

New Media, Technology and the Law

Newsletter

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COPYRIGHT

Class Action Litigation against Google over "Book Search" Scanning Project Settled

The Authors Guild, the American Association of Publishers and Google, Inc. announced a settlement of consolidated class action lawsuits challenging the Google "Book Search" scanning project. The settlement provides, among other things, that Google will make payments totalling \$125 million which will be used in part to establish a "book registry" through which rights holders will be able to register works that they wish to make available to the project. Works contained on the registry will be made available in participating libraries, with per page printing fees being distributed to the rights holders. The settlement must be approved by the district court.

Editor's Note: Additional documents pertinent to the settlement are available on the [Authors Guild Web site](#) and include a Joint FAQ explaining the details of the settlement.

The Authors Guild, Inc. v. Google Inc., 05 CV 8136-JES (S.D.N.Y., settlement documents filed Oct. 28, 2008) [Download PDF](#)

PRO-IP Act, Increasing IP Infringement Penalties, Signed into Law

S. 3325, the Prioritizing Resources and Organization for Intellectual Property Act of 2008 (PRO-IP Act) was signed into law on October 13. The new law supplements various existing intellectual property enforcement provisions, and includes an increase in statutory damages for counterfeit goods and harmonization of forfeiture laws concerning intellectual property rights, among other things. The law also establishes an Intellectual Property Enforcement Coordinator within the White House, a provision to which the [current administration previously objected](#).

Editor's Note: The [press release](#) issued by Senator Leahy on the passage of the bill describes in detail the numerous provisions of the bill as enacted.

PRO-IP Act, S. 3325 (110th Cong. 2d Sess.), Pub. L. 110-403 (Oct. 13, 2008) [Download PDF](#)

Distribution of File Not Established by "Making Available" in Shared Folder of P2P Application

A showing that a defendant in a copyright infringement action made a copyrighted music file available in a shared folder accessible to a peer-to-peer file sharing network is not sufficient to establish infringement of the copyright owner's distribution right, a district court held. The court vacated a \$220,000 damages award on the ground that its prior jury instruction to the contrary was erroneous and substantially prejudiced the rights of the defendant. The court concluded that, under the plain language of § 106 of the Copyright Act, a "distribution" of a copyrighted work requires an actual dissemination of the work. The court noted, however, that direct proof of actual dissemination was not required to show a distribution and the plaintiffs are free to use circumstantial evidence to establish actual dissemination.

Editor's Note: The court in Capitol Records, Inc. v. Thomas raised the "making available" issue *sua sponte* in May following the trial and resulting jury award of damages, and invited the submission of *amicus* briefs that are referenced in the court's ruling. The briefs submitted by, among others, the Electronic Frontier Foundation and the MPAA are available on the [Web site of the EFF](#).

Capitol Records, Inc. v. Thomas, No. 06-1497 (D. Minn. Sept. 24, 2008) [Download PDF](#)

Failure To Deploy Robots.txt File To Deter Search Engine Indexing Gives Rise to Implied License

A Web site operator's decision not to deploy a robots.txt file to instruct search engine crawlers not to index and copy the operator's copyrighted works gives rise to an implied license to search engines to display cached copies of the works in search engine results, a district court ruled. The court concluded that the admission in the Web site operator's complaint that he knew that his failure to deploy the robots.txt file would result in the works being cached "conclusively establishes the affirmative defense of implied license." The court declined to completely dismiss the operator's infringement claims, however, because the operator claimed that the search engines continued to display his works after the commencement of the lawsuit. The court commented that a nonexclusive implied license could be revoked where no consideration had been given for the license, and that the institution of a lawsuit could constitute revocation of the license.

Parker v. Yahoo! Inc., 208 U.S. Dist. LEXIS 64512 (E.D. Pa. Sept. 25, 2008) [Download PDF](#)

Right of Publicity Claim for Use of Voice in Videogame Not Preempted by Copyright Act

A right of publicity claim based on the use of an individual's voice in a film promoting a videogame is not preempted by the Copyright Act, the U.S. Court of Appeals for the Third Circuit ruled. The court concluded that the Pennsylvania right of publicity claim was not expressly preempted because the statute required a showing of "commercial value," which is an element additional to those required for a copyright claim. Further, the court concluded that a person's distinctive voice is not a work of authorship within the subject matter of copyright. The court rejected the argument that the right of publicity claim was impliedly preempted, noting that the agreement pursuant to which the individual had conveyed the right to use his voice in films had expressly withheld consent for any use that constituted "an endorsement of any product or service." The appeals court upheld the district court's entry of summary judgment in favor of the individual's estate on the right of publicity claim, but remanded for further consideration of the false endorsement claims under the Lanham Act.

Editor's Note: The court relied heavily on the existence of the language withholding consent to uses that constitute an endorsement, noting that "performing artists should have the burden of reserving publicity rights when contracting away any rights under copyright law they may have." Note should be taken of the court's discussion of the need for courts to carefully circumscribe the publicity rights of performers in situations in which they convey copyright rights in their works and performances but fail to reserve publicity rights:

"Despite our holding, we emphasize that courts must circumscribe the right of publicity so that musicians, actors, and other voice artists do not get a right that extends beyond commercial advertisements to other works of artistic expression."

"If courts failed to do so, then every record contract or movie contract would no longer suffice to authorize record companies and movie studios to distribute their works. In addition to copyrights, entertainment companies would need additional licenses for artists' rights of publicity in every case."

Facenda v. N.F.L. Films, Inc., 2008 U.S. App. LEXIS 19228 (3d Cir. Sep. 9, 2008)

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Circumstantial Evidence of Satellite Signal Theft Sufficient To Establish Violations of Cable Act and Wiretap Act

Violations of the federal Communications Act and the federal Wiretap Act can be established by circumstantial evidence of signal piracy, the Court of Appeals for the Ninth Circuit held. The court ruled that although evidence of possession of a pirate access device may not be sufficient by itself to establish signal piracy, the defendant in this case not only possessed numerous such devices, he also possessed a satellite television receiver that he had never activated with the satellite television provider. In addition, the court noted evidence in the record showing a call to the provider from the defendant's residence complaining about a system malfunction subsequent to the provider's implementation of electronic countermeasures to thwart the use of piracy devices.

DirecTV, Inc. v. Webb, 2008 U.S. App. LEXIS 20312 (9th Cir. Sept. 25, 2008) [Download PDF](#)

Claim of Innocent Infringement of Web Site Article Rejected Where Infringer, Experienced in SEO, Could Have Located Copyright Notice

A defendant experienced in search engine optimization services could not credibly claim innocent infringement with respect to the unauthorized copying and posting of a copyrighted article on her Web site, where an online search would easily have led her to the original article containing the author's copyright notice, a district court ruled. The court also declined to increase the statutory damages award for willfulness, on the ground that the plaintiff did not offer the copyrighted article for sale, and the defendant was not a competitor of the plaintiff, therefore there was "little potential for actual damages." In addition the court noted that the plaintiff's demand letter threatened criminal prosecution unless a payment of \$300,000 was received, and concluded that the letter was "highly inappropriate" and "itself arguably a violation of the law." The court commented that it was "not persuaded that defendants' infringing conduct, especially when counterbalanced by plaintiff's egregious demand" justified enhanced statutory damages.

McNamara v. Universal Commercial Services, Inc., 2008 U.S. Dist. LEXIS 69961 (D. Ore. Sep. 16, 2008) [Download PDF](#)

Software Developer's Delivery of Custom Software and Source Code to Customer Gave Rise to Irrevocable Implied License

A software developer's delivery of custom software to a customer, coupled with the storage of the program source code on the customer's computers, gave rise to an unlimited, nonexclusive implied license to the customer to use, modify, and retain the source code, the Court of Appeals for the Ninth Circuit ruled. The court concluded that the course of dealings between the parties gave rise to an implied license because the customer requested the creation of the works in question, and the developer created and delivered the works to the customer with the intent that the customer use, retain, and modify the works. In assessing the developer's intent, the court noted that the relevant intent was the objective intent of the developer at the time of the creation and delivery of the works, and that the developer's later expressed intent to retain control over the works and limit the customer's license was irrelevant. Finally, the court concluded that because the customer paid for the works, the implied license was irrevocable.

Asset Marketing Systems, Inc. v. Gagnon, 2008 U.S. App. LEXIS 19179 (9th Cir. Sept. 9, 2008) [Download PDF](#)

Software Reseller's Posting of License Key on Web Site Accessible to Customers Constituted Unauthorized Use of Developer's Trademark

A software value-added reseller that made an updated license key available to its customers via its Web site violated the plaintiff software developer's trademarks, where the updated license key would enable customers to use the subject software beyond the time period authorized in the license agreement between the reseller and the developer, a district court held. The court noted that the agreement allowed the reseller to use the trademarks only for a limited time frame, and that although the agreement also allowed the reseller to use one of the marks as a corporate name, that fact did not evidence an intent to allow the use of the marks beyond the limited time frame set forth in the agreement. The court granted an injunction directing the reseller to remove the license key from its Web site, and requiring it to post a statement on its Web site expressing the contractual limitations on its authorization to supply or support the developer's software.

TM Computer Consulting, Inc. v. Apothacare, LLC, 2008 U.S. Dist. LEXIS 69284
[Download PDF](#)

TRADEMARKS AND DOMAIN NAMES

Lack of Evidence that Domain Name Registrant Knew of Trademark Owner's Mark at Time of Registration Negates Finding of Bad Faith under ACPA

A trademark owner's failure to rebut a domain name registrant's claim that he had no knowledge of the owner's mark at the time he registered disputed domain names precludes a

finding that the registrant acted in bad faith under the Anticybersquatting Consumer Protection Act (ACPA), a district court ruled. The court also referenced the registrant's undisputed statements that he registered the domain names with the intent to later use them in connection with a legitimate business, and that he did in fact commence such a business shortly thereafter. The court also rejected the argument that the reregistration of the disputed domain names after the commencement of the litigation was sufficient evidence to establish a registration with knowledge of confusing similarity to the owner's trademarks, finding that this single factor was insufficient to create a trial issue of fact with respect to bad faith.

Healix Infusion Therapy, Inc. v. Murphy, 2008 WL 4155459 (S.D. Tex. Sept. 2, 2008)

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Defense of Laches Applicable to Anticybersquatting Claims in Dispute over Domain Name

The defense of laches is available to bar a claim that a domain name registrant violated the Anticybersquatting Consumer Protection Act in maintaining an inactive domain name, a district court ruled. The court concluded that although an ACPA claim is a type of "continuing harm" that might preclude the application of the statute of limitations, the defense of laches is nevertheless available when the period of delay before filing suit was "wholly unexcused." In evaluating the availability of the defense, the court considered the five-year period of delay between the notice to the plaintiff of the domain name and the institution of suit, the plaintiff's failure to show an excuse for the period of delay, and the evidentiary prejudice to the registrant caused by the delay. In commenting on the evidentiary prejudice to the registrant, the court commented that although the registrant had not suffered economic prejudice because it had not invested or expanded its use of the trademark incorporated in the inactive domain name, the delay prejudiced its ability to address the legal issues as it would be required "to prove a negative, that is, that it did not unlawfully acquire diamondbrite.com or use it in commerce in a way likely to cause confusion, in violation of the Lanham Act, and that it did not register, use, or traffic in the domain name with a bad faith intent to profit, in violation of the ACPA."

Southern Grouts & Mortars, Inc. v. 3M Co., 2008 U.S. Dist. LEXIS 70222 (S.D. Fla. Sept. 17, 2008) [Download PDF](#)

Failure To Allege Use in Commerce in the U.S. or in Foreign Trade with the U.S. Defeats ACPA Claim

In an *in rem* action under the Anticybersquatting Consumer Protection Act to recover an unlawfully transferred domain name, the claimant's failure to allege that its claimed common law trademark incorporated in the domain name was used in commerce in the United States or in foreign trade with the United States defeats its ACPA claim, a district court ruled. The court found that the "use in commerce" requirement applied to claims

under the ACPA, and that the "commerce" was coterminous with the commerce that Congress may regulate under the Commerce Clause. Although the court recognized that the use of a domain name incorporating a claimed trademark could establish common-law rights in the mark sufficient to support an ACPA claim, the claimant in this case alleged that its use of the mark was in connection with a London-based business offering services only in the London area.

Tober v. Aprov.com, 2008 U.S. Dist. LEXIS 73440 (E.D. Va. Sept. 23, 2008) [Download PDF](#)

Judgment Debtor's Trademarks May Be Subject to Judicial Sale along with Domain Names Representing Goodwill of Online Business

A judgment debtor's trademarks used in connection with an online gambling business may be subject to judicial sale in conjunction with the domain names used in the same business, a district court ruled. The court rejected the judgment debtor's argument that the trademarks could not be subject to a judicially forced sale because it would result in a sale of the marks separate from the goodwill that the trademarks represent. The court reasoned that the debtor itself had described the goodwill of its business as being connected to the trademarks and domain names, the domain names themselves were already in the process of being sold to satisfy the creditor's judgment, and therefore the trademarks could be sold in conjunction with the sale of the domain names.

Editor's Note: The \$46 million judgment against the debtor, Bodog Entertainment Group S.A., was rendered in a patent infringement litigation. That judgment was upheld recently by the Court of Appeals for the Federal Circuit. 1st Technology LLC v. Rational Enterprises LTDA, No. 2008-1132 (Fed. Cir. Oct. 8, 2008).

1st Technology LLC v. Bodog Entertainment Group S.A., 2008 U.S. Dist. LEXIS 76189 (W.D. Wash. Sep. 30, 2008) [Download PDF](#)

CONTRACTS

Neither Purchaser Nor Manufacturer of Computer System May Rely upon Terms of Click-Wrap Software Licensing Agreement that Purchaser Had No Opportunity To Review

The purchaser of a retail point of sale computer system that was installed by an authorized dealer of the manufacturer cannot claim the benefit of express warranties contained in the click-wrap software license agreement displayed to the authorized dealer, but neither can the manufacturer claim the benefit of the warranty disclaimers contained in the agreement, a New York state appeals court ruled. The court reasoned that there was no evidence that the manufacturer of the system was in privity with the purchaser, nor was there evidence that

the authorized dealer acted as the agent of either the purchaser or the manufacturer. The court concluded that the trial court was correct in dismissing the purchaser's breach of contract claims arising from the terms of the click-wrap software license agreement, but erred in dismissing claims arising out of a sales brochure and price quote that were prepared jointly by the dealer and manufacturer and presented to the purchaser, and the seller's distribution agreement. In discussing the nonenforceability of the click-wrap software license agreement, the court commented:

"Generally, DLA's [digital license agreements] are enforceable under appropriate circumstances.... Nonetheless, the DLA is not enforceable here because [the purchaser] did not have the opportunity to read or assent to it. Although the fact that [the purchaser] did not actually read the DLA is not dispositive (see Brower v. Gateway, 246 AD2d 246, 252), an end user must be given the opportunity to view the DLA (see Moore v Microsoft Corp., 293 AD2d at 587), a circumstance which was not established here. The DLA never appeared on [the purchaser's] computer screens either before or after [the system] was installed. [The purchaser] never expressly agreed to the DLA, never authorized [the distributor] to agree to the DLA on its behalf ... and did not know of its existence until raised by [the manufacturer] in this action.

Jesmer v. Retail Magic, Inc., 2008 N.Y. App. Div. LEXIS 6717 (Sup. Ct. App. Div. 2d Dept. Sept. 9, 2008) [Download PDF](#)

ONLINE DEFAMATION

Common Interest Privilege in Defamation Case Lost by Excessive Publication on Publicly Accessible Web Site

The common interest privilege that would otherwise be available as a defense in an Internet defamation case was lost when the privilege was abused by the excessive publication of allegedly defamatory statements to a publicly accessible Web site, a district court ruled. The court noted that the defendants claiming the privilege were members of a nonprofit corporation whose actions the defendants questioned, and that as members of the corporation they were entitled to communicate amongst themselves concerning the qualifications of officers of the corporation and their participation in the activities of the corporation. However, the court noted further that the Web site where they published their allegedly defamatory statements was not password-protected and was accessed thousands of times from hundreds of IP addresses, and the statements had been viewed by nonmembers of the corporation as well as competitors.

Editor's Note: This action was originally filed as a "John Doe" lawsuit due to the anonymous nature of the postings. In earlier rulings, the court first denied, then granted, the plaintiff's motion for discovery with respect to the identity of the anonymous posters, two of

whom came forward voluntarily. See *Best Western International v. Doe*, 06-cv-01537 (D. Ariz. Oct. 24, 2006).

Best Western International v. Furber, No. CV-06-1537 (D. Ariz. Sept. 5, 2008) [Download PDF](#)

TCPA

State May Not Provide Private Right of Action for Violation of TCPA Prerecorded Call Standards

A state may not create a private right of action for telephone calls that violate the technical standards and procedures established under § 227(d) the federal Telephone Consumer Protection Act (TCPA), a Maryland appeals court ruled. The court upheld the dismissal of the plaintiff's complaint under the TCPA and the Maryland Telephone Consumer Protection Act in which he alleged that he received prerecorded political campaign telephone calls that did not include the telephone number of the person or entity responsible for the call. The court noted that the TCPA expressly exempts § 227(d) from the provision that permits states to impose more restrictive intrastate requirements or regulations on certain aspects of telephone solicitations. The court also upheld the lower court ruling that the calls in question were political in nature, and therefore, under the TCPA regulations of the Federal Communications Commission, they were exempt from the prohibition against prerecorded telephone solicitations without prior express consent of the called party.

Worsham v. Erlich, 2008 Md. App. LEXIS 113 (Md. Ct. Special App. Sept. 15, 2008) [Download PDF](#)

Fax Transmission Service Providers May Be Liable for TCPA Violations

Providers of fax transmission services for an investment newsletter may be liable for violation of the Telephone Consumer Protection Act (TCPA) if they serve as "more than a mere conduit for third-party faxes," the District of Columbia Court of Appeals ruled. The appeals court reversed a ruling dismissing claims against parties that the trial court deemed to be merely "service providers" to the party on whose behalf the faxed newsletter were sent. The appeals court noted that the claims against the providers had been dismissed prior to the conduct of discovery. The court further noted that the plaintiff alleged that the providers had, among other things, provided proprietary software for converting newsletters into digital format, provided lists of fax numbers to which the newsletter was sent, determined the timing and destination of the fax transmissions, and prepared and transmitted detail reports of the transmissions. The court also ruled, consistent with courts in other jurisdictions, that a jurisdiction need not affirmatively enact enabling legislation to permit TCPA actions to be brought in local courts, and, accordingly, that private TCPA

actions could be brought in the Superior Court of the District of Columbia, a court of general jurisdiction.

Portugese American Leadership Council of the U.S. v. Investors' Alert, Inc., 2008 D.C. App. LEXIS 390 (D.C. Ct. App. Sept. 11, 2008) [Download PDF](#)

Individual's Assertion of TCPA Claim Based on Receipt of Unsolicited Fax at Corporate Office Not Subject to Frivolous Pleading Sanction

A complaint alleging violation of the Telephone Consumer Protection Act (TCPA) and parallel state law was not frivolous, where the individual plaintiff alleged that she had personally retrieved an unsolicited fax received by a fax machine in a corporate office in which she worked, a Ohio appeals court ruled. The court referenced the language of the TCPA, which provides that "any person or entity" may bring a private cause of action under the TCPA for an injunction or damages. The court found that at the time the complaint was filed, there was no binding legal precedent limiting standing under the TCPA or state law to the person or entity that owned the fax machine or paid for the telephone line to which it was attached, and thus "it was arguable" that she had sufficient standing to pursue her claims.

Radvansky v. Western & Southern Financial Group, 2008 Ohio App. LEXIS 3776 (Ohio Ct. App. 1st Dist. Sept. 5, 2008) [Download PDF](#)

SPAM

Virginia Anti-Spam Statute Held Unconstitutionally Overbroad

The Virginia anti-spam statute, § 18.2-152.3:1 of the Virginia Computer Crimes Act, is unenforceable because it is unconstitutionally overbroad, the Virginia Supreme Court held. The court reversed a conviction and nine-year sentence imposed under the statute, concluding that the statute is not narrowly tailored to protect the compelling interests of the State because it is "not limited to instances of commercial or fraudulent transmission of e-mail, nor is it restricted to transmission of illegal or otherwise unprotected speech such as pornography or defamation speech." The court rejected the argument that it should adopt a limiting construction of the statute by declaring that it applied only to the foregoing categories of e-mail, on the ground that such a construction of the statute was not reasonable. In analyzing the application of the statute to noncommercial speech, the court commented:

"...Code § 18.2-152.3:1 would prohibit all bulk e-mail containing anonymous political, religious, or other expressive speech. For example, were the Federalist Papers just being published today via e-mail, that transmission by Publius would violate the statute. Such an expansive scope of unconstitutional coverage is not what the Court in [United States v.

Williams, 553 U.S. at ___, 128 S.Ct. at 1843] referenced 'as the tendency of our overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals.'"

Jaynes v. Commonwealth, 666 S.E.2d 303 (Va. Sept. 12, 2008) [Download PDF](#)

PRIVACY

Appeals Court Restores Ohio State Privacy Law Claims for Personal Information Posted on County Web Site in Connection with Traffic Summons

A trial court improperly dismissed privacy claims under Ohio law based upon the posting on a county Web site of personally identifiable information from a traffic summons that included an individual's Social Security number and driver's license number, an Ohio appeals court ruled. The plaintiff further alleged that the public posting of the information had resulted in specific incidents of identity theft. The court concluded that the individual had made out a claim under Ohio's Privacy Act prohibition against "intentionally using or disclosing the personal information in a manner prohibited by law," because the Ohio Supreme Court previously had recognized a privacy interest in Social Security numbers. The court also ruled that related state law claims were improperly dismissed, including invasion of privacy in the publication of private facts and public nuisance.

Editor's Note: The plaintiff's earlier federal court action asserting both federal and state claims was dismissed; that dismissal was upheld by the Sixth Circuit, which ruled that there is no federal constitutional right to informational privacy absent a "fundamental liberty interest." [Lambert v. Hartman](#), 517 F.3d 433 (6th Cir. Feb. 25, 2008). The Ohio appellate court also concluded in the ruling discussed above that Lambert was not precluded from re-litigating her state law claims in state court, after they had been dismissed from the federal action.

Lambert v. Hartman, 2008 Ohio 4905 (Ohio Ct. App. 1st Dist. Sept. 26, 2008) [Download PDF](#)

Class Action Claims for Sale of Pharmacy Customer Prescription Information for Marketing Purposes Dismissed without Prejudice

A class action lawsuit challenging the alleged sale of pharmacy customer prescription information to data mining companies which used the information for marketing purposes was dismissed with leave to refile. The complaint alleged that data mining companies installed software on the defendant pharmacies' mainframe computer servers that captured and collated patient prescription information and "de-identified" it via the assignment of a number to each patient. The court concluded that because the complaint alleged that the information was "de-identified" prior to being transferred to the data mining companies, the complaint failed to allege a cause of action under the California Confidentiality of Medical

Information Act. The court also dismissed related claims for breach of contract, violation of the California constitutional right of privacy, unfair competition and violation of the California Consumer Legal Remedies Act, among others.

London v New Albertson's, Inc., 2008 U.S. Dist. LEXIS 76246 (S.D. Cal. Sept. 30, 2008)

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Fourth Amendment Requires Search Warrant for Disclosure of Subscriber's Cell Phone Locational Data to Law Enforcement

A law enforcement request for access to a cellular subscriber's locational data must be made via a search warrant supported by probable cause, a district court ruled. The court upheld the ruling of a magistrate judge denying the application of a federal prosecutor for an order seeking "historic" (i.e., not real-time) cell site location information on a cellular subscriber from a cellular provider. In her February 22 ruling, the magistrate judge found that the Stored Communications Act, neither alone nor in tandem with the Pen Registry Statute, does not provide authority for an order requiring the disclosure of locational data on mere "reasonable suspicion" of criminal activity, whether it is real-time or historic information. The magistrate judge commented on the "extraordinarily personal and potentially sensitive" nature of the location information being sought by the prosecutor, which might "reveal, for example, an extramarital liaison or other information regarding sexual orientation/activity; physical or mental health treatment/conditions (including, e.g., drug or alcohol treatment and/or recovery programs/associations); political and religious affiliations; financial difficulties; domestic difficulties and other family matters (such as marital or family counseling, or the physical or mental health of one's children); and many other matters of a potentially sensitive and extremely personal nature."

Editor's Note: The magistrate's ruling, reported at *In re Application of the U.S.*, 534 F. Supp. 2d 585 (W.D. Pa. Feb. 22, 2008), is included in the PDF file containing the district court's affirmance.

In re Application of the U.S., 2:07-mj-00524 (W.D. Pa. Sept. 10, 2008) [Download PDF](#)

WORKPLACE

Jury Finding that Excessive Internet Use Was Pretext for Discriminatory Firing Found Supported by Record

A jury finding that a female employee's firing for excessive Internet use was pretextual was supported by, among other things, evidence that the policy prohibiting personal Internet use was announced two days before the decision to fire the employee was made, a district court ruled. The court denied the employer's motion for judgment as a matter of law or alternatively for a new trial, noting that the timing of the announcement of the Internet

policy and the employee's termination "could be viewed suspiciously by the jury," especially in light of evidence that the employee did not have Internet access on the day the policy was announced. The court also faulted the employer's report on the employee's Internet use on which the employer said it relied, because the employee's duties involved being at a computer during the entire workday, and the employer failed to distinguish between Web sites that the employee could legitimately have accessed for business purposes and those that were personal in nature. In commenting on the stated position of the president of the employer company that he would fire an employee for any personal use of the Internet, the court remarked:

"It is simply not believable in the internet age that an employee required to work almost exclusively at a computer, employed by a telecommunications company, would be expected to never access the Internet for a non-work- related matter during working hours. While companies may strive for efficiency out of their employees, they would cease to function if employees were summarily fired for using the internet. Internet use has become elemental. Would [the president] have summarily terminated [the employee] for receiving personal telephone calls at work? Reasonably, no."

Hubbard v. Total Communications, Inc., 2008 U.S. Dist. LEXIS 69655 (D. Conn. Sept. 17, 2008) [Download PDF](#)

DEVELOPMENTS OF NOTE

PCI Security Standards Council Issues New Credit Card Data Security Standards
[Standards](#)

Copyright Royalty Board Sets Rates for Digital Music
[Final Initial Determination](#)

Webcaster Settlement Act Allowing Rate Negotiations Signed into Law
[Bill Summary & Status File](#)

Copyright Office Initiates Latest Triennial Round of DMCA Rulemaking
[Federal Register](#)

New Encryption Export Regulations Published
[Federal Register](#)

MySpace Suicide Trial Delayed as Judge Considers Legal Issues
[News Report](#)

Keeping the Internet Devoid of Sexual Predators Act, Requiring Sex Offender Registration of "Internet Identifiers," Signed Into Law
[Bill Summary & Status File](#)

Protect Our Children Act, Requiring ISPs To Report Child Pornography, Signed into Law
[Bill Summary & Status File](#)

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