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Michigan COMPUTER LAWYER

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http://www.michbar.org/sections/computer/

State Bar of Michigan Computer Law Section


# Internet Privacy: *Issues and Solutions*

Wednesday, September 12, 2001 at 2:30 p.m. (immediately following our annual business meeting), with a knowledgeable panel of speakers, including Joan Trusty, Esq., of EDS. The meeting will be held during the 66th Annual Meeting of the State Bar of Michigan in Lansing.

## Congratulations to the Winners of the 2000 Edward F. Langs Writing Competition

**First Place**
$500
*James McNeil*
Windsor, Ontario

**Second Place**
$300
*Nina Korkis*
Sterling Heights, Michigan

**Third Place**
$200
*Jin-Hui Han*
Ottawa, Canada

# Is the CLS an Antedote to Lawyer Jokes?

Do you have days when it's hard to remember the dignity and majesty of our profession? When you discover that your opposing counsel abhors the new rules on civility; when you need 10 hours to finish that emergency project on your desk, but it's due at Noon today; when your physician tells you a particularly sinister lawyer joke, just as he's starting a proctologic exam: are these times when you wonder whether you should have taken that job counting coconuts in Maui?

It *is* easy to get mired in the day-to-day pressures of practice. That makes it especially important to re-charge your emotional and intellectual batteries regularly. A convivial meeting with colleagues, or an informative seminar, works wonders towards reminding us of the many fine aspects of this profession.

For years, many of your colleagues have found the Computer Law Section (CLS) an effective forum for recharging those batteries. The CLS has provided pleasant dinners with colleagues, informative seminars, interesting newsletters (like the one you hold in your hand), and opportunities to study and exchange ideas in an expanding field. It has offered a way for busy lawyers to remember why we chose this profession in the first place.

This year, the CLS has been especially active. We have presented a number of speakers (on UCITA, on interdisciplinary practice, and on raising venture capital; we'll also present a panel on Internet Privacy at the Annual meeting on September 12), put together a theme issue of the Michigan Bar Journal (publication is later this year), instituted a scholarship program for computer-related CLE, and awarded the Edward Langs writing award (see *infra*). In addition, our many committees have continued to function well, offering members opportunities to explore their particular interests.

I hope that you have been able to enjoy some of these projects, and invite you to actively participate in the CLS. If you would like more information, or would like to become more active, please contact me, or any other member of the CLS Council.

*Larry Jordan, chair*

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# 2002 Edward F. Langs Writing Award
# ESSAY COMPETITION RULES

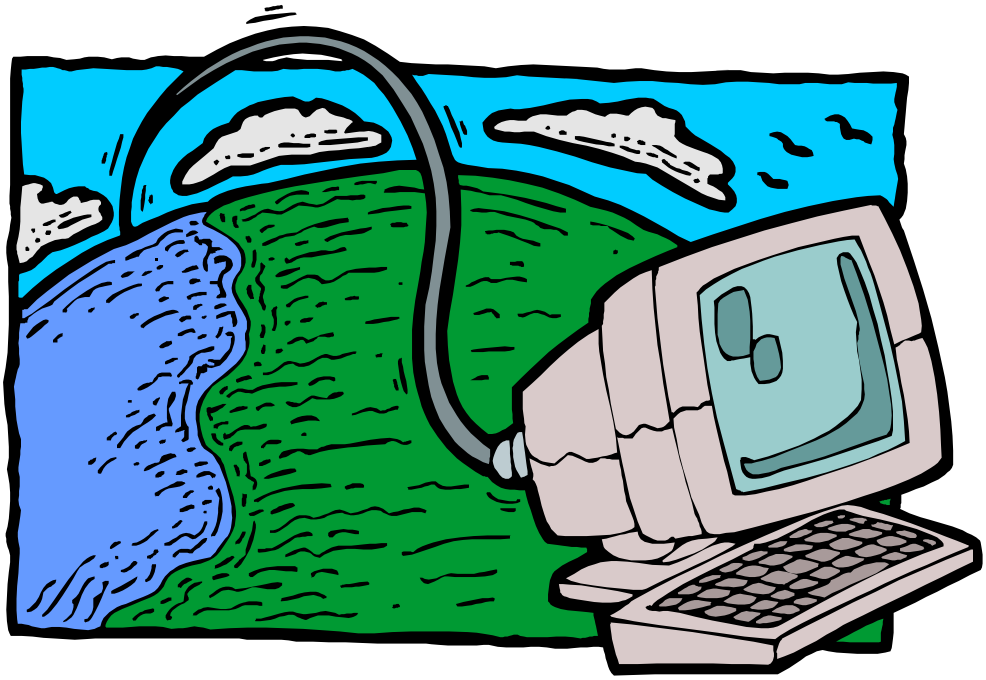
1. The award will be given to the student article, which in the opinion of the judges makes the most original and significant contribution to the knowledge and understanding of current computer law issues. The article should demonstrate original, creative and useful thought and insight into the law relating to computers.
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 (8½ by 11 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.
11. The entry must be post-marked by June 30, 2002.
12. Entries are to be mailed to:
    David R. Syrowik, Chairman
    Computer Law Section Essay Competition
    Brooks & Kushman P.C.
    1000 Town Center, 22nd Floor
    Southfield, Michigan 48075

# Computer Law Section

# Cyberspace went down to Dayton

*Kimberly A. Paulson*
*Miller, Canfield, Paddock and Stone, P.L.C.*

On June 8, 2001, the University of Dayton School of Law held its twelfth annual Advanced Computer and Cyberspace Law Seminar. As usual, the seminar featured a variety of speakers from all over the country. Adding to the diversity and breadth of the seminar, "techies" were represented as well as lawyers. In total, thirteen different presentations were available to attendees, limited only by the necessity of choosing only two of four available breakout sessions. Due to space restrictions, I am unable to review the substance of each presentation in this article. However, each year certain implicit themes emerge from the seminar; this year was no exception. Such themes usually arise from the nature of the highly publicized cases, statutes, and controversial practices that have defined Cyberspace law during the past year. In a year filled with Napster, DeCSS, and DoubleClick, one is left to wonder how the law can ever keep up with cyberspace—or if it should. Whether intentional or not, this seemed to be a common theme of this year's seminar, and it is one I will explore here in more depth.



## Technology vs. Law

In the nineties it became clear that the law was lagging far behind technology. The emergence of the Internet as a mainstream commerce vehicle and the inevitable abuses and concerns emerging from new technology left lawmakers and judges scratching their heads. Years later, we still have not determined the best way to address legal issues involving new technology. Do we simply apply existing law, twisting and squeezing it to fit an inherently different high-tech landscape? Perhaps we make entirely new laws that specifically address high-tech concerns and hope that they will not be obsolete before they can be signed into law. Is it a better solution to simply make modifications to existing laws to promote continuity while addressing new high-tech concerns? Of course, some believe that the government should just leave Cyberspace alone and let it regulate itself. While the Dayton seminar did not reach a conclusion on this issue, it promoted a variety of views that fall at different points on the spectrum of public opinion.

## Fight Fire With Fire

Fittingly, the first presentation of the seminar, given by Andy Johnson-Laird, a forensic software analyst and perennial Dayton favorite, was entitled "New Technologies and the Legal Issues They Raise." Mr. Johnson-Laird discussed the concept of "cyberspace as battlefield" in reference to the ease of anonymously attacking computer targets to steal information, vandalize or shut down a site, gather intelligence, or make a political or social statement. Whatever the motivation, the devastating effects on the targeted computer system are the same. This is one situation where no laws can adequately address or remedy the problem. Once a hacker has hit, the damage is done. The laws

*Continued on page 10*

# Recent Developments In Computer Law

*By David R. Syrowick*
*Brooks & Kushman P.C., Southfield*

## U.S. SUPREME COURT

### Antitrust

As reported in the September 27, 2000 issue of the WALL STREET JOURNAL, the Supreme Court decided against an early review of the Microsoft antitrust case and said that the D.C. Circuit Court of Appeals should hear the appeal first. *Microsoft Corp. v. U.S.*

## U.S. COURT OF APPEALS

### Patents

As reported at 60 BNA's PTCJ 303, on August 2, 2000 the Court of Appeals for the Federal Circuit held that conflicting expert testimony on the operation of an accused computer program that scans data to detect computer viruses created fact issues that barred a summary judgment of no literal infringement. *Hilgraeve Corp. v. McAfee Associates, Inc.*

### Copyright

As reported at 60 BNA's PTCJ 278, on July 28, 2000 the U.S. Court of Appeals for the Ninth Circuit stopped a preliminary injunction set to shut down the Napster music site on the Internet pending appeal. The ruling derailed a district court order that Napster would have to close down its music exchange service if it were unable to prevent users from trading copyrighted music. Ninth Circuit Judges Alex Kozinski and Barry Silverman found that the appeal had raised "substantial questions of first impression going to the merits and form of the injunction. *Napster, Inc. v. A&M Records, Inc.*

Later, as reported at 60 BNA's PTCJ 392, the Copyright Office and the Patent and Trademark Office filed an amicus brief in the Ninth Circuit Napster case, arguing that Section 1008 of Title 17 provides Napster no immunity for its activities. The statute, according to the brief, prohibits infringement actions for making digital recordings, but not for distributing digital recordings. Napster's reply brief challenges the government's narrow reading of the Section 1008 immunity provisions. *A&M Records, Inc. v. Napster*.

As reported at 55 USPQ2d 1643, the U.S. Court of Appeals for the Fifth Circuit held on July 25, 2000 that plaintiff failed to show that defendants' computer program, used for pricing in picture framing industry, is substantially similar to plaintiff's copyrighted program, or that defendants misappropriated substantial elements of plaintiff's program. *Computer Management Assistance Co. v. Robert F. DeCastro, Inc.*

As reported at 56 USPQ2d 1312, the U.S. Court of Appeals for the Fifth Circuit held on September 14, 2000 that infringement plaintiff that submitted copies of later versions of source code to the Copyright Office, rather than original source codes for its software, did not deposit two complete copies of works as required by 17 U.S.C. § 408(b), and therefore failed to comply with statutory formalities necessary to establish its ownership of works in issue. *Geoscan, Inc. v. Geotrace Technologies, Inc.*

### Trademarks

As reported at 60 BNA's PTCJ 648, the U.S. Court of Appeals for the Federal Circuit ruled on October 10, 2000 that substantial evidence supports the Trademark Trial and Appeal Board's decisions on likely confusion and abandonment involving the marks "On-Line Today" and "Online Today" application. *On-Line Careline, Inc. v. America Online, Inc.*

As reported at 55 USPQ2d 1441, the U.S. Court of Appeals for the Ninth Circuit held on August 18, 2000 that a federal court in California has specific personal jurisdiction over defendant in an action in which plaintiff seeks declaratory judgment establishing its rights to use "masters.com" Internet name, and in which defendant's forum-related conduct, in the form of a letter triggering domain name dispute resolution procedure, forced plaintiff to either bring suit or lose use of its World Wide Web site. *Bancroft & Masters, Inc. v. Augusta National, Inc.*

As reported at 55 USPQ2d 1158, the U.S. Court of Appeals for the Fourth Circuit vacated an order on June 9, 2000 dismissing an *in rem* suit against Internet domain names to permit a federal district court to consider *in rem* provisions of Anticybersquatting Consumer Protection Act, which was enacted during pendency of appeal. *Porsche Cars North America, Inc. v. allporsche.com*

**Telecommunications**

As reported at 69 BNA's U.S. Law Week 1044, on June 22, 2000 the U.S. Court of Appeals for the Third Circuit held that the Child Online Protection Act sweeps too broadly to pass constitutional muster because of its focus on "contemporary community standards" to determine whether material on the Internet is harmful to minors. *ACLU v. Reno*.

As reported at 69 BNA's U.S. Law Week 1030, the U.S. Court of Appeals for the Ninth Circuit recently held that the provision of Internet service over cable broadband facilities is a "telecommunications service" under the Communications Act, not a cable service subject to local franchise authorities. *AT&T Corp. v. Portland, Ore*.

**First Amendment**

As reported at 69 BNA's U.S. Law Week 1029, on June 23, 2000, the U.S. Court of Appeals for the Fourth Circuit held en banc that a Virginia statute that prohibits state employees from accessing sexually explicit materials on state computers without prior permission does not trammel First Amendment free speech rights. *Urofsky v. Gilmore*.

**Securities Regulation**

As reported at 50 BNA's Electronic Commerce and Law 1037, the U.S. Court of Appeals for the Second Circuit recently held that the vendor of a computer program billed as an automatic system for trading currency futures is a "commodity trading advisor" who may be compelled to register under the Commodity Exchange Act without violating free speech rights. *Commodity Futures Trading Commission v. Vartuli*.

**Criminal**

As reported at 5 BNA's Electronic Commerce and Law 1111, the U.S. Court of Appeals for the Ninth Circuit recently held that an affidavit stating that files had been sent to a computer from a child pornography dealer and providing general information about the habits of collectors and pedophiles need not show that defendant is a collector or pedophile to make out probable cause for a search. *United States v. Hay*.

## U.S. DISTRICT COURTS

**Copyright**

As reported at 55 USPQ2d 1436, the U.S. District Court for the Eastern District of Pennsylvania held on July 12, 2000 that the defendant is liable as a matter of law for infringement of plaintiff's copyright in stenography computer software, since plaintiff's copyright registration is *prima facie* evidence of validity and ownership of copyright, and since defendant has admitted to using software, which renders defendant liable; first sale doctrine does not provide defense to plaintiff's claims for conversion. *Stenograph L.L.C. v. Sims*.

As reported at 60 BNA's PTCJ 397, the U.S. District Court for the Southern District of New York on September 6, 2000 held that MP3.com's willful copyright infringement by launching service that involved unauthorized copying of CDs which were then made available to defendant's customers for downloading in "MP3" music files, entitled the plaintiff record company to a statutory damages award of $25,000 per CD. *UMG Recordings, Inc. v. MP3.com, Inc.*

As reported at 60 BNA's PTCJ 354, the U.S. District Court for the Southern District of New York held on August 17, 2000 that distribution of a computer code that allows users to decrypt and replicate copyrighted DVD movies is a violation of the Digital Millennium Copyright Act. In a 90-page ruling, the court permanently enjoining a "hacker" magazine from posting and linking to the DeCSS decryption software on its Internet web site, refusing to apply the DMCA's statutory exemptions for reverse engineering and research. The court also rejected the contention that the prohibitions of the DMCA violate the First Amendment by prohibiting the dissemination of computer software as speech. *Universal City Studios, Inc. v. Reimerdes*.

As reported at 60 BNA's PTCJ 360, the U.S. District Court for the Central District of California recently held that the fair use doctrine permits Internet "spiders" to make temporary copies of web pages to extract and republish factual information. *Ticketmaster Corp v. Tickets.com, Inc.*

**Patents**

As reported at 55 USPQ2d 1208, the U.S. District Court for the Western District of Texas held on May 30, 2000 that an accused computer mouse that does not meet "negative slope" limitation of asserted claims ofppatents for ergonomically superior computer mouse does not infringe patents in suit either literally or under the doctrine of equivalents. *Goldtouch Technologies, Inc. v. Microsoft Corp.*

As reported at 55 USPQ2d 1420, the U.S. District Court for the Eastern District of Virginia held on June 27, 2000 that the prosecution history of a patent for computerized fantasy football game, which shows that scoring methods referenced in prior art, including those awarding points for yardage gained, were not contemplated as awarding "bonus points" as that term is used in claims at issue, precludes finding that accused games infringe patent for game that awards "bonus points" for certain players. *Fantasy Sports Properties, Inc. v. Sportsline.com, Inc.*

**Patents—Transfer of Action**

As reported at 55 USPQ2d 1220, the U.S. District Court for the District of Columbia held on June 26, 2000 that the interests of justice warrant transfer of patent, antitrust, and defamation action from District of Columbia to Northern District of California, since most facts and issues in present action are identical or closely related to those considered and decided by California court in plaintiff's earlier patent infringement action . *Reiffin v. Microsoft Corp.*

As reported at 56 USPQ2d 1144, the U.S. District Court for the Southern District of New York held on August 14, 2000 that while selection and arrangement of materials in plaintiff's licensing directories are sufficiently original to warrant copyright protection, plaintiff has not demonstrated likelihood of succeeding on merits of its claim that directories are infringed by defendant's computerized database directory of licensees and licensors. *EPM Communications, Inc. v. Notara, Inc.*

**Copyright—Jurisdiction**

As reported at 60 BNA's PTCJ 284, the U.S. District Court for the Eastern District of Michigan held on July 24, 2000 that the sale by a Texas resident of allegedly infringing items on the e-Bay Internet auction site to Michigan residents did not create personal jurisdiction in Michigan over the Texas resident. McCauley has an Internet web site and on occasion has made mail-order purchases of Winfield's patterns, using them to make crafts that she has then sold to the public. In 1999, she used the e-Bay Internet auction site to sell to Michigan residents some of her craft goods that were based on Winfield's designs. Winfield sued McCauley for copyright infringement in Michigan. Granting a motion to dismiss, the court held that the defendant lacked "minimum contacts" with the state because the defendant had no control over who the winning bidders were. In addition, the court was not persuaded that there was a sufficient level of "interactivity" to establish that the defendant purposefully availed herself of the privilege of doing business in Michigan. *Winfield Collection Ltd. v. McCauley*.

**Trademarks—Jurisdiction**

As reported at 55 USPQ2d 1560, the U.S. District Court for the Eastern District of Virginia held on July 13, 2000 that Internet domain name registration agreements between defendant and domain name registrar located in Virginia for exercise of personal jurisdiction over non-resident defendant in action brought under Anti-Cybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d), and neither circumstances of agreements' execution, nor relationship of agreements to forum, are sufficient to establish personal jurisdiction. *America Online, Inc. v. Huang*.

As reported at 55 USPQ2d 1735, the U.S. District Court for the Eastern District of Virginia held on July 24, 2000 that the registration of a domain name with a Virginia registrar is not a sufficient minimum contact for personal jurisdiction and thus cannot defeat *in rem* jurisdiction under the Anticybersquatting Consumer Protection Act. Finding that the *in rem* domain name suit may proceed, the court adopted the reasoning of the week-old *America Online, Inc. v. Huang* ruling that personal jurisdiction in Virginia cannot be based solely on Virginia domain name registration. The court noted the *in rem* plaintiff's burden of proving no personal jurisdiction and required that the plaintiff exercise "due diligence" in attempting to uncover information about the putative cybersquatting defendant. *Heathmount A.E. Corp. v. Technodome.com*.

As reported at 55 USPQ2d 1426, the U.S. District Court for the Southern District of New York held on July 7, 2000 that bad faith intent to profit is a necessary element of *in rem* action against Internet domain name, in which plaintiff alleges cyberspiracy in violation of 15 U.S.C. § 1125(d)(1), since breadth of *in rem* statute is narrowed by bad faith element, such that *in rem* action against Internet domain name does not extend to innocent registration of name by someone who is aware of name's trademark status, but registers domain name containing mark for any reason other than with bad faith intent to profit. *BroadBridge Media L.L.C. v. Hypercd.com*.

As reported at 56 USPQ2d 1048, the U.S. District Court for the Eastern District of Virginia held on August 15, 2000 that a domain name owner's bad faith intent to profit is a necessary element of an *in rem* action under the Anticybersquatting Consumer Protection Act. Dismissing an ACPA claim, the court rejected the contention that Congress meant the *in personam* and *in rem* causes of action under the statute to be separate with distinct elements, and held instead that Sections 43(d)(1) and 43(d)(2) of the Lanham Act must be read together. The court admitted that the bad faith requirement may be difficult in a default proceeding, but noted that one of the factors under the statute indicating bad faith is the registrant's failure to keep a current address on record. *Harrods Ltd. v. Sixty Internet Domain Names*.

As reported at 56 USPQ2d 1150, the U.S. District Court for the Eastern District of New York held on July 24, 2000 that defendant's maintenance of World Wide Web site accessible from New York is insufficient, without more, to establish "solicitation" for purposes of personal jurisdiction under New York's long-arm statute, and there is no evidence that defendant derives substantial revenue from interstate commerce as required for exercise of personal jurisdiction. *Telebyte, Inc. v. Kendaco, Inc.*

As reported at 60 BNA's PTCJ 322, the U.S. District Court for the Northern District of Texas held on July 25, 2000 that an interactive web site that permitted Texas residents to order products online was insufficient to establish jurisdiction over the site operator because no products were actually sold to forum residents. *People Solutions, Inc. v. People Solutions, Inc.*

**Trademarks**

As reported at 60 BNA's PTCJ 399, the U.S. District Court for the Northern District of Ohio recently held that the National Football League's exclusive use of its own trademarks as registered domain names does not restrain trade or create an unlawful monopoly under the Sherman Act. In May 1997, plaintiff Steven Weber registered with Network Solutions, Inc. the domain names jets.com and dolphins.com then listed these names for sale on his web site, domainsale.com. When the NFL challenged the registration, Weber ultimately filed suit against the NFL, claiming that the NFL "(1) wrongfully exercis[ed] control over his property (2) unlawfully restrain[ed] trade in Ohio and elsewhere, (3) tortiously interfer[ed] with plaintiff's business relationships, and (4) abus[ed] their rights as trademark holders." He later asserted that the NFL violated the Sherman Act by creating a restraint on trade and an unlawful monopoly, 15 U.S.C. § § 1, 2. *Weber v. National Football League*.

As reported at 55 USPQ2d 1217, the U.S. District Court for the Northern District of Iowa held on May 9, 2000 that defendant's use of trademark "Ford Financial Solutions" and Internet domain name "fordfinancialsolutions.com" infringes and dilutes plaintiff's "Ford" name and trademarks, since defendant's financial services are similar to and compete with plaintiff's financial services, and since consumers are likely to begin associating both plaintiff and defendant with financial services offered in connection with "Ford" mark. *Ford Motor Co. v. Ford Financial Solutions, Inc.*

As reported at 55 USPQ2d 1620, the U.S. District Court for the Southern District of New York held on July 13, 2000 that defendants' registration and use of Internet domain name "barbiesplaypen.com" for "adult" entertainment World Wide Web site, with bad faith intent to profit from plaintiff's "Barbie" trademarks, constitutes cybersquatting and dilution of plaintiff's marks in violation of the Anticybersquatting Consumer Protection Act and Federal Trademark Dilution Act. *Mattel, Inc. v. Internet Dimensions, Inc.*

As reported at 5 BNA's Electronic Commerce and Law 1016, the U.S. District Court for the District of Minnesota recently held that a web site operator's registration and use of a domain name containing a character string identical to an insurance company's trademark, for the purpose of criticizing the insurance company and not for commercial gain, does not infringe the mark. The court also holds that the web site operator did not violate the Anticybersquatting Consumer Protection Act, because he lacked a bad faith intent to profit from his registration and use of the domain name. *Northland Ins. Cos. v. Patrick Blaylock*.

As reported at 5 BNA's Electronic Commerce and Law 1109, the U.S. District Court for the Eastern District of Pennsylvania recently held that the registration of misspellings of trademarks as domain names, for the purpose of attracting consumers to a web site by deception, demonstrates a bad-faith intent to profit from misspelled trademarks. *Electronics Boutique Holdings Corp. v. Zuccarini*.

As reported at 5 BNA's Electronic Commerce and Law 1015, the U.S. District Court for the Southern District of New York recently held that the Anticybersquatting Consumer Protection Act does not apply where the operator of a web site has used another person's trademark in the metatags of the site but not in the domain name. The court finds that this interpretation is clear from the plain language of the statute. The court's opinion is the first federal court decision to expressly state that the ACPA does not apply to metatags. *Bihari v. Gross*.

As reported at 5 BNA's Electronic Commerce and Law 923, the U.S. District Court for the Eastern District of Virginia recently held that because at the time of registration the operator of peta.org thought he had a legitimate First Amendment right to express himself by creating a parody of the People for the Ethical Treatment of Animals. A cyberspatter's conduct did not rise to the level of willful infringement of the PETA trademark sufficient to warrant attorneys fees. *People for the Ethical Treatment of Animals, Inc. v. Doughney*.

As reported at 60 BNA's PTCJ 664, the U.S. District Court for the Central District of California recently held that there is no per se First Amendment safe harbor for obtaining domain names that feature a company name followed by "sucks.com". *Lucent Technologies, Inc. v. Johnson*.

**Unfair Competition**

As reported at 5 BNA's Electronic Commerce and Law 920, the U.S. District Court for the District of Connecticut recently awarded a small software development company $1 million in punitive damages against Microsoft Corp. for misleading the developer into thinking that future versions of Windows would remain compatible with cross-platform software written by the developer in violation of a Connecticut unfair competition statute. The court found that statements made by Microsoft executives about the company's future plans to support technologies that would enable software developers to write cross-platform software applications were akin to "bait-and-switch" tactics. *Bristol Technologies, Inc. v. Microsoft Corp.*

**Interstate Commerce**

As reported at 5 BNA's Electronic Commerce and Law 1035, the U.S. District Court for the Southern District of New York recently held that a trial may be necessary to decide whether a New York law that restricts the activities of out-of-state Internet-based vendors of alcoholic beverages is a permissible exercise of the state's authority under the 21st Amendment. If at trial it were demonstrated that the law had a purpose of illegitimately favoring in-state dealers, then such a law may

be found to impose an undue burden on interstate commerce, the court said. *Swedenburg v. Kelly*.

**Interference with Contract—Personal Jurisdiction**

As reported at 2000 U.S. Dist. Lexis 372, the U.S. District Court for the Western District of Michigan recently held that personal jurisdiction was proper over an individual defendant who maintained an Internet site entitled "Amway: The Untold Story." Amway asserted that the court had limited personal jurisdiction over the defendant based upon the fact that defendant's actions caused tortious consequences to occur in Michigan.

In reviewing whether the maintenance of his web site concerning Amway was sufficient to allow the exercise of personal jurisdiction, the court applied a sliding scale approach. Defendant argued that his site was a passive web site and did not provide sufficient grounds for the court to establish personal jurisdiction over him.

The court noted that if jurisdiction were based upon a defendant's mere presence on the Internet, a defendant would be subjected to jurisdiction on a worldwide basis and the personal jurisdiction requirement as they currently exist would be eviscerated. To establish personal jurisdiction, there must be something more to indicate that the defendant purposely (albeit electronically) directed his activity in a substantial way to the forum state. That something more can be supplied by the effects doctrine. The doctrine provides that, in tort cases, jurisdiction may attach if the defendant's conduct is aimed at or has an effect in the forum state. The court examined Amway's tortious interference claim based on the defendant's allegedly placing defamatory statements on the web site with the intent to cause harm in Michigan.

Applying the effects test, the court considered the following elements of proof:

1. Whether the defendant committed an intentional tort;
2. Whether the plaintiff felt the brunt of the harm in the forum, such that the forum was the focal point of the harm suffered; and
3. Whether the defendant expressly aimed his tortious conduct at the forum, such that the forum can be said to be the focal point of the tortious activity.

The court concluded that all three prongs were met and found personal jurisdiction had been established.

**Content Regulation**

As reported at 5 BNA's Electronic Commerce and Law 1058, the U.S. District Court for the Southern District of Indiana recently held that a local law that makes it unlawful to permit minors unaccompanied by an adult to view video games containing "graphic violence" does not likely violate the First Amendment.

**Antitrust**

As reported at 5 BNA's Electronic Commerce and Law 1107, the U.S. District Court for the Middle District of Florida recently held the PGA Tour likely has a protectable property interest in "real time" information on professional golfers' scores that it collects and transmits to PGA-affiliated web sites. On the basis of this conclusion, the court denies a newspaper chain's claim that restrictions the PGA placed on retransmission of its "real time" data violates federal antitrust laws. The court distinguishes this case from *National Basketball Association v. Motorola, Inc.*, which rejected a claim to hot news protection of basketball scores. *Morris Communications Corp. v. PGA Tour, Inc.*

## U.S. PATENT AND TRADEMARK OFFICE

**Trademarks**

As reported at 56 USPQ2d 1060, the Trademark Trial and Appeal Board on August 14, 2000 ruled that applicant's "ATMLINK" is generic term for computer hardware components used for enabling connection of asynchronous communication networks, in view of undisputed evidence that "ATM" is acronym for "asynchronous transfer mode," and that "link" for ATM system is hardware which provides connection or path for ATM transmissions. *In re 3Com Corp.*

## THE STATES

**Case Law**

**Illinois—Content Regulation**

As reported at 5 BNA's Electronic Commerce and Law 1057, an Illinois State Court recently held that a web site that essentially created a marketplace for vote-buying likely violates Illinois and federal election laws, issuing an injunction shutting down the site. *Board of Election Commissioners of the City of Chicago v. Bernhard* (Ill. Cir. Ct., Cook Cty.).

**New York—Trademark**

As reported at 60 BNA's PTCJ 321, the New York Supreme Court, Suffolk County, held on June 27, 2000 that the federal cybersquatting act does not apply to state claims of domain name misappropriation. *Electronic Funds & Data Corp. v. Zlobec*.

**Tennessee—Contract**

As reported at 5 BNA's ELECTRONIC COMMERCE AND LAW 1017, a Tennessee Court of Appeals held on September 21, 2000 that a contract for hardware and software allegedly given to a licensee on a "take it or leave it" basis is not a contract of adhesion. The "conclusory" statements of one party are not enough to show that an agreement is an adhesion contract. *Wilson Pharmacy, Inc. v. General Computer Corp.*

**Statutes**

**Michigan—Internet Access**

Michigan Senate Bill 936, enacted in June, requires the state's public libraries to adopt and enforce a policy that restricts minors' access to the Internet, starting October 1, 2000. The legislation's goal is to prevent a minor from viewing obscene matter or sexually explicit matter that is harmful to minors. The Bill reads as follows:

> AN ACT to amend 1982 PA 455, entitled "An act to provide for the confidentiality of certain library records; and to provide for the selection and use of library materials," by amending section 6 (MCL 397.606), as added by 1999 PA 37.
>
> *The People of the State of Michigan enact:*
>
> Sec. 6. (1) If a library offers use of the Internet or a computer, computer program, computer network, or computer system to the public, the governing body of that library shall adopt and require enforcement of a policy that restricts access to minors by providing the use of the Internet or a computer, computer program, computer network, or computer system in 1 of the following ways:
>
> (a) Both of the following:
>
> (i) By making available, to individuals of any age, 1 or more terminals that are restricted from receiving obscene matter or sexually explicit matter that is harmful to minors.
>
> (ii) By reserving, to individuals 18 years of age or older or minors who are accompanied by their parent or guardian, 1 or more terminals that are not restricted from receiving any material.
>
> (b) By utilizing a system or method that is designed to prevent a minor from viewing obscene matter or sexually explicit matter that is harmful to others;
>
> (2) A governing body of a library, member of a governing body of a library, library, or an agent or employee of a governing body of a library or library, is immune from liability in a civil action as provided in section 7 of the revised judicature set of 1961, 1961 PA 236, MCL 691.1407.
>
> (3) This section does not apply to a library established by a community college district, a college or university, or a private library open to the public.
>
> Enacting section1. This amendatory act takes effect October 1, 2000.

**Delaware—Corporate Law**

As reported at 69 U.S. LAW WEEK 2051, changes wrought by amendments to the Delaware General Corporation Law will enable corporations to take advantage of evolving communications technology. Effective July 1, 2000, Delaware corporations are allowed to conduct stockholder meetings, obtain written consent, and fulfill notice requirements online.

## FOREIGN

**Europe—Software Patents**

As reported in the September 13, 2000 issue of the WALL STREET JOURNAL, an administrative board for the European Patent Office has voted 10-9 to allow patents for software in Europe, with a final decision coming in November at a conference of all the countries represented by the Office. Software patents are available in the U.S. and Japan, and multinational companies have been arguing for unlimited patenting as part of a uniform global legal framework. Critics, however, fear that large companies will use the patenting process as a tool to squelch innovative technologies that threaten their standard products. Among the dissenting countries were Germany, the U.K. and France. The head of the German delegation expressed his reservations over the change: "We would have problems with the U.S. tendency to patent everything that can be patented. That would stifle innovation and cause a glut of litigation."

## Cyberspace went down to Dayton

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may allow recovery after the fact, but that is only if the anonymous hacker can be identified and is not judgment-proof. Even criminal penalties are not particularly satisfying when a major corporation has been damaged to the tune of millions of dollars. What, then, does Mr. Johnson-Laird recommend? He suggests that only more technology can properly address this high-tech concern. Since hackers are generally able to access computers due to known weaknesses in the software caused by programming errors, information, research, and the eventual creation of better and safer software are key. Continued maintenance, monitoring, and updating of hardware and software security measures are, at this time, the best protection in what is otherwise a hacker's paradise.

Also expounding the view that more technology is the answer to Internet concerns was Stanton McCandlish of the Electronic Frontier Foundation, who addressed the issue of spam. Mr. McCandlish reviewed the handful of bills pending in Congress, most of which place restrictions on the amount and manner of sending spam. While apparently many privacy advocates do not believe that the anti-spam bills go far enough since most would require an "opt-out," Mr. McCandlish explained why he believed they went too far. First Amendment concerns figured foremost in his reasoning, as the definition of spam in most of the bills is allegedly very broad. Further, he noted, the proposed federal laws would trump state laws, many of which already provide good protection, and may actually reduce an individual's rights. An additional criticism of the proposed laws is that, according to Mr. McCandlish, they were, for the most part, written by ISP's, and as a result give ISP's far more rights and remedies than the individual users. In conclusion, Mr. McCandlish explained that investment in better filters and other technological developments to allow the users to control spam themselves is the real solution, not new laws.

### If It Ain't Broke, Why Fix It?

On the other end of the spectrum, Bruce E. H. Johnson, a partner with the law firm of Davis Wright Tremaine, discussed the application of traditional notions of property rights to activity in cyberspace. Referring to "cyberproperty," Mr. Johnson discussed recent cases implicating traditional property doctrines in the context of Cyberspace. Not surprisingly, among the traditional property laws implicated in Internet cases are intellectual property laws. Various copyright statutes were applied, for instance, in *RIAA v. Diamond Multimedia Systems, Inc.*[1] (applying the Audio Home Recording Act to the "Rio" device), *RealNetworks, Inc. v. Streambox, Inc.*[2] (applying the DMCA to devices allowing users to download "streaming" video and audio), and, of course, the Napster case[3], which examined contributory infringement of copyrights in the context of the facilitation of peer-to-peer file sharing.

Perhaps more surprising, though, is courts' application of traditional trespass law to Internet activity. Mr. Johnson cited to *eBay, Inc. v. Bidder's Edge, Inc.*[4] and *Ticketmaster Corp. v. Tickets.com*[5], in demonstrating the application of trespass law to the Internet and pointed out the wide variation in the courts' treatment of the issue. Both cases involved the use of "spiders" or "bots" used by one web site to gather factual information from another, and the allegation by the invaded site that such activity constituted trespass. Ultimately, the resulting rule of law is a superficial one, which purportedly evaluates the actual damage caused by the "invasion." On this basis, an injunction was granted in the eBay case but denied in the Ticketmaster case. While "spiders" and "bots" are subject to special scrutiny, the use of "cookies" has survived numerous attacks.

Gary Kaplan, an attorney with the firm of Reed Smith, also discussed the application of traditional consumer protection laws to on-line transactions. Specifically, Mr. Kaplan addressed laws that regulate warranties, such as the Magnuson-Moss Warranty Act, the UCC, and similar state laws. He also addressed laws that prohibit false advertising and deceptive trade practices, such as Section 5 of the Federal Trade Commission Act, the Lanham Act, and similar state statutes. Mr. Kaplan concluded that on-line transactions are subject to all of these consumer protection statutes just as any other transaction would be.

### Driving Down The Middle Of The Information Superhighway

Somewhere in the middle of the spectrum, Mr. Johnson-Laird and his colleague, Barbara Frederiksen explained why simply making some modifications to existing discovery practices might suffice to bring them into the era of electronic information. They did not dispute the continuing importance of discovery requests or protective orders, but explained that they needed to change with the times.

Ms. Frederiksen explained that discovery requests for electronic information should be very thorough; emphasizing that a lawyer must not forget less conventional information storage devices, such as PDA's and cell phones. She also emphasized the importance of wording discovery requests with great specificity. The discovery request must address the fact that because technology advances so quickly, the storage media containing the requested electronic information may be obsolete. Lawyers need to be sure that the information they are requesting is produced in a still-readable format that can be accessed with the equipment and expertise available to them. In addition, she recommended asking for any "decoding" necessary for interpreting the data obtained.

Mr. Johnson-Laird also addressed the modifications necessary to make protective orders more useful when used in conjunction with electronic discovery. Referring to them as "overprotective orders." he suggested that the traditional language in protective orders needs to undergo an overhaul to accommodate electronic discovery. Mr. Johnson-Laird asserted that the most common problem is that lawyers confuse "access" with "use." Unlike paper discovery, simply possessing electronic discovery, or having "access" to it, does not necessarily mean that the possessor can read and interpret it. An example of this misunderstanding, he said, exists in the continuing inclusion of a limitation of the number of copies that can be made. While the definition of a "copy" may be easy to understand in terms of paper discovery, it is not as clear in terms of electronic discovery, where saving information to a hard drive or c.d., or simply opening files in RAM could constitute making a copy. Further, as Mr. Johnson-Laird pointed out, because a great deal of information may be produced on one c.d. or drive, it is not clear if a copy is only made if it is copied in its entirety or if any piece of it is copied.

In addition, he also explained that new provisions need to be added to a protective order to address technological concerns, such as a paragraph stating that the electronic information should only be placed on a computer for the purposes of analysis and should be removed from such machines once the analysis is completed. He also recommended using vague language in labeling the media containing proprietary materials so that a "would-be thief" would have a more difficult time determining what information is contained therein and which party produced it. However, he also pointed out that many so-called technological measures that lawyers often think are important for protection, such as mandatory use of passwords and screen savers or a limitation on the number of computers onto which the information can be stored, are unnecessary and, in fact, provide little or no protection because they are easily defeated.

## New and Improved?

Several speakers discussed new laws that have been enacted to regulate on-line transactions. The consensus seems to be that these laws are a good starting point for accomplishing lofty goals but that they leave a great deal to be desired. Mr. Kaplan expounded a view that certain new laws enacted to address transactions in Cyberspace achieve much-needed uniformity and predictability with respect to on-line transactions. Specifically, Mr. Kaplan discussed the Electronic Signatures in Global Commerce Act, commonly known as E-Sign, and the Uniform Electronic Transactions Act, otherwise known as UETA. While he explained that they serve well their primary purpose of mandating that electronic agreements cannot be denied legal effect solely because of their electronic format, these laws are inconsistent in some respects and provide little guidance as to what constitutes a valid electronic contract. In this respect, these statutes have filled a gap in the law that no existing law could completely fill, a good starting point, but still leave many questions.

The same can be said of new privacy laws. Stuart Ingis, an attorney at Piper Marbury Rudnick & Wolfe, discussed some of these new attempts to regulate what he calls "information privacy." In particular, Mr. Ingis explained that the Children's Online Privacy Protection Act, otherwise known as COPPA, imposes strict requirements on operators of web sites and collectors of electronic information who may be collecting personal information from children. While the goal is noble, Mr. Ingis explained the some of the provisions create more questions than they answer. For instance, the act requires those collecting information from children to obtain prior "verifiable parental consent," which is likely to be particularly challenging. Determining whether the act applies to a particular web site is also challenging, as the law applies to the operators of web sites that are "directed to children" or web sites that are intended for general audiences but who have "actual knowledge" that he collects personal information from children. Mr. Ingis also pointed out a concern that over-regulation of "information privacy" may ruin new capitalistic industries and opportunities that have arisen as a result of the Internet.

## Conclusion

Undoubtedly, the battle between law and technology will continue to rage on. Fortunately for us, we have a nearby and inexpensive seminar of great depth and diversity to guide us through the landmines. The University of Dayton School of Law Twelfth Annual Advanced Computer Law Seminar, like the ones before it, was a resounding success. I look forward to next year.

1 180 F.3d 1072 (9th Cir. 1999).
2 2000 WL 127311 (W.D. Wash. 2000).
3 *See* 239 F.3d 1004 (9th Cir. 2001).
4 100 F. Supp.2d 1058 (N.D. Cal. 2000).
5 2000 WL 1887522 (C.D. Cal. 2000), *aff'd*, 248 F.3d 1173 (9th Cir. 2001).

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