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# Michigan IT Lawyer

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

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## Bits and Bytes from the Chair

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

I hope you are all enjoying your summer.

The long awaited Bilski decision has finally been released and I am looking forward to a detailed analysis of it at our **Annual Seminar on September 22, 2010** at the Inn at St. John's in Plymouth, Michigan. *Charlie Bieneman* and our ICLE seminar committee have been hard at work in scheduling the speakers and event. Please make an effort to attend as it promises to be quite interesting.

Our **Annual Meeting** will be held at the same date as the Annual Seminar during the lunch break, so there is double the reason to clear your calendar for that day. If you have an interest in serving on the IT Law Section Council for the 2010-2011 year, please contact me directly at (248) 727-1386 or at [jbisdorf@jaffelaw.com](mailto:jbisdorf@jaffelaw.com).

The next **IT Law Section Council** meeting will be held via telephone conference on **August 11, 2010** at 5 PM. All members of the Section are invited to participate. Please let me know if you are not on the Council and would like to receive the dial-in information.

Also, I would like to remind you that we have created our own Facebook web site. Please check out our page at: <http://www.facebook.com/pages/Michigan-IT-Lawyers/105421292829635> for news and updates.

Thank you for your support and see you soon!

Jeremy D. Bisdorf  
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2009-2010

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## Recent Developments in Information Technology Law

By David R. Syrowik, *Brooks Kushman PC*

### PATENTS – Case Law – U.S. Supreme Court

As reported at 80 BNA's PTCJ 126, on May 24, 2010, the U.S. Supreme Court denied review of a Federal Circuit ruling that vacated a half-billion dollar patent infringement damages award against Microsoft Corp. for use of a pop-up calendar in Microsoft Outlook. *Microsoft Corp. v. Lucent Technologies Inc.*

As reported at 561 U.S. \_\_\_\_, on June 28, 2010, the U.S. Supreme Court ruled that a business method patent for hedging risk did not define a patentable process under 35 U.S.C. § 101 but rather was an attempt to patent an abstract idea. Prior Supreme Court precedent provides that such ideas, laws of nature and physical phenomena are specific exceptions to § 101's dynamic and wide scope as to patentable subject matter. Despite an extensive concurring opinion authored by Justice Stevens, who would have held that all business methods are unpatentable, Justice Kennedy, who authored the majority opinion, held that a business method was one kind of "method" that, at least in some circumstances, is eligible for patenting under § 101. In saying this, the Court rejected the exclusivity of the Federal Circuit's "machine-or-transformation" test but rather looked to the Federal Circuit to come up with other limiting criteria in evaluating business method patents in the Information Age. Instead of coming up with a test of its own, the Court told the Federal Circuit to look to the definition of the term "process" in § 101(b) and the "guideposts" of the *Benson, Flook and Diehr* Supreme Court cases in coming up with a different, less extreme test than the "machine-or-transformation" test. *Bilski v. Kappos*.

### ANTITRUST/TRADEMARKS – Case Law – U.S. Supreme Court

As reported at 80 BNA's PTCJ 116, on May 24, 2010, the U.S. Supreme Court unanimously ruled that the National Football League's licensing of its teams' logos and trademarks constitutes concerted action that is not categorically beyond Section 1 Sherman Act antitrust liability, and the legality of such concerted action must be evaluated under the rule of reason. The court reverses a Seventh Circuit ruling that the 10-year exclusive licensing agreement did not constitute concerted action because the NFL teams were best described as a single source of economic power when promoting NFL football through licensing the teams' intellectual property. *American needle Inc. v. National Football League*.

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

As reported at 80 BNA's PTCJ 94, on May 17, 2010, the U.S. Court of Appeals for the Federal Circuit invalidated a patent for computerized parts-sales method in view of prior art reference. *Orion IP LLC v. Hyundai Motor America*.

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

As reported at 80 BNA's PTCJ 157, on May 19, 2010, the U.S. Court of Appeals for the Sixth Circuit ruled that summary judgment was properly granted to the defendant in an infringement suit brought by a credit union software developer against a competing software developer. *R.C. Olmstead Inc. v. CU Interface*.

As reported at 80 BNA's PTCJ 17, on April 29, 2010, the U.S. Court of Appeals for the Second Circuit ruled that IP addresses and lists of allegedly copied songs were sufficient to proceed with peer-to-peer lawsuit. *Arista Records LLC v. Doe 3*.

As reported at 80 BNA's PTCJ 263, on June 15, 2010, the U.S. Court of Appeals for the Second Circuit asked New York's top court whether the harm from alleged copyright infringement is felt, for purposes of that state's long-arm statute, where the copyright holder resides or where the act of copying and uploading content to the Internet occurs. *Penguin Group (USA) Inc. v. American Buddha*.

## COPYRIGHTS – Case Law – U.S. District Courts

As reported at 80 BNA's PTCJ 25, on March 31, 2010, the U.S. District Court for the Northern District of California ruled that Facebook escaped copyright infringement liability due to game-maker's faulty pleading. *Miller v. Facebook, Inc.*

As reported at 80 BNA's PTCJ 167, in an April 23, 2010 decision unsealed May 18, 2010, the U.S. District Court for the Southern District of New York ruled that though quantitatively small, copied software code may infringe if of qualitative value. *Marketing Technology Solutions, Inc. v. MediZine LLC*.

As reported at 80 BNA's PTCJ 84, on May 11, 2010, the U.S. District Court for the Southern District of New York ruled that the operator of the peer-to-peer file sharing program LimeWire is secondarily liable for its users' infringement of the copyrights on thousands of protected songs. *Arista Records LLC v. Lime Group LLC*.

As reported at 80 BNA's PTCJ 96, on May 5, 2010, the U.S. District Court for the Central District of California ruled that fabric designs based on "clip art" are registrable as derivative work, not as group. *L.A. Printex Industries Inc. v. Aeropostale*.

## TRADEMARKS – Case Law – U.S. District Courts

As reported at 80 BNA's PTCJ 242, on June 9, 2010, the U.S. District Court for the Northern District of Illinois denied summary judgment to Google, thereby opening the possibil-

ity that it could be liable for cybersquatting as "licensee" of various infringing domain names. *Vulcan Golf LLC v. Google Inc.*

## TRADEMARKS – U.S. Patent and Trademark Office

As reported at 94 USPQ2d 1399, on April 14, 2010, the Trademark Trial and Appeal Board ruled that a computer monitoring system that anticipates and detects adverse drug events, sold under applicant's "Vigilanz" mark, is very different from opposer's heart monitors sold under "Vigilance" mark, and products move in different channels of trade to different classes of consumers. *Edwards Lifesciences Corp. v. Vigilanz Corp.*

## TRADE SECRETS – Case Law – State Courts – California

As reported at 80 BNA's PTCJ 15, on April 29, 2010, the California Court of Appeals ruled that Intel Corp. was not liable for misappropriating trade secrets when it incorporated a supplier's code into its products, even knowing that the supplier had been accused of misappropriation in creating the supplied component. Intel did not "use" trade secret embodied in software when it never had source code. *Silvaco Data Systems v. Intel Corp.* ■

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# Privacy Consent Glossary

By Jay Cline, CIPP

Differing understandings of what “opt in” and “opt out” mean have stymied countless conversations between corporate marketers and privacy officers around the world. Similar confusion over definitions of “marketing” communications versus “administrative” communications have put the brakes on many creative marketing ideas. What are some possible solutions? The following glossary offers some starting points for your company’s internal policy deliberations.

## 1. “Opt in” = express, affirmative, or explicit consent

The gold standard in privacy-consent language is the so-called “opt in” consent. Regulators around the world tend to require this level of consent--alternatively called express, affirmative, and explicit--for collecting sensitive data and for using personal data in ways most individuals might not agree to. For example, the U.S.-EU Safe Harbor principles state: “For sensitive information, affirmative or explicit (opt-in) choice must be given if the information is to be disclosed to a third party or used for a purpose other than its original purpose or the purpose authorized subsequently by the individual.”

There are more complicated “opt-in” definitions than the Safe Harbor. The U.S. CAN-SPAM Act, for example, defines this higher level of consent occurs when “(A) the recipient expressly consented to receive the message, either in response to a clear and conspicuous request for such consent or at the recipient’s own initiative; and (B) if the message is from a party other than the party to which the recipient communicated such consent, the recipient was given clear and conspicuous notice at the time the consent was communicated that the recipient’s electronic mail address could be transferred to such other party for the purpose of initiating commercial electronic mail messages.”

It’s debatable whether requiring this level of consent is always good policy. What’s not as debatable is lawmakers’ intent behind this standard: that data subjects’ clear and informed consent is required for exceptional uses of their data.

In practice, what should be examples that are widely understood to qualify as opt-in consent?

- An unticked box on a Web page or paper form that says: “Send me promotional e-mail offers.” If consumers tick that box, they’ve provided opt-in consent.

- An unticked “I agree” box below a Web- or paper-based set of terms and conditions in which it is clearly and prominently stated that the consumer will receive direct marketing. If consumers tick that box, they’ve also provided opt-in consent.
- An optional field on a form that says “e-mail address,” and nearby it says: “By providing your e-mail address, you may receive marketing e-mails from us.” If consumers provide their e-mail address, they, too, will have provided opt-in consent.
- A “subscribe” button on a Web site “shopping cart” page that, when clicked, uses information from the purchase to subscribe a consumer to a newsletter and use and disclose that information according to the terms of the privacy policy posted on the site.
- An inquiry from a consumer who says or writes: “Please add me to your mailing list.”
- A business card that is dropped into a fishbowl that says: “Drop your card and win a free lunch and join our mailing list.”

According to Andrew Serwin, chair of the Foley & Lardner LLP Privacy Security & Information Management Practice, in certain cases a “double” opt-in regime is used. “This occurs when a company needs to ensure that there is no issue regarding whether a recipient gave consent,” says Serwin.

## 2. “Opt out” = soft opt in, default opt in, assumed, deduced, deemed, or implicit consent

Even if consumers haven’t explicitly checked an opt-in box, there still may be many situations where companies can assume they have appropriate consent to send direct marketing to their consumers. If it’s usual and customary for companies in a certain industry in a certain country to send direct marketing to consumers at addresses listed in public directories or at the contact information provided during a sale, these companies may often be safe to assume they have obtained an appropriate level of consent.

Even the European Union, known for its more restrictive approach to privacy consent, accepts the legitimacy of this opt-out approach. In its Directive on Data Protection, the EU defines a data subject’s consent broadly as ‘any freely given

specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed.’ The EU more directly provides for an opt-out approach to direct marketing in its subsequent Directive on Electronic Communications. Its section on unsolicited communications states: “[W]here a natural or legal person obtains from its customers their electronic contact details for electronic mail, in the context of the sale of a product or a service, in accordance with Directive 95/46/EC, the same natural or legal person may use these electronic contact details for direct marketing of its own similar products or services provided that customers clearly and distinctly are given the opportunity to object, free of charge and in an easy manner, to such use of electronic contact details when they are collected and on the occasion of each message in case the customer has not initially refused such use.”

Canadian legislation similarly sanctions the use of opt-out consent. The Personal Information Protection and Electronic Documents Act (PIPEDA) states: “The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate...” The form of the consent sought by the organization may vary, depending upon the circumstances and the type of information. In determining the form of consent to use, organizations shall take into account the sensitivity of the information.”

### 3. “Marketing” versus “administrative” communications

If consumers don’t provide the necessary consent for companies to send them marketing communications--which are usually seen as secondary uses from the original purpose for which the data was originally collected--companies still want to be able to communicate with consumers about their accounts. In some cases, companies are required to communicate with consumers, such as to send them annual privacy notices and other types of administrative correspondence. According to Serwin, companies will often combine marketing material with administrative communications. As a result, debates have unfolded inside many companies over what qualifies as “marketing” communications subject to privacy permissions and what qualifies as “administrative,” “transactional,” or “service” communications not subject to the same permissions, and how to handle “hybrid” communications.

There are no commonly accepted guidelines for resolving these debates. For its part, the Federation of European Direct and Interactive Marketing defines direct marketing in a broad way as ‘the communication by whatever means (including but not limited to mail, fax, telephone, on-line services etc...) of any [emphasis mine] advertising or marketing material, which is carried out by the Direct Marketer itself or on its behalf and which is directed to particular individuals.’

continued on the next page



## How to Access Your Member Area of the Bar's Website

Visit the [Member Area](http://e.michbar.org), at <http://e.michbar.org>, of the State Bar’s website to take advantage of these great opportunities.

- Change your contact information
- Register for events
- Access Casemaker
- View Bar Journal archives
- Pay your dues online (September–February)
- Purchase publications and brochures
- Purchase logo clothing, mugs, thumb drives, and more

All attorneys, law students, legal administrators, and legal assistants with an assigned Bar membership number already have a login. If you do not know or have forgotten your login, you can request to have a new password sent to your e-mail address on record. You can visit the [online member directory](http://www.michbar.org/memberdirectory/home.cfm), at <http://www.michbar.org/memberdirectory/home.cfm>, to view your record.

If you need to add or change your e-mail address on record, you can complete an online form for immediate access to the Member Area.

Visit [http://www.michbar.org/programs/pdfs/memberarea\\_help.pdf](http://www.michbar.org/programs/pdfs/memberarea_help.pdf), and follow [four simple steps](#) to access your member area.

The U.S. CAN-SPAM Act more narrowly defines a “commercial electronic mail message” as any electronic mail message the primary purpose [emphasis mine] of which is the commercial advertisement or promotion of a commercial product or service. The Act also provides a detailed definition for “transactional” or “relationship” message as a message “the primary purpose of which is (i) to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender; (ii) to provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient; (iii) to provide (I) notification concerning a change in the terms or features of; (II) notification of a change in the recipient’s standing or status with respect to; or (III) at regular periodic intervals, account balance information or other type of account statement with respect to, a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender; (iv) to provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or (v) to deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.’

What could be some possible rules of thumb to harmonize these international terminology variances? These defini-

tions may be starting points for your organization:

- “Marketing” communications are messages sent through any channel to an identifiable individual where the timing of the message, the majority of the content, or the topics of the subject headers have as their primary purpose influencing the consumer to make another commercial transaction.
- “Administrative” communications are non-marketing messages whose purpose is directly related to the original purpose for which the individual’s information was first collected.

Other key privacy terms that have acquired slightly different understandings in different regions include “customer” versus “consumer,” what qualifies as an “existing business relationship,” and what is a “privacy consent” versus a “privacy permission,” “privacy preference,” or “privacy choice.” In all of these cases, a global harmonization of terms will be needed before any global privacy agreement can be successfully negotiated. ■

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*This article was first published in the September 2009 issue of Inside 1to1: Privacy, a publication of the International Association of Privacy Professionals (IAPP). Information regarding the IAPP is available at <http://www.privacyassociation.org>.*

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## Save the Date!

The Third Annual Information Technology Law Seminar will be **Wednesday, September 22, 2010**, from 9 a.m. to 4 p.m., to be followed by a complimentary open bar reception. Reserve the date on your calendar, and plan to take advantage of a great line up of speakers while receiving continuing legal education credit! Speakers include *Ward Classen of Computer Sciences Corporation*, and *Roberta Morris of Stanford University*. Once again the Information Technology Law Section of the State Bar of Michigan is working in cooperation with the Institute for Continuing Legal Education (ICLE), and the venue is the St. John’s Inn in Plymouth, with a webcast also available. The price for section members is \$95, which is an amazing deal for an all-day seminar with national speakers.. If you are interested in sponsoring the event, please contact *Charlie Bieneman* at [\[man.com\]\(http://www.icle.org/modules/store/seminars/schedule.aspx?PRODUCT\_CODE=2010CI7712\), or \*Jeremy D. Bisdorf\*, \[jbisdorf@jaffelaw.com\]\(mailto:jbisdorf@jaffelaw.com\). For details about the seminar or to register, visit \[http://www.icle.org/modules/store/seminars/schedule.aspx?PRODUCT\\\_CODE=2010CI7712\]\(http://www.icle.org/modules/store/seminars/schedule.aspx?PRODUCT\_CODE=2010CI7712\)](mailto:cab@raderfish-</a></p></div><div data-bbox=)

Attend the Information Technology Section’s **Annual Business Meeting**. Mingle with Section peers, learn about opportunities to get more involved with the Section, and participate in the election of Section Council Members. The Information Technology Section’s 2010 Business Meeting will be held during the lunch session of the Third Annual Information Technology Law Seminar. Be there! Please contact *Mark Malven* at [MMalven@dykema.com](mailto:MMalven@dykema.com) if you have questions about the event. ■

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# 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](mailto:michael@gallo.us.com).

## Miscellaneous

- <http://www.technolawyer.com> - Weekly newsletters that provide product reviews, technology tips, and other information on a variety of technology topics that may be of interest to lawyers.
- <http://www.itbusinessedge.com/cm/docs/1865> - 'Corporate Twitter Account Policy' that can be used to set guidelines for those maintaining a company Twitter account.
- <http://www.itbusinessedge.com/cm/docs/1839> - 'Corporate Facebook Account Policy' that can be used to set guidelines for those maintaining a company Facebook account.
- <http://www.itbusinessedge.com/cm/docs/DOC-1907> - Cisco Systems' Internet postings policy. Guidelines that can be used to create a social media policy that applies to employees who use blogs, wikis and social networking sites.
- <http://www.itbusinessedge.com/cm/docs/DOC-1310> - 'Sample Internet Usage Policy' that can be used to set guidelines for the use of the Internet within a business environment.
- <http://www.contractedge.com/legal.html> - Articles for non-lawyers that overview legal issues may impact Internet and software firms. Topics include Contracts, Copyright, Patent, Trademark, Trade Secret, and Internet Legal issues. NOTE: *ContractEdge* is a vendor that sells 'fill in the blank' IT legal contracts. ■