



STATE BAR OF MICHIGAN

Michigan IT Lawyer

A Publication of the State Bar of Michigan Information Technology Law Section

<http://www.michbar.org/computer>

Table of Contents
May 2010 ■ Vol. 27, Issue 3

- Bits and Bytes from the Chair 1
- Recent Developments in Information Technology Law 2
- Meet a Section Member 5
- The Copyright Takedown Notice and the YouTube® Toddler 6
- Save the Date!!! 15
- New Trust Account Overdraft Notice Rule Takes Effect Sept. 15 15
- Publicly Available Websites for IT Lawyers 16
- 2010 Edward F. Langs Writing Award .. 17

Michigan IT Lawyer is published every other month. Previously published issues of the *Michigan IT Lawyer*, and its predecessor the *Michigan Computer Lawyer*, are available at <http://www.michbar.org/computer/newsletters.cfm>. If you have an article you would like considered for publication, send a copy to:

Michael Gallo
2700 Renshaw Drive
Troy, Michigan 48085
e-mail: michael@gallo.us.com



Bits and Bytes from the Chair

By Jeremy D. Bisdorf, *Jaffe Raitt Heuer & Weiss PC*

Happy Spring to you all!

On Thursday, April 15, our Section held a Spring Networking Event in cooperation with DetroitNet.org at *the Post Bar* in Novi. For those of you that are not familiar with the organization, DetroitNet.org is a large group of IT professionals based in southeastern Michigan that meets regularly to network and discuss IT related issues. Our Section members had the opportunity to establish relationships with the members of this fantastic organization as well as to mix and mingle with fellow Section members. The event was covered by local *Fox 2 News* and other media organizations. **Thank you to Anthony Targan** for his efforts in organizing this event!

Also, the IT Law Section recently created a *Facebook* site. **William Lamp-ing** set up the Section's profile and populated it with information on Section activities and upcoming events. Please join out the page at: <http://www.facebook.com/pages/Michigan-IT-Lawyers/105421292829635>. **Thanks Bill!**

Please keep your calendar clear for our annual **IT Law ICLE Seminar** on **September 22, 2010** at the *Inn at St. John's in Plymouth*, Michigan. This year, we will hold the Section's **Annual Meeting** immediately following lunch at the seminar. It would be great to have you there.

If you or any of your clients would like to provide sponsorship for the Seminar, there are still opportunities available. Please let me know if you would like more information on how you or your clients can reach over 3,500 persons interested in information technology law with highly targeted advertising.

If you have any ideas for articles of interest to be published in our newsletter, please let us know. I am looking forward to seeing you in September and to reading your posts on our Facebook site!

Jeremy D. Bisdorf
Chairperson
Information Technology Law Section
jbisdorf@jaffelaw.com



2009-2010

Information Technology Section Council

Chairperson ▪ Jeremy D. Bisdorf
Chairperson-elect ▪ Mark G. Malven
Secretary ▪ Charles A. Bieneman
Treasurer ▪ Karl A. Hochkammer

COUNCIL MEMBERS

Charles A. Bieneman
Jeremy D. Bisdorf
William Cosnowski, Jr.
Donald M. Crawford
Jeanne M. Dunk
Samuel Frederick
Brian A. Hall
Karl A. Hochkammer
Matthew M. Jakubowski
William J. Lamping, Jr.
Mark G. Malven
Ronald S. Nixon
Carla M. Perrota
Vincent I. Polley
Claudia Rast
David R. Syrowik
John L. Tatum
Mary Ann Wehr

Immediate Past Chair

Christopher J. Falkowski

Ex-Officio

Claudia V. Babiarz
Thomas Costello, Jr.
Kathy H. Damian
Christopher J. Falkowski
Robert A. Feldman
Sandra Jo Franklin
Mitchell A. Goodkin
William H. Horton
Lawrence R. Jordan
Charles P. Kaltenbach
Michael S. Khoury
J. Michael Kinney
Edward F. Langs*
Thomas L. Lockhart
Janet L. Neary
Kimberly A. Paulson
Paul J. Raine
Jeffrey G. Raphelson
Frederick E. Schuchman III
Steven L. Schwartz
Carol R. Shepard
Anthony A. Targan
Stephen L. Tupper

Commissioner Liaison

James N. Erhart

Newsletter Editor

Michael Gallo

*denotes deceased member

Recent Developments in Information Technology Law

By David R. Syrowik, *Brooks Kushman PC*

COPYRIGHTS – Case Law – U.S. Supreme Court

As reported at 79 BNA's PTCJ 497, on March 2, 2010, the U.S. Supreme Court unanimously ruled that the inclusion of authors of unregistered works in a class action settlement involving the electronic distribution rights of freelance authors does not prevent a federal court from considering the settlement. The court emphasizes that the Copyright Act's registration requirement constitutes "a precondition to filing a claim that does not restrict a federal court's subject matter jurisdiction." *Reed Elseviere Inc. v. Muchnick*.

PATENTS – Case Law – U.S. Courts of Appeal

As reported at 79 BNA's PTCJ 751, on April 13, 2010, the U.S. Court of Appeals for the Federal Circuit reversed a \$21 million award to a video game controller patentee ruling that the patent owner is not entitled to an invention date early enough to support its complaint against Nintendo. *Anascape Ltd. v. Nintendo of America Inc.*

As reported at 79 BNA's PTCJ 755, on April 10, 2010, the U.S. Court of Appeals for the Federal Circuit held that patented methods for communications between global positioning system servers and devices such as cell phones are directly infringed by the service operator. *SIRF Technology Inc. v. International Trade Commission*.

As reported at 94 USPQ2d 1368, on April 7, 2010, the U.S. Court of Appeals for the Federal Circuit ruled that Google's system for running continuous auctions to determine placement of advertisements on search results pages of Internet search engine does not infringe asserted claims of patent-in-suit, which enables bidder to pursue position for ad other than highest available position, since accused system simply selects highest ranking position of priority that is available for offered bid, and since claim language and prosecution history indicate inventor disclaimed that subject matter. *Bid for Position LLC v. AOL LLC*.

As reported at 79 BNA's PTCJ 538, on March 4, 2010, a split U.S. Court of Appeals for the Federal Circuit upheld contempt sanctions against EchoStar Corp. for violations of an infringement decision against digital video recorders used by customers of the Dish Network satellite television service. *TiVo Inc. v. EchoStar Corp.*

As reported at 93 USPQ2d 1943, on March 10, 2010, the U.S. Court of Appeals for the Federal Circuit ruled that infringement is willful if infringer was aware of asserted patent, but nonetheless acted despite "objectively high likelihood" that its actions constituted infringement of valid patent, and if infringer knew or should have known of this objectively high risk; in present case, substantial evidence supports jury's verdict that defendant willfully infringed pat-

ent for method of processing and storing information about structure of electronic documents. *14i L.P. v. Microsoft Corp.*

As reported at 93 USPQ2d 1805, on February 25, 2010, the U.S. Court of Appeals for the Federal Circuit reviewed the district court's claim construction without deference to lower court's factual decisions underlying that construction; in present case, district court correctly construed claims directed to software for displaying market for commodity traded on electronic exchange, and judgment of non-infringement is affirmed. *Trading Technologies International Inc. v. eSpeed Inc.*

As reported at 79 BNA's PTCJ 793, on April 16, 2010, the U.S. Court of Appeals for the Federal Circuit ruled that Verizon failed to defeat patent invalidity and non-infringement findings for its patents directed to packet-switched telephony, also known as voice over Internet protocol (*i.e.* VOIP). *Verizon Services Corp. v. Cox Fiber-net Virginia Inc.*

PATENTS/ADVERTISING INJURY – Case Law – U.S. Courts of Appeal

As reported at 79 BNA's PTCJ 750, on April 5, 2010, the U.S. Court of Appeals for the Ninth Circuit ruled that a patent infringement claim against Hyundai Motor America challenging the automaker's "build your own vehicle" website feature constituted an "advertising injury." The court accordingly reverses a summary judgment that an insurance company had no duty to defend Hyundai in the patent infringement charges against it. *Hyundai Motor America v. National Union Fire Insurance Co. of Pittsburgh, PA.*

COPYRIGHTS – Case Law – U.S. Courts of Appeal

As reported at 79 BNA's PTCJ 507, on February 25, 2010, the U.S. Court of Appeals for the Fifth Circuit ruled that a defendant accused of downloading copyrighted sound recordings was not an innocent infringer based solely on the argument that she is too young and naïve to understand how copyright law applies to her actions. *Maverick Recording Co. v. Harper.*

COPYRIGHTS/TRADE SECRETS – Case Law – U.S. Courts of Appeal

As reported at 79 BNA's PTCJ 710, on April 5, 2010, the U.S. Court of Appeals for the Ninth Circuit ruled that tech start-up's industry practices support finding that a programmer was an employee for purposes of the work-for-hire doctrine even though parties had no employment agreement, defendant did not fill out federal employment forms or receive benefits, and plaintiff did not withhold taxes. *Just Med Inc. v. Byce.*

TRADEMARKS – Case Law – U.S. Courts of Appeal

As reported at 79 BNA's PTCJ 693, on April 1, 2010, the U.S. Court of Appeals for the Second Circuit ruled that online auction site operator eBay Inc. is not liable for trademark infringement or dilution based on some sellers' listing of counterfeit Tiffany jewelry, because it takes action when it has knowledge of fraud with regard to any specific listing. Affirming a judgment for eBay on the jewelry maker's trademark claims, the court, however, remands the question of whether eBay might be liable for false advertising for posting ads on its own site and on search engine sites stating that Tiffany jewelry can be purchased on eBay. *Tiffany (NJ) Inc. v. eBay Inc.*

COPYRIGHTS – Case Law – U.S. District Courts

As reported at 79 BNA's PTCJ 745, on April 7, 2010, a group of visual artists associations and interest groups filed a class-action lawsuit against Google Inc. in the U.S. District Court for the Southern District of New York alleging that Google's Book Search program infringes their copyrights in photographs and other visual works contained in the books and periodicals that Google scans. The lawsuit is similar to an action filed by the Authors Guild and the Association of American Publishers in 2005, which is currently awaiting settlement approval. *American Society of Media Photographers Inc. v. Google Inc.*

As reported at 93 USPQ2d 2007, on February 9, 2010, the U.S. District Court for the Middle District of Florida denied defendants' motion to dismiss plaintiff's infringement action for lack of subject matter jurisdiction, since there are genuine issues of material fact as to whether plaintiff met deposit requirements when it registered its barcoding software program with the U.S. Copyright Office, and whether plaintiff intentionally concealed information relevant to its copyright application. *Pegasus Imaging Corp. v. Allscripts Healthcare Solutions Inc.*

As reported at 93 USPQ2d 1903, on February 3, 2010, the U.S. District Court for the Northern District of California granted to plaintiffs default judgment in action accusing defendant of selling, online, infringing copies of plaintiffs' copyrighted instructors' solutions manuals for educational textbooks, since plaintiffs will suffer irreparable harm if defendant is allowed to continue selling infringing works, since defendant's infringement was willful, and since strong policy favoring decisions on merits does not warrant denial of default judgment. *Pearson Education Inc. v. Wong.*

As reported at 94 USPQ2d 1234, on February 18, 2010, the U.S. District Court for the District of Massachusetts

Recent Developments . . .

Continued from page 3

granted summary judgment to plaintiff monastery that defendant did not make fair use of copyrighted English translation of ancient Greek religious text by posting copy of work on website, even though defendant does not seek commercial gain from his use of work; although plaintiff has not alleged any specific lost sales or profits, it has had to expend time and resources to enforce its rights in work, and deterrence of injurious conduct by others is consideration separate and apart from showing of actual market harm. *Society of the Holy Transfiguration Monastery Inc. v. Archbishop Gregory of Denver, Colo.*

COPYRIGHTS/DMCA – Case Law – U.S. District Courts

As reported at 79 BNA's PTCJ 196, on February 18, 2010, the U.S. District Court for the Southern District of Florida awarded \$12.3 million DMCA damages against a defaulting cell phone "reflasher" who unlocked software controls designed to restrict the use of the device to approved networks. *Trac Fone Wireless Inc. v. Anadisk LLC.*

TRADEMARKS – Case Law – U.S. District Courts

As reported at 79 BNA's PTCJ 683, on February 26, 2010, the U.S. District Court for the Eastern District of California ruled that Google's use of "Styrotrim" mark as keyword is not likely to cause confusion. *Jurin v. Google, Inc.*

As reported at 93 USPQ2d 1771, on January 21, 2010, the U.S. District Court for the Northern District of Texas denied defendants' motion to dismiss claim for declaratory judgment of non-infringement of their trademarks since defendants have allegedly published information on their website accusing plaintiff of infringement and threatening to sue for misuse of defendants' protected materials, which clearly invokes Lanham Act, and since factors considered in deciding whether to dismiss declaratory action, particularly absence of parallel state proceeding involving subject matter, weigh in favor of retaining jurisdiction. *Ceramic Performance Worldwide LLC v. Motor Works LLC.*

TRADEMARKS/PERSONAL JURISDICTION – Case Law – U.S. District Courts

As reported at 94 USPQ2d 1247, on March 9, 2010, the U.S. District Court for the Southern District of Ohio ruled that infringement plaintiff has failed to make *prima facie* showing that defendant purposefully availed itself of privilege of

doing business in Ohio, since defendant's website primarily consisted of passively posted information about defendant's "Puretech" water-treatment systems, and was not interactive to degree that reveals specifically intended interaction with Ohio residents, and since defendant's website and advertising contacts with Ohio, viewed together, do not suggest that defendant's conduct was in any way purposefully directed at Ohio. *William R. Hague Inc. v. Puretech Water Systems, Inc.*

TRADEMARKS/COPYRIGHTS – Case Law – U.S. District Courts

As reported at 79 BNA's PTCJ 680, on March 19, 2010, the U.S. District Court for the Northern District of California reduced a \$32 million statutory damages award to \$10.8 million against three parties involved in a web hosting service. *Louis Vuitton Malletier S.A. v. Akanoc Solutions Inc.*

PATENTS – U.S. Patent and Trademark Office

As reported at 94 USPQ2d 1031, on February 13, 2010, the Trademark Trial and Appeal Board ruled that a document obtained from Internet may be admitted into evidence in *inter partes* proceeding before Trademark Trial and Appeal Board pursuant to notice of reliance, in same manner as printed publication in general circulation, provided document identifies date of publication or date accessed and printed, as well as its source; types of documents that may be introduced by notice of reliance are therefore expanded to include websites, advertising, business publications, annual reports, and studies or reports prepared for or by party or non-party, if they can be obtained through Internet as publicly available documents. *Safer Inc. v. OMS Investments Inc.*

As reported at 94 USPQ2d 1375, on April 15, 2010, the Trademark Trial and Appeal Board ruled that a website page that displays product, and provides means of ordering product, can constitute acceptable specimen of trademark use as long as mark appears on web page in manner in which mark is associated with goods; however, Internet web page that merely provides information about goods, without providing means for ordering them, is viewed as promotional material, which is not acceptable to show trademark use on goods. *In re Quantum Foods Inc.*

COPYRIGHTS – United Kingdom

As reported at 79 BNA's PTCJ 754, on April 8, 2010, the Digital Economy Act was passed, which, among other things, gives copyright holders in the United Kingdom greater recourse to combat online copyright infringement. ■

Meet a Section Member: John L. Tatum



John L. Tatum

John L Tatum PC
4931 Ranch Ln
Bloomfield Hills, MI 48302

P: (248) 203-7030
E: john@tatum.com

- **What is the name of your firm/corporation/employer?** John L Tatum PC
- **What is your area of practice?** Environmental Mediation – Superfund Allocation
- **When did you first become involved with the Section?** About 1980
- **Where did you grow up?** Portland Oregon
- **Where did you attend undergraduate and law school?**
Stanford University, Willamette University Law
- **What was your undergraduate major?** Economics
- **What are your hobbies, other interests?** Golf, Cooking, Reading
- **Favorite restaurant?** Shiraz
- **A recent book you read?** *Super Freakonomics*
- **Last vacation?** Niece's wedding in Portland OR
- **Who is your hero? (a parent, a celebrity, an influential person in one's life)** Father
- **If you had to describe yourself using three words, they would be...**
Numbers guy, Techie, honorable
- **What is your favorite movie?** James Cameron's *Terminator 2* and now *Avatar* can't wait to see what he comes up with next
- **What do you like to do most with a free hour?** Read
- **What is the most significant event of the last year?** EPA's 30% budget increase is accelerating cleanup and settlement negotiations
- **What email can Section members use to contact you?** john@tatum.com
- **A short comment on why you became involved with the Information Law Technology Section:** Got together with Mike Kinney, Mike Khoury, Dave Syrowik et al in the '80s in the early days of the Computer Law Association which became the Computer Law and now IT Law section. I've been working on compliance and litigation systems and the law since working as an IBM 360 systems programmer while in law school. ■

The Michigan IT Lawyer is pleased to present “The Copyright Takedown Notice and the YouTube® Toddler” by Vichit Chea. Mr. Chea is one of three student authors to receive a 2009 Edward F. Langs Writing Award from the State Bar of Michigan’s Information Technology Law Section. The statements made and opinions expressed in this essay are strictly those of the author, and not the State Bar of Michigan or the Information Technology Law Section. Comments regarding this article can be forwarded to the Michigan IT Lawyer, care of michael@gallo.us.com. Enjoy!

The Copyright Takedown Notice and the YouTube® Toddler

By Vichit Chea

Issue/Purpose

Recently a U.S. District Court ruled that a copyright owner must make a “good faith evaluation” of whether an allegedly infringing work constitutes a fair use prior to sending a takedown notice. Failure to make such an assessment can leave the copyright owner liable for damages. While this is the only district court to date to establish such an obligation, it sets a burdensome precedent for copyright owners. Generally, copyright owners use automated programs to identify and attempt to remove (via takedown notifications) potentially infringing works on YouTube and similar internet sites. Since a fair use evaluation requires weighing subjective factors, automating the process of policing the internet for copyright infringements will likely prove impossible without some human evaluation.

Copyright owners will have to decide what constitutes a “good faith evaluation” and how to evaluate whether the allegedly infringing work is a “fair use.” This research paper will focus on both issues. First, the current standards for a “good faith evaluation” will be discussed and applied to the current situation. Second, the existing methods that copyright owners use to evaluate infringement will be discussed. Based on this research, the best method will be recommended.

Short Answer

The Standard of Good Faith Belief

At a minimum, a completely automated search program that simply locates potentially infringing websites will not establish a “good faith belief” that a work is infringing if the results are not evaluated and filtered based on human assessments.

Recommendation to Copyright Holders for Evaluating Infringing Websites

Copyright holders should use a two stage evaluation process. First, an automated search program should be used in order to generate a listing (with attached website links) and descriptions of the potentially infringing websites. Second, the listings must be assessed by human beings. This assessment should include a quick review of the website (by clicking on the attached website link generated from the automated search), followed by an evaluation for fair use by applying a simple four part checklist that contains the fair use factors.

Background

On February 7, 2007, Stephanie Lenz did something that most parents do with regularity. She videotaped a “cute” moment of her son, Holden, dancing in her family’s kitchen.¹ Holden, 18 months old, was pushing a little toy cart, stopping occasionally to bop up and down to the beat of the song “Let’s Go Crazy” by Prince, heard in the background.² Before the advent of the internet though, Stephanie’s viewing audience would have been limited to a physically local setting. This limitation was because her only option would have been to attach her video camera to a television. With the dawn of the Digital Age, consumers are increasingly able to share these special moments with a wider audience thanks to the advent of high speed digital transfers, inexpensive digital recording devices, and file sharing internet sites. Today Stephanie’s potential audience is virtually limitless.

Stephanie sought to utilize this amazing technology to share this moment with her friends and family located out of state.³ She uploaded the video to YouTube.com (“YouTube”) and titled it “Let’s Go Crazy # 1.”⁴ YouTube is a popular internet video hosting site providing “video sharing” and “user generated content.”⁵ The video is twenty-nine seconds in length.⁶ During that time, Prince’s song can be heard softly in the background for twenty seconds.⁷ Unfortunately, Stephanie’s friends and family were not the only people aware of Holden’s little dance. Universal Music Corp. (“Universal”) was also “*observing*” content on YouTube.

Universal owns the copyright to Prince’s “Let’s Go Crazy” song.⁸ On June 4, 2007, Universal sent a take-down notice to YouTube.⁹ Pursuant to Title II of the Digital Millennium Copyright Act (“DMCA”),¹⁰ Universal alleged that they had a good faith belief that Stephanie’s video was a violation of copyright law. (See Universal’s e-mail sent to copyright@youtube.com.)¹¹ YouTube removed the video the following day and notified Stephanie that her video had been removed due to Universal’s allegation.¹²

Stephanie responded differently than most YouTube users in her position. She consulted an attorney and sent YouTube a DMCA counter-notification, pursuant to another provision in the DMCA,¹³ and demanded that her video be re-posted.¹⁴ She asserted that her video constituted fair use of Prince’s song and thus did not infringe Universal’s copyrights.¹⁵ YouTube re-posted the video about six weeks later.¹⁶

Stephanie, continuing to act in an atypical way, decided to go on the offensive. On July 24, 2007, Stephanie sued Universal alleging violation of a DMCA provision¹⁷ which creates liability for knowingly making false claims in a take-down notice (a.k.a. misrepresentation).¹⁸ The district court dismissed the original complaint for failure to allege facts showing Universal knew that its complaint was in bad faith.¹⁹ The district court, however, gave Stephanie leave to amend her complaint, which she re-filed on April 18, 2008. Stephanie’s detailed allegation suggested that Universal issued the removal notice only to appease Prince’s notorious efforts to police infringements of his works.²⁰ Further, the take-down notice was not based on the particular characteristics of the video or any good faith belief that it actually infringed a copyright.²¹ The crux of Stephanie’s complaint was that Universal lacked a good-faith basis, as required by the DMCA,²² because it deliberately ignored whether her use of Prince’s song constituted fair use.

In a motion to dismiss,²³ Universal argued that “copyright owners cannot be required to evaluate the question of fair use prior to sending a takedown notice because fair use is

merely an *excused* infringement of copyright rather than a use *authorized* by the copyright owner or by the law.”²⁴ The court squarely rejected this argument and held:

[I]n order for a copyright owner to proceed under the DMCA with “a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law,” the owner must evaluate whether the material makes fair use of the copyright. 17 U.S.C. § 512(c)(3)(A)(v). An allegation that a copyright owner acted in bad faith by issuing a takedown notice without proper consideration of the fair use doctrine thus is sufficient to state a misrepresentation claim pursuant to Section 512(f) of the DMCA.²⁵

The court also rejected Universal’s argument that courts should not require copyright holders to engage in a fact-intensive and subjective, “fair use” analysis before acting to protect their rights.²⁶ The court reasoned that it was not requiring copyright holders to get the fair use analysis correct in close cases, but simply to take a look at fair use prior to sending a takedown demand.²⁷ For instance, even a cursory glance at Stephanie’s video may have prevented this situation. Moreover, the court stated that a good faith consideration of whether a particular use constitutes fair use will further the public policy of ensuring “that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will expand.”²⁸

The court stated that it has considerable doubt that Stephanie would be able to meet her burden of proving Universal acted with subjective bad faith.²⁹ Stephanie’s allegations, however, were sufficient at the pleading stage.³⁰ Thus, the court denied Universal’s motion to dismiss.³¹ As of the date of this writing, the case has proceeded to the discovery phase and has not reached final judgment.

Analysis

Although, the *Lenz* holding is only one federal district court’s interpretation, the case is significant because it creates a real possibility that the copyright holder could be liable to the alleged infringer. Such liability could result if a copyright holder sends a take-down notice prior to evaluating the alleged infringement for fair use. This decision will likely have the most impact on copyright holders who use automated processes to identify allegedly “infringing” works and send out large amounts of takedown notices as a result.³² Human interpretation of the automated search results will likely be required since a fair use assessment is a subjective test. In

order to understand the implications of the *Lenz* holding, the current standards of what constitutes “fair use” as well as what is required for a “good faith belief” under § 512(c)(3)(A)(v) must be discussed.

Fair Use in the Copyright Act of 1976

The Copyright Act is very broad in scope.³³ By its terms, it grants owners dominion over the reproduction, public performance and display, and distribution of a work, as well as a monopoly on the creation of derivative works.³⁴ In order to balance this intrusion into First Amendment issues and privacy concerns, the fair use doctrine plays a crucial role in limiting the expansive grant of rights to copyright owners. By the Copyright Act’s own terms, the fair use doctrine allows people to use copyrighted works without such use necessarily being considered an infringement.³⁵ Without fair use, whistling a tune while walking down the street, posting a “Dilbert” cartoon on your office door, reverse engineering computer code and “time-shifting” (recording for later viewing) “American Idol” would all be activities that would infringe upon copyrights.³⁶

The Copyright Act unequivocally established four factors used to assess fair use.³⁷ These factors include: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.” No factor by itself is conclusive.³⁸ Instead, the fair use doctrine has evolved over time.³⁹ As new technologies emerge, the courts have the first opportunity to apply copyright law to them, with Congress having the last word.⁴⁰ The normal evolution of fair use proceeds by a technologist or other creative person making use of another’s work in a manner that she believes to be fair.⁴¹ If the rights-holder disagrees, she can file suit and obtain a court decision regarding the legality of such use.⁴² Congress may override the judicially created rule, or agree with the decision by codifying it or acquiescing to it.⁴³

The epitome of the evolution of the fair use doctrine involved the video cassette recorder (“VCR”). In *Sony Corp. of America v. Universal City Studios, Inc.*,⁴⁴ Universal City Studios and Walt Disney Company sued Sony, the maker of the Betamax VCR.⁴⁵ The television content copyright holders sought to have the VCR impounded as a tool of piracy.⁴⁶ The copyright holders argued that there were virtually no noninfringing uses of the VCR, reasoning that a viewer’s taping of a television broadcast would violate the copyright holder’s

right to prevent unlawful reproduction.⁴⁷ The U.S. Supreme Court disagreed, holding that use of the VCR to record television programs for later viewing was merely “time-shifting,” and thus constituted a fair use.⁴⁸ At the time of this decision though, most copyright scholars thought home taping of broadcast television should not constitute fair use.⁴⁹ These scholars held this viewpoint because, at the time, it was unprecedented for a court to find fair use when the copyist reproduced the entirety of the work and did so for a non-transformative purpose.⁵⁰ Thus, the Supreme Court allowed the fair use doctrine to evolve in response to the new technological possibilities created by the VCR.⁵¹

While *Lenz v. Universal Music Corp.* may not alter the outer boundaries of what constitutes fair use, the court’s decision was a case of first impression regarding a new technology and how the fair use doctrine will affect it. At issue was new technology that allows user generated content to be posted on websites. The essence of the dispute was not whether Stephanie’s video constituted a fair use, but whether copyright holders had to evaluate her video for fair use prior to sending a take-down request. The court’s decision thus had modified the fair use doctrine by mandating a fair use assessment prior to issuing DMCA take-down notifications.

A court should likely find that Stephanie’s video of Holden dancing to Prince’s “Let’s Go Crazy” song is fair use. At a minimum, three of the four factors should weigh in Stephanie’s favor. First, the purpose and character of the use was not commercial. Instead, the use was merely personal, showing a “cute” moment in a child’s life. The video may be important to Stephanie’s friends and family. To the rest of the world, however, it is just another video of a cute baby dancing, nothing with much commercial appeal to the YouTube audience. Since this video lacks the drawing power to interest a mass audience, the commercial appeal to YouTube is likely negligible (although thanks to this lawsuit, the drawing power has vastly increased).

Second, examining the nature of the copyrighted work does not provide a clear winner. Some analysts may find this factor weighs slightly in favor of Universal since Prince’s song is a creative work. Generally, creative works tend to be considered less available to fair use than factual works, published works, and scientific articles.⁵² However, for a well known song, like Prince’s “Let’s Go Crazy,” success is directly related to its ability to be known publicly. Thus, most songs may be analogized to a published written work. A song’s publishing occurs during radio broadcasts and through the sale of compact discs (and now online sales). Consequently, this factor is a draw.

Third, the amount and substantiality of the copyrighted work was minor. The unedited version of Prince's "Let's Go Crazy" song is 4 minutes and 39 seconds long according to Amazon.com.⁵³ In contrast, Stephanie's use of the song was only twenty seconds long. Further, the song is heard rather softly and in poor quality. Moreover, the subject of the video is clearly the baby, Holden dancing, and the song is little more than background noise. Thus, this factor would clearly weigh in favor of Stephanie.

Finally, the effect of the use on the market is negligible. No one is likely to forego purchasing Prince's song because they can hear a low quality 20 second clip of it in Stephanie's YouTube video. This factor would also clearly weigh in favor of Stephanie.

Given that at least three of the factors clearly favor application of the fair use doctrine, any person who reviewed Stephanie's video could only conclude that it constituted fair use. More importantly, it is clear from this analysis that fair use determinations generally do not require extensive legal training. A simple examination of the work, and a ten minute primer on fair use and anyone would conclude that Stephanie's use of Prince's "Let's Go Crazy" song was not infringing. This conclusion is extremely important in resolving the issue at hand. Did Universal's fair use assessment give them a "good faith belief" that the suspected work was infringing? Since any fair use assessment would have concluded that Stephanie's video constituted fair use, it is apparent that Universal Music Corp. did not even do a fair use assessment of Stephanie's video prior to sending the take down notice.

Good Faith Belief

While the *Lenz* court held that a fair use assessment must occur to establish a "good faith belief," an issue arises in determining how reasonable that assessment must be? In other words, can copyright holders go through the motions of a fair use assessment or will their actions be judged by an objective, "reasonable man" standard? The *Lenz* court, followed the precedent set by the Ninth Circuit in *Rossi v. Motion Picture Association of America, Inc.*⁵⁴ and held that it is the copyright holder's subjective belief as to whether the use is fair which determines § 512(f) liability.⁵⁵ The Ninth Circuit firmly rejected the argument that an objective standard of review should be used to gauge the reasonableness of a copyright holder's conduct in sending takedown notifications.⁵⁶

In *Rossi*, the copyright holders were the Motion Picture Association of America ("MPAA").⁵⁷ The alleged infringer was Michael Rossi, the owner of the "internetmovies.com" website.⁵⁸ The website's content was an "online magazine,"

providing visitors with a directory of websites containing information about movies.⁵⁹ Rossi's website contained the following contents: "Join to download full length movies online now! New movies every month"; "Full Length Downloadable Movies"; and "NOW DOWNLOADABLE."⁶⁰ Moreover, these statements were combined with several images from the MPAA's copyrighted motion pictures.⁶¹ These links, however, did not actually allow the user to download movies.⁶²

When the MPAA became aware of Rossi's website,⁶³ they viewed the website but did not attempt to download any movies.⁶⁴ From this initially limited assessment, the MPAA followed the notice and takedown procedures detailed in the DMCA,⁶⁵ sending notices to both Rossi and Rossi's internet service provider ("ISP").⁶⁶ The ISP informed Rossi that they were going to shut down his website.⁶⁷ Rossi found a new ISP, but "internetmovies.com" was offline for "approximately 1 second to 72 hours."⁶⁸ Rossi then sued the MPAA for tortious interference with contractual relations and tortious interference with prospective economic advantage claims.⁶⁹ The district court granted summary judgment to the MPAA, holding that the "MPAA had more than a sufficient basis to form the required good faith belief that Rossi's site contained infringing content prior to asking the ISP to shut down the site."⁷⁰

On appeal, Rossi argued that in order to have a "good faith belief" of infringement, a copyright holder must conduct an objectively reasonable investigation into the allegedly offending website.⁷¹ Rossi reasoned that if the MPAA had reasonably attempted to investigate the site by attempting to download the movies, it would have been apparent that no movies could actually be downloaded, and thus, no infringement was occurring.⁷²

The Ninth Circuit refused to hold a copyright holder's investigation to such an objective standard.⁷³ Instead, the Ninth Circuit held that the "good faith belief" requirement is a subjective one.⁷⁴ The court reached this conclusion for several reasons. First, they stated that other federal statutes using "good faith" have traditionally been interpreted to encompass a subjective standard.⁷⁵ Second, they concluded that Congress could have easily incorporated an objective standard of reasonableness if it wanted to do so.⁷⁶ The Ninth Circuit discerned that Congress did not intend to change the traditional subjective standard, reasoning that its' failure to include an objective standard was purposeful.⁷⁷ Finally, the Ninth Circuit stated that the DMCA expressly provided a limited cause of action against copyright holder's who send improper infringement notifications. However, liability is only imposed for a knowing misrepresentation.⁷⁸ Thus, they concluded that a

copyright owner cannot be made liable simply because an unknowing mistake is made.⁷⁹

The Ninth Circuit determined that the MPAA's failure to follow the links provided by the "NOW DOWNLOADABLE" content was at best, an unknowing mistake.⁸⁰ In contrast, Rossi's content virtually compels someone to believe that movies were available for downloading from the site.⁸¹ Moreover, Rossi admitted that his own customers often believed that actual movies were available for downloading.⁸² Thus, the Ninth Circuit affirmed the summary judgment for the copyright holders because Rossi failed to show any evidence that the MPAA's takedown notifications were made knowingly and in bad faith.⁸³

This subjective standard creates a high burden for plaintiffs who must prove that the copyright holder lacked a "good faith belief." Since the *Lenz* court is likely to follow Rossi's subjective standard (as it should, since the Northern District of California sits in the Ninth Circuit's jurisdiction), Stephanie's chances of succeeding on the merits are slim.⁸⁴ The discovery process in the *Lenz* case may likely turn up evidence that a clever defense attorney can use to argue that Universal had a good faith belief from some skeletal form of a fair use assessment. In contrast, finding evidence of bad faith will likely be very difficult for the plaintiff. "Smoking gun" emails or memos establishing that the copyright holder sent a takedown notification, despite believing the challenged use to be fair are rare finds.⁸⁵ The best case scenario for plaintiffs is finding direct evidence that the copyright holders simply did not consider fair use at all.⁸⁶

Alternatively, some courts may find as a matter of law that some uses of copyrighted work are so obviously fair that it would be impossible to subjectively believe otherwise. In *Online Policy Group v. Diebold, Inc.*,⁸⁷ Judge Fogel (coincidentally the presiding judge on *Lenz v. Universal Music Corp.*) used this very concept, finding that no reasonable copyright owner could have believed that the portions of an email archive at issue were protected by copyrights. Thus, the cease and desist letters issued to the ISP's constituted a knowing misrepresentation.

Using similar reasoning in *Lenz*, Stephanie's attorneys could argue that it was impossible for Universal, as a matter of law, to subjectively believe that a twenty-nine second video with the title picture of Holden's little body was anything other than a fair use of Prince's "Let's Go Crazy" song. The takedown notice almost certainly resulted from an automated search process which identified the title of Stephanie's video "Let's Go Crazy #1" and matched it to Prince's song title. Even a cursory glance at the video posting (without even

playing the video) should dispel any notion that Stephanie's video was an infringing use. The subjective belief standard may provide a convenient escape hatch for copyright holders, but it should only protect copyright holders that rely on some form of a human assessment. Automated processes which merely search for similar titles and send automatic takedown notifications without employing any individual human assessment should not be protected. Similarly, an employee who only confirms the title's similarity should not meet the standard for a fair use assessment.

The requirement for human assessment was not explicitly stated in the holding of *Rossi*. The court, however, mentioned the fact that an MPAA employee had reviewed the website.⁸⁸ The court then explained in a footnote the difference between conducting purely automated searches and the use of human assessment to individually examine the automated search results.⁸⁹ The court noted that many anti-piracy departments use automated processes, often referred to as "Ranger" programs to detect websites containing potentially infringing material.⁹⁰ The Net-Coalition and Internet Commerce Coalition, acting as Amici Curiae, argued that computers conducting automated searches cannot form a belief consistent with the language of the DMCA because they cannot distinguish between infringing content and content that merely contains words that suggest infringement.⁹¹ In essence, the Amici Curiae were arguing that automated searches cannot perform the fair use assessment.⁹² The court did not disagree with the Amici Curiae. Instead, the court stated that the Amici Curiae's argument was not really at issue in this case.⁹³ While the MPAA admitted relying heavily on a "Ranger" automated search program to initially identify potentially infringing websites, human beings subsequently reviewed the identified sites.⁹⁴ Specifically, the MPAA employs three to four employees that review these identified sites.⁹⁵ The court made a factual determination that these employees, and not the "Ranger" automated search program, ultimately decided whether a website contained infringing material.⁹⁶

The court's finding that the MPAA used employees to review identified sites distinguishes the *Rossi* decision from *Lenz*. In *Lenz*, the copyright holder, Universal, never asserted that its' employees reviewed the video at issue. The lack of such an assertion is conspicuous by its absence from Universal's attached brief in their motion to dismiss.⁹⁷ If Universal did, in fact, have employees reviewing the automated search results, Universal would have asserted as much. Similarly, Universal would have simply cited *Rossi* as controlling authority to establish that the company had met the standard articulated in *Rossi* to support a "good faith belief." Instead, Universal was forced to litigate the issue that the *Rossi* court

had reserved and argue that a fair use assessment was not required to support a “good faith belief.” While the decision in *Lenz* ran contrary to Universal’s argument, one clear conclusion can be inferred from both the *Rossi* and *Lenz* decisions. When a court is evaluating whether a copyright holder had a “good faith belief” that a website is infringing, an automated search program that merely locates potentially infringing websites will not be sufficient to support a “good faith belief.” Instead, the results must be evaluated, filtered, and individually assessed by human beings for fair use.

Methods Used to Evaluate Online Copyright Infringement

In order to understand why an automated process cannot meet the DMCA’s “good faith belief” requirements for issuing a takedown notification, it is important to understand how these automated processes work. The advantages and disadvantages of these automated processes will be discussed. Finally, a recommendation will be made on how automated processes may be combined with human assessment.

The exact methodology that automated processes utilize to search the web remains a carefully guarded secret by the companies that are promoting their services. Generally, anti-piracy software is a type of search engine that browses the internet, exploring anything from peer-to-peer networks (“P2P”) and instant messaging (“IM”), to various websites.⁹⁸ Basically, the automated software uses agents known as “bots” to scan the internet for potentially infringing copyrighted content.⁹⁹ This content is determined by the copyright holder.¹⁰⁰

The methodology employed depends in part on the sophistication of the automated search program. Copyright holders utilizing less sophisticated search programs can upload the titles of copyrighted materials to determine text match searches.¹⁰¹ The more sophisticated programs allow the copyright holder to upload a digital fingerprint of the copyrighted material.¹⁰² Digital fingerprints are referred to as “hashes,” which are sampled portions of known pirated copyright material.¹⁰³ For example, the copyright holder can download pirated music, take “hashes” from this pirated music, and use it as a comparative sample when the bots perform the search.¹⁰⁴ In Universal’s situation, though, since Stephanie Lenz had used Prince’s song as background noise, as opposed to uploading a pirated song on YouTube, such a digital fingerprint would have been impossible to utilize. Thus, Universal most likely employed a less sophisticated automated search program.

Autonomy’s Virage program offers the latest technology, utilizing “meaning-based computing” to search for infringing

works.¹⁰⁵ This technology takes whatever format the infringing work is in and separates the text, image, and audio portions of that infringing work and compares them to a stored database of “hashes” (the samples uploaded by the copyright holder).¹⁰⁶ After comparison, the Virage program then analyzes how each separate layer relates to the other (i.e. comparing the text layer to the audio layer) and can grade the potential for infringement.¹⁰⁷

This method of separating the potential layers by “ripping” the scanned internet item allows for scalability.¹⁰⁸ By determining what layer is potentially infringing and comparing it to the original format, the program can determine the likelihood that the work is infringing with much greater accuracy than less sophisticated automatic scanning programs.¹⁰⁹ Moreover, the program can prioritize the higher likelihood of infringing works from the lower infringing works.¹¹⁰ This would allow the copyright holders to focus more on commercial infringers, thus allocating valuable economic resources accordingly.¹¹¹ Consequently, the technology can reduce the risk of improper identifications while also reducing administrative overhead.¹¹²

If Universal had been using “meaning-based computing” technology, Stephanie Lenz’s video could have been broken down into three layers, a text layer, an audio layer, and a video layer. Each layer is individually important and each layer can relate to one another. For example, the text layer would be important in matching the song’s name to the potentially infringing work. The audio layer would be important in matching the song itself to the potentially infringing work. The text and audio layers would relate to each other if the text matched the song, i.e. the song title “Let’s Go Crazy” matching the music component of the video. From this analysis Stephanie Lenz’s video would have a high likelihood of infringing, right? Wrong. The potentially infringing work’s audio layer would likely be a bad match. Not only is the song playing almost inaudibly in the background, but Stephanie’s voice is heard asking “what do you think of the music?” The kid’s voices are also heard screaming in the background. The mixture of different sounds and the poor audio quality music in the background would make it difficult to match the audio layer to Prince’s song. Removing the audio layer as a potential match the examination turns to the video which does not match, at all. Thus, Universal is left with only a text match. Thus, the “meaning-based computing” method reveals a very low likelihood of infringement.

Each time the automated search program finds a match, it adds the probable infringer to a database.¹¹³ The sophistication of the program will determine the amount of informa-

tion stored about the probable infringer. At a minimum, the software will store the information necessary to meet the requirements for issuing a DMCA takedown notification.¹¹⁴ Thus, it will need the title of the potentially infringing file, location of the potentially infringing file (website address, network address, etc.), contact information about the ISP (looked up from a “whois” search), and the match criteria that the automated search program used to generate a “hit.”¹¹⁵ Typically, this information will be stored for later manual verification by a human being.¹¹⁶

The advantage of automated search programs is that they generate all the administrative information needed to send a takedown notification per DMCA requirements.¹¹⁷ Without automated search programs, the collection of this information could be extremely time consuming and monotonous.¹¹⁸ The automated search program is so efficient that it can literally send the takedown notification to the ISP without any human involvement.¹¹⁹ YouTube, alone, has ten hours of video content posted online every minute of every day (approximately more than 250,000 clips per day).¹²⁰ Thus, it is easy to understand why copyright holders would want to use automated programs to help police the internet. It would simply be impossible for human manual policing to keep up with the huge amounts of content posted in UGC sites. Moreover, with the use of digital fingerprinting and meaning-based computing technology, these automated search programs allow forensic identification of infringing works that cannot even be detected by human means.

As much as copyright holders need automated search technology, our current structure of copyright law demands human evaluation. By the DMCA’s very words, a copyright holder must have a “good faith belief” that the work is infringing.¹²¹ Computer software can never have a “good faith belief.” As the *Rossi* court pointed out, “good faith is a *state of mind* consisting of honesty in belief or purpose.”¹²² Thus, the courts will always look to the copyright holder’s subjective state of mind rather than the automated software itself. Moreover, copyright law’s fair use consists of a four factor test that relies upon good sense and an “equitable rule of reason,” instead of bright line rules. Ultimately, this requires that each potential infringement be evaluated on a case by case basis.

The general public benefits by requiring that copyright holders have a “good faith belief” that infringement has occurred, which is supported by some form of human assessment. Automated search programs can be disadvantageous because they typically utilize inconclusive methods for identifying infringement. A study performed by the University of

Washington showed that copyright holders sometimes send DMCA takedown notices in cases where no infringement has occurred.¹²³ While this is not a ground breaking discovery, it is troubling that their study identified printers and other devices receiving takedown notices even though it is impossible for these devices to download any copyrighted material.¹²⁴ In total, the authors of the study were able to obtain over 400 spurious takedown notices.¹²⁵

In the study, the authors used BitTorrent, a P2P file distribution tool as their forum.¹²⁶ P2P networks rely on a “swarm” of computers, acting together, each computer helping to distribute small blocks that comprise the original file.¹²⁷ Computers can join the swarm without actually transferring any data.¹²⁸ The swarm, though, would keep track of the new computer joined as a potential candidate for file transferring.¹²⁹ The swarm uses a tool called a tracker to accomplish this task.¹³⁰ The authors queried the swarm and advertised their presence as a potential replica, thus becoming registered by the tracker.¹³¹ This registration by the tracker occurs without actually uploading or downloading any file data whatsoever.¹³²

The study analyzed two forms of detection utilized to identify infringing users: indirect detection and direct detection.¹³³ The indirect detection treated the tracker list as a conclusive infringer, regardless of whether or not data was exchanged.¹³⁴ In contrast, the direct detection method analyzes the data that is being transmitted.¹³⁵ The study determined that direct detection was more conclusive.¹³⁶ Yet the study also determined that most of the copyright holder’s enforcement agencies were using indirect detection.¹³⁷ The reason, though, is obvious. Direct detection requires the enforcement agency to upload and/or download data and then determine if the data being transferred is a match to the copyrighted material.¹³⁸ This results in more resources being required and/or the utilization of more sophisticated enforcement technology.¹³⁹ In contrast, indirect detection merely requires a query of the tracker information in order to obtain IP addresses (in essence, one part of the identity of a computer).¹⁴⁰ Copyright holders who use tools that produce inconclusive results cast a very wide net particularly when they rely on these tools to send takedown notifications. As a result, some honest internet users, whose user generated content constitutes fair use, will receive inappropriate notifications and have their content shut down.

This overreaching by copyright holders should result in liability. As Universal is learning, shortcuts in copyright enforcement can lead to expensive legal fees and judicial precedent that could be harmful to the company and the

industry. If Universal had used one of the more sophisticated automated programs, such as “meaning-based computing,” incorrect takedown notices could have been minimized. The greater accuracy of this technology in determining potentially infringing works will reduce the amount of content that has to be individually reviewed by human beings to make fair use assessments. Thus, the initial investment in more sophisticated automated software will likely be offset by the reduction in employee hours. Potential cost savings from decreased litigation, the decreased potential for adverse legal judgments and the avoidance of negative publicity also favor investment in more sophisticated automated software.

Conclusion

The internet’s expansive reach has created a sea change in the copyright holder’s world. Until companies such as Universal adjust their business model to this new world, they need to adopt the best technological tools to protect their intellectual property. Tools using indirect detection are inadequate. They produce inconclusive results and ultimately lead to inappropriate takedown notifications. Copyright holders now have the added obligation to assess fair use in arriving at a “good faith belief” that a work is infringing. Copyright holders must now have human beings manually check each individual search result. More sophisticated automated search software will result in two benefits. First, the results will be better filtered to identify the true infringers, generating less false positives. Second, a reduced results list will require less employee time dedicated to fair use evaluations. Employees can focus their efforts on stopping infringement instead of filtering through large amounts of false positives. More importantly, this process provides two levels of protection for innocent users such as Stephanie Lenz, whose fair use of Prince’s “Let’s Go Crazy” song should never have generated take down notices. Ultimately, this process more effectively balances the competing public policy interests of copyright holders and innocent citizens whose user generated content constitutes fair use. ■

Endnotes

- 1 Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1151-02 (N.D. Cal. 2008).
- 2 *Id.* at 1152.
- 3 *Id.*
- 4 *Id.* The video is available to the public at <http://www.youtube.com/watch?v=N1KfJHFWIhQ>. As of this writing, it has been viewed over 872,000 times and received 1,323 text comments. Obviously, the video’s notoriety is due to the current legal battle.
- 5 *Id.*
- 6 *Id.*
- 7 *Id.*
- 8 *Id.*
- 9 *Id.*
- 10 17 U.S.C. § 512 (2000).
- 11 Lenz, 572 F. Supp. 2d at 1152.
- 12 *Id.*
- 13 17 U.S.C. § 512(g)(3). The counter notification provision’s requirements are quite similar to the notification requirements. In Stephanie’s case, she had to send a written, signed communication to YouTube containing identification of the video alleged to be infringing, a statement under perjury of law that she had a good faith belief that her video was not infringing, and consent to the jurisdiction of the address she provides. Lenz, 572 F. Supp. 2d at 1152.
- 14 *Id.*
- 15 *Id.*
- 16 *Id.*
- 17 17 U.S.C. § 512(f).
- 18 Lenz, 572 F. Supp. 2d at 1153.
- 19 *Id.*
- 20 *Id.*
- 21 Sec. Amend. Compl. of Pl. at ¶31, Lenz v. Universal Music Corp., 2008 WL 2810556 (2008).
- 22 17 U.S.C. § 512(c)(3)(a) stating “[a] statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.”
- 23 Fed. R. Civ. P. Rule 12(b)(6). The standard the court used was that “[d]ismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.” Lenz, 572 F. Supp. 2d at 1153.
- 24 *Id.* at 1154.
- 25 *Id.*
- 26 *Id.* at 1155.
- 27 *Id.*
- 28 *Id.* at 1156.
- 29 *Id.* The subjective bad faith requirement was determined in Rossi v. Motion Picture Ass’n of America, Inc., 391 F.3d 1000, 1004 (9th Cir. 2004). Rossi is discussed, *infra* n. 54.
- 30 *Id.*
- 31 *Id.*
- 32 Sam Bayard, *California Court Warns Copyright Bullies Not to Ignore Fair Use*, CITIZEN MEDIA LAW PROJECT, ¶ 8 (Aug. 22, 2008), <http://citmedialaw.org/print/1994>.
- 33 See Copyright Act of 1976, Title 17 of U.S. Code.
- 34 Fred von Lohmann, *Fair Use and Digital Rights Management: Preliminary Thoughts on the (Irreconcilable?) Tension between Them*, COMPUTERS, FREEDOM & PRIVACY 2002 (Apr. 16, 2002).

- 35 17 U.S.C. § 107 stating “the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, *is not an infringement of copyright.*” (emphasis added).
- 36 Lohmann, *supra* note 34.
- 37 17 U.S.C. § 107.
- 38 Lohmann, *supra* note 34.
- 39 *Id.*
- 40 *Id.*
- 41 *Id.*
- 42 *Id.*
- 43 *Id.*
- 44 464 U.S. 417 (1984).
- 45 *Id.*
- 46 *Id.*
- 47 *Id.*
- 48 *Id.*
- 49 Lohmann, *supra* note 34.
- 50 *Id.*
- 51 *Id.*
- 52 University of Minnesota, *Fair Use Analysis Worksheet*, available at <http://www.lib.umn.edu/copyright/checklist.phtml>.
- 53 “Let’s Go Crazy” from the “Purple Rain” album available for \$0.99 at Amazon.com. Available at <http://www.amazon.com/gp/product/B0011Z74IE>.
- 54 391 F.3d 1000 (9th Cir. 2004).
- 55 *Id.* at 1004.
- 56 *Id.* at 1005.
- 57 *Id.* at 1002. The MPAA consists of movie producers and distributors. *Id.* Their organizational purpose is to prevent unauthorized copying, transmittal, or other distribution of the movie studio’s motion pictures. *Id.*
- 58 *Id.* at 1001-02.
- 59 *Id.* at 1002.
- 60 *Id.*
- 61 *Id.*
- 62 *Id.* at 1003.
- 63 *Id.* at 1002.
- 64 *Id.* at 1002, fn. 2.
- 65 See 17 U.S.C. § 512(c)(3)(A).
- 66 *Id.* at 1002.
- 67 *Id.*
- 68 *Id.*
- 69 *Id.*
- 70 *Id.*
- 71 *Id.* at 1003-04.
- 72 *Id.* at 1003.
- 73 *Id.* at 1004.
- 74 *Id.* at 1005.
- 75 *Id.* at 1004.
- 76 *Id.*
- 77 *Id.*
- 78 *Id.* at 1004-05.
- 79 *Id.* at 1005.
- 80 *Id.*
- 81 *Id.*
- 82 *Id.*
- 83 *Id.* at 1005-06.
- 84 Judge Fogel, in dicta, stated that “the Court has considerable doubt that Lenz will be able to prove that Universal acted with the subjective bad faith required by *Rossi*, and following discovery her claims well may be appropriate for summary judgment.” Lenz, 572 F. Supp. 2d at 1156.
- 85 Bayard, *supra* note 32.
- 86 *Id.*
- 87 337 F. Supp. 2d 1195, 1204 (N.D. Cal. 2004).
- 88 *Rossi*, 391 F.3d at 1005.
- 89 *Rossi*, 391 F.3d at 1005, fn. 7.
- 90 *Id.*
- 91 *Id.*
- 92 *Id.*
- 93 *Id.*
- 94 *Id.*
- 95 *Id.*
- 96 *Id.*
- 97 Reply ISO Mot. to Dismiss of Def., Lenz v. Universal Music Corp., 2008 WL 2810558 (2008).
- 98 Associated Press, *RIAA Reveals Method to Madness*, WIRED, Aug. 28, 2003. Available at <http://www.wired.com/entertainment/music/news/2003/08/60222>.
- 99 *Id.*
- 100 e.g., see Autonomy’s Virage Automatic Copyright Infringement Detection program. The program utilizes image and audio analysis technology to offer an “accurate and scalable method of detecting breaches of copyright regardless of location or format.” Available at <http://news.thomasnet.com/fullstory/802684>.
- 101 e.g., see <http://www.DMCANotice.com>.
- 102 Associated Press, *supra* note 98.
- 103 *Id.*
- 104 *Id.*
- 105 Autonomy Press Release, *Autonomy’s Virage Automates Copyright Infringement Detection for Online Video*, AUTONOMY GROUP, Apr. 5, 2007. Available at <http://news.thomasnet.com/fullstory/802684>. Hereinafter referred to as “Press Release.”

106 *Id.*
 107 *Id.*
 108 *Id.*
 109 *Id.*
 110 *Id.*
 111 *Id.*
 112 *Id.*
 113 *Id.*
 114 Lawrence G. Walters, *Copyright Enforcement Made Easy*, DMCANOTICE.COM. Available at <http://www.dmcanotice.com/copyright.htm>.
 115 *Id.*
 116 Associated Press, *supra* note 98.
 117 Walters, *supra* note 106.
 118 *Id.*
 119 *Id.*
 120 Steven Seidenberg, *Copyright in the Age of YouTube*, ABA JOURNAL – LAW NEWS NOW, Feb. 2009. Available at http://www.abajournal.com/magazine/copyright_in_the_age_of_youtube.
 121 See 17 U.S.C. § 512(c)(3)(A).
 122 Rossi, 391 F.3d at 1004, fn. 5, quoting BLACK’S LAW DICTIONARY, 7th ed. 1999.
 123 Michael Piatek, et. al., *Why My Printer Received a DMCA Takedown Notice*, UNIVERSITY OF WASHINGTON, DEPT. OF COMPUTER SCIENCE AND ENGINEERING, Jun. 6, 2008. Available at http://dmca.cs.washington.edu/dmca_hotsec08.pdf.
 124 *Id.* at §1.
 125 *Id.* at §1, table 1.
 126 *Id.* at §2.
 127 *Id.*
 128 *Id.*
 129 *Id.*
 130 *Id.*
 131 *Id.*
 132 *Id.*
 133 *Id.*
 134 *Id.* at §4.
 135 *Id.* at §5.
 136 *Id.*
 137 *Id.*
 138 *Id.*
 139 *Id.*
 140 *Id.* at §4.

Save the Date!!!

On **Wednesday, September 22, 2010**, the Information Technology Law Section will convene for an annual meeting and an ICLE event! Contact **Jeremy D. Bisdorf**, jbisdorf@jaffelaw.com, for sponsorship information!

New Trust Account Overdraft Notice Rule Takes Effect Sept. 15

New Rule 1.15A of the Michigan Rules of Professional Conduct, also known as the Trust Account Overdraft Notice Rule (TAON), takes effect on September 15, 2010. To review Rule 1.15A in its entirety, visit [MRPC 1.15A](#).

A brief summary of the requirements of the TAON Rule is provided below:

- Before the effective date of the TAON Rule, financial institutions doing business in Michigan must submit a signed agreement to the State Bar of Michigan to obtain approval to maintain lawyer trust accounts as defined by MRPC 1.15(a).
- Lawyers must confirm that their financial institutions are on the list of approved financial institutions posted on the State Bar’s website.
- No further action is required by lawyers for their preexisting IOLTA accounts; these accounts have already been identified as lawyer trust accounts by financial institutions when opened by lawyers.
- After confirming that their financial institution is on the State Bar’s list, lawyers must contact their financial institutions to change the name on their non-IOLTA accounts to include the term “trust” or “escrow” if not already included in the account name.
- After confirming that their financial institution is on the State Bar’s list, lawyers may download a form (Non-IOLTA Lawyer Trust Account Notice to Financial Institution) from the State Bar’s website and submit the completed form to their approved financial institutions for each non-IOLTA trust account and must send a copy to the State Bar.
- Lawyers must continue to safeguard client and third-party funds held in trust to avoid all overdrafts to their IOLTA and non-IOLTA accounts.
- Approved financial institutions maintaining lawyer trust accounts must submit overdraft reports within five banking days of any overdrafts to the grievance administrator of the Attorney Grievance Commission.

The State Bar is in the process of communicating with financial institutions to invite their participation in the TAON program. The State Bar expects to begin receiving signed TAON agreements from financial institutions in May and will begin posting its list of approved financial institutions at that time. The State Bar will update the list of approved financial institutions as signed TAON agreements are received from financial institutions. Lawyers should wait until the name of their financial institution appears on the State Bar’s list of approved financial institutions before submitting a completed non-IOLTA notice form.

Publicly Available Websites for IT Lawyers

Following are some publicly available websites relating to varying aspects of information technology law practice. Some of these websites may require payment for certain services. Neither the State Bar of Michigan nor the IT Law Section endorses these websites, the providers of the website, or the goods or services offered in connection therewith. Rather these websites are provided for information purposes only and as possible useful tools for your law practice.

Please provide any feedback or recommendations for additional websites to michael@gallo.us.com.

Miscellaneous Recommendations and Guidelines

- <http://oig.hhs.gov/oei/reports/oei-01-07-00450.pdf> - Recommendations from the Inspector General of the Department of Health and Human Services (HHS), regarding information technology contracts. The recommendations are directed to contracts awarded by a specific agency within HHS, but provide insight into how a federal department would like to structure information technology contracts.
- http://www.michigan.gov/dmb/0,1607,7-150-9131_9347---,00.html - The Michigan Administrative Guide to State Government presents, in either printed form or in an electronically accessible standard format, what an informed person should know about the major processes through which State government operates.
- <http://www.it.northwestern.edu/policies/index.html> - A comprehensive list of Northwestern University's policies and guidelines regarding information technology concerns such as security, software, network, email and vendors
- <http://www.mma-net.org/hrservices/retentionguide.asp> - Business record retention guidelines from the Michigan Manufacturers Association
- <http://www.cybercrime.gov/reporting.htm> - U.S. Department of Justice recommendations for reporting computer, Internet-related, or Intellectual property crime
- <http://www.ncsl.org/IssuesResearch/TelecommunicationsInformationTechnology/UniformElectronicTransactionsActs/tabid/13484/Default.aspx> - Links to statutory citations of Uniform Electronic Transactions Act (UETA), which provide a legal framework for the use of electronic signatures and records in government or business transactions. State enactments of UETA make electronic records and signatures as legal as paper and manually signed signatures.
- <http://www.computerforensicsworld.com> - A resource that embraces all aspects of digital and computer forensics ■

2010 Edward F. Langs Writing Award

Essay Competition Rules

1. Awards will be given to up to three student essays, which in the opinion of the judges make the most significant contribution to the knowledge and understanding of information technology law. Factors to be taken into consideration include: originality; timeliness of the subject; depth of research; accuracy; readability; and the potential for impact on the law.
2. Essay must be original, deemed to be of publishing quality, and must not have been submitted to any other contest within the previous 12 months.
3. Essay must be typed, double spaced, at least ten pages in length, must contain proper citations listed as either end-notes or footnotes, and must have left, right, top, and bottom margins of one inch.
4. Essay must include the submitter's name, email address, mailing address, telephone number, and school attended.
5. A total of \$1,500 in US dollars shall be divided between the award winning essays, and all rights to award winning essays shall become the property of the State Bar of Michigan.
6. The Information Technology Section of the State Bar of Michigan reserves the right to make editorial changes, and to publish award winning essays in the Section's newsletter, the *Michigan IT Lawyer*.
7. Essay must be submitted as a Microsoft Word document, postmarked by **June 30, 2010**, and emailed to dsyrowik@brookskushman.com.