



## Contents

Note From the Chair  
By: Paul Raine ..... 1

Survey Says...  
Members voice opinions in first-  
ever online survey  
By: Anthony Targan ..... 2

Use of the DMCA and Copy-  
right Law to Create Patent-like  
Protection in Manufactured  
Goods—the Sixth Circuit  
Lexmark Case  
By: Proprietary Rights Committee,  
Computer Law Section, State Bar of  
Michigan ..... 5

2006 Edward F. Langs Award  
Essay Competition Rules ..... 13

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## Notes From the Chair

Anticipation is often half the fun...

Regardless of whether you are planning a trip, a holiday get-together or any future event, anticipation is often half the fun. I am writing this on the eve of a trip to the West Coast with my family. I have shared my expectations of the trip with my wife and son, and they have shared their expectations with me. We will be visiting some familiar places, but we are looking forward most to visiting places where we have never been. Just planning the trip has been a lot of fun.

Likewise, I hope to share with many computer law section members their expectations for the coming year. I look forward to keeping some of the familiar traditions of the section, such as the Spring Luncheon in May and the fairly recent tradition of an annual meeting combined with a golf outing in September. However, I also anticipate making some changes. For example, our bylaws were recently changed to allow the business of the section to be conducted without the need for a face-to-face meeting. I feel that the Computer Law Section should be a leader in making use of computers, e-mail, listservs, etc., to conduct the section's business.

If we can get the majority of the business of the section completed in advance of a meeting, we can all look forward to hearing guest speakers and spending more time networking and socializing rather than conducting lengthy council meetings.

I look forward to a productive, fun-filled year for the section, and I hope you will share with me your vision of what our section can do for its membership.

-Paul Raine

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The aim and purpose of the Computer Law Section of the State Bar of Michigan is to provide information relative to the field of computer law and other information that the section believes to be of professional interest to the section members.

Unless otherwise stated, the views and opinions expressed in the Michigan Computer Lawyer are not necessarily those of the Computer Law Section or the State Bar of Michigan.

**Computer Law Section Survey**

**Survey Says ...**

Members voice opinions in first-ever online survey

*By Anthony Targan*

Okay, so maybe it's hard to recreate the excitement of "Family Feud," but I bet Richard Dawson's contestants never got to answer questions like, "What activity would most attorneys prefer to enjoy at the annual meeting?" (More on that later). In case you missed out on the fun, 101 Computer Law Section members completed the 30-question online survey in August and September. The response rate of over 20 percent exceeded expectations for a first-time survey. Perhaps the incentive of a prize drawing for a \$150 CompUSA gift card helped a little. The drawing, held at the section's annual meeting on September 30, was won by Jolene Shellman of Varnum, Riddering, Schmidt & Howlett LLP in Milwaukee, Wisconsin.

The survey results provided some interesting demographic information about section members and some valuable feedback on section events that will help in planning future functions. While I won't recount the responses to every question, you might find the following results to be of interest.

The section includes many experienced attorneys (two-thirds have over ten years in the legal profession), but exactly half of respondents had been section members four years or less. Most members do not practice "computer law" full-time. In fact, in response to the question, "What percentage of your work is related to computer law?" less than a quarter of respondents spend more than half their time on computer law matters.

Section members represent all areas of the state of Michigan and beyond but not surprisingly are concentrated in southeast Michigan, according to the following breakdown:

Detroit metro*	30%
Detroit	18%
Ann Arbor	15%
Southfield	11%
Lansing	11%
Out-state/out-of-state	10%
Grand Rapids	5%

\* (Oakland, Macomb, Wayne and Washtenaw Counties not in other specific cities)

Many Computer Law Section members also belong to the Business Law (39%); Intellectual Property Law (37%); Arts, Communications, Entertainment & Sports (13%); and Young Lawyers Sections (11%). This information provides insight into

potential opportunities for co-sponsoring events with other sections.

The answer to one question confirmed my own belief that section members need to be more involved: Only 36% of respondents had been to at least one section event (annual meeting, spring networking function, or council meeting) in the past three years! If barely a third of survey respondents are attending events, I would assume that the involvement level is even lower among non-responders. Improving member participation is an annual rallying cry of council leadership. Hopefully, the insights derived from this survey will help the council design events that attract and involve more members. (Okay, I'll get off my soap box now. Back to the survey results).

Of those members who had attended section events, the overall satisfaction level was high: 17% rated events "excellent"; 67% "good"; 14% "acceptable" and only one person said "poor." Quality of speakers had similar ratings. The content and topics of CLS programs was rated excellent/relevant by 14%, good/interesting by 77%, and acceptable by 9%. Two things the section is doing particularly well are facilities (35% excellent; 65% good) and food (32% excellent; 68% good).

Regarding the fees charged for section events (which are always discounted for section members), 33% said the fees offered "good value," 60% said they were "acceptable," and only 7% thought fees were "too high." Specifically, with respect to the section annual meeting, nearly half of all respondents preferred the current format of a half-day event including activities, a panel presentation, and a meal. In response to the question, "I would be most likely to participate in these activities in conjunction with the CLS Annual Meeting," respondents (selecting all that applied) answered as follows:

Golf	29%
Running	13%
Skiing	10%
Tennis	9%
Dancing/music	7%
Swimming	6%
None of above	52%

While golf remains the likely frontrunner for next year's meeting, I am pleasantly surprised that my personal favorite (running) finished second .... Could a "Tech Lawyers' 5K" be in your future?

In terms of location, most members prefer to meet and network close to work, as the totals tend to reflect the demographics previously outlined. Southfield (with over 20%) got the most votes of any specific location. While many liked the site of recent annual meetings (Links of Pinewood in Walled Lake), the council is looking for a new location due to the golf and meeting facilities being sold for development. (Please direct any annual meeting location suggestions to Paul Raine, section chair.)

Other questions focused on section resources. The *Michigan Computer Lawyer* newsletter received high marks for content and overwhelming support of the decision to switch to electronic distribution, which saves the section thousands of dollars each year. The *Michigan Bar Journal* "technology law" theme issue (next scheduled for publication in June 2007) was rated "very favorable" by 42% and "favorable" by 52% of respondents. The section webpage, accessible via the State Bar of Michigan homepage [www.michbar.org](http://www.michbar.org), is underutilized, to say the least.

The last survey question reopened a perennial, proverbial can of worms that has been the source of much debate among council members: namely, "what's in a name?" Section mem-

bers were asked whether they prefer the current Computer Law Section name or one of three alternatives (all four names were presented in random order to each respondent). The results may surprise you:

Information Technology Law Section	40.4%
Technology Law Section	24.5%
Computer and Internet Law Section	21.3%
Computer Law Section	13.8%

Without stating my own personal preference, I find the results very telling and urge the current council to revisit this issue now that membership has spoken. The section's name is the first thing people notice when they consider joining and is arguably the most important recruitment tool we have to promote membership.

# Use of the DMCA and Copyright Law to Create Patent-like Protection in Manufactured Goods —the Sixth Circuit *Lexmark* Case

By: *Proprietary Rights Committee, Computer Law Section, State Bar of Michigan*

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## I. BACKGROUND

The Digital Millennium Copyright Act (i.e., DMCA) is a major piece of legislation, adopted in 1998, which extensively amended the copyright laws, in part, to conform U.S. law to various treaty obligations, and, in part, to modernize the law to take into account various new digital technologies. While not in the legislation itself, the legislative history of the DMCA is replete with statements focusing on the need to provide copyright holders with protections against international digital piracy. *See, e.g., 144 CONG. REC. S4884* (daily ed. May 14, 1998) (statement of Sen. Hatch). Provisions of the DMCA are codified in various sections of Title 17 of the U.S. Code.

## INTERNATIONAL BACKGROUND

In 1996, the United States became party to two new international agreements relating to intellectual property that had been negotiated under the auspices of the World Intellectual Property Organization (*i.e.*, WIPO). These were the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Under these treaties, member states obligated themselves, among other things, to adopt laws forbidding the circumvention of technological measures used by copyright owners to protect their rights and to provide protection for “rights management information” that was distributed in connection with copies or phonorecords of a protected work. In 1998, Congress passed the DMCA, Pub. L. No. 105-304, 112 Stat. 2860, to implement these obligations and for other purposes.

## MAIN FEATURES OF THE DMCA

One of the main features of the DMCA is the provision forbidding the circumvention of technological measures that protect access to or exploitation of copyrighted works. Because of the ease of copying in the digital environment, copyright owners who make their works available digitally, such as over the Internet, have increasingly begun to use technological self-help measures to protect their economic interests. For instance, they may use technology to control access to their work by encrypting it or by requiring a user to enter a password before the work may be read or listened to. Alternatively, they may allow unfettered access to the work but use technology to prevent the work from being transferred from one computer to another or otherwise copied. DMCA contains three provisions that are designed to make it illegal to circumvent technological measures:

(a) *Circumventing Access Controls*: 17 U.S.C. § 1201(a)(1) makes it illegal to “circumvent a technological measure that effectively controls access” to a copyrighted work.

(b) *Trafficking in Devices that Circumvent Access Control Technology*: Under 17 U.S.C. § 1201(a)(2) it is also illegal to “manufacture, import, offer to the public, provide or otherwise traffic in any technology, product, service, device, [or] component” that is primarily designed to circumvent technological measures that control access to a work.

(c) *Trafficking in Devices that Circumvent Copy Control Technologies*: Finally, 17 U.S.C. § 1201(b) makes it illegal to “manufacture, import, offer to the public, provide or otherwise traffic in any technology, product, service, device, [or] component” that is primarily designed to circumvent technological measures that protect the rights of a copyright owner.

The latter two provisions discussed above are sometimes called the “anti-trafficking” provisions or the “device” provisions of DMCA, while the first provision is sometimes called the “anti-circumvention” provision.

## THE LEXMARK CASE

On October 26, 2004, a three-judge panel of the Court of Appeals for the Sixth Circuit decided a case entitled *Lexmark International, Inc. v. Static Control Components, Inc.*, in which the court considered a preliminary injunction entered pursuant to 17 U.S.C. § 1201(a)(2), an “anti-trafficking” provision of the DMCA, against certain microchips manufactured by defendant, Static Control Components, Inc. (i.e., Static or SCC). (See Appendix A, available at <http://www.michbar.org/computer/pdfs/AppendixA.pdf>).

The DMCA section at issue in the *Lexmark* case provides as follows:

(a)(2) No person shall manufacture, import, offer to the public, provide or otherwise traffic in any technology, product, service, device, component, or part thereof, that —

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

(C) is marked by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

The *Lexmark* case garnered substantial attention because it involved an assertion of the DMCA for a purpose other than deterring piracy of the plaintiff's copyrighted works. Moreover, the facts of the case seemingly comported well with a straightforward reading of the DMCA's broadly-drafted strictures. The case presented an opportunity for the Sixth Circuit panel to define more precisely the outer boundaries of the DMCA, and, perhaps, to set forth its view of the relationship, if any, that an alleged violation of the DMCA must bear to a subsequent act of piracy of the plaintiff's works. The three different opinions that were generated show that there may be an opportunity to create patent-like protection in manufactured goods, such as automotive aftermarket parts, by the proper use of the DMCA and copyright laws.

In Section II of this report, the facts in the dispute between Lexmark and Static are discussed. In Section III, the panel opinion, Judge Merritt's concurring and Judge Feikens' concurrence and partial dissent are discussed.

Section IV offers some suggestions as to how manufacturers, such as automobile manufacturers, who currently have the technology and ability, might use the DMCA and the Copyright Law to create patent-like protection in manufactured goods.

## II. THE FACTS IN THE LEXMARK CASE

The plaintiff, Lexmark, manufactures and markets laser and inkjet printers, along with printer toner cartridges. Lexmark designed and implemented a business strategy that enabled owners of certain Lexmark printers to buy either an ink cartridge at the regular price or a "prebate" ink cartridge at a discounted price. A prebate is similar to a rebate, but with a prebate there is no need to send in a receipt to acquire a refund. Instead, the consumer accepts a shrinkwrap license agreement and is offered an on-the-spot discount. For instance, in *Lexmark*, by opening prebate cartridge packaging, consumers accepted the following agreement that required them to return their spent prebate cartridge to Lexmark after the initial use and prohibited them from refilling the spent cartridge:

RETURN EMPTY CARTRIDGE TO LEXMARK FOR REMANUFACTURING AND RECYCLING. Please read before opening. Opening this package or using the patented cartridge inside confirms your acceptance of the following license/agreement. This all-new cartridge is sold at a special price subject to a restriction that it may be used only once. Following this initial use, you agree to return the empty cartridge only to Lexmark for remanufacturing and recycling. If you don't accept these terms, return the unopened package to your point of purchase. A regular price cartridge without these terms is available.<sup>1</sup>

To ensure customer compliance with the shrinkwrap agreement, Lexmark manufactured the prebate cartridges with a microchip that prevented their compatibility with a Lexmark printer if the cartridges had been refilled. Lexmark placed the microchip on each prebate cartridge and employed an authentication sequence whereby certain Lexmark printers exchanged a "secret handshake" with each microchip.

Two computer programs allegedly were protected by the secret handshake. A Toner Loading Program (*i.e.*, TLP) was located on each microchip and downloaded by the printer to calculate the quantity of toner left within the cartridge. One version of the TLP contained

33 instructions and occupied 37 bytes of memory. Another version of the TLP contained 45 commands and occupied 55 bytes of memory. The court noted that the name of the case (*i.e.*, *Lexmark International, Inc. v. Static Control Components, Inc.*) occupied more memory space than the TLP.

A Printer Engine Program (*i.e.*, PEP) resided within the printer and controlled certain printer functions. The programs were protected by the secret handshake in the sense that the printer would return an error message and fail to operate upon the insertion of a toner cartridge incapable of satisfying the secret handshake. However, neither program was encrypted nor required a password to be read from memory.

The secret handshake was initiated whenever a Lexmark printer was powered up, opened or closed, or when a toner cartridge was inserted therein. When any of these events occurred, both the microchip and the printer calculated an authentication code, the results of which were then compared. The printer would function only when the authentication codes matched.

The defendant, Static, manufactures, among other items, component parts for refurbished toner cartridges. By October of 2002, Static had developed its Smartek microchip for use with remanufactured prebate cartridges. This microchip mimicked the authentication sequence to allow interoperability between Lexmark printers and prebate cartridges refurbished by unauthorized parties. Although Static had independently reverse-engineered a means for bypassing the authentication sequence, it programmed wholesale copies of the TLP onto its Smartek chips.

On December 30, 2002, Lexmark brought suit and moved for a preliminary injunction against SCC. Lexmark claimed that SCC's Smartek chips infringed its copyright in the TLP and that distribution of the chips violated the § 1201(a)(2) anti-trafficking provision of the DMCA. As reported at 253 F.Supp.2d 944 (E.D. Ky 2003), the district court first concluded that Lexmark's claim of copyright infringement was likely to prevail on the merits. The court then determined that Lexmark's claims under the DMCA were also likely to prevail on the merits. The court stated that the plain meaning of the statutory language was clear, and therefore, any appeal to legislative history of the DMCA would be inappropriate.

### III. THE SIXTH CIRCUIT OPINIONS

#### PANEL OPINION

A panel of the Sixth Circuit reversed the district court's determination and vacated the preliminary injunction. As noted in the concurring opinion, the court found that:

The Toner Loading Program is not copyrightable because of the merger and scenes a faire doctrines<sup>2</sup>, and even if it were copyrightable, SCC's use of the program in this case appears to fall under the fair use exception. Its purpose, though commercial in nature, was only to sell cartridges that could be used by Lexmark printers rather than to profit by infringing any Lexmark copyright. The fact that the Toner Loading Program is not copyrightable defeats both Lexmark's direct claim to copyright infringement and its DMCA claim based on the Toner Loading Program (because the DMCA only prevents the circumvention of measures that protect copyright-protected works). I agree that Lexmark's DMCA claim based on the clearly copyright-protected Printer Engine Program fails because the authentication sequence does not, and is not intended to, "effectively control... access" to the Printer Engine Program.

The panel held Section 1201(a)(2) inapplicable on the grounds that the secret handshake did not constitute an access control measure under the DMCA, because, in the panel's view, it did not "effectively control access" to the Printer Engine Program. Rather, the panel held that Lexmark's control over access to its Printer Engine Program terminated upon the sale of each printer. At that moment, in the panel's view, Lexmark relinquished control of the Printer Engine Program to the purchaser of the printer:

It is not Lexmark's authentication sequence that 'controls access' to the Printer Engine Program . . . . It is the purchase of a Lexmark printer that allows 'access' to the program. Anyone who buys a Lexmark printer may read the literal code of the Printer Engine Program directly from the printer memory with or without the benefit of the authentication sequence, and the data from the program may be translated into readable source code after which copies may be freely distributed . . . . No security device, in other words, protects access to the Printer Engine Program code, and no security device accordingly must be circumvented to obtain access to that program code.

The authentication sequence, it is true, may well block one form of 'access'—the 'ability to . . . make use of' the printer from functioning. But it does not block another relevant form of 'access'—the 'ability to . . . obtain' a copy of the work or to 'make use of' the literal elements of the program (its code). Because the statute refers to 'control[ling] access to a work protected under this title,' it does not naturally apply when the 'work protected under this title' is otherwise accessible. Just as one would not say that a lock on the back door of a house 'controls access' to a house whose front door does not contain a lock, and just as one would not say that a lock on any door of a house 'controls access' to the house after its purchaser receives the key to the lock, it does not make sense to say that this provision of the DMCA applies to otherwise-readily-accessible copyrighted works.

The panel acknowledged a likelihood that the secret handshake did block a form of access—the ability to use the Printer Engine Program—because the secret handshake could prevent the printer from operating. However, the panel found that the failure of the secret handshake to restrict other forms of access, such as access to the literal code of the program, prevented the secret handshake from qualifying as a technological access control measure under the DMCA. "It seems clear," the panel wrote, "that [Section 1201(a)(2)] does not naturally extend to a technological measure that restricts one form of access but leaves another route wide open."

The panel noted several cases cited by Lexmark in which district courts had determined that access to a work could be controlled by controlling the ability to use the work. However, the panel distinguished these cases, interpreting the restricted use in each cited case to involve restricting use of the copyrightable expression in the protected work. For example, the panel distinguished *Sony Computer Entertainment America, Inc. v. Gamemasters* (*i.e.*, Gamemasters), in which a preliminary injunction issued under Section 1201 against video game enhancement software that circumvented an access control measure that prevented a game console from operating unauthorized video games. The *Lexmark* panel emphasized that the access control measure in *Gamemasters* ultimately prevented commands in the video game programs from generating images and sounds that constitute copyrightable expression. In *Lexmark*, however, the use of the Printer Engine Program generated no copyrightable expression.

The court next rejected Lexmark's argument that "access-control measures may 'effectively control access' to a copyrighted work within the meaning of the DMCA even though the measure may be evaded by an 'enterprising end-user.'" The court said:

[O]ur reasoning does not turn on the degree to which a measure controls access to a work. It turns on the textual requirement that the challenged circumvention device must indeed circumvent something, which did not happen with the Printer Engine Program. Because Lexmark has not directed any of its security efforts, through its authentication sequence or otherwise, to ensuring that its copyrighted work (the Printer Engine Program) cannot be read and copied, it cannot lay claim to having put in place a ‘technological measure effectively controls access to a work protected under [the copyright statute].’

Legislative purpose also supported this conclusion, the court said. The DMCA was meant to restrict piracy of creative works, the court said. “Nowhere in its deliberations over the DMCA did Congress express an interest in creating liability for the circumvention of technological measures designed to prevent consumers from using consumer goods while leaving the copyrightable content of a work unprotected,” the court said. “In fact, Congress added the interoperability provision in part to ensure that the DMCA would not diminish the benefit to consumers of interoperable devices ‘in the consumer electronics environment.’”

Similarly, the court concluded that the Smartek chip did not provide access, as defined by the DMCA, to the Toner Loading Program. Accordingly, the panel vacated the preliminary injunction against the Smartek microchips under the DMCA.

### **JUDGE MERRITT’S CONCURRING OPINION**

In addition to joining in the panel opinion, Judge Merritt wrote separately to express his belief that the central inquiry in a Section 1201 dispute is whether the defendant circumvented an access control measure “for the purpose of pirating works protected by the copyright statute”:

We should make clear that in the future, companies like Lexmark cannot use the DMCA in conjunction with copyright law to create monopolies of manufactured goods for themselves just by tweaking the facts of this case: by, for example, creating a Toner Loading Program that is more complex and ‘creative’ than the one here, or by cutting off other access to the Printer Engine Program. The crucial point is that the DMCA forbids anyone from trafficking in any technology that ‘is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a [protected] work.’ 17 U.S.C. § 1201(2)(A) (emphasis added). The key question is the ‘purpose’ of the circumvention technology. The microchip in SCC’s toner cartridges is intended not to reap any benefit from the Toner Loading Program—SCC’s microchip is not designed to measure toner levels—but only for the purpose of making SCC’s competing toner cartridges work with printers manufactured by Lexmark.

Judge Merritt went on to expressly reject the suggestion that any device that intentionally circumvents a technological access control measure violates the DMCA, regardless of the purpose of the circumvention. Were that the case, Judge Merritt noted, “Manufacturers could potentially create monopolies for replacement parts simply by using similar, but more creative, lock-out codes. Automobile manufacturers, for example, could control the entire market of replacement parts for their vehicles by including lock-out chips. Congress did not intend to allow the DMCA to be used offensively in this manner, but rather only sought to reach those who circumvented protective measures ‘for the purpose’ of pirating works protected by the copyright statute.”

Judge Merritt emphasized that the burden should not be on a competitor in the market for manufactured goods to prove that it qualifies for an exception to the DMCA regarding cases where a protected work is not being pirated. He said that Lexmark should be required to demonstrate as an initial matter that the primary purpose of Static's device is piracy.

### **JUDGE FEIKENS' CONCURRENCE**

Judge John Feikens also joined in the majority opinion by agreeing that the DMCA was not intended by Congress to be used to create a monopoly in the secondary markets for parts or components of products that consumers have already purchased. He also agreed on the outcome of the second count, although he came to that conclusion for different reasons. Judge Feikens authored a separate opinion that concurred with respect to Lexmark's DMCA claims. In particular, he stated his view that a customer's purchase of a Lexmark printer entitles the customer to use the Printer Engine Program for the life of the printer. Judge Feikens dissented as to the majority's decision on the first count regarding the copyrightability and infringement of the Toner Loading Program (TLP).

With respect to the second count, Judge Feikens believed:

[T]hat consumers did not have an implied license to use the copyrightable TLP beyond the first refill of the prebate cartridge. With the assumption that the shrinkwrap agreement was valid and enforceable (I believe Lexmark can demonstrate a likelihood of success on that question), I would conclude consumers' implied license to use the copyrighted TLP did not extend beyond the first refill of the prebate cartridge. The TLP at issue is not present in the printer at purchase. Instead, the consumer gains access to using it by purchasing the rebate toner cartridge (which stores the programs in its micro-chip). The prebate toner cartridge is only sold under a special shrinkwrap agreement that requires that the cartridge be returned to Lexmark when it is empty and may not be refilled by others for reuse. Since the consumer is only authorized to use the prebate cartridge until the toner runs out, it follows that the license also blocks the consumer from using the TLP after that time.

With respect to the third count, Judge Feikens believed that:

[T]he consumer has a right (via an implied license) to use the Printer Engine Program for the life of the printer. Because the consumer has this right, there is no right of the copyright owner to prevent the consumer from using the Printer Engine Program, and therefore, defendants cannot be found to be in violation of the DMCA.

## **IV. THE USE OF THE DMCA AND COPYRIGHT LAW TO CREATE PATENT-LIKE PROTECTION IN AUTOMOTIVE AFTERMARKET PARTS**

### **BACKGROUND**

The number of automotive electronic systems continues to grow based on government legislation aimed at improving vehicle emissions and safety, as well as customer demand for new comfort and convenience features, such as new power assists for previous manual functions. Microprocessor-based control units are used for safety-related applications such as tire

pressure monitoring systems (TPMSs), rollover protection, and occupant sensing (i.e., smart air bags), as well as comfort and convenience features such as power doors, rain-sensitive windshield wipers, and LED exterior lighting. Other applications include electronic fuel injection, electric drivetrain, keyless ignition, night vision, climate control, collision radar, and hybrid propulsion systems to meet future emissions regulations. 32-bit microprocessors are in use for vehicle navigation and multimedia applications. Appendix B, available at <http://www.michbar.org/computer/pdfs/AppendixB.pdf>, describes the technology behind keyless entry into automotive vehicles and the related technology used in tire pressure monitoring systems. Consequently, it is clear that the technology required to make interoperability prevention systems is both cost effective and widely used.

### THE THREAT OF THE USE OF THE DMCA AND COPYRIGHT LAW TO CREATE PATENT-LIKE PROTECTION

The two automotive aftermarket industry groups, the Automotive Aftermarket Industry Association and the Automotive Parts Rebuilders' Association, filed briefs (Appendices C and D, respectively are available at <http://www.michbar.org/computer/pdfs/AppendixC.pdf> and <http://www.michbar.org/computer/pdfs/AppendixD.pdf>) with the district court in the *Lexmark* case. These groups were concerned that a finding for *Lexmark* could adversely affect their members, since many replacement parts or subsystems may contain a computer chip which communicates with the electrical control unit (ECU) or other computer on the motor vehicle. Like *Lexmark*, the manufacturer of the motor vehicle could program an authentication sequence or "secret handshake" into the ECU so that a replacement part or subsystem could not be used in that vehicle.

However, as noted above, replacement parts or subsystems may contain a computer chip which not only communicates with the ECU via an authentication sequence, but also may be programmed with a copyrightable computer program related to the performance of the part or subsystem. Thus, the panel opinion has left the door open for manufacturers to obtain patent-like protection for their goods by employing a copyrightable computer program or other subject matter (*i.e.*, a protected work) and cutting off all other access to the protected work. Furthermore, if the computer program generates images and/or sounds that constitute copyrightable expression and which are provided to the occupants of a motor vehicle, the manufacturer can rely on the *Gamemasters* case noted herein.

#### Endnotes

<sup>1</sup>On September 30, 2003, the U.S. District Court for the Northern District of California held that the single-use restriction appearing on the packaging (*i.e.*, shrinkwrap) of the cartridge amounted to a legitimate condition on sale that does not violate the patent exhaustion doctrine. *Arizona Cartridge Remanufacturers Association, Inc. v. Lexmark International, Inc.*, 68 USPQ2d 1786.

<sup>2</sup>The court found that the TLP functioned as a "lock-out code" since the PEP did a checksum operation on the data bytes of the TLP to bar the use of any unauthorized cartridges.

## ESSAY COMPETITION RULES



2006  
Edward F. Langs  
Writing Award

1. The award will be given to the student article, which in the opinion of the judges makes the most significant contribution to the knowledge and understanding of Computer and/or Internet Law. Factors that are taken into consideration include originality, timeliness of the subject, depth of research, accuracy, readability, and the potential for impact on the law.
2. The top three papers will receive awards of \$500, \$300, and \$200 respectively (in US dollars).
3. All entries must be original and must not have been submitted to any other contest within the last 12 months.
4. All entries must include the submitter's name(s), current address, current telephone number, and college or university attended.
5. All articles must be typed, double-spaced and submitted on letter-size (8 1/2x11 inch) plain, white, bond paper (no onion skin).
6. Entries must be typed with margins of 10 and 70, respectively, along with top and bottom margins of no less than one inch each.
7. All entries must contain proper citations, including footnotes at the end of the entry.
8. Entry of at least 10 pages is preferred.
9. All rights to the entries shall become the property of the State Bar of Michigan.
10. The Computer Law Section reserves the right to make editorial changes and publish the article(s) in the Section Newsletter.
11. The entry must be post-marked **by June 30, 2006**.
12. Entries are to be mailed to:  
David R. Syrowik, Chairman  
Computer Law Section Essay Competition  
Brooks Kushman PC  
1000 Town Center, 22nd Floor  
Southfield, Michigan 48075

# STATE BAR OF MICHIGAN

## 2006 Judicial Elections Seminar

Are you considering running for a judicial position or seeking information about judicial elections? The State Bar of Michigan is holding a seminar to provide invaluable information about election laws, campaign finance rules, and ethical rules pertaining to elections.

Mark your calendars!  
Register now for:  
Tuesday, January 17, 2006  
1:00-4:30 p.m.  
Tuition: \$75 per attendee

Michigan Library &  
Historical Center  
The Forum Room  
702 W. Kalamazoo Street  
Lansing, Michigan

Written materials include:  
*Becoming a Judge: Ethics  
and Campaign Practices*  
and other handouts.

Who should attend: Lawyers seeking judicial office  
and members of the news media who cover judicial elections.

### Faculty & Program Agenda

- |                  |  |
|------------------|--|
| 1:00 – 1:30 p.m. | Registration   |
| 1:30 – 1:35 p.m. | Welcome  |
| 1:35 – 2:30 p.m. | <i>Filing for Candidacy, Campaign Reports,<br/>Campaign Contributions</i><br>Lydia Valles and Elizabeth Newberry<br>Michigan Bureau of Elections   |
| 2:30 – 3:15 p.m. | <i>Campaign Timing, Ethical Considerations<br/>in the Management of Campaign Funds,<br/>Campaign Advertising and Debates</i><br>Dawn M. Evans<br>Director of Professional Standards<br>State Bar of Michigan |
| 3:15 – 3:30 p.m. | Break  |
| 3:30 – 4:00 p.m. | <i>Campaign Complaints, Winding Up Your<br/>Law Practice, and Divestiture</i><br>The Honorable Susan Moiseev<br>Member, State Bar Committee on Ethics,<br>Judicial and Professional                          |
| 4:00 – 4:30 p.m. | <i>Questions and Answers</i>   |

\*MJJ program for sitting judges at the Hall of Justice same day.  
Contact Tricia Shaver, ShaverT@courts.mi.gov or (517) 373-7452

## 2006 Judicial Elections Seminar

### Registration Form

Return completed form with payment to:

**Finance Department  
State Bar of Michigan  
Michael Franck Building  
306 Townsend  
Lansing, MI 48933-2083**

**Online registration: <http://e.michbar.org>**

For more information call (517) 346-6336.  
Registration fee: \$75. Seating is limited.

P# \_\_\_\_\_

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Please make your check payable to:

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I learned about this seminar:

- Michigan Bar Journal  website  
 other (please specify)