. v. American Buddha, 2009 U.S. Dist. LEXIS 34032 (S.D.N.Y. Apr. 21, 2009) [Download PDF](#)

DEVELOPMENTS OF NOTE

FCC Seeks Comment on Consumer Notice for Breaches of Electronic Health Records

Health Breach Notification Rulemaking, Project No. R911002 (Apr. 16, 2009) [Download Notice](#)

Free Software Foundation Settles Open Source Copyright Infringement Litigation against Cisco

Free Software Foundation, Inc. v. Cisco Systems, Inc., No. 1:08-cv-10764 (S.D.N.Y. complaint filed Dec. 11, 2008) [Link to blog post](#)

Florida Attorneys Challenge Florida Rules on Attorney Web Advertising on First Amendment Grounds

Rothman v. The Florida Bar, No. 09-80503 (S.D. Fla. Apr. 1, 2009) [Download PDF](#)

YouTube Can't Appeal DMCA Ruling Favoring Videographer Who Dismissed Single Action to Join Class Action

Tur v. YouTube, Inc., No. 07-56683 (9th Cir. Apr. 21, 2009) [Download PDF](#)

Trademark Holder Sues Domain Name Registrar under ACPA over Parked Domain Pages Containing Paid Advertising

UBID Inc. v. GoDaddy Group, No. 09-2123 (N.D. Ill. Complaint filed Apr. 6, 2009) [Download PDF](#)

Offshore Online Gambling Company Partygaming Agrees to \$105 Million Federal Fine in Non-Prosecution Agreement

Press Release April 7, 2009 [Download PDF](#)

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