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UCC ARTICLE 2B NEARS COMPLETION

By Bernard T. Lourim
Clark Hill P.L.C.

UPCOMING EVENTS

**Council Meeting
Spring Networking Lunch
May 27, 1998 at noon**

Ritz Carlton Hotel
Dearborn, MI
Council Meeting to follow lunch

**Tentative Council Meeting (TBD)
June 1998**

**Proprietary Rights Committee
Meeting
Late June**

Offices of Brooks & Kushman
Southfield, MI.

Current project: Preparation of a standard form of software license that includes software patent licensing considerations.

**State Bar Annual Meeting
September 16-18, 1998**

Lansing, MI

Program Topic: Year 2000 Software Issues

Emerging Technology Committee

Virtual Discussions Ongoing

Those persons interested in participating in the Committee discussions should contact Mitch Goodkin, the Committee chair, by e-mail (mitch@mail.tmo.umich.edu). The current topic being discussed involves "Information Age to the Automation Age."

In July 1995, the Executive Committee of the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the development of a new article of the Uniform Commercial Code to deal with licensing and other transactions involving information. Now, three years later, the Drafting Committee will present Article 2B for final reading and promulgation at the NCCUSL Annual Meeting during the last week of July 1998. The American Law Institute (ALI) has scheduled Article 2B for passage early next year. At that point, the new article will be sent to the states for adoption.

Article 2B differs in coverage from UCC Articles 2 and 2A in both the type of contract (a license versus a sale or a lease) and in the content of the contract (information versus goods). These distinctions form the basis for Article 2B, but there are exceptions. For example, Article 2B applies to the sale of a copy of software.

While Article 2B originated in concept to create a legal framework for software licenses, the development of technology, coupled with the intervention of participants from the motion picture, broadcast, publishing, banking, online and other industries, have expanded the scope of Article 2B. The current Article 2B draft defines the scope of the article to include (i) any transaction that creates a software contract (which includes a license of software, a sale of a copy of software, or a contract to develop software), access contract (electronic access to an information processing system such as an Internet or online service), or license (of information) and (ii) agree-

ments to provide support for, maintain, or modify information related to a contract covered by Article 2B. The current draft excludes from its scope embedded programs, patent and trademark licenses, certain core financial functions and personal-services contracts not related to software. As a result of the March 1998 meeting of the drafting committee, the current draft also excludes *traditional* licensing in the motion picture, broadcast and cable industries. The drafting committee anticipates, however, that these companies' movement into on-line systems, software and multimedia will reduce the significance of this exclusion.

Article 2B drafts, including the April 15, 1998 draft, which is the most recent draft as of this writing, and related materials can be found at <http://www.law.upenn.edu/library/ulc/ulc.htm>.

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State Bar of Michigan Computer Law Section



MEMO FROM THE CHAIR

By Michael S. Khoury

Summer is almost here, and with the warm weather our annual Spring Networking Lunch. The program will be held on May 27, 1998 starting at 12:00 noon at the Ritz Carlton Hotel in Dearborn. The topic will be "Confidentiality in the Cyberspace Era," and is discussed in detail elsewhere in this newsletter. We hope to see a big turnout for this function, a favorite of Section members. Afterward, we will have a short section council meeting, and everyone is, of course, invited.

For those of you who have visited our website, you can see that it is there, sort of. We still have a number of formatting, content and communication bugs to work out with the State Bar and the Bar's Internet service provider, but we hope to continually improve the site and provide more content for members.

The Section co-sponsored the ICLE program "Representing Clients in Computer Transactions" on April 24, 1998. After 100 people wanted to register for the program initially planned for 40, ICLE moved the program to the Ypsilanti Marriott and was able to accommodate all those who wished to attend. (Maybe we should get a commission!)

The production of the newsletter will also undergo some changes over the next several months. After several years of service, Jeff Szuma, our current editor, will be succeeded by Christopher Falkowski. Chris is a relatively new member of the Section, and has significant IT experience, in addition to being a lawyer working in the field. Additionally, council members Anthony Targan and Alan Kanter have agreed to assist the editor by providing input, oversight and assistance in the development and production of the newsletters. The purpose is to provide timely, interesting and useful information for Section members, and to provide a forum for discussion on current events. Look forward to a number of changes in the newsletter resulting from these activities.

The State Bar Annual Meeting is scheduled for September 16-18, 1998 in Lansing. Our meeting and program will be on September 16, and will start at 2:00 p.m. As previously noted, the focus of the Annual Meeting program will be on Year 2000 issues. Kathleen Damian is assembling a group of speakers to discuss the issues from a number of different perspectives.

Lastly, the Section officers and Council are dedicated to the service of Section members; input and participation is welcome. One of the ways that members can actively be involved in Section activities is to serve on committees or on the Council of the Section. If you are interested in serving on the Council, in getting involved in Committee activities (or in starting activities in a new area), please feel free to contact me or any other Council member. Under the By-Laws, I will serve as the chair of the nominating committee for new officers and Council members for the 1998-99 year, and I hope that anyone who is interested in participating will contact me. Both e-mail and snail mail are acceptable.

Welcome To Our Home!



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Spring Networking Lunch

Wednesday, May 27, 1998
Ritz Carlton Hotel
Dearborn, Michigan
Lunch: 12:00 p.m.—1:30 p.m.

“Confidentiality in the Cyberspace Era”

—PANEL DISCUSSION—

The Computer Law Section of the State Bar of Michigan will be holding its annual Spring Network Lunch on **Wednesday, May 27th, at the Ritz Carlton Hotel** in Dearborn, Michigan. The luncheon will feature a panel discussion on the topic “**Confidentiality in the Cyberspace Era.**” The speakers will focus on confidentiality issues related to the growing use of technology in health care delivery and consumer transactions. The lawyers who will be participating as panelists are:

Lori-Ann Rickard of St. John Health System
Holli Hart Targan of Jaffe, Raitt, Heuer & Weiss, P.C.
Ty Tartt of Ameritech.

The cost for the luncheon is \$35 per person and the cut-off date for reservations is *May 20, 1998*. If you are interested in attending, send a check payable to “State Bar of Michigan”

Mail to: Kathy Damian, Assistant General Counsel,
AAA Michigan,
One Auto Club Drive,
Dearborn, Michigan 48126

Please include a note with the name(s) of those planning to attend along with your check. Reservations are also available by phone. Call: **Kathy Damian** (313) 336-1052.





RECENT DEVELOPMENTS IN COMPUTER LAW

By David R. Syrowick
Brooks & Kushman P.C.

U.S. SUPREME COURT

Antitrust

As reported in 66 U.S. LAW WEEK 1275, a unanimous U.S. Supreme Court on November 5, 1997 repudiated a 29-year-old anti-trust doctrine and decided that the legality of vertical maximum price fixing agreements should be judged under the rule of reason. The court says it is difficult to see how vertically imposed maximum prices "could harm consumers or competition to the extent necessary to justify their *per se* invalidity." *State Oil Co. v. Khan*.

Copyright

As reported in 66 U.S. LAW WEEK 1533, a unanimous U.S. Supreme Court on March 9, 1998 held that the first sale doctrine prevents a copyright owner from invoking the import protections of 17 U.S.C. § 602(a) for products originally made in the U.S. The Court stated that the first sale doctrine in Section 109(a) of the Copyright Act, which limits the exclusive right to sell and distribute copies to first sales of the work, applies to imported copies, thereby restricting the copyright owner's statutory right to prohibit unauthorized imports. The decision is a blow to U.S. manufacturers and distributors that have been trying to combat the so-called gray market, in which another company buys their products and resells them outside the normal chain of distribution. Products sold on the gray market include everything from software and movies to

cosmetics and medicine. *Quality King Distributors v. L'anza Research International, Inc.*

As reported in the April 1, 1998 issue of the WALL STREET JOURNAL, the U.S. Supreme Court on March 31, 1998 overturned a Ninth Circuit ruling by holding that the Seventh Amendment requires a jury trial for a copyright claim of statutory damages under 17 U.S.C. § 504(c). *Feltner v. Columbia Pictures Television, Inc.*

U.S. COURTS OF APPEAL

Patents

As reported at 45 U.S.P.Q.2d 1421, the U.S. Court of Appeals for the Federal Circuit held on January 15, 1998 that a patent for a long-distance telephone call computer, which is properly construed to require display of cost both as charges accrue during a call and after the call is terminated, is not infringed under the doctrine of equivalents by the accused devices, which cannot provide cost information while a call is in progress. *Phonometrics, Inc. v. Northern Telecom, Inc.*

Trade Secrets

As reported at 55 BNA's PTCJ 372, the U.S. Court of Appeals for the Second Circuit held on February 20, 1998 that the doubling of a reasonable royalty award in a trade secret misappropriation case to reflect

the "cost of infringement" and deter future infringement was improper. The court vacated the enhanced damages award, observing that the term "cost of infringement" defies definition. *Vermont Microsystems, Inc. v. Autodesk, Inc.*

As reported at 45 U.S.P.Q.2d 1537, the U.S. Court of Appeals for the Fifth Circuit held on January 12, 1998 that a district court properly dismissed a claim that defendant misappropriated plaintiff's trade secrets by selling computer programs on the ground that the parties' agreements showed that defendant did not owe plaintiff a duty of non-disclosure at the time of sale. *Expansion Plus, Inc. v. Brown-Forman Corp.*

Copyright

As reported at 44 U.S.P.Q.2d 1296, the U.S. Court of Appeals for the Seventh Circuit held that a collection of numerical codes describing dental procedures was the product of creative decisions inherent in compiling the set of classification and thus was copyrightable under 17 U.S.C. § 102(a). *American Dental Association v. Delta Dental Plan Association*.

Trademarks

As reported at 55 BNA's PTCJ 143, in an unpublished opinion, the U.S. Court of Appeals for the Sixth Circuit held on December 3, 1997 that a former franchisee found liable for trademark infringement suffered "advertising injury" within the meaning of an insurance contract, and was not covered by



the exclusion for “advertising injury arising out of breach of contract.” *Assurance Company of America v. J.P. Structures, Inc.*

As reported at 55 BNA’s PTCJ 114, the U.S. Court of Appeals for the Sixth Circuit ruled on December 3, 1997 that a licensee’s continued, unauthorized use of a trademark after termination of the license established a likelihood of confusion as a matter of law. It also ruled that an award of treble damages plus profits, amounting to four times the actual damages, did not violate Section 35(a) of the Lanham Act permitting damages awards “not exceeding three times the amount” of actual damages. *U.S. Structures v. J.P. Structures.*

As reported at 44 U.S.P.Q.2d 1545, the U.S. Court of Appeals for the Seventh Circuit held on October 29, 1997 that a preliminary injunction is warranted prohibiting defendants from using “Meridian” mark for insurance in general public forum, such as telephone directories, Internet sites, and newspaper advertising. *Meridian Mutual Insurance Co. v. Meridian Insurance Group, Inc.*

Trademarks—Personal Jurisdiction

As reported at 55 BNA’s PTCJ 119, the U.S. Court of Appeals for the Ninth Circuit held on December 2, 1997 that a defendant’s allegedly infringing use of a service mark on an Internet web page, accessible to residents of plaintiff’s state, was inadequate for personal jurisdiction over the defendant. The court ruled as a matter of first impression that the defendant had not “purposefully availed” itself of the state for jurisdictional purposes through its essentially passive activity of posting a home page without engaging in commercial activity in the forum. *Cybersell, Inc. v. Cybersell, Inc.*

Defamation—Immunity From Suit

As reported at 66 U.S. LAW WEEK 1317, the U.S. Court of Appeals for the Fourth Circuit ruled that provisions of the 1996 Communications Decency Act that shield interactive computer service providers from being treated as publishers of information submitted by another information content

provider afford immunity from defamation suits arising out of statements posted by third parties on an interactive computer service. The court affirms the dismissal of a

held that the licensing of a copyrighted code of medical procedures by the AMA to a federal agency was copyright misuse in that the AMA license required the agency



defamation action against America Online, Inc. It says the plaintiff’s claim of distributor liability is a subset of publisher liability and is therefore included in the statutory grant of immunity. It also holds that the separate claims of negligence based on AOL’s failures to promptly remove a defamatory message and to intercept a second defamatory message are indistinguishable from defamation claims. *Zeran v. America Online, Inc.*

Antitrust — Copyright Misuse

As reported at 43 U.S.P.Q.2d 1611, the U.S. Court of Appeals for the Ninth Circuit

to agree not to use a competing system. *Practice Management Information Corp. v. American Medical Association.*

U.S. DISTRICT COURTS

Patent

As reported at 44 U.S.P.Q.2d 1369, the U.S. District Court for the Northern District of California held on April 2, 1997 that a license to use, modify, and compile a plaintiff’s source code in defendants’ voice recognition software product is a complete



defense to charge of patent infringement. *Apple Computer, Inc. v. Articulate Systems, Inc.*

As reported at 44 U.S.P.Q.2d 1719, the U.S. District Court for the Northern District of Illinois held on August 21, 1997 that accused intravenous solution compounders do not "sort" parameters to be compounded by means of computer as required by claims of patent in suit, and human judgment exercised by operator of accused compounders is not, as matter of law, structure either identical to or equivalent of computer software. *Clintec Nutrition Co. v. Baxa Corp.*

As reported at 44 U.S.P.Q.2d 1627, the U.S. District Court for the Central District of California held on July 3, 1997 that prosecution history estops plaintiff from asserting that the scope of a patent for computer disk drive system covers structure that accomplishes thermal compensation through use of "separate member" rather than relying solely on arrangement, geometry, and selection of materials. *Rodime PLC v. Seagate Technology, Inc.*

As reported in the October 30, 1997 issue of the WALL STREET JOURNAL, Digital settled its computer chip patent infringement suit against Intel for \$1.5 Billion. The sum includes \$700 million for selling semiconductor-manufacturing facilities, plus product discounts and licensing fees worth perhaps \$800 million over a decade. *Digital Equipment Corp. v. Intel Corp.*

Patent—Jurisdiction

As reported at 45 U.S.P.Q.2d 1444, the U.S. District Court for the Southern District of Texas on June 25, 1997 held that a foreign defendant's maintenance of a largely passive Internet website, which could not function as a means by which defendant "purposefully directed" information to Texas, is insufficient basis for exercise of specific personal jurisdiction in a patent infringement action. *Agar Corp. v. Multi-Fluid, Inc.*

Copyright

As reported in 55 BNA's PTCJ 137, the U.S. District Court for the Northern District of Illinois ruled November 13, 1997 that an

Internet service provider was not liable for direct copyright infringement, despite copied material on a web site maintained for its subscriber. In a summary judgment ruling, the court had no difficulty finding the owner of the web site directly liable for infringing computer clip art, but declined to reach the same conclusion for the provider because any copying that occurred was caused by Internet users, not by the provider. However, the court was not impressed by the provider's arguments that software in RAM is not adequately fixed to constitute a copy, and refused to find on summary judgment that the provider is clear of any contributory infringement liability. *Marobie-FL, Inc. v. National Association of Fire Equipment Distributors.*

As reported at 44 U.S.P.Q.2d 1343, the U.S. District Court for the Southern District of New York held on September 17, 1997 that an agreement by which a corporation transferred "all right, title and interest" in computer programs and software to its wholly owned subsidiary transferred copyrights in those works as well as works themselves. *Shugrue v. Continental Airlines, Inc.*

As reported at 44 U.S.P.Q.2d 1842, the U.S. District Court for the Southern District of New York held on November 3, 1997 that a "work for hire" agreement, which unambiguously states that infringement defendants shall own copyrights in computer software at issue, is neither invalid nor unconscionable under 17 U.S.C. § 204(a), even though agreement was executed after plaintiff began work on software. *Zyware, Inc. v. Middlegate, Inc.*

As reported at 44 U.S.P.Q.2d 1441, the U.S. District Court for the Northern District of Illinois held on September 3, 1997 that computer shareware is not transformed for fair use purposes by including it in a compilation of shareware programs labeled the "latest and greatest". What is new is the computation, not the individual works, which themselves have not been transformed, the court explained. Although this and the other statutory factors weighed against a finding of fair use, the court declined to issue a summary judgment. It pointed to fact issues that remained concerning the effect of the compilation on the market for the original shareware, and to the

fact that this is a case of first impression. *Storm Impact, Inc. v. Software of the Month Club.*

As reported at 1997 WL 780957, the U.S. District Court for the Eastern District of Michigan held on December 12, 1997 that an attorney who worked for the city of Detroit owned the copyright to a Litigation Management Software program which he created on his own time using a software package that he bought with his own funds. The attorney later downloaded the program into the city's law department's computer system. The Court found that the attorney did not act within the scope of his employment when he created the software program. The Court stated that the city did not own the copyright in the software program pursuant to the Work Made for Hire provision of the Copyright Act of 1976. The Court found that designing the computer program was not the type of work that the attorney was hired to perform. Rather, the attorney was hired to manage the city's law department. The Court looked to the attorney's job description and also determined that the city never asked the attorney to develop the software. In fact, the attorney had no prior computer programming experience and the city had its own computer programming department to do programming of the type the attorney decided to do on his own. However, the Court did find that there was a genuine issue of material fact as to whether the computer program was a copyrightable work in that, according to the city, the attorney's contribution in making the computer program was simply to customize the user interface of a preexisting computer program in order to adopt it for use in a case management system. *Quinn v. City of Detroit.*

As reported at 1997 WL 755031, the U.S. District Court for the Northern District of Ohio granted on November 25, 1997 plaintiff's motion for summary judgment with respect to claims of direct and contributory copyright infringement by a computer bulletin board system operator. The defendants made available hundreds of graphic image files to paying customers of defendants' bulletin board service which files contained illegal copies of adult photographs from PLAYBOY MAGAZINE. Defen-



dants had adopted an incentive program to encourage their subscribers to upload information into the BBS in order to increase a stockpile of information available to their customers. The uploaded information was held in an upload file where it was briefly screened by defendants' employees before it was released by those employees onto the general BBS. The files which were available on the defendants' BBS contained virtually exact reproductions of copyrighted photographs from PLAYBOY MAGAZINE. These facts transformed the defendants from passive providers of a space in which infringing activities happened to occur to active participants in the process of copyright infringement. *Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc.*

As reported at 45 U.S.P.Q.2d 1827, the U.S. District Court for the Northern District of California on February 2, 1998 held that evidence of creativity involved in designing plaintiff's font software programs warrants finding that programs are entitled to protection under the Copyright Act as original works of authorship. *Adobe Systems, Inc. v. Southern Software, Inc.*

As reported at 55 BNA's PTCJ 315, the U.S. District Court for the Central District of California held on January 30, 1998 that an Internet web site that contains a "framed" link to the copyrighted material on another web site may constitute an infringing derivative work. The court denied the accused infringer's motion to dismiss, reasoning that the case law cited by both parties does not demonstrate conclusively whether the frame page is a derivative work. *Futuredontics, Inc. v. Applied Anagramic, Inc.*

Copyright—Insurance Coverage

As reported at 1998 WL 99639, the U.S. District Court for the

Eastern District of Michigan on March 4, 1998 held that charges of copyright infringement based on the development of a software program was not "advertising injury" for purposes of coverage under a liability insurance policy. The insured software developer argued that by providing a free sample or demonstration version of the program in conjunction with its advertising activities it was entitled to a defense. The Court, however, stated that the program

may not be viewed as an advertisement for itself, or, alternatively, the causal connection requirement had not been met because the free sample did not cause the infringement. *Farmington Casualty Co. v. Cyberlogic Technologies, Inc.*

Trade Secrets—Insurance Coverage

As reported at 55 BNA's PTCJ 356, the U.S. District Court for the Northern District of Illinois on January 23, 1998 held that charges of trade secret misappropriation based on the development of competing software from unauthorized material was not "advertising injury" for purposes of coverage under a liability insurance policy. *Winklevoss Consultants, Inc. v. Federal Insurance Co.*

Trademarks

As reported in the March 25, 1998 issue of the WALL STREET JOURNAL, the U.S. District Court for the Northern District of California ruled on March 24 that Microsoft cannot use Sun's Java logo in any of its marketing material. Microsoft said that it would continue to claim that its software is "Java compatible" but without Sun's logo. More hearings are expected later in the year.

As reported at 44 U.S.P.Q.2d 1764, the U.S. District Court for the Central District of California on July 31, 1997 granted summary judgment that defendants' use of "la-opinion.com" Internet domain name infringes and dilutes plaintiff's federally registered "La





Opinion” mark for Spanish language newspaper. *Lozano Enterprises v. La Opinion Publishing Co.*

As reported at 44 U.S.P.Q.2d 1521, the U.S. District Court for the Central District of California held on September 26, 1997 that plaintiff in an action for infringement and dilution brought against the exclusive registrar of Internet domain names is denied leave to amend complaint to add claim for contributory dilution. *Lockheed Martin Corp. v. Network Solutions, Inc.*

As reported at 55 BNA’s PTCJ 82, the U.S. District Court for the Central District of California held on November 17, 1997 that Network Solutions, Inc.—the exclusive registrar of Internet domain names—does not violate the trademark law by simply registering allegedly infringing names for use on the Internet. The court concluded that registration of a domain name is not a use “in connection with the sale, offering for sale, distribution or advertising of goods or services”, and granted NSI’s motion for summary judgment. *Lockheed Martin Corp. v. Network Solutions, Inc.*

As reported at 54 BNA’s PTCJ 503, the U.S. District Court for the Northern District of Illinois held on September 29, 1997 that trademark misuse may not be asserted as an affirmative claim, but only as a defense to a trademark infringement suit. It dismisses an Internet service provider’s suit alleging that a request to cancel its domain name by a trademark owner in a different line of business constitutes trademark misuse. No American court has applied trademark misuse affirmatively, the court says. Declining to extend the analogy of patent misuse cases, it observes that, unlike patent holders, trademark holders usually do not have the ability to destroy competition. *Juno Online Services L.P. v. Juno Lighting, Inc.*

As reported at 45 U.S.P.Q.2d 1096, the U.S. District Court for the Northern District of Illinois held on November 12, 1997 that a non-resident infringement defendant’s World Wide Web site is insufficient basis for assertion of personal jurisdiction over defendant by federal district court in Illinois. *Transcraft Corp. v. Doonan Trailer Corp.*

As reported at 55 BNA’s PTCJ 163, the U.S. District Court for the Central District of California held on December 11, 1997 that Network Solutions Inc.’s registration of an Internet domain name embodying another party’s trademark does not constitute a commercial use of the mark. The court declined to enjoin the company in charge of registering domain names from registering names that are confusingly similar to the plaintiff’s registered trademarks. *Academy of Motion Picture Arts and Sciences v. Network Solutions, Inc.*

As reported at 45 U.S.P.Q.2d 1860, the U.S. District Court for the District of Oregon on December 12, 1997 held that an infringement plaintiff’s “Top Producer” mark, for computer software programs targeted to real estate industry, is not generic. *Top Producer Systems, Inc. v. Software Sciences Ltd.*

Trademark/Venue

As reported at 1997 WL 722008, the U.S. District Court for the Eastern District of Michigan on November 10, 1997 transferred a

case from the state of Michigan to the state of Florida pursuant to 28 U.S.C. § 1406(a) because venue was not proper with respect to all of the defendants in the state of Michigan. The court found that venue was proper with respect to one of the defendants who operated an Internet web site which was accessible to any computer user in Michigan. The web site contained information about various products including alleged misrepresentations concerning an insulation system at issue in the case. Plaintiff argued that the “passing off” of plaintiff’s product as one of the defendant’s products had occurred in Michigan because Michigan computer users were able to view the alleged misrepresentations in the district. The plaintiff asserted that this led to confusion in the district over the propriety of the insulation system. The Court found that venue was proper with respect to that one defendant because Michigan computer users could view the alleged misrepresentations concerning the insulation system, request more information about the defendant, and even request a direct personal contact from one of the defendant’s sales representatives through the web site. *IA, Inc. v. ThermaCell Technologies, Inc.*

Tort

As reported in the December 19, 1997 issue of the WALL STREET JOURNAL, America Online, Inc. proclaimed a major victory in federal court against a sex-oriented junk e-mail company. The nation’s largest on-line service said Over the Air Equipment, Inc. agreed to pay undisclosed damages and cease sending unsolicited e-mail messages, known as spam, to AOL members. AOL filed its suit in October in federal court in Alexandria, VA against the Las Vegas company, which sends unsolicited e-mail messages to promote adult-oriented Web sites. Over the Air declined to comment. *America Online, Inc. v. Over the Air Equipment, Inc.*

Antitrust

As reported in the November 11, 1997 issue of the WALL STREET JOURNAL, Microsoft said that the Justice Department’s antitrust case against it is aimed at stalling improvements to Windows software and should be thrown out. However, as reported in the December 12, 1997 issue of the WALL STREET JOURNAL, the U.S. District Court for the District of Columbia ordered Microsoft to stop bundling its internet software with its widely used Windows computer operating systems, dealing at least a temporary blow to the software giant’s plans to dominate one of the computer industry’s hotly contested markets. Judge Thomas Penfield Jackson’s order bars Microsoft from requiring personal computer makers that license its operating system to also accept its World Wide Web software. The ruling, a victory for the Justice Department, applies not just to the Windows 95 operating system but to its successors. The judge didn’t find Microsoft in contempt of a 1995 consent decree, however. The Justice Department in October had asked for a \$1 million-a-day fine, alleging that the Redmond, Washington software giant had violated a provision that forbade Microsoft from leveraging its near-monopoly in Windows to benefit its other products. Judge



Jackson appointed a special master, Lawrence Lessig, an authority on Internet law at Harvard University, to review the case and report back to U.S. District Court in Washington, D.C., in May. The order is in effect at least until the special master makes his report and the court revisits the issue. *U.S. v. Microsoft Corp.*

Contracts/Non-Compete Agreement

As reported at 1997 WL 781514, the U.S. District Court for the Eastern District of Michigan held on December 15, 1997 that a non-compete agreement entered into between a Michigan corporation and a California resident was enforceable under Michigan law. The plaintiff had acquired a company named Data ReCall for which the defendant, a California resident, had worked as a sales agent. The defendant then signed an employment agreement with the plaintiff, which agreement contained a covenant not to compete for a period of one year after the termination of her employment with plaintiff. The agreement further contained a confidentiality provision requiring the defendant not to disclose any trade secrets or confidential information of the plaintiff. The agreement also contained a forum selection clause providing that the agreement would be governed by and enforceable in accordance with Michigan law. At all relevant times, the defendant was a resident of California and worked out of an office in California. After terminating her employment with the plaintiff, the defendant accepted employment with Peak Industries, Inc., a direct competitor of plaintiff. The plaintiff filed suit alleging that if the defendant was allowed to work for Peak it would necessarily cause the dissemination of its protected trade secrets and confidential information. The Court determined that Michigan had a substantial relationship to the parties and the transaction since the plaintiff was a Michigan corporation. In addition, the Court found that there was a reasonable basis for choosing Michigan law, namely to ensure that the plaintiff had some certainty in defending its rights in suits with its employees all over the country. The Court also found that California did not have a fundamental policy barring all non-competition clauses since California only invalidated provisions of employment contracts prohibiting an employee from working for a competitor unless they are necessary to protect the employer's trade secrets. The Court found that continuing employment with the plaintiff was sufficient consideration and support of the agreement in the case. The Court found that given the highly competitive nature of the business field, the one-year duration of the employment contract appeared reasonable. As to the geographical limitation, the Court held that the unlimited geographical scope was reasonable in that the plaintiff's business was sufficiently national and international in scope. The plaintiff asserted that the defendant would only be prohibited from selling bar code systems and related products which were only a small part of the market for computer software and products. The Court determined that the defendant was exposed to confidential information in the form of customer lists, profit margins, and pricing schemes. The Court also found that the defendant was not precluded from selling other computer products and appeared to be a well-qualified sales person. *Lowry Computer Products, Inc. v. Head.*

First Amendment

As reported at 66 U.S. Law Week 1555, the U.S. District Court for the Eastern District of Virginia decided that Virginia's ban on state employees' access to sexually explicit materials on state computers except when required for bona fide agency projects violates the First Amendment. *Urofsky v. Allen.*

Criminal Law

As reported at 66 U.S. Law Week 1520, the U.S. District Court for New Jersey declared that an assistant U.S. attorney violated Fed. R. Crim. P. 6(e) and 32 by posting on the Internet, without the court's consent, a sentencing memorandum containing grand jury information. *U.S. v. Smith.*

U.S. PATENT AND TRADEMARK OFFICE

As reported in the January 12, 1998 issue of the WALL STREET JOURNAL, International Business Machines Corp. received more U.S. patents (i.e. 1,724) than any other company in 1997, grabbing the top spot for the fifth consecutive year on a list dominated by Japanese companies. But the number of IBM patents fell 8% from 1996. The decline in patents could hurt what has become a big IBM revenue stream: Its patent portfolio generates about \$1 billion in annual royalties, up from about \$350 million in 1993. IBM executives dismissed the dip in patents as a "statistical aberration". Marshall Phelps, Jr., Vice President of intellectual property and licensing, said IBM patent applications jumped 25% last year and were running at a "historic high". Some of IBM's research successes last year were well chronicled. It received 50 patents for a breakthrough that could sharply boost the power of computer chips by using copper instead of aluminum. Other IBM patents covered techniques to extend battery life in laptop computers and discover viruses on the Internet. IBM said nearly a third of its U.S. patents last year were software-related and 15% were related to network computing.



By Anthony A. Targan, Esq.
R. L. Polk & Co.

Signs of the Times— The Uniform Electronic Transaction Act and Electronic Signatures

According to handwriting experts, the way a person signs his or her name is uniquely individual to each one of us. Evidence of a person's signature is often the key indication of whether a transaction was authorized or a contract formed. But in the current computer age, what if the person "signs" his name by pointing and clicking on a computer screen instead of putting pen to paper? And what if the "person" signing is not human at all, but is instead a computer or "electronic agent"? These are some of the questions raised and hopefully answered by the draft Uniform Electronic Transaction Act (the "UETA"), which is currently under consideration and review by the Drafting Committee of the National Conference of Commissioners on Uniform State Laws. (See March 23, 1998 Draft and related materials which can be found at <http://www.law.upenn.edu/library/ulc/ulc.htm>.)

One underlying objective of the UETA is to facilitate electronic commerce by promoting the acceptability and enforceability of electronic signatures. It goes without saying that if people lack a basic level of confidence in the authenticity and security of electronic signatures, it will undermine their trust in electronic commerce generally. The drafters of the UETA have recently expanded the scope of the UETA to apply to *all* electronic writings and signatures unless specifically excluded. At the same time, however, the UETA is "fundamentally a procedural statute to effectuate transactions accomplished through an electronic medium," and is not intended to supersede the underlying substantive law of contracts or commercial transactions. (Reporter's Memorandum at 1, 3).

The essential premise of the UETA is that a "signature may not be denied legal effect, validity, or enforceability solely because it is an electronic signature," and not in paper form. (Section 301(a).) An electronic signature is "any symbol or methodology adopted with intent to sign a writing" and can even take the form of "'point and click' processes in on-line and on-screen programs." (Reporter's Notes 1 and 3 to Section 302.) An electronic signature can establish the signing

party's identity, its acceptance of a record, and the integrity of the informational content contained in a record. (Section 302(a).) One hotly debated aspect of the draft UETA is the creation of legal presumptions concerning the effect of an electronic signature. In its current draft, the UETA provides for limited, "bursting bubble" rebuttable presumptions that if an electronic signature is adopted in accordance with a "commercially reasonable security procedure for validating electronic signatures," the signature is "presumed to be authentic and authorized" and is "presumed to be signed by the person to whom the electronic signature correlates." (Section 302(b).)

Another significant aspect of the UETA deals with Electronic Agents, which are defined in Section 102 as "a computer program or other electronic or automated means used, selected, or programmed by a person to initiate or respond to electronic records or performances in whole or in part without review by an individual." The UETA contemplates the somewhat Orwellian possibility that computers may be able to manifest assent on behalf of their human counterparts, and even among themselves, without the intervention of human beings! As explained in the Reporter's Note to Section 102, "An electronic agent by definition is capable, within the parameters of its programming, of initiating, responding or interacting with other parties or their electronic agents once it has been activated by a party, without further attention of that party. This draft contains provisions dealing with the efficacy of, and responsibility for, actions taken and accomplished by electronic agents *in the absence of human intervention.*" (Emphasis added). Under Section 303, Operations of Electronic Agents, a party is bound by the actions of its electronic agent and is deemed to have signed electronic records resulting from the operations of its electronic agents. This raises the question, do you know what your computer's been up to while you're away?



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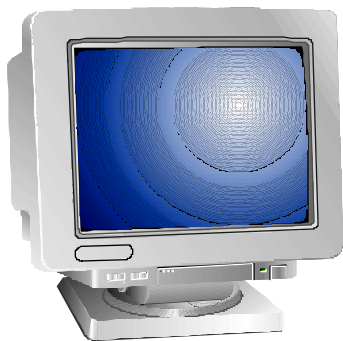
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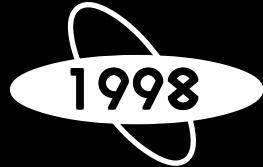
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By Deborah W. Alper
Technology Licensing Specialist

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