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Delay in eBay Auction Listings May Breach Contract, Constitute Unfair Practice

A delay in the searchability of eBay auction listings may have breached the terms of the eBay user agreement and may constitute unfair competition under Cal. Bus. & Prof. Code §17200, a district court ruled. The court declined to dismiss a putative class action filed by an eBay seller, concluding that the practice of charging sellers for 24-hour listings, when the listings did not become searchable by purchasers for up to four hours after submission of the listing form, may have breached the terms of the user agreement because it did not disclose the delay period. The court also concluded that the plaintiff's complaint concerning the delay sufficiently alleged an unfair practice under the California unfair competition law.

Editor's Note: It is typical to find that the terms and conditions of Web sites incorporate by general or ambiguous reference other documents or materials published by the Web site operator. One point of the court's decision in this case involved this common practice. The court refused to take judicial notice of eBay's listing form disclosing the delay, as well as help pages alleged by eBay to be incorporated by reference in the user agreement, on the ground that the parties disagreed on whether the exhibits represented the documents available to users on the date the disputed auction listings were created. This case suggests that greater precision and attention should be paid to ensure that materials intended to be incorporated by reference are in fact treated that way.

The Missing Link, Inc. v. eBay, Inc., 2008 U.S. Dist. LEXIS 40593 (N.D. Cal. May 5, 2008)

New York Court Finds Dell Computer Liable for Violations of Consumer Protection Laws

Dell Computer and its affiliate Dell Financial Services engaged in numerous instances of fraud, false advertising, deceptive business practices and abusive debt collection practices, a New York court ruled in a civil enforcement action brought by the New York Attorney General under state consumer protection law. The court relied upon affidavits from consumers who filed complaints with the Attorney General alleging, among other things, that Dell engaged in deceptive "bait advertising" of promotional credit financing, engaged in deceptive advertising with respect to its warranties, engaged in fraudulent or deceptive practices in administering rebate programs, and engaged in unlawful conduct with respect to denials of credit. The court entered an injunction against future conduct and ordered further proceedings to determine the amount of restitution to be made to consumers, and to consider disgorgement of profits.

People v. Dell, Inc., No. 3778-07 (N.Y. Sup. Ct. Albany Cty May 27, 2008)

First Sale Doctrine in Ninth Circuit Protects Reconveyance of Licensed Software

A reconveyance of a copy of copyrighted software is not a breach of contract or copyright infringement and is protected by the copyright "first sale" doctrine despite restrictions on resale contained in the original license accompanying the copy, a district court ruled. The court concluded that transaction between the software developer and the original user constituted a sale subject to the first sale doctrine, not a license, because the operative agreement, although characterized as a license, allowed the original purchaser to retain possession of the copy in exchange for a single, up-front payment. The court declined to dismiss the action filed by a subsequent purchaser of the copy who sought a declaratory judgment that his proposed auction of the copy was lawful. The court noted that there are conflicting panel opinions in the Ninth Circuit analyzing whether a purchaser of software subject to a license is an "owner of a ... copy" of a computer program within the meaning of Section 109(a) of the Copyright Act. The court concluded that it was bound to follow the first of the panel opinions, *United States v. Wise*, 550 F.2d 1180 (9th Cir. 1977), because it had not been questioned or overruled, and to disregard three contrary, subsequent opinions, including *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993).

Vernor v. Autodesk, Inc., No. C07-1189RAJ (W.D. Wash. May 20, 2008)

Presence of Music File in Shared Folder of P2P Application Not a Distribution Under the Copyright Act

Evidence that a copy of a music file is available for downloading by others from the shared folder of a P2P file-sharing application is insufficient to establish that the copy was distributed within the meaning of the Copyright Act, a district court ruled. The court denied the motion of the plaintiff record companies for summary judgment, concluding that there was no showing of unauthorized distribution as to the majority of the files at issue, and that as to 12 files downloaded from the defendant's computer by an investigator, there were disputed issues of fact concerning the defendant's responsibility for their accessibility for downloading. As to the majority of the music files at issue, the court rejected the argument that distribution could be inferred, commenting that the presence of the music files in the shared folder of the P2P application "does not prove that the copy changed hands. It only shows that the defendant attempted to distribute the copy, and there is no basis for attempt liability in the statute, no matter how desirable such liability may be as a matter of public policy."

Editor's Note: In a related development, the court in another file-sharing case, *Capitol Records, Inc. v. Thomas*, (D. Minn. May 15, 2008) asked the parties for submission of briefs on the issue of whether the presence of a copyrighted music file in the shared folder of a P2P application, without showing an actual transfer of a file, violates the distribution right. Citing the ruling in *Atlantic Recording Corp. v. Howell*, among others, the court indicated that it was considering granting a new trial on the ground that it had committed a manifest error of law in its instructions to the jury that rendered a $220,000 verdict in favor of the record company plaintiffs.

Atlantic Recording Corp. v. Howell, 2008 U.S. Dist. LEXIS 35284 (D. Ariz. Apr. 29, 2008)

Magistrate Recommends $103,575 Attorney Fee Award to Prevailing Defendant in Dismissed File-Sharing Case

Attorney fees in the amount of $103,575 should be awarded to the defendant in a P2P file-sharing action that was dismissed with prejudice, a magistrate judge recommended. The judge found that the award should include amounts expended in formulating the defendant's various tort counterclaims against the recording industry plaintiffs concerning their investigation and prosecution of the action, even though the counterclaims have been voluntarily dismissed and are the subject of a separate action brought by the defendant as a plaintiff. The judge concluded that the tort claims "involved the same conduct and were sufficiently related to her defense of the copyright infringement case" and therefore that fees relating to those claims were properly included in the award.

Atlantic Recording Corp. v. Andersen, No. 05-933-AC (D. Ore. May 14, 2008)

Secondary Meaning Not Established by Number of Search Engine Hits Generated by Trademark Term

A plaintiff failed to establish that its claimed trademark had acquired secondary meaning by relying on the number of search engine hits generated by the trademark term, the Tenth Circuit ruled. The court concluded that the number of hits generated on Internet search engines did not support such a finding because the evidence was not accompanied by a showing that "the relevant market of consumers has visited the websites containing these hits." The court also concluded that the use of the claimed trademark on the defendant's parody Web site was not infringing because the defendant's site was not commercial, and, as a successful parody, it did not create a likelihood of confusion with the plaintiff's Web site.

Utah Lighthouse Ministry v. Foundation for Apologetic Information and Research (FAIR), 2008 U.S. App. LEXIS 11523 (10th Cir. May 29, 2008)

Claimed Trademark "Real News" Is Descriptive for Internet News Reporting Sites

The phase “real news” is a descriptive term when used in the domain name and on a Web site for an Internet news reporting service, a district court ruled. The court concluded that the term could not be protected as a trademark because it is “part of the common lexicon” and conveys information about a particular quality of the news service, not information about its source or association with a particular entity. The court also ruled that the service had failed to show that the claimed trademark had acquired a secondary meaning, noting among other things that a showing of some 2,000 to 8,000 unique visitors a month to the service’s Web site was not necessarily “substantial” in the context of the Internet, where the site is made available for free to a target audience of millions of potential visitors.

Real News Project, Inc. v. Independent World Television, Inc., 2008 U.S. Dist. LEXIS 41457 (S.D. N.Y. May 27, 2008)

Licensee of Patented Technology Not Entitled to Patent Owner’s Infringement Recovery Against Videogame Console Manufacturer

The licensee of patented “haptic” technology that enables the integration of tactile sensations into computers and other technologies was not entitled to participate in a patent infringement action brought by the patent owner against a videogame company, a district court ruled. The court found that the licensee’s exclusive license did not cover the use of the technology in the same manner as the videogame company. The court considered the language in several license agreements that granted the licensee exclusive rights with respect to “content-restricted” Web sites and other forms of technology, concluding that the definition of that term pertained to forms of technology restricted to persons at least 18 years of age. Because the patent infringement action against the videogame company pertained only to videogames rated by the Entertainment Software Ratings Board as suitable for those 17 and over, the court concluded that the patent owner did not breach its contract with the licensee when it refused to permit the licensee to intervene in the patent infringement litigation.

Editor's Note: The patent infringement action at issue in the case resulted in a verdict against Sony with respect to its PlayStation video game system. The $90.7 million verdict against Sony was upheld by the Federal Circuit in April 2007, in an opinion that also upheld the lower court's ruling that the Internet Services, LLC, the licensee, did not have standing to sue and thus was properly precluded from participating in the infringement litigation. However, the district court indicated that the licensee might have a cause of action for breach of contract against the patent owner. Immersion Corp. v. Sony Computer Entertainment America, Inc., 05-1358 (Fed. Cir. Apr. 4, 2007) (nonprecedential).

Internet Services, LLC v. Immersion Corp., 2008 U.S. Dist. LEXIS 39877 (N.D. Cal. May 16, 2008)

Communications Decency Act Bars Claim Alleging Failure to Identify Underage Users

A claim that social networking service Myspace.com was negligent in failing to implement procedures to identify underage users and prevent them from being contacted by sexual predators was properly barred by Section 230 of the Communications Decency Act (CDA), the Fifth Circuit ruled. The claim was brought by a parent on behalf of her thirteen year old girl daughter, who lied about her age in order to create a MySpace account, and who was then contacted through the service by a man who subsequently sexually assaulted her. The appeals court concluded that the negligence claim was "merely another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace's role as a publisher of online third-party-generated content."

Doe v. MySpace, Inc., 2008 U.S. App. LEXIS 10612 (11th Cir. May 16, 2008)

Communications Decency Act Good Samaritan Provision Protects ISP Spam Blocking

The decision by an Internet Service Provider (ISP) to block e-mail messages sent by a particular e-mail marketer while allowing e-mails by other similar marketers is protected by the “Good Samaritan” provision of the Section 230 of the Communications Decency Act (CDA), a district court ruled. Citing 47 U.S.C. 230(b)(4), the court dismissed claims that selective blocking of e-mails violated the e-mail marketer’s First Amendment rights, constituted tortious interference with prospective economic advantage, a deceptive and unfair practice under the Illinois Consumer Fraud and Abuse Act, and a violation of the Computer Fraud and Abuse Act. The court concluded that the e-mail marketer’s contention that its e-mails complied with the federal CAN-SPAM Act was irrelevant, commenting that “compliance with CAN-SPAM, Congress decreed, does not evict the right of the provider to make its own good faith judgment to block mailings.”

e360Insight, LLC v. Comcast Corp., No. 08 C 340 (N.D. Ill. Apr. 10, 2008)

Computer Hard Drive of Attorney Plaintiff Subject to Discovery Despite Presence of Personal and Client Documents

The computer hard drive of an attorney who brought an action against e-mail marketers as a plaintiff is subject to discovery despite the presence of both personal and client documents on the hard drive, a district court ruled. The court granted the defendant’s request to inspect the attorney’s hard drive, and ordered that a mirror image of the hard drive be created by the attorney’s expert. The court established a protocol for the inspection that requires the attorney to examine the documents on the hard drive in conjnction with his expert, remove any privileged documents, and create a privilege log identifying the deleted documents. In rejecting the argument that the examination was precluded by the attorney-client privilege, the court commented that the attorney “has caused this issue to become problematic because of his failure to place a sufficient litigation hold on his computer systems as of the date he anticipated this litigation.”

Ferron v. Search Cactus, L.L.C., 2008 U.S. Dist. LEXIS 34599 (S.D. Ohio Apr. 28, 2008)

Media Companies Not Liable For Use of Photograph in Documentary Series

The use of a photograph of two music promoters visiting a friend in prison in a documentary TV series and related commercial did not defame the promoters or constitute misappropriation of their likenesses for profit, a district court ruled. The court concluded that the photograph accurately depicted the promoters as visitors of the prisoner, and a reasonable viewer would not link the promoters to the prisoner's illegal activity merely by seeing their photograph together. Regarding the promoter's depiction in the commercial, the court concluded that while reasonable people might view them as disreputable people based on the photograph and the prisoner's history, "the promoters may have lost standing in their community, but they cannot complain of a broadcast of accurate pictures of their social choices." The court dismissed the misappropriation claim on the ground that no product or service was being promoted by showing the photograph of the promoters. Commenting on the promoter's own participation in talk shows, press conferences and news stories, the court stated:

"Stories that could be called news or stories that are tawdry pandering to shallow sensationalism are all about tastes, preferences, and freedoms of our public. Prince and Randle insist that the network not detract from their personas, but they actively want them to use their names and deeds to promote their recordings. Life has its frictions, and publicity has a fierce reciprocity."

Prince v. Viacom, 2008 U.S. Dist. LEXIS 32092 (S.D. Tex. April 14, 2008)

Subpoena to ISP in File-Sharing Case Not Precluded by First Amendment Right to Anonymity

The issuance of a subpoena to an Internet Service Provider to obtain subscriber information identifying parties who allegedly infringed copyrighted sound recordings is not precluded by the subscribers' First Amendment privacy interests, a district court ruled. The court held that any First Amendment right that the subscribers might have to remain anonymous was outweighed by the right of the record company plaintiffs to use judicial process to pursue their copyright claims. The court also concluded that the grant of expedited discovery was proper under Fed. R. Civ. P. 26, because the companies' allegations of their copyright ownership and the defendants' unauthorized downloading, distribution and making available of copyrighted recordings, satisfied either the "good cause" standard, or the "prima facie" standard proffered by the John Doe defendant.

Arista Records, LLC v. Does, No. 07-1649, 2008 U.S. Dist. LEXIS 34405 (D. D.C. Apr. 28, 2008)

Preliminary Injunction Against Internet Postings in Matrimonial Dispute Violates First Amendment

A preliminary injunction issued in a matrimonial action against the posting of defamatory statements or confidential information is unconstitutionally overbroad and vague and an invalid prior restraint under the First Amendment, a California appeals court ruled. The court concluded that under California law, while a court may enjoin the posting of defamatory statements, it may do so only after the statements are determined at trial to be defamatory. The court also ruled that the trial court failed to apply a balancing test in determining whether the complaining spouse's privacy rights were substantially outweighed by the First Amendment rights of the spouse who posted the confidential information. The court reversed the grant of the preliminary injunction, and remanded for consideration of whether an injunction against the posting of specific personal or identifying information of the complaining spouse, a law enforcement officer, "would serve the significant public interest of protecting the safety of a law enforcement officer."

Evans v. Evans, No. D051144, 2008 Cal. App. LEXIS 689 (Cal. Ct. App. 4th Dist. May 12, 2008)

Student Discipline for "Vulgar and Misleading" Blog Post Did Not Violate First Amendment

The discipline imposed upon a high school student who posted a "vulgar and misleading" message concerning school officials on her publicly accessible blog did not violate her First Amendment rights, the Second Circuit held. The appeals court upheld the district court's denial of a preliminary injunction against the imposition of the discipline, relying on precedent in the circuit that a student may be disciplined for off-campus expressive conduct if it creates a foreseeable risk of disruption within the school environment. The court noted that the student posted the comments to her blog with the purpose encouraging other students to read and respond to her comments and contact school officials concerning them.

Doninger v. Niehoff, 2008 U.S. App. LEXIS 11418 (2d Cir. Mar. 4, 2008)

Public Employee's First Amendment Rights Not Violated by Discharge for Personal Use of Employer E-Mail

A public employee's First Amendment rights were not violated when she was discharged for using the employer's e-mail system to send a personal e-mail concerning employment-related matters that contained her identification as a public employee, the Fourth Circuit ruled. The court noted that the e-mail violated a state Internet use policy that required employees to identify personal communications as personal, in order to prevent them from being viewed as official communications. The court referenced evidence in the record that the nature of the employee's position in the field of human resources conveyed to recipients the mistaken impression that the information contained in the e-mail was part of her job-related activity, and that the mistaken impression resulted in "considerable confusion" among recipients as to the source of the information.

Bowers v. Scurry, 2008 U.S. App. LEXIS 9558 (4th Cir. May 2, 2008) (unpublished)

Tort Plaintiff Lacks Standing for First Amendment Challenge to County's Gag Agreement Over Activist Web Site

A woman whose husband died in an accident at a county landfill lacks standing to challenge, on First Amendment grounds, a gag agreement under which activists protesting environmental conditions at the landfill agreed to dismantle their Web site, the Fourth Circuit ruled. The woman claimed that the accident would not have occurred if the activists had continued to monitor and oppose unsafe conditions at the landfill. The appeals court concluded that the woman's claims of injury based on the First Amendment right to receive speech were too speculative, because there was no showing that the woman or her husband would have received information about unsafe conditions such as that which caused the accident absent the gag agreements.

Stephens v. County of Albemarle, 2008 U.S. App. LEXIS 10051 (4th Cir. May 9, 2008)

"E-Gold" Online Payment System an Unlicensed Money Transmitting Business Under Federal Criminal Statute

The “E-Gold” online payment system is a an unlicensed “money transmitting business” within the meaning of 18 U.S.C. § 1960, which criminalizes the operation of such a business, a district court ruled. The court declined to dismiss the indictment against the system and several of its principals, rejecting the argument that because the payment system does not deal in cash or currency, it is not required to be licensed under applicable federal law. The court concluded that § 1960 was intended to include transmission of funds by any means. The court also concluded that the payment system was a “business” within the meaning of the statute, noting that the system was operated by three primary managers who supervised a “cadre” of employees, and that the total funds transferred through the system exceeded $145 million.

U.S. v. E-Gold, LTC, et al., 2008 U.S. Dist. LEXIS 37602 (D. D.C. May 8, 2008)

Failure to Disapprove of Electronic Access to Bank Account Dooms Claim Under Virginia Computer Crime Law

Conclusory allegations that bank account withdrawals made by computer were unauthorized by the corporate account holder are insufficient to support a claim under the Virginia Computer Crimes Act, the Fourth Circuit held. The appeals court referenced evidence in the record that the plaintiffs were aware of the withdrawals and did not object to them, commenting that in the face of the evidence, the plaintiffs’ persistence in the claim that they were unaware of the withdrawals failed to create a genuine issue of fact. The appeals court also noted that the defendant’s use of a computer to accomplish the withdrawals was incidental, as the defendant e-mailed another party requesting that the withdrawals be made, and that party made the electronic withdrawals and then wired the withdrawals electronically to the defendant.

Othentec Limited v. Phelan, 2008 U.S. App. LEXIS 10233 (4th Cir. May 12, 2008)

Purchaser Who Failed to Show Injury Lacks Standing in Antitrust Action Against Online Bookseller

The plaintiff in a putative class action against online bookseller Amazon.com lacks standing to challenge a marketing agreement between the bookseller and bricks-and-mortar bookseller Borders Group, because he did not show that he had ever purchased an item for a higher price then he would have in the absence of the marketing agreement, the Ninth Circuit ruled. The court noted that under the terms of the agreement, Amazon.com operated the Borders Web site and paid Borders a commission on sales, in return for an agreement by Borders to abandon direct participation in the online market during the period of the agreement. In affirming the district court's finding that the plaintiff had failed to show an injury in fact, the appeals court referenced evidence placed in the record by Amazon.com that books purchased by the plaintiff prior to the agreement were the same or lower after the agreement.

Gerlinger v. Amazon.com, Inc., No. 05-17328 (9th Cir. May 27, 2008)

National Association of Realtors Settles Antitrust Charges Over Online Real Estate Brokers

The U.S. Department of Justice announced that it reached a proposed settlement of a civil antitrust suit brought against the National Association of Realtors with respect to its policies on online real property listings. According to the Department press release, if the settlement receives court approval, the Association "will enact a new policy that guarantees that Internet-based brokerage companies will not be treated differently than traditional brokers. Under the new policy, brokers participating in a NAR-affiliated [Multiple Listing Service] will not be permitted to withhold their listings from brokers who serve their customers through virtual office websites (VOWs). In addition, brokers will be able to use VOWs to educate consumers, make referrals, and conduct brokerage services. Such brokers will not be excluded from MLS membership based on their business model."

Press Release May 27, 2008

FTC Approves New CAN-SPAM Rules

On May 12, 2008, the Federal Trade Commission approved amendments to its regulations implementing the provisions of the federal CAN-SPAM Act. According to the FTC's press release announcing the approval, the new rules address the following points: (1) an e-mail recipient cannot be required to pay a fee, provide information other than his or her e-mail address and opt-out preferences, or take any steps other than sending a reply e-mail message or visiting a single Internet Web page to opt out of receiving future e-mail from a sender; (2) the definition of "sender" was modified to make it easier to determine which of multiple parties advertising in a single e-mail message is responsible for complying with the Act's opt-out requirements; (3) a "sender" of commercial e-mail can include an accurately-registered post office box or private mailbox established under United States Postal Service regulations to satisfy the Act's requirement that a commercial e-mail display a "valid physical postal address"; and (4) a definition of the term "person" was added to clarify that CAN-SPAM's obligations are not limited to natural persons.

Press Release May 12, 2008

ISP That Failed to Show Significant Adverse Effect From E-Mails Lacks Standing Under CAN-SPAM

An Internet Service Provider (ISP) that failed to show "significant adverse effect" from the e-mails allegedly sent to its subscribers by affiliates of an Internet marketing company lacks standing to maintain a civil action under the CAN-SPAM Act, a district court ruled. The court noted that while the ISP had shown some evidence that spam generally had imposed costs on it over the years, it failed to show any evidence that the specific e-mails complained of resulted in adverse effects, such as the generation of complaints, the need to increase server capacity, server crashes, or either failure of or increased costs for filtering technology. The court also concluded that the ISP had not shown that the marketing company had "procured" the sending of e-mails by its affiliates because it did not show that the marketing company had consciously avoided knowing that the offending e-mails would be sent.

Asis Internet Services v. Optin Global, Inc., 2008 U.S. Dist. LEXIS 34959 (N.D. Cal. Apr. 29, 2008)

Use of Cell Phone Number on Loan Application Is Not "Prior Express Consent" Under TCPA to Debt Collection Calls

A debtor's inclusion of her cell phone number on a loan application, along with other contact information, and her use of the cell phone number in subsequent correspondence with the lender, does not constitute "prior express consent" to the receipt of autodialed and prerecorded debt collection calls to her cell phone, a district court ruled. The court expressly disagreed with a Federal Communications Commission declaratory ruling exempting debt collection calls from the limitations of the Telephone Consumer Protection Act (TCPA), concluding that the FCC interpretation of the prior express consent requirement in effect impermissibly allowed express or implied consent and thus is "manifestly contrary to the plain language of the statute, is unreasonable, and therefore is not deserving of deference." The court found that while the debtor's inclusion of the cell phone number on the application constituted implied consent to be contacted by cell phone, it did not constitute express consent, i.e., "'positive, direct, unequivocal consent, requiring no inference or implication to supply its meaning.'"

Leckler v. Cashcall, Inc., 2008 U.S. Dist. LEXIS 42298 (N.D. Cal. May 20, 2008)

Action Under Ohio Consumer Act for "Free Prize"
E-Mails Properly Dismissed for Failure to Properly Plead
a Consumer Transaction

An action brought under the Ohio Consumer Sales Practices Act, alleging that unsolicited e-mails notifying the plaintiff that he had won a "free prize" constituted an unfair or deceptive practice, were properly dismissed because the plaintiff failed to factually support his contention that the e-mails constituted "consumer transactions" within the meaning of the Act, the Sixth Circuit ruled. The appeals court upheld the dismissal of the plaintiff's claim without prejudice, concluding that the Act covers "consumer transactions," which are defined as solicitations to supply, among other things an award by chance, "to an individual for purposes that are primarily personal, family or household."

Ferron v. Zoomego, Inc., 2008 U.S. App. LEXIS 10341 (6th Cir. May 7, 2008) (unpublished)

Washington Attorney General Obtains $541,000 Verdicts Against Marketers Under State Anti-Spyware Law

The Washington Attorney General obtained summary judgment rulings against two affiliate marketers under the state's Computer Spyware Act, including $400,000 in penalties and $141,000 in attorney fees against each marketer. The court found that the marketers had advertised their "registry cleaner" products, including "Registry Sweeper Pro," "Registry Rinse," and Registry Doc," by sending "Net Send" messages to computers running the Windows Messenger Service, with alarmist messages suggesting that the computers were at risk of critical systems errors and other problems. Consumers who downloaded the "free trial version" of the marketers' software program to scan their computers for registry errors were told that there were "critical errors" that could be removed by purchasing the full version of the program. In some cases, the downloads included an unrelated search toolbar and bundled software that changed Internet browser home pages.

The court rulings are available at State v. Securelink Networks, LLC, No. 07-2-04987-8 (Wash. Super. Ct. Kings Cty May 2, 2008) (summary judgment as to Manuel Corona, Jr. and Securelink Networks, LLC) and State v. Securelink Networks, LLC, No. 07-2-04987-8 (Wash. Super. Ct. Kings Cty May 2, 2008) (partial summary judgment as to Rudy Corella and NJC Softwares, LLC)

Press Release May 2, 2008

Web Site Use of Trademarked Materials Supports Exercise of Specific Jurisdiction Over Canadian Corporation

A Canadian retailer's inclusion of a competitor's trademarked materials on its Web site supports the exercise of specific jurisdiction over the retailer in Idaho, a district court ruled. The court noted that under Ninth Circuit authority, the mere operation of the Web site is not sufficient to support the exercise of general jurisdiction. The court concluded, however, that the inclusion of the trademarked materials, coupled with the retailer's knowledge that the trademark owner, a competitor, was located in Idaho, supported a finding of specific jurisdiction under the "effects test" enunciated in the Supreme Court's decision in *Calder v. Jones*, 465 U.S. 783 (1984). Among other things, the court found that the inclusion of the trademarked materials constituted the commission of an intentional act that was expressly aimed at its competitor in Idaho, and that any sale facilitated by the trademarked materials would have the effect of injury the competitor in Idaho.

The Bear Mill, Inc. v. Teddy Mountain, Inc., 2008 U.S. Dist. LEXIS 38007 (D. Idaho May 7, 2008)

Blog With Moderated Comments "Interactive" for Zippo Personal Jurisdiction Analysis

The fact that a blogger moderates third-party comments prior to posting renders the blog more, not less, interactive for purposes of analysis under the "Zippo sliding scale," for determining personal jurisdiction, a district court ruled. The court found that the blog was comparable to an Internet bulletin board that had been held "at least interactive, and not passive" by the Fifth Circuit in *Revell v. Lidov* (5th Cir. 2002). The court ultimately concluded, however, that the blog, even though interactive, did not support a finding of specific jurisdiction because the blogger did not expressly aim his activities on his blog at forum residents.

Healix Infusion Therapy, Inc. v. Helix Health, LLC, No. H-08-0337, 2008 U.S. Dist. LEXIS 34562 (Apr. 25, 2008)

Developments of Note

Federal Grand Jury Indicts in MySpace Suicide Case
U.S. v. Drew, No. 08-00582 (C.D. Cal. indictment May 16, 2008)

Subpoena Seeking Anonymous E-Mail Account Information For Use in Foreign Divorce Proceeding Not Precluded by First Amendment
London v. Does 1-4, 2008 U.S. App. LEXIS 11428 (9th Cir. May 22, 2008) (unpublished)

Internet Archive Reveals Win in Standoff with FBI Over National Security Letter
Announcement

FTC to Host Conference on Consumers and Contactless Payment
Press Release

World Economic Organization Says IP Addresses Are in Danger of Rapidly Running Out, Urges Transition to Next Generation Internet

OECD Report

News Corp. Found Not Liable for Reverse Engineering Dish Network Set-Top Boxes

ABC News

Craigslist and eBay Trade Lawsuits in Corporate Governance, Competition Disputes

CNET News Blog

District Court Sets Music Licensing Rates Due ASCAP from Yahoo!, AOL and Real Networks

U.S. v. ASCAP (S.D. N.Y. Apr. 30, 2008)

MySpace Obtains Record $230 Million Default CAN-SPAM Judgment

MySpace, Inc. v. Wallace

District Court Denies Reconsideration in Friendfinder CDA Section 230 Case

Doe v. Friendfinder Network, Inc., 2008 U.S. Dist. LEXIS 38177 (May 8, 2008)

Virginia Supreme Court Grants Limited Rehearing in Constitutional Challenge to Anti-Spam Law

Jaynes v. Commonwealth, No. 062388, 2008 Va. LEXIS 56 (Va. Apr. 28, 2008)

Senate Judiciary Committee Holds Hearings on Global Internet Freedom

Notice of Subcommittee Hearing May 20, 2008

Iowa Data Security Breach Bill Signed Into Law

SF 2308 Signed May10, 2008

Canadian Privacy Group Files Complaint Over Bell Canada Deep Packet Inspection

Complaint filed May 9, 2008

Amazon.com Files Constitutional Challenge to New York Online Sales Tax

Complaint filed April 25, 2008

Canadian Radio-Television and Telecommunications Commission Opens Inquiry Into ISP Traffic Shaping

News Report

Georgia Aims to Lure Videogame Producers, Other Entertainment Companies, With Economic Incentive Act

2008 Entertainment Industry Investment Act

Court Awards $110 Million in Statutory Damages and Injunction Against TorrentSpy P2P System

Columbia Pictures Industries, Inc. v. Bunnell, No. 2:06-cv-01093 (C.D. Cal. May 5, 2008)

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