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Table of Contents

July 2009 ■ Vol. 26, Issue 4

■ Recent Developments in Information Technology Law.....	3
■ Meet a Section Member	5
■ Publicly Available Websites for IT Lawyers	6
■ Upcoming Events.....	7
■ Your Health Online.....	7

Bits and Bytes from the Chair

By Christopher J. Falkowski, *Falkowski PLLC*

“The more things change, the more they are the same.”

Alphonse Karr (1808-1890), French writer

So what is the next “big thing”? One of the really fun things about IT law is the rapid rate of change in the IT industry. If you enjoy dynamic environments that border on chaos, it is hard to see how an area such as real property law can come close to competing with IT law. The technology itself is always in flux, and thus the lawyers and business people can never truly catch up. At best, you can achieve the temporary success of *Sisyphus*, only to watch the boulder again roll to the bottom of the next hill.

I learned computer science from experts in the academic and the corporate worlds who had personal experience using *punch cards*. To those of us who grow impatient when a multi-media website takes more than a second to open, it is hard to believe what passed for cutting edge IT only a few decades ago. While I attended a corporate training program for computer programmers, one of my instructors fondly shared a story of how a gust of wind caused by a passing train caused a stack of punch cards to take flight with independent trajectories across an area as large as a football field. A railroad track apparently separated the mainframe computer and its operators from the offices where the programmers worked. Thus, the unfortunate timing of a passing train just as a junior programmer (the instructor as a junior programmer) was transporting the stack of punch cards to the operator resulted in significant economic loss as thousands of cards had to be collected and correctly re-ordered. When it comes to IT, the good ole days are now. I cannot imagine the patience required by those early pioneers in the industry, but I am grateful for them.

Since the time of punch cards, there have been a variety of very real and important “big picture” developments in the IT industry. Sometimes such trends become so prevalent and omnipresent that the terminology itself becomes overhyped and overused for a period of time. Despite such excesses, and in some

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Continued on next page



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Bits and Bytes . . .

Continued from page 1

cases because of such excesses, each new development brings with it new legal issues to be addressed by IT lawyers.

In the early 1990's, as personal computers became increasingly powerful, the buzz in the IT industry pointed to a technical architecture known as "client-server". Large amounts of data were migrated from large and well established mainframe computers to client-server technologies that were relatively new and untested, particularly with respect to the issue of scalability. There were cost and other benefits to that mass migration, but there were also excesses as well, and in many instances, those excesses resulted in the retention of legal counsel. This was the time period before I became an attorney, so I can only guess at the interesting legal work that resulted. I knew enough at the time only to realize that the undeniable and apparently unstoppable trend creating new legal questions for which there was no clearly established precedent. It was the confrontation of those issues that ultimately led me to attend law school.

Following the client-server boom of the early 1990's was the [dot-com boom](#) of the late 1990's. From a technological standpoint, the Internet revolution was very much enabled by client-server technology. It is no coincidence that the Internet revolution exploded immediately after the widespread emergence of client-server technology. The successes of the dot-com era are well known, as companies such as [Amazon](#), [eBay](#), and [Yahoo](#) are now household names. Although [Google](#) went public after the bubble had already burst, the company was founded during that same period of time. Like any other intense trend, that era also had its excesses. For some of the notable failures, see [cnet.com](#) and [floodofdollars.com](#). I had the pleasure of working as an attorney during the dot-com era, and I think it is safe to say that the aggregate demand for IT lawyers increased both during the build-up of the bubble as well as afterwards in cleaning up the various messes. One very important technological development during the dot-com boom was the development of the [Java](#) programming language and the concept of a [virtual machine](#). For the dot-com boom to be possible, it was necessary that different types of computers with different operating systems and different Web browsers be able to interact with the same website. [Amazon](#) could not have become "the" place to go for online books without a web page interface that was compatible with the vast majority of technical architectures.

By now many readers must be thinking to themselves, "Thanks for the historical perspective, but what exactly is your point?" Well, the point is that the IT industry finds itself in the grips yet another undeniable trend. The trend is already

Continued on next page

Statement of Editorial Policy

The aim and purpose of the Information Technology Law Section of the State Bar of Michigan is to provide information relative to the field of information technology 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 Information Technology Lawyer* are not necessarily those of the Information Technology Section or the State Bar of Michigan.

somewhat of a cliché for technologists, but is not necessarily well known in the IT law community, much less among general business lawyers. Some refer to the trend as “cloud computing” while others point to more specific aspects of the trend through terms such as “software as a service” or “virtual networks” (building upon the concept of a [virtual machine](#)). There are many different ways to define what [cloud computing](#) is, and the [technologists](#) themselves do not readily agree to a specific definition. Nonetheless, the [ramifications](#) of cloud computing are discernable, which means that now is a good time for IT lawyers to think about and discuss the legal issues that are raised by the emergence of cloud computing.

If you have read this entire article about cloud computing and are interested in learning more about the topic (or at least in learning more about what your fellow practitioners know about the subject), I would urge you to attend the upcoming Annual Meeting for the IT Law Section on **September 17th** at 3 p.m. at the [Hyatt Regency](#) hotel in Dearborn. The presentation on cloud computing will go from 3 p.m. to 4 p.m. The Section’s business meeting will run beforehand from 2 p.m. to 3 p.m. If you have any questions, please do not hesitate to e-mail me at chris@falkowskipllc.com. I look forward to seeing you on the 17th!

Chris Falkowski
Chairperson 2008-2009
IT Law Section

Recent Developments in Information Technology Law

By David R. Syrowik, *Brooks Kushman PC*

U.S. Supreme Court

Patents

As reported at 78 BNA’s PTCJ 145, on June 1, 2009, the U.S. Supreme Court granted a petition for a writ of certiorari in a case challenging the “machine-or-transformation” test of the Federal Circuit for evaluating the patentability of business methods. The Federal Circuit previously held that, under Supreme Court precedent, the sole test for determining whether a claimed “process” is patent-eligible under 35 U.S.C. § 102 is the “machine-or-transformation” test, under which a process either must be tied to a particular machine or apparatus, or must transform a particular article into a different state or thing that is central to the purpose of the claimed process. *Bilski v. Doll*.

U.S. Courts of Appeal

Patents

As reported at 90 USPQ2d 1843, on April 30, 2009, the U.S. Court of Appeals for the Federal Circuit held that the district court correctly construed the term “excess cash” in a number of business method patents directed to methods for “apportioning . . . a part of [an] excess cash payment among a number of predetermined accounts” to refer to amount selected by payor beyond total amount due at point of sale, since specification explains that “excess cash” is what is left over after merchant subtracts price of items consumer is purchasing from cash that consumer tenders to complete sale. *Every Penny Counts Inc. v. American Express Co.*

Copyrights

As reported at 90 USPQ2d 1481, on April 16, 2009, the U.S. Court of Appeals for the First Circuit ruled that the district court lacked authority to issue order permitting recording and “narrowcasting” of motions hearing in consolidated copyright infringement action brought by record companies against alleged users of peer-to-peer file-sharing software, since applicable local rule cannot be read to create broad, discretionary catchall exception to general prohibition against broadcasting of court proceedings. *In re Sony BMG Music Entertainment*.

U.S. District Courts

Copyrights

As reported at 90 USPQ2d 1720, on March 5, 2009, the U.S. District Court for the Southern District of New York ruled that infringement defendant that operates “social networking” Web site cannot be held to have “transacted business” in New York within meaning of long-arm statute based solely on its provision of social networking

Continued on next page

services to New York customers; however, plaintiffs' factual allegations that defendant sold advertisements to New York companies, and sought to participate in advertising campaigns specifically directed at New York users, are sufficient to establish that defendant uses its Web site to transact business in New York. *Capitol Records LLC v. VideoEgg Inc.*

As reported at 78 BNA's PTCJ 163, on May 11, 2009, the U.S. District Court for the Northern District of California held that accessing the Facebook social network through automated means to obtain personal data is a violation of the Facebook terms of service and is actionable as copyright infringement. *Facebook Inc. v. Power Ventures Inc.*

As reported at 90 USPQ2d 1580, on February 23, 2009, the U.S. District Court for the Eastern District of Pennsylvania ruled that a counterclaim for abuse of process, asserted by defendant accused of infringing copyrights in sound recordings through use of peer-to-peer file-sharing network, is barred by Noerr-Pennington doctrine, since plaintiffs used appropriate legal channels in obtaining subpoena in order to identify user of Internet protocol address being used for file sharing, and acted in accordance with limitations of subpoena, and since "sham litigation" exception to doctrine does not apply, in that plaintiffs had ample "probable cause" to institute infringement action. *Motown Record Co. v. Kovalcik.*

As reported at 90 USPQ2d 1648, on January 13, 2009, the U.S. District Court for the Western District of Washington held that a state-law claim for breach of contract, based on allegation that defendant is using more copies of copyrighted software that it is licensed to use, is preempted by federal copyright law, since license does not express mutual agreement that defendant can use extra copies of software so long as it pays for them, and absent such agreement, contract claim is no different from infringement claim. *Attachmate Corp. v. Sentry Insurance, a Mutual Co.*

As reported at 78 BNA's PTCJ 262, on June 10, 2009, the U.S. District Court for the Northern District of California ruled that fact issues preclude ruling that YouTube video of talk show was non-infringing. *Brave New Films 501(C)(4) v. Weiser a/k/a Savage.*

False Advertising

As reported at 90 USPQ2d 1640, on December 15, 2008, the U.S. District Court for the District of Colorado denied equitable relief to plaintiff in action alleging that defen-

dant made false statements in its online advertising for service that generates leads to insurance companies, since plaintiff has not shown that statements are either literally or impliedly false, that statements actually misled or were likely to mislead insurance agents, or that plaintiff has suffered or is likely to suffer any injury from statements. *NetQuote Inc. v. Byrd.*

U.S. Patent and Trademark Office

Patents

As reported at 78 BNA's PTCJ 119, on February 3, 2009, the Board of Patent Appeals and Interferences clarified the definiteness standard (35 U.S.C. § 112) for computer-implemented claim functions. The Board held that means-plus-function claims directed to method for implementing online incentive system at merchant's Web site, which recite steps of "providing, at a merchant's web site, means for a consumer to participate in an earning activity to earn value from a merchant," are unpatentable for indefiniteness. *Ex parte Catlin.*

As reported at 90 USPQ2d 1620, on November 11, 2008, in an unpublished opinion, the Board of Patent Appeals and Interferences held that claims that recite computer readable medium encoded with computer program, in which "computer readable medium" includes data signal embodied in wireless communications link, are unpatentable under 35 U.S.C. § 101, since claim for computer instructions embodied only in transitory, propagating signal is not "process, machine, manufacture, or composition of matter." *Ex parte Uceda-Sosa.*

Trademarks

As reported at 90 USPQ2d 1660, on April 8, 2009, the Trademark Trial and Appeal Board granted summary judgment to opposer that applicant seeking registration under 15 U.S.C. § 1126(e) lacked *bona fide* intent to use proposed "V.I.C." mark in commerce at time application was filed, since foreign registrations and Web site printouts submitted by applicant do not demonstrate trademark use for goods claimed in application, and do not show intent to use mark in United States. *Honda Motor Co. v. Winkelmann.* ■

Meet a Section Member: Mark G. Malven



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- **What is the name of your firm/corporation/employer?**
Dykema Gossett PLLC
- **What is your area of practice?**
Technology Transactions –I am the leader of Dykema’s Technology Transactions Practice
- **When did you first become involved with the Section?**
Shortly after moving here from Chicago in 2004
- **How would you summarize your professional experience?**
I spent the first 11 years of my legal career in Chicago. I started out as corporate transactional associate at one of the larger firms, and started to gravitate to technology on my own initiative. After 5 years I was recruited to join Gordon & Glickson, an internationally known technology law boutique, where I was able to take my game to the next level and developed my technology transactions expertise. We represented many dotcoms during the bubble and I eventually caught dotcom fever myself –leaving to join a startup as its VP of Business Development and guy in charge of finding VC money. My timing was less than perfect, however, as the bubble burst shortly after I arrived. While the move was not financially lucrative, I really learned a lot. I then started my own firm, which was much fun but also not very lucrative. Eventually, my wife told me to get a real job or “no babies for you!” She was right, of course. My efforts to get back to BigLaw led me first to Raymond & Prokop in Southfield and, upon its dissolution, to Dykema (which turned out to be a perfect fit).
- **Where did you grow up?**
West Lafayette, Indiana –my father was on the faculty at Purdue.
- **Where else have you lived?**
I was born in Los Angeles when my father was doing his post-doc work at UCLA. I lived in Indiana from age 2 through the end of college, then SE Michigan for seven years (four years working as a crash safety engineer at Chrysler, three years in Law School at U of M), then downtown Chicago for 11 years.
- **Where did you attend undergraduate and law school?** Purdue for Mechanical Engineering, and U of M for Law.
- **What are your hobbies, other interests?**
I am very active with my church, Faith Covenant Church in Farmington Hills, including serving on our Adult Discipleship Commission. My primary current interest is spending time with family –my wife and I just had our first child, who is now 4 months old, and we are enjoying parenthood very much. I can safely say, with perfect objectivity, that she is the most beautiful baby ever.
- **Favorite restaurant?**
Vermilion in Chicago –the food is fantastic –it’s a fusion of Latin and Indian.
- **Favorite legal case that can be found in Westlaw or Lexis?** *Gustafson v. Alloyd Co*, 513 U.S. 561 (1995). This U.S. Supreme Court case involved whether a stock purchase agreement should be considered a “prospectus” under Section 12(2) of the Securities Act of 1933, and therefore give an unhappy buyer a right of rescission under the Securities Act. I was able to persuade the senior partner handling the case at my firm that I should be the lead associate and I ended up doing much of the drafting of the brief for *Gustafson*, the seller. It was an amazing experience –studying the case law and formulating our arguments, all the while dealing with all the amicus and other interested parties, some of whom had very different goals than we did. The most incredible part was, not surprisingly, going to the Court for the argument. I felt like a “real” lawyer, walking the behind-the-scenes, non-public areas and then attending a Supreme Court argument for which I helped prepare. The best part –we won 5-4. As the (very colorful) senior partner said upon hearing of our victory, “Any monkey can win 9-0 –it takes skill to win 5-4!”
- **If you had to describe yourself using three words, they would be...** Christian, kind, leader
- **What is your favorite movie of the past ten years?** I LOVE great movies, and cannot possibly limit myself to one. My favorites from the last ten years include, in no particular order, *A.I.*, *Black Hawk Down*, *the Lord of the Rings* trilogy, *Monster*, *The Passion of the Christ*, *Eternal Sunshine of the Spotless Mind*, *Journeys with George*, *Pan’s Labyrinth*, *Juno*, *Hotel Rwanda* and *United 93*.
- **What one word would you put on your gravestone?** As an aspiration - “Faithful”
- **What email can Section members use to contact you?** mmalven@dykema.com

Publicly Available Websites for IT Lawyers

The Proprietary Rights Committee of the Information Technology Law Section has assembled a list of over 50 publicly available websites with up-to-date, reliable and comprehensive information that is useful to lawyers who practice in the IT law area. The websites are easy to search or navigate to obtain the desired information, and although raw data and information are important, often the websites contain summaries and discussions, as well as links to other useful websites.

The Michigan IT Lawyer will publish a selection of these websites in each issue, and feedback or recommendations for additional websites can be forwarded to David Syrowik, DSyrowik@brookskushman.com. Enjoy!

General Reference

- <http://www.webopedia.com> - Computer and Internet technology definitions.
- <http://www.wikipedia.org> - A free encyclopedia that anyone can edit.
- <http://whatis.techtarget.com> - An IT encyclopedia and learning center.
- <http://www.dictionary.com> - Ask.com offers a free online Dictionary, Thesaurus, Reference Tool and Translator.
- <http://www.m-w.com> - Merriam-Webster offers a free online Dictionary, Thesaurus, Spanish-English Dictionary and Medical Dictionary.
- <http://www.brint.com> - Labeled "The Premier Global Knowledge Network for Business Information Technology Finance and Knowledge Management Professionals", this site provides a range of research possibilities. Example: Select 'Research', 'Computer', 'Computer and Technology Law', 'Lawyers and Law Firms', 'Asia', 'China', 'Haworth & Lexon', 'English', to view the web page of a Shanghai law firm focusing on corporate, securities, investment, technology, intellectual property and real estate.
- <http://www.iana.org/domains/root/db> - The Internet Assigned Numbers Authority is the global coordinator of the DNS root (the right-most part of the URL, such as .com, .uk and .org), and provides a 'Root Zone Database' that lists contact information for each DNS root.

Intellectual Property - General

- <http://www.wipo.int> - WIPO (World Intellectual Property Organization) is an agency of the United Nations that is dedicated to developing a balanced

and accessible international intellectual property (IP) system, which rewards creativity, stimulates innovation and contributes to economic development while safeguarding the public interest. One service that WIPO offers regards PCT (Patent Cooperation Treaty) filings and related documents retrieval. International searches and preliminary novelty reports are also available for review and download. In addition, WIPO also covers many other IP related topics including copyright issues and enforcement of IP rights.

- <http://www.ipmenu.com> - IP Menu is a worldwide Internet directory system aimed at users and researchers working in the intellectual property field. The system is designed in hierarchical fashion with indices by country or property type (e.g., patent, trademark, etc.). Each section has access to online websites containing patent, trademark, design, domain names, legislation, company, and business information. IP Menu also links to government and library websites, and lists unique features, such as information and intellectual property conferences.
- <http://www.ipmall.info> - Pierce Law Center's IP Mall is an IP resource website that provides access to various resources as well as links to external sources. There are over 2,700 links under the 'IP Links' section.
- <http://www.managingip.com> - 'Managing Intellectual Property' is a global magazine for intellectual property owners, with more than 8,000 readers across the globe; about two-thirds of the readers are senior in-house counsel in multinational companies. Searchable topics includes patent, trademark, copyright, Internet and domain names, IP management, licensing, and dispute resolution.
- <http://www.copyright.gov> - United States Copyright Office. ■

Upcoming Events

Plan to attend the Information Technology Section's **Annual Business Meeting**. Mingle with your Section peers, learn about opportunities to get more involved with the Section, participate in the election of Section Council Members, and attend a substantive presentation on IT law. The Information Technology Section's Annual Business Meeting will coincide with the State Bar of Michigan's annual convention, and is planned for **September 17, 2009 at 2 p.m., at the Hyatt Regency in Dearborn**. Be there! Please contact Mark Malven at MMalven@dykema.com if you have questions about the event.

Reminder! The Information Technology Section of the State Bar of Michigan and the Institute of Continuing Legal Education (ICLE) will host an **IT Law Seminar on Thursday, October 29, 2009 at The Inn of St. Johns in Plymouth**. Tentatively, topics and presenters will include:

- *Patenting Software and Business Methods* - Professor Roberta J. Morris, Stanford Law School
- *The Legal Landscape of Web 2.0* - Robert S. Gurwin, AOL LLC
- *Privacy Issues* - Robert L. Rothman, Former General Motors Chief Privacy Officer
- *Avoiding Problems and Surprises When Contracting with the Government* - Charles R. (Rod) Marvin, Jr., Dykema
- *Benefits and Risks of Open Source Software* - William T. Casey, EDS
- *Risk Allocation in Tech Services & License Agreements* - Beth A. Mier, CSC Covansys Corp

Reserve the date on your calendar, and plan to take advantage of a great line up of speakers while receiving continuing legal education credit! If you are interested in sponsoring the event, please contact Charlie Bieneman at cab@raderfishman.com. ■

Your Health Online

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Going online can be a convenient way to compare prescription drug prices, research health products and services, answer health questions, or do some research ahead of your next medical appointment.

If you've spent much time searching or shopping online, you may already know the usual precautions to take — like making sure you have up-to-date security software on your. When you take your health online, the same rules apply, and so do a few others.

Following are a few tips for being smart and safe when dealing with health information and health care products online:

Know who's on the other end

Before you hand over any personal or financial information, whether to buy something or just get "more information," remember: anyone can set up shop online under almost any name. If you're thinking about buying a health-related product from an unfamiliar company or website, do some research:

- Confirm the online seller's physical address (not just a P.O. Box) and phone number, so you know you can reach someone if you need to.
- Do a search for the company name and website, and be sure to look past the first page of results. If you find a lot of negative reviews, you may be better off taking your business elsewhere.
- Check with the local Better Business Bureau (BBB) where the seller is based to see if it has a report on the company. And if you see a BBB logo on the site, check that it links back to the BBB site. Also, read logos and websites carefully. Some companies want to trade on the reputation of the BBB or other trusted organizations, and either misuse logos, or create lookalike logos, seals, and websites.
- Look for indicators the site is secure, like a lock icon on the browser's status bar or a URL that begins with "https" (the "s" stands for "secure"). But also know that security icons can be forged, so they are not foolproof. Avoid sites that ask you to give out personal or financial information over email, or ask you to wire cash.

Continued on next page

Consider the source

When you are looking for health information online, it is easy to get a lot of misinformation along the way. Instead of a random search, try starting with trusted sources. Two great choices are MedlinePlus (medlineplus.gov) and Healthfinder.gov (healthfinder.gov), government websites that let you look up hundreds of health topics and the latest health headlines.

Wherever you start your health search, always consider who is behind the information. Government websites (sites ending in .gov) are a good bet. So are university or medical school websites (.edu) and sites for trusted, nationally recognized health or research facilities, like the Mayo Clinic. Not-for-profit groups with a mission that focuses on research and teaching the public about specific conditions (whose sites typically end in .org), can also be good resources, but keep in mind that “.org” does not guarantee a site is reputable. Scammers can set up bogus .org sites.

Only buy prescription drugs from licensed U.S. pharmacies

What looks like an online pharmacy could be a front for a scammer or identity thief. The sites may use official looking seals and logos, promise money back guarantees, and “look” legitimate, but all of that can be faked. You could end up with products that are fake, expired, mislabeled, or the wrong dosage. They could even contain dangerous ingredients. Or, you might pay for a prescription and never get your order – or your money back.

So how can you tell if you are dealing with a legitimate U.S. pharmacy? To see if a pharmacy is licensed in the U.S., check with the state board of pharmacy where it’s based. The National Association of Boards of Pharmacy (NABP) at www.nabp.info has information on each state’s board. NABP also has a list of online pharmacies that meet extra NABP criteria and have been accredited through its Verified Internet Pharmacy Practice Sites (VIPPS) program. Reputable pharmacy websites also should require a prescription, have a licensed pharmacist to answer questions, and provide a physical business address and phone number.

Talk to your doctor or health professional

As you look for answers to your health questions, you might come across websites or ads for pills or other products that make some pretty big promises. They may say their product will cure a serious condition like arthritis, diabetes, Alzheimer’s disease, multiple sclerosis, cancer, and HIV-AIDS, or that one product will cure a range of conditions. Or, the ad might just be for a weight loss pill that says you can lose weight without exercising or changing how you eat.

The products may be called “scientific breakthroughs” or “ancient remedies,” or the ads may use scientific-sounding words like “thermogenesis,” or safe-sounding words like “natural.” Scammers can be creative. But the reality is that most of these products are useless, and at best a waste of money. Others are flat-out dangerous to your health.

Do not trust a website just because it looks professional or has success stories from “real people.” The stories may be made up, or the people may be actors or models paid to praise the product. Instead, before you think about trying a health product, ask your doctor about it. Your doctor can tell you about the risks of a product, as well as how it could affect any medicine you’re taking or treatments you’re getting.

For more on health from the FTC, visit ftc.gov/health.

How to Report if You’ve Been a Victim of an Online Fraud

If you think you may be a victim of fraud, file a complaint with the FTC. You also can file a complaint with:

- The [attorney general’s office](#) in your state.
- Your county or state consumer protection agency. Check the blue pages of the phone book under county and state government, or visit consumeraction.gov and look under “Where to File a Complaint.”
- The [Better Business Bureau](#).
- Econsumer.gov, where you can report complaints about online and related transactions with foreign companies.
- Report problems with a medication or medical device to the [FDA](#). ■