

New Media, Technology and the Law

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Novell Entitled to \$2.5 Million in Royalties on SCO UNIX License to Sun

Novell is entitled to \$2.5 million in royalties that The SCO Group received from Sun Microsystems in return for a release of Sun's obligations under a 1994 license of UNIX code, a district court ruled. The ruling was rendered in the slander of title litigation brought by SCO against Novell, in which the parties contested ownership in the copyright to the UNIX code. Late last year the court ruled that Novell retained the copyright under the 1995 Asset Purchase Agreement between Novell and SCO's predecessor in title. In this ruling the court concluded that the SCO's purported release of Sun's obligation under the 1994 license was unauthorized, and that Novell was entitled to the sum received by SCO in return for the unauthorized release. The court also ruled that Novell was not entitled to pass-through royalties on UNIX licenses granted by SCO to Microsoft and IBM, however, because the obligation to remit royalties on some of the code has expired, and license to the remainder of the code was "incidental" and thus not subject to royalties under the terms of the agreement.

[The SCO Group, Inc. v. Novell, Inc.](#), No. 2:04CV139 (D. Utah July 16, 2008)

Unauthorized Use of "Bot" Program With Video Game Software Constitutes Copyright Infringement

A prohibition on the use of a “bot” program contained in the Terms of Use applicable to the use of video game server software, coupled with the terms of the End User License agreement applicable to the client game software, constitutes a limitation on the scope of the license to game players, thus violations of that limitation constitute an infringement of the game distributor's copyright, a district court ruled. In the game distributor's copyright infringement suit against the distributor of the bot program, the court reasoned that the EULA, which granted the limited license, expressly stated that game players were subject to both the EULA and the TOU, thus the documents read together established limitations on the scope of the license. The court concluded that game players infringed the game distributor's copyright when the game was played in connection with the bot program and the game software was copied into RAM. Thus, the court ruled, the distributor of the bot program could therefore be held secondarily liable for the game players' infringement.

Editor's Note: The court also rejected the argument that a game player's use of the software in connection with the bot program was protected under § 117(a)(1) of the Copyright Act because a game player as an “owner of a copy” entitled to make a copy of a computer program as an “essential step in the utilization of the computer program.” The court referenced, but declined to follow, the ruling in *Vernor v. Autodesk, Inc.*, 2008 WL 2199682 (W.D. Wash. May 20, 2008) concerning the issue of ownership of a copy of software.

[MDY Industries, LLC v. Blizzard Entertainment, Inc.](#), No. CV-06-2555 (D. Ariz. July 14, 2008)
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CD-ROM Version of National Geographic Magazine a Privileged Revision Under Copyright Act § 201(c)

The CD-ROM version of the National Geographic Magazine is a privileged revision of a collective work under § 201(c) of the Copyright Act, the Eleventh Circuit, sitting en banc, ruled. The appeals court concluded that the CD-ROM version of the magazine preserved the “contextual fidelity” of the original work, and thus the presentation of the material in a new format did not result in the creation of a new collective work. The court found that the additional elements provided in the CD-ROM version of the work, such as a search function, indexes, and an introductory sequence, did not destroy the original context of the original work.

Greenberg v. National Geographic Society, 2008 U.S. App. LEXIS 13832 (11th Cir. June 30, 2008) (*en banc*)

Digital Wire-Frame Models of Automobiles Not Sufficiently Original for Copyright Protection

Digital wire-frame computer models of automobiles, created by measuring the features of the actual automobiles depicted, are not sufficiently original to qualify for copyright protection as original works, a panel of the Tenth Circuit ruled. The court concluded that in creating the wire-frame models, the plaintiff company did not make any creative decisions as to lighting, shading, background, angle or perspective that are associated with original expression. The court also noted that the expressed intent of the plaintiff company, as reflected in its own description of the digitization service it provided, was to copy the vehicles depicted without adding any original expression.

Editor's Note: This opinion is notable for its exploration of the implications of the wire-frame technology, the comparison of wire-frame technology to photography, and the extensive discussion of the treatment of photography under copyright law.

Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc., 2008 U.S. App. LEXIS 12774 (10th Cir. June 17, 2008)

Each Distribution of Altered Software Program Constitutes a Separate Violation of DMCA Copyright Management Information Provision

Each distribution to a customer of a software program from which copyright management information has been removed constitutes a separate violation of the Digital Millennium Copyright Act (DMCA), a district court held. In the context of multiple pretrial evidentiary rulings, the court also concluded that the issue of whether the distribution of each update of the software program constitutes a separate violation would have to be decided by the jury, because the nature of the “updates” in question ranged from the addition or deletion of single lines of code, to major overhauls of all components of the software program at issue. The court also held that the copyright owner was limited to damages for infringing actions that took place within three years before the complaint was filed, following the approach of the Sixth Circuit and a majority of circuit courts to the interpretation of the Copyright Act damages provision allowing a cause of action to be maintained if it is “commenced within three years after the claim is accrued.”

Goldman v. Healthcare Management Systems, Inc., 2008 U.S. Dist. LEXIS 44436 (W.D. Mich. June 5, 2008)

Title to Promotional CDs Passed to Music Industry Insiders, Despite Legend Restricting Further Transfers

Title to promotional music CDs distributed by a record company passed to the industry insiders to whom the CDs were sent unsolicited, despite the inclusion of a restrictive legend on the CDs that prohibited further transfer, a district court ruled. The court concluded that a subsequent transferee of the CDs qualified an owner of a copy under § 109(a) of the Copyright Act because the record company did not intend to regain possession of the CDs, there was no recurring benefit to the record company from the retention of the CDs by the insiders, and the only apparent benefit of the license to the record company was a restraint on trade. Accordingly, the court ruled that the transferee's online auctions of the promotional CDs were protected by the "first sale" doctrine. The court also concluded that the promotional CDs constituted a gift under the federal Postal Reorganization Act because the CDs were mailed to the insiders without their "prior expressed request or consent."

UMG Recordings, Inc. v. Augusto, No. CV 07-03106 (C.D. Cal. June 10, 2008)

Employee Properly Denied Unemployment Benefits for Claiming Copyright in Employer Content

An employee was properly found to be disqualified from receiving unemployment benefits for misconduct following her discharge for asserting a personal copyright interest in the employer's Web site and catalogs, and for removing her hard drive from her work computer without authorization, the Supreme Court of North Carolina ruled. The court concluded that the employee's actions, including her inclusion of a personal copyright notice on the employer's Web site and in its catalogs, were properly found to constitute work-related misconduct by the employment benefits agency, and that it was irrelevant that the employee may have acted in good faith in claiming the copyright interest. The court also noted that the employee had not received permission to affix personal copyright notices on the employer's materials, nor had she informed the employer that she had done so.

Binney v. Banner Therapy Products, Inc., 2008 N.C. LEXIS 487 (N.C. June 12, 2008)

South Carolina County May Restrict Further Dissemination of Public Records Under Copyright Act

A county required to provide geographic information systems (GIS) maps to a commercial entity pursuant to a South Carolina Freedom of Information Act (FOIA) request may restrict further dissemination of the documents under the Copyright Act, the South Carolina Supreme Court ruled. The court noted that while the South Carolina Legislature and state constitution do not specifically permit counties to claim copyright in public records, they do not specifically prohibit it either. The court concluded that the public records law and the state FOIA could be “read harmoniously” by allowing the county to impose licensing restrictions on the further dissemination of copyrighted public documents.

[Seago v. Horry County](#), 2008 S.C. LEXIS 194 (S.C. June 16, 2008)

Wisconsin County Not Required to Provide Direct Access to Database of Tax Data Under Open Records Law

A Wisconsin county that outsourced the maintenance of its real property tax data to a third-party provider is not required to provide direct electronic access to the database under the state open records law, the Wisconsin Supreme Court ruled. The court concluded that the provision of the property tax records in the form of “portable document format” (PDF) files satisfied a real estate company's request for the information in the form of “electronic/digital” files, even though provision of the data in that form did not readily permit the real estate company to easily manipulate the data. The court agreed with the concerns expressed by the Wisconsin Attorney General that allowing direct access to the database would pose substantial risks of disclosure of confidential data and impairment of the integrity of the database.

Editor's Note: An earlier lawsuit involving this controversy resulted in a ruling by a panel of the Seventh Circuit that extracting public records data from the database maintained by the third-party provider did not violate federal copyright law. *Assessment Technologies of Wisconsin, LLC v. Wiredata, Inc.*, 350 F.3d 640 (7th Cir. 2003)

Wiredata, Inc. v. Village of Sussex, 2008 Wisc. LEXIS 69 (Wisc. Sup. Ct. June 25, 2008)

Absent Knowledge, Online Auction Site Not Liable for Contributory Trademark Infringement for Sale of Counterfeit Items by Users

Online auction site eBay is not liable for contributory trademark infringement for counterfeit items sold by users on its site, a district court ruled. The court concluded that eBay could be found liable for contributory infringement only if it continued to supply its services to users it knew or should have known were supplying counterfeit items, rejecting the argument that eBay could be held liable for failing to take preemptive steps to remove auctions of counterfeit items from its site. The court also concluded that the use of the plaintiff's marks in its advertising, on its home page, and in sponsored advertising is a protected, nominative fair use of the trademarks. The court commented:

“The result of the application of this legal standard is that Tiffany must ultimately bear the burden of protecting its trademark. Policymakers may yet decide that the law as it stands is inadequate to protect rights owners in light of the increasing scope of Internet commerce and the concomitant rise in potential trademark infringement. Nevertheless, under the law as it currently stands, it does not matter whether eBay or Tiffany could more efficiently bear the burden of policing the eBay website for Tiffany counterfeits — an open question left unresolved by this trial.”

Editor's Note: In addition to this important ruling on trademark infringement liability, eBay has been the subject of several other rulings in recent weeks. See [Windsor Auctions, Inc. v. eBay, Inc.](#), 2008 WL 2622791 (N.D. Cal. July 1, 2008) (eBay not liable under the Robinson-Patman Act for alleged preferential treatment of some vendors); [Mazur v. eBay, Inc.](#), No. C 07-03967 (N.D. Cal. July 25, 2008) (granting in part and denying in part motion to dismiss claims of liability against eBay for alleged shill bidding by users of “Live Auction” service). See also [Hill v. StubHub](#), 07 CVS 11310 (N.C. Super. Ct. July 14, 2008) (refusing motion pursuant to CDA § 230 to dismiss state law ticket-scalping suit against eBay's online ticket reselling site due to questions of fact).

[Tiffany \(NJ\) Inc. v. eBay Inc.](#), No 04 Civ. 4607 (RJS) (S.D.N.Y. July 14, 2008)

Trademark Owner's Receipt of E-Mail Containing Link to Web Site Constitutes Constructive Notice of Infringing Use

The receipt of an e-mail containing links to Web sites with allegedly infringing uses of a trademark was sufficient to put the trademark owner on constructive notice of the infringing use, a district court held. The court concluded that for purposes of determining whether the trademark owner unreasonably delayed in filing suit for trademark infringement, the owner should be deemed to have had constructive, if not actual, knowledge of the infringing use as of the date the e-mail indicating a possible infringing use was received.

The Argus Research Group, Inc. v. Argus Media, Inc., 2008 U.S. Dist. LEXIS 43188 (D. Conn. June 3, 2008)

Use of Trademarks as Advertising Search Terms May Suggest Sponsorship or Endorsement by Trademark Owner

An online merchant that claimed on its Web site to be an authorized reseller of a trademark owner's products may not be entitled to the protection of the first sale doctrine because its use of the owner's trademarks as advertising search terms suggested sponsorship or endorsement by the trademark owner, a district court ruled. The court also ruled that the use of the trademarks in keyword advertising, coupled with the use of first-person pronouns such as "we" and "us" to refer to the trademark owner, similarly suggested sponsorship or endorsement, and could deprive the merchant of the nominative fair use defense for the use of the trademarks on its Web site. The court declined to dismiss the trademark owner's trademark infringement and unfair competition claims, finding that a reasonable trier of fact could conclude that the merchant was a "favored or authorized" dealer in the trademark owner's product, and that it was sponsored or endorsed by the trademark owner.

Standard Process, Inc. v. Total Health Discount, Inc., 2008 U.S. Dist. 44598 (E.D. Wisc. June 6, 2008)

Keyword Advertising and Keyword Stuffing a Trademark Use in Commerce Causing Consumer Confusion

A company's use of a competitor's trademarks in keyword advertising and Web site HTML code and metatags constitutes an actionable use in commerce that caused a likelihood of confusion, a district court ruled. The court equated these uses of the competitor's trademarks with the use of the trademarks in infringing domain names registered by the company and used to divert traffic to its own Web site advertising its competitive software product. The court concluded that all three uses of the competitor's trademarks were intended to deceive consumers, and that the resulting irreparable injury to the competitor justified the issuance of a preliminary injunction.

Editor's Note: In his [Technology and Marketing Law blog](#), Prof. Eric Goldman criticizes this ruling and that in *Standard Process, Inc. v. Total Health*, discussed above, as “regressive,” and points out that there are numerous rulings on the issue of keyword advertising and trademark use in commerce that are not cited in the opinion.

Finance Express LLC v. Nowcom Corp., 2008 WL 2477430 (C.D. Cal. June 18, 2008)

Injunction, But No Damages, for Cybersquatting Prior to Enactment of ACPA

A party that prevails on a claim under the Anticybersquatting Consumer Protection Act (ACPA) is entitled to an injunction against future conduct by the domain name registrant, but is not entitled to damages for conduct that took place prior to the enactment of the ACPA, a district court ruled. The court referenced the damages provision of the Act, which expressly precludes an award of damages for conduct prior to its enactment. The court found that the infringing domain name was registered with a “bad faith intent to profit” prior to the adoption of the ACPA in 1999, but that the registrant had not re-registered, trafficked in, or used the domain name subsequent to the adoption of the Act. The court concluded that the entry of an injunction against the future registration of infringing domain names was proper, however, because the registrant had failed to satisfy the “heavy burden” of showing that there was “no reasonable expectation that the wrong will be repeated.”

Silver Ring Splint Co. v. Digisplint, Inc., 2008 U.S. Dist. LEXIS 48621 (W.D. Va. June 18, 2008)

Patent Exhaustion Doctrine Limits Rights in Microchips and Chipsets Embodying Patented Invention

The doctrine of patent exhaustion limits the rights of a patent holder in microchips and chipsets embodying patented inventions that were manufactured pursuant to a license agreement, the Supreme Court ruled. The Court reasoned that the microchips and chipsets substantially embodied the patents at issue “because they had no reasonable noninfringing use and included all the inventive aspects of the patented methods.” The Court held that because the license agreement pursuant to which the microchips and chipsets were manufactured authorized the sale of those items, the sale exhausted the rights of the patent holder. The Court concluded, therefore, that the patent holder could not enforce the patents against purchasers from the licensee who incorporated the microchips and chipsets into computers.

[Quanta Computer, Inc. v. LG Electronics, Inc.](#), 533 U.S. ___, 128 S. Ct. 2109 (June 9, 2008)

Defamatory E-Mail to Listserv Protected by Michigan Shared Interest Privilege

A defamatory e-mail sent to a listserv mail list available to Michigan police chiefs was protected by the shared interest privilege under Michigan law, an appeals court ruled. The court found that the e-mail was sent to the listserv by a law enforcement officer who was investigating allegations that the plaintiff had attempted to defraud the officer's department in a transaction, and that the officer acted in good faith in an attempt to alert other police agencies of the result of the investigation and for the investigatory purpose of determining if other departments had experienced similar incidents involving the plaintiff. The court concluded that the e-mail to the listserv satisfied the requirement of being limited in its scope to a proper purpose, because the members of the listserv were “persons with an obvious interest in the matter.”

Hall v. Greene, 2008 Mich. App. LEXIS 1271 (Mich.Ct. App. June 17, 2008)

“Concrete Showing” of Each Element of Prima Facie Case of Libel Required to Obtain Discovery of Anonymous Poster's Identity

A plaintiff in an action for libel, filed against an anonymous poster to a Web site, must make a “concrete showing” of every element of a prima facie case of libel in order to obtain discovery of the poster's identity from the poster's Internet Service Provider, a district court ruled. The court balanced a series of factors to determine whether the poster's First Amendment right to anonymous speech was outweighed by the plaintiff's need for discovery to redress the wrongs alleged in the complaint. As to those factors the court noted that the poster had been notified of the application and had in fact responded to it; that the plaintiff had identified specific statements constituting actionable speech; that there were no other adequate means of obtaining the poster's identity; and that the ISP's privacy policy stated that it would provide subscriber information upon order of a court. The court concluded that the that the plaintiff had satisfied the “concrete showing” requirement, and thus the balancing test weighed in favor of allowing the requested discovery.

Doe I v. Individuals, whose true names are unknown, 2008 U.S. Dist. LEXIS 48749 (D. Conn. June 13, 2008)

“Bald Allegations” of Participation in Preparation of Defamatory Postings Does Not Shield Pleading From Dismissal Under CDA § 230

“Bald allegations” that the operator of a consumer review Web site participated in the preparation and publication of allegedly defamatory reviews posted by users are insufficient to withstand dismissal pursuant to § 230 of the Communications Decency Act (CDA), a district court ruled. The court noted that the plaintiff's claims that the operator participated in the preparation of the reviews was belied by the plaintiff's own complaint, which included the first and last names of the users who posted the allegedly defamatory review and detailed the plaintiff's dealings with those users at its automobile dealership. The court also noted that the complaint contained no allegations that the operator of the site actively solicited the submission of the reviews by the users.

Nemet Chevrolet Ltd. v. ConsumerAffairs.com, Inc., 2008 WL 2557380, No. 1:08CV254 (E. D. Va. June 18, 2008)

Contents of Employee Pager Text Messages Protected From Disclosure To Employer by the Stored Communications Act

The contents of an employee's pager text messages archived on the servers of a text messaging provider are protected from disclosure to the employer subscriber of the text messaging service under the provisions of the Stored Communications Act (SCA), 18 U.S.C. § 2701-2711, the Ninth Circuit held. The appeals court ruled that the pager text messaging provider was an “electronic communication service” within the plain language of the SCA, and therefore that the contents of archived text messages could be disclosed only to “an addressee or intended recipient” of the text messages, i.e. the employee user, not the employer subscriber to the text messaging service. The court also ruled that under the particular facts presented, the subscriber to the text messaging service, a municipal police department, violated the Fourth Amendment rights of the employee user of the text messaging service when the department reviewed the contents of the messages in order to determine whether they were work-related. The court concluded that although the police department had an announced policy disclaiming any employee expectation of privacy in messages using the text messaging service, the “operational reality” was that the department had led employees to believe that such messages would be reviewed only under certain narrow circumstances.

Editor's Note: Although this case involved a government employer, the ruling is instructive for all employers, most particularly for the appeals court's conclusion that the “operational reality,” i.e., the employer's actual practices, overrode its announced policy with respect to employee expectation of privacy in their communications on the text messaging system. The case is more fully discussed on [Proskauer's Privacy Law blog](#).

Quon v. Arch Wireless Operating Co., Inc., 2008 U.S. App. LEXIS 12766 (9th Cir. June 18 2008)

Sixth Circuit En Banc Vacates Preliminary Injunction Against Government E-Mail Searches

A complaint seeking declaratory and injunctive relief against the enforcement of the Stored Communications Act (SCA) provision that authorizes government searches of stored e-mail on less than probable cause should have been dismissed on ripeness grounds, the Sixth Circuit sitting en banc ruled. The court vacated a preliminary injunction entered by the district court and upheld in an earlier panel opinion, see 490 F.3d 455. The panel had concluded that subscribers have a reasonable expectation of privacy in the content of e-mails that are stored with, or sent or received through, a commercial Internet service provider, and that ex parte government searches of such e-mails under § 2703(d) of the SCA violate the Fourth Amendment. In vacating the injunction, the en banc court concluded that evaluation of a subscriber's expectation of privacy in stored e-mail should be undertaken "in the context of a specific internet-service agreement and a specific search and seizure."

Editor's Note: The en banc court's 9-5 ruling leaves open in the Sixth Circuit the question of whether a subscriber has a reasonable expectation of privacy in stored e-mail. Compare *Quon v. Arch Wireless*, discussed above, in which the Ninth Circuit concluded that under the SCA, public employee users of a text message service have a reasonable expectation of privacy in the content of their messages, as against the public employer subscriber to the service.

[U.S. v. Warshak](#), 2008 U.S. App. LEXIS 14717 (6th Cir. July 11, 2008)

Ruling on Employee Expectation of Privacy in E-Mail Requires Evidentiary Hearing on Employer Policy Implementation

An evidentiary hearing is necessary to determine whether an Internet and electronic communications use policy applicable to state employees, which disavowed any employee expectation of privacy in e-mail communications, should be deemed to overcome married state employees' expectations of privacy and spousal privilege in their e-mail communications, a magistrate judge ruled. The magistrate granted the employees' motion to quash a subpoena to a state agency seeking discovery of e-mail communications conducted on the agency's system. The court found that the factual record was insufficient to rule on relevant factors such as "knowledge, implementation, or enforcement" of the employer's policy, including whether the employees "were ever notified of the Policy by a log-on banner, flash screen, or employee handbook," whether the employees were ever aware of the policy, whether the policy was regularly enforced, and whether state employee communications were actually monitored.

Sprenger v. The Rector and Board of Visitors of Virginia Tech, 2008 U.S. Dist. LEXIS 47115 (W.D. Va. June 17, 2008)

Evidence of Unauthorized Computer Access Supports Issuance of Subpoena to ISP for Subscriber Information

Evidence that unauthorized access to the plaintiff's computer was traced back to an IP address belonging to a particular Internet Service Provider (ISP) supports the issuance of a subpoena to the ISP to obtain the identity of the subscriber who used the IP address, a district court ruled. The court rejected the argument of the subscriber, who appeared anonymously, that the plaintiff had failed to state a claim under the Computer Fraud and Abuse Act (CFAA). The court noted that the allegation that a password-protected computer had been accessed without authorization, coupled with a showing of an investigation costing in excess of \$5,000, sufficiently alleged a cause of action under the CFAA. The court referenced the subscriber's anonymous appearance, noting that the subscriber had received notice of the subpoena and had been given an opportunity to respond, and stated that the court had authority under the Federal Rules to require such notice.

Kimberlite Corp. v. Does 1-20, 2008 U.S. Dist. LEXIS 43071 (N.D. Cal. June 2, 2008)

Under Federal and New York Constitutions, Warrant Not Required for Law Enforcement GPS Tracking of Vehicle

A defendant's rights under the federal and New York state constitutions against unreasonable searches and seizures were not violated by law enforcement use of a GPS device to track his movements in his vehicle, a New York appellate court ruled. Noting that the GPS device was not connected to the vehicle's electronic system, was not placed inside the vehicle, and did not monitor occurrences in the vehicle nor monitor its movements on private property, the court concluded that the placement of the device did not intrude on a constitutionally protected area. The court compared the use of the GPS device to "constant visual surveillance by police officers," for which no warrant is required under the Fourth Amendment.

[People v. Weaver](#), 2008 NY Slip Op 04960 (App. Div. 3rd Dept. June 5, 2008)

Indefinite Sealing and Non-Disclosure of Electronic Surveillance Orders Deemed Unconstitutional

Indefinite sealing and non-disclosure of orders covering federal law enforcement applications for pen register and trap/trace devices on telephones and requests for customer information under the Pen/Trap Statute and the Stored Communications Act violate the First Amendment prohibition against prior restraint of speech and the common law right of public access to judicial records, a magistrate judge ruled. The judge referenced statistics showing that the imposition of indefinite sealing and non-disclosure requirements on such applications meant that in practice such applications were never made public. The judge indicated that he would impose a 180-day sealing or non-disclosure order on future applications, with provision for the government to apply for an additional period if the relevant investigation is still active or upon a showing of exceptional circumstances such as danger to the life or physical safety of an individual.

In re Sealing and Non-Disclosure of Pen/Trap/2703(d) Orders, No. H-08-218M, No. H-08-219M (S.D. Tex. May 30, 2008)

Hacked Retailer Not Liable to Credit Card Issuers for Breach in Security of Card Information

A retailer whose store networks were illegally accessed, resulting in a breach in the security of credit and debit card information and subsequent fraudulent charges, is not liable in damages to the credit unions that issued the cards for their resulting losses, a Massachusetts trial court held. The court concluded that neither the retailer nor the acquiring bank that processed its credit card transactions were liable for fraud or negligent misrepresentation, even though the retailer retained certain credit card information in violation of the credit card holding company operating rules. Among other things, the court concluded that the neither the retailer nor its acquiring bank had ever made any direct representations to the plaintiffs to induce them to issue the cards or to remain in the credit card system. The court also concluded that the credit unions could not have reasonably relied on any representations concerning the defendants' compliance with the credit card companies' operating regulations, as the credit card companies had notified them several times that a number of merchants and acquiring banks were probably storing confidential data in violation of the operating regulations.

Editor's Note: The court in *Cumis* also rejected the argument that the banks and credit unions were third-party beneficiaries of the acquiring bank's agreement to comply with the card issuer's operating rules, relying in part on the similar ruling by the district court in *Sovereign Bank v. BJ's Wholesale Club, Inc.*, 2006 U.S. Dist. LEXIS 4063 (M.D. Pa. 2006). That ruling was recently overruled by the Third Circuit Court of Appeals, see *Sovereign Bank v. BJ's Wholesale Club, Inc.*, No. 06-3392/3405 (3d Cir. July 16, 2008) (material issues of fact preclude summary judgment on whether Visa intended banks and credit unions to be third-party beneficiaries of the agreement with the acquiring bank).

Cumis Insurance Society, Inc. v. BJ's Wholesale Club, 2008 Mass. Super. LEXIS 154 (Mass. Super. Ct. June 4, 2008)

Television Journalists' Reliance on Web Site for Story Facts Does Not Establish Actual Malice in Defamation Suit

A television news program that relied upon a Web site that turned out to be an outrageous parody of the true facts of a controversial incident did not act with reckless disregard for the truth, a district court held. The court noted the testimony of an expert witness for the defamation plaintiff to the effect that relying on the Internet is not a common method of news gathering, but concluded that the actual malice standard in defamation focuses on the defendant's actual state of mind with respect to the truth or falsity of published statements, therefore evidence of common practice or industry standards with respect to news gathering was irrelevant. The court found that while the television journalists were "certainly gullible," and their failure to confirm the outrageous statements that they repeated was "an extreme departure from professional standards," their unprofessional conduct did not rise to the level of reckless disregard for the truth.

Levesque V. Doocy, 2008 U.S. Dist. LEXIS 43205 (D. Me. June 3, 2008)

Internet Marketing Agreement to Provide Newspaper Subscription Information Not Governed by Article 2 of the UCC

A contract under which an online advertiser agreed to produce online advertising for a newspaper and supply resulting subscription information to the newspaper is not governed by Article 2 of the Uniform Commercial Code because it is an agreement for the provision of services, not the sale of goods, a California appeals court ruled. The online advertiser argued that summary judgment should not have been granted on the newspaper's breach of contract claim because there were triable issues of fact as to whether the newspaper had accepted the subscription information, alleged by the newspaper to be deficient, by failing to reject it in a timely manner. The appeals court described the agreement as one under which the advertiser agreed provide the service of producing advertising and transmit the resulting subscription information to the newspaper, distinguishing the agreement from one in which a list of demographic information was sold for the purpose of solicitation of subscribers by the purchaser, an arrangement that had been held to be a transaction in goods.

Wall Street Network, Ltd v. New York Times Co., 2008 Cal. App. Unpub. LEXIS 5154 (Cal. Ct. App. 2d Dist. June 20, 2008) (unpublished)

Allegation of Intent to Harm Required For Computer Fraud and Abuse Claim

A complaint alleging that a computer software company violated the Computer Fraud and Abuse Act (CFAA) when its software suddenly failed due to a hidden “time bomb” is insufficient because the plaintiff customer failed to allege that the company intentionally sought to cause damage, a district court ruled. The court noted that the complaint alleged a violation of 18 U.S.C. § 1030(a)(5)(A)(i), which imposes liability on any person “who knowingly causes the transmission of a program, information, code or command, and as a result of such conduct intentionally causes damage....” The court declined the plaintiff's suggestion that it should infer an allegation of intentional harm from the language of the complaint, and dismissed the complaint with leave to amend.

Kalow & Springnut, LLP v. Commence Corp., 2008 U.S. Dist. LEXIS 48036 (D.N.J. June 23, 2008)

Attorney's Faxed Newsletter May Constitute an Unsolicited Advertisement Under Telephone Consumer Protection Act

A one-page faxed newsletter that included the sending attorney's name, contact information, logo, and list of practice areas may constitute an unsolicited advertisement within the meaning of the Telephone Consumer Protection Act (TCPA), a district court ruled. The court denied the attorney's motion to dismiss the newsletter recipient's TCPA claim, rejecting the attorney's contention that the newsletter consisted primarily of editorial content, and that the information identifying the attorney constituted only an “incidental advertisement” under the FCC's TCPA implementing rules. The court reasoned that the advertisement comprised approximately 20 to 25 percent of the newsletter, “a not insignificant amount of space,” and thus a jury could conclude that the newsletter as a whole violated the TCPA.

Holtzman v. Turza, 2008 U.S. Dist. LEXIS 47571 (N.D. Ill. June 19, 2008)

Prohibition Against Class Arbitration in Computer Contract Violates Illinois Public Policy

A prohibition against class arbitration contained in a contract accompanying a computer purchased in a telephone transaction is unenforceable as a violation of the public policy of Illinois, an Illinois appeals court ruled. The court referenced its prior opinion in *Hubbert v. Dell Corp.*, 835 N.E. 2d 113 (2005) in which it found the same computer company's dispute resolution provision to be enforceable under Texas law, but noted that the rationale for that ruling had been undermined by a subsequent ruling of the Illinois Supreme Court finding a similar prohibition on class arbitration to be unconscionable. Further, the court reasoned that unlike the online transaction at issue in *Hubbert v. Dell*, where the class arbitration prohibition was available on the seller's Web site via hyperlink and was conspicuous, the telephone purchaser was not alerted to the terms and conditions until after he had purchased the computer equipment.

[*Wigginton v. Dell, Inc.*](#), 2008 Ill. App. LEXIS 577 (Ill. App. Ct. 5th Dist. published June 2, 2008)

Computer Software Contract Breach Requires Notice and Opportunity to Cure Under UCC Article 2

A company that was dissatisfied with the progress of a computer software and hardware installation project should have given notice to the vendor of any claimed breach and allowed a reasonable time for cure under Article 2 of the Uniform Commercial Code, a Kansas appellate court ruled. The court concluded that the UCC controlled the parties' agreement because the Kansas Supreme Court has ruled that computer software is "goods" subject to the UCC even if incidental services are included in the transaction, if the services would have been unnecessary without the purchase of the software. The court found that the company improperly ended the contract without any warning of its dissatisfaction, thus it was liable in damages to the vendor.

[*Inter-Americas Insurance Corp., Inc. v. Imaging Solutions Co.*](#), 2008 Kan. App. LEXIS 98 (Kan. Ct. App. June 13, 2008)

Under Utah Law, Modification of Online Agreement, Without Notice, to Add Arbitration Provision Not Unconscionable Between Commercial Parties

Under Utah law, an online agreement that provides for posting of modifications to one party's Web site, without notice to the other party, is neither procedurally nor substantively unconscionable, a district court ruled. The court concluded that an arbitration provision contained in a modified version of the online agreement was therefore enforceable. The court noted that the party arguing that the modification provision was unconscionable was "a sophisticated corporation" that had occasion to continually visit the Web site containing the modified agreement due to the nature of the underlying subject matter of the agreement, and thus monitoring the site for updates to the agreement was "not unduly burdensome." The court commented that it was "faced with internet-savvy corporate parties that entered into a contract on the internet and agreed to make changes through the internet."

Margae, Inc. v. Clear Link Technologies, LLC, 2008 U.S. Dist. LEXIS 46765 (D. Utah June 16, 2008)

eBay Auction of Elvis's Former Home Deemed Non-Binding Advertisement

The provision in the eBay real estate auctions terms of use that such auctions are not legally binding offers to sell real estate was not overridden by the sellers' inclusion of a conflicting statement to the effect that the winning bid created a legally binding contract, a district court ruled. Applying Tennessee law to an auction for Elvis Presley's pre-Graceland residence, the court found that the terms of the TOU were "unambiguous in their intent not to make the auction a binding sales agreement." The court concluded that the conflicting statement added to the auction listing by the sellers did not override the intent expressed in the TOU because there was "no evidence of a manifestation of an intent to form a binding contract" by the parties. The court pointed to evidence that the statement was added to the listing only to discourage fraudulent bidders, and to evidence of contract negotiations that took place subsequent to the end of the auction.

Gleason v. Freeman, 2008 U.S. Dist. LEXIS 52304 (W.D. Tenn. June 16, 2008)

Online Submission of Requests for Insurance Referrals and Quotes From Rival Company May Constitute Fraud Under Colorado Law

A company engaged in the business of collecting and selling insurance referrals through a Web site may be liable for fraud under Colorado law for submitting false inquiries to a rival company's Web site, a district court ruled. The court concluded that there were genuine issues of material fact concerning the rival company's reliance on the false leads, the rival company's justifiable reliance on the false leads, and whether the false leads were the proximate cause of the rival company's claimed loss of customers for its referral business. The court similarly declined to dismiss the rival company's tortious interference claims based on the same conduct.

Editor's Note: In its opinion, the district court referenced its earlier unreported ruling rejecting the argument that the rival company could not have relied upon the false information submitted through its Web site because no human actually read the information, which was "received and distributed electronically" to its customers. The court reiterated that although no authority had been offered on the point under Colorado law, a California court had found that a company's computer system can act as its agent in relying on information received electronically. See *Thrifty-Tel, Inc. v. Bezenek*, 46 Cal. App. 4th 1559, 54 Cal. Rptr. 2d 468 (Ct. App. 1996).

Netquote, Inc. v. Byrd, 2008 U.S. Dist. LEXIS 46996 (D. Colo. June 17, 2008)

UK Court Requires Former Employee Subject to Confidentiality Agreement to Disclose Social Network Contacts

A former employee subject to a confidentiality agreement, who allegedly uploaded information concerning his employer's clients to the LinkedIn social network, must disclose information concerning his LinkedIn contacts to the employer in response to a pre-action application for discovery, the High Court of Justice, Chancery Division, ruled. The court also ruled that disclosure of related information could be obtained from the LinkedIn network. The court concluded that the employer had presented reasonable grounds on which to conclude that it had a claim for breach of the confidentiality agreement based upon the transfer of the client information to the LinkedIn network and its subsequent use by the employee in his own competing business.

Hays Specialist Recruitment (Holdings) Ltd v. Ions, [2008] EWHC 745 (Ch.) Apr. 16 2008

Attorney Sanctioned For Overly Broad Third-Party Subpoena to Web Site Operator

A plaintiff's attorney who served a third-party subpoena on the operator of an informational Web site on autism violated the prohibition in the federal rules against the use of court proceedings to harass, and failed to comply with the requirement to avoid imposing undue burden and expense on a subpoenaed non-party, a magistrate judge ruled. The magistrate judge rejected the attorney's unsubstantiated contention that the Web site operator was part of a conspiracy to obstruct justice in the underlying lawsuit claiming neurological damage from exposure to a vaccine. The magistrate judge found that the subpoena was "breathtakingly broad," and that in issuing it the attorney improperly sought to burden the Web site operator.

Sykes v. Bayer Corp., No. 08-mc-13-JM (D.N.H. June 23, 2008)

Florida County's Declaratory Judgment Action Against Travel Companies Over Hotel Tax Reinstated

A declaratory judgment action brought by county officials to determine the liability of online travel companies for payment of the Florida Tourist Development Tax on hotel bookings satisfied the procedural requirements for a request for declaratory relief, a Florida appeals court ruled. The court found that the county was not required to first assess the so-called "hotel tax" or "bed tax" on the companies in order to litigate the issue of their liability for the tax. The court noted the existence of numerous lawsuits around the country against online travel companies with respect to the assessment of similar taxes, but concluded that the procedural rulings in those cases were inapplicable due to the differences in the tax laws of those jurisdictions.

Editor's Note: As the court noted, local entities have been active in seeking to apply so-called "hotel taxes" to online travel companies, with results that vary according to the language of the statutes and ordinances that levy the taxes. In another recent ruling involving a number of hotel tax ordinances in Ohio, the district court ruled that online travel sites were not liable for the tax because they were neither "vendors" nor "operators" as they were not the proprietors of the hotels for which they sold rooms. However, the court concluded that the local entities did have a viable claim to taxes that the sites collected but did not remit. *City of Findlay v. Hotels.com*, 2008 U.S. Dist. LEXIS 47706 (N.D. Ohio June 19, 2008).

[Orange County v. Expedia, Inc.](#), 2008 Fla. App. LEXIS 8479 (Fla. Ct. App. 5th Dist. June 13, 2008)

Developments of Note

ICANN Approves Major Expansion of Internet TLDs

[Announcement](#), June 26, 2008

Sixth Circuit Upholds FCC Video Franchising Rules

[Alliance for Community Media v. FCC](#), Nos. 07-3391, et al. (6th Cir. June 27, 2008)

Belgian Newspapers' Copyright Infringement Suit Against EU Commission Over News Aggregation Dismissed on Jurisdictional Grounds

[Out-Law.com](#), July 2, 2008

Belgian Newspapers Seek \$77 Million in Copyright Infringement Damages For Google News Aggregation

[The Washington Post](#), May 28, 2008

French Court Orders eBay to Pay \$61 Million Damages for Sales of Counterfeit Goods by Users

Reuters, June 30, 2008

In Wake of MySpace Suicide Case, Missouri Expands Harassment Law to Include Online Communications

[Bill as Passed](#),

FTC Testifies Before Senate Committee on Anti-Spyware Enforcement Efforts
Testimony, June 11, 2008

Virginia Supreme Court Upholds Online Solicitation Criminal Statute Over First Amendment Challenge

[Podracky v. Commonwealth of Virginia](#), 2008 Va. App. LEXIS 284 (Va. June 10, 2008)

W. Va. Supreme Court Suspends Attorney for Unauthorized Access to Attorney E-Mail Accounts at Spouse's Law Firm

[Lawyer Disciplinary Board v. Markins](#), No. 33256 (W.Va. Sup. Ct. May 23, 2008)

Comcast Sued in Three Class Actions Over Alleged P2P Blocking

[Blog Post](#), June 6, 2008

New York Tax Authority Says Video Downloads Are Intangibles Not Subject to Sales Tax
[Advisory Opinion TSB-A-08\(22\)S](#), May 2, 2008

Red Hat Settles JBoss Patent Litigation, Claims Settlement Satisfies Patent Provisions of
GPL Licenses

[Press Release](#), June 11, 2008

FCC Amends Do-Not-Call Regulations to Remove 5-Year Expiration of Registrations

[FCC 08-147](#), June 17, 2008

Oregon Legislature Back Off Claim of Copyright in Arrangement and Subject-Matter
Compilation of State Statutes

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