



STATE BAR OF MICHIGAN

# Michigan IT Lawyer

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

<http://connect.michbar.org/itlaw>

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*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://connect.michbar.org/itlaw/newsletter/newsletters>. If you have an article you would like considered for publication, send a copy to:

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## Bits and Bytes from the Section

By Michael Gallo, 2014-2015 Chairperson,  
Information Technology Law Section

Another Michigan winter is upon us, and a snow covered landscape appears to be here for a while, so sit back, relax, and enjoy this issue of the *Michigan IT Lawyer*.

In addition to **David R Syrowik's** always interesting '*Recent Developments in Information Technology Law*', this issue of the *Michigan IT Lawyer* is filled notices are reminders of the many information technology law related opportunities available during 2015!

This year marks the **50th anniversary of the Michigan Court of Appeals**, and the *IT Law Section* is asking for nominations from Section members for the most influential Michigan Court of Appeals decision for our Section's practice area. The Section will forward one nominated decision to the *Michigan Court of Appeals 50th Anniversary Celebration Committee*. If you wish to nominate a decision, please send a **case name, citation and one sentence description** to [michael@gallo.us.com](mailto:michael@gallo.us.com) by **Friday, February 27, 2015**.

On **Thursday, May 14, 2015**, an **IT Law Section Council** meeting is planned to take place in Troy, Michigan, which Section members are invited to attend in person or by teleconference. Meeting information and an agenda will be sent prior to the meeting, through the Section's Listserv. Another IT Law Section Council meeting is targeted for **Thursday, August 13, 2015**, and a location is being sought, so if your firm or company would like to host a meeting, please notify [michael@gallo.us.com](mailto:michael@gallo.us.com)!

During **May 2015**, the IT Law Section will be one of the sponsors of the *First Annual Entrepreneurial Law Institute*. Be sure to watch for information from ICLE regarding this day and a half event that will connect lawyers, accountants, entrepreneurs and investors with the movers and shakers of Michigan's growing start up scene.

**MARK YOUR CALENDAR** for **Thursday, September 10, 2015**, and plan to attend the **8th Annual Information Technology Law Seminar**. This entertaining and educational event will once again include interesting, informative and





2014-2015

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\*denotes deceased member

Bits and Bytes . . .

*Continued from page 1*

enlightening speakers and topics, and the event will be the backdrop for the IT Law Section's Annual Meeting!

Attorneys with patent prosecution experience, and anyone who knows of a low-income inventor may be interested in learning more about the **Michigan Pro Bono Patent Project**. For more information on this exciting new program visit the Intellectual Property Law Section's web site at <http://connect.michbar.org/iplaw/patent>.

With warm wishes, and an eye towards Spring, thanks for being a member of the IT Law Section! ▪



## State Bar of Michigan Information Technology Law Section Mission Statement

The purposes of the Section are to review, comment upon, and appraise members of the State Bar of Michigan and others of developments in the law relating to information technology, including:

- (a) the protection of intellectual and other proprietary rights;
- (b) sale, leasing, distribution, provision, and use of, hardware, software, services, and technology, including computer and data processing equipment, computer software and services, games and gaming, information processing, programming, and computer networks;
- (c) electronic commerce
- (d) electronic implementation of governmental and other non-commercial functions;
- (e) the Internet and other networks; and
- (f) associated contract and tort liabilities, and related civil and criminal legal consequences.

*The Information Technology Law Section's bylaws can be viewed by accessing <http://connect.michbar.org/itlaw/council> and clicking the 'Bylaws' link.*

# Recent Developments in Information Technology Law

By David R. Syrowik, Brooks Kushman PC

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

As reported at 89 BNA's PTCJ 81 on November 6, 2014, the U.S. Court of Appeals for the Federal Circuit ruled that Google, Microsoft ad auction systems don't infringe Walker Digital patent. *Walker Digital, LLC v. Microsoft Corp.*

As reported at 88 BNA's PTCJ 528, on June 13, 2014, the U.S. Court of Appeals for the Federal Circuit ruled that a patent asserted against Nintendo Wii remote was invalid for indefiniteness since the specification of the patent failed to disclose an algorithm to be performed on a general purpose computer or microprocessor and the claims contained a "means for" clause. *Triton Tech of Tex., LLC v. Nintendo of Am., Inc.*

As reported at 88 BNA's PTCJ 529, on June 12, 2014, the U.S. Court of Appeals for the Federal Circuit ruled that a feature that displayed users' names in website's URL was obvious. *In re Wirth.*

As reported at 88 BNA's PTCJ 587, on June 19, 2014, the U.S. Court of Appeals for the Federal Circuit ruled that Google and Android smartphone makers do not infringe Gemalto's patent on processing apps written in high-level languages such as Java. *Gemalto S.A. v. HTC Corp.*

As reported at 88 BNA's PTCJ 651, on July 7, 2014, the U.S. Court of Appeals for the Federal Circuit ruled that limiting language in an old patent application, incorporated by reference into asserted patents, narrowed the scope of integrated circuit claims such that Intel Corp. and others were not infringing. Affirming a decision by the International Trade Commission, the court held that the claims in later continuations-in-part could not overcome the disavowal of scope. *X2Y Attenuators, LLC v. Int'l Trade Comm'n.*

As reported at 89 BNA's PTCJ 166, on November 14, 2014, the U.S. Court of Appeals for the Federal Circuit ruled that Ultramercial's claims relating to the delivery of online video content with advertising are directed to patent ineligible abstract ideas that are not saved by implementation over the Internet. *Ultramercial, Inc. v. Hulu, LLC.*

As reported at 88 BNA's PTCJ 743, on July 14, 2014, the U.S. Court of Appeals for the Federal Circuit ruled that a stipulation in an Information Disclosure Statement submitted to the Patent and Trademark Office during reex-

amination was a clear and unmistakable disclaimer of the broader claim scope the patentee was looking to assert in district court. A wireless network patent owner's infringement charges against Apple Inc. and Motorola Mobility LLC fall because the limited claim scope did not cover the way their mobile phones communicate to base stations. *Golden Bridge Tech., Inc. v. Apple Inc.*

As reported at 88 BNA's PTCJ 805, on July 18, 2014, the U.S. Court of Appeals for the Federal Circuit ruled that the International Trade Commission violated its own rules in refusing to bar "import" of electronically transmitted data. In vacating a decision the full commission had no authority to make, the court also identifies ways in which the situation here could have been avoided. *Align Tech., Inc. v. Int'l Trade Comm'n.*

As reported at 88 BNA's PTCJ 1107, on August 22, 2014, the U.S. Court of Appeals for the Federal Circuit agreed with a district court's decision to wipe out a \$147.2 million patent infringement award to Mformation. The court agrees with Blackberry—Research in Motion Ltd.—that the trial judge did not modify his construction of the asserted patent claims post-verdict, and that given the jury instructions, no reasonable jury could have found infringement. *Mformation Techs., Inc. v. Research In Motion Ltd.*

As reported at 88 BNA's PTCJ 1112, on August 26, 2014, the U.S. Court of Appeals for the Federal Circuit ruled that computerized management of bingo games is an unpatentable abstract idea under 35 U.S.C. § 101. *Planet Bingo, LLC v. VKGS LLC.*

As reported at 88 BNA's PTCJ 1180, on September 3, 2014, the U.S. Court of Appeals for the Federal Circuit ruled that patent claims relating to a computerized method for guaranteeing online transactions were claims on abstract idea with no "inventive concept" and thus not patentable subject matter under Section 101. The court affirms a district court's ruling in favor of Google, freeing its Google Trusted Stores program from a claim of patent infringement by a company claiming patent rights in a computerized method for increasing confidence in online transactions. *BuySafe, Inc. v. Google, Inc.*

As reported at 88 BNA's PTCJ 1172, on September 10, 2014, the U.S. Court of Appeals for the Federal Circuit affirmed

that most of Interval Licensing, Inc.'s patent claims asserted against "pop-up" notifications by AOL, Apple, Google and Yahoo are invalid. *Interval Licensing LLC v. AOL, Inc.*

As reported at 89 BNA's PTCJ 8 on November 5, 2014, the U.S. Court of Appeals for the Federal Circuit, in a split decision, vacates patent noninfringement by Citrix, Webex distributed learning tools. *Williamson v. Citrix Online, LLC.*

### **COPYRIGHTS – Case Law – U.S. Court of Appeals**

As reported at 88 BNA's PTCJ 581, on June 25, 2014, the U.S. Court of Appeals for the Sixth Circuit affirms need to specify what portions of software are protectable under the Copyright Law. *Automated Solutions Corp. v. Paragon Data Sys., Inc.*

As reported at 88 BNA's PTCJ 735, on July 11, 2014, the U.S. Court of Appeals for the Tenth Circuit ruled that a special master's report failed to adequately set forth its findings and reasoning in support of a conclusion that a payroll management program was infringing. The court remands, holding that the abstraction-filtration-comparison test for substantial similarity requires explicit application of the abstraction test before further analysis can go forward. *Paycom Payroll, LLC v. Richison.*

### **COPYRIGHTS/DMCA – Case Law – U.S. Court of Appeals**

As reported at 88 BNA's PTCJ 520, on June 17, 2014, the U.S. Court of Appeals for the Second Circuit ruled that Photobucket is entitled to safe harbor protections under DMCA. *Wolk v. Photobucket.com, Inc.*

### **TRADEMARKS – Case Law – U.S. Court of Appeals**

As reported at 88 BNA's PTCJ 1056, on August 14, 2014, the U.S. Court of Appeals for the Seventh Circuit held that a drop in sales of a real computer product after a Batman movie used the same name for a fictional product did not constitute a basis for a claim of reverse confusion in trademark law. The court concludes that consumers were not confused about the origin of the former's computer security product simply because a character in the movie used the fictional program to hack into other computers. *Fortres Grand Corp. v. Warner Bros. Entm't, Inc.*

### **PATENTS – Case Law – U.S. District Courts**

As reported at 89 BNA's PTCJ 87; 88, on November 3, 2014, the U.S. District Court for the Central District of Califor-

nia denies patent eligibility to claims on information management and database systems, but comes out the other way in a case on the same day involving a Caltech-patented invention directed to encoding and decoding data to achieve error correction during data transmission. Though the two opinions barely acknowledge each other, the contrasting cases identify arguably the first comparative analysis by the same court that distinguishes aspects of software-related claims as statutory subject matter under 35 U.S.C. § 101. *Enfish, LLC v. Microsoft Corp.*; *Cal. Inst. of Tech. v. Hughes Commc'ns Inc.*

As reported at 88 BNA's PTCJ 1181, on September 4, 2014, the U.S. District Court for the Central District of California stated that the possibility that the Supreme Court's two-step test for patent eligibility in *Alice Corp.* might be reduced to an "I know it when I see it" approach is a matter of concern. *Eclipse IP LLC v. McKinley Equip. Corp.*

As reported at 88 BNA's PTCJ 1255, on September 11, 2014, the U.S. District Court for the Middle District of Florida ruled that a patent claim on an automated system for contributing to a charity or to a savings account by "rounding off" transaction amounts adds no "inventive concept" to a long-known abstract idea and thus is not patentable subject matter. The court says that the idea of adding small amounts to transactions for a variety of purposes—including taxation, Christmas Club savings, charity or even theft—has existed for "millennia." The concept has even been used in fiction, such as in the 1983 motion picture "Superman III," the court notes. *Every Penny Counts Inc. v. Wells Fargo Bank N.A.*

As reported at 88 BNA's PTCJ 1250, on September 14, 2014, the U.S. District Court for the Northern District of Illinois ruled that a patent license to Android developer Google allows Samsung and HTC devices to use the patented operating system. *Cascade Computer Innovation LLC v. Motorola Mobility Holdings, Inc.*

As reported at 88 BNA's PTCJ 1331, on September 19, 2014, the U.S. District Court for the Northern District of California ruled that a computer-implemented method and system directed to "the commonplace and time-honored practice of interacting with customers to promote marketing and sales" is not patent eligible. *Open Text S.A. v. Alfresco Software Ltd.*

As reported at 88 BNA's PTCJ 1799, on September 30, 2014, the U.S. District Court for the Northern District of California ruled that a searchable database of medical resources "merely automates what was previously done manually by assistants or librarians," and is thus ineligible for patenting. *Cogent Med. Inc. v. Elsevier Inc.*

As reported at 88 BNA's PTCJ 1684, on October 24, 2014, the U.S. District Court for the Eastern District of Virginia ruled that patent claims drawn to computer network billing systems are not patent eligible under 35 U.S.C. § 101 since they are not improvements to a technological process or to a computer itself. *Amdocs (Israel) Ltd. v. Openet Telecom, Inc.*

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

As reported at 89 BNA's PTCJ 242, on November 21, 2014, the U.S. District Court for the Southern District of New York ruled that allegations that a party posted instructions on a website for how to strip digital rights management protections from e-books do not, on their own, state a plausible claim of contributory copyright infringement. The court dismisses contributory infringement and inducement counterclaims asserted against an online e-book retailer that, prior to going out of business, used its website to advise its customers on how to transfer their already purchased titles to new reading devices. *Abbey House Media, Inc. v. Apple Inc.*

As reported at 88 BNA's PTCJ 521, on June 10, 2014, the U.S. District Court for the Northern District of California ruled that an online publishing platform cannot claim DMCA copyright immunity over images published on its website before it designated a DMCA-related agent with the U.S. Copyright Office. *Oppenheimer v. Allvoices, Inc.*

As reported at 88 BNA's PTCJ 855, on July 24, 2014, the U.S. District Court for the Southern District of New York ruled that FilmOn.com, a company that offers a service identical to the one held infringing by the Supreme Court in *ABC v. Aereo*, violated an injunction when it continued operating after Aereo itself stopped. *CBS Broad. Inc. v. FilmOn.com, Inc.*

As reported at 88 BNA's PTCJ 1160, on September 9, 2014, the U.S. District Court for the Southern District of New York ruled that a searchable service that monitors TV and radio news and compiles a searchable database is making fair use of the broadcast content. The court grants summary judgment in favor of the TVEyes news monitoring and database service against a copyright infringement claim by the Fox News Network. *Fox News Network, LLC v. TVEyes, Inc.*

As reported at 88 BNA's PTCJ 1289, on September 29, 2014, the U.S. District Court for the Southern District of New York ruled that the company operating the Grooveshark online music service and its founders were directly and indirectly liable for copyright infringement by employees. Grooveshark “ ‘bet the company on the fact that [it] is easier to ask forgiveness than it is to ask permission’ to use plaintiff’s content,” the court explains, citing an executive’s testimony. *UMG Recording Inc. v. Escape Media Corp. Inc.*

As reported at 88 BNA's PTCJ 1477, on October 3, 2014, the U.S. District Court for the Northern District of California ruled that the 2013 movie “Elysium” did not incorporate elements that were substantially similar to protectable elements of a screenplay written by a plaintiff in a copyright infringement proceeding. Granting summary judgment in favor of the movie’s producers and writer/director Neill Blomkamp, the court also rejects the plaintiff’s argument that evidence he posted his screenplay to a website widely used by screenwriters was enough to establish that the producers and Blomkamp had access to it. *Briggs v. Blomkamp.*

As reported at 88 BNA's PTCJ 1694, on October 23, 2014, the U.S. District Court for the Eastern District of Virginia ruled that conversion-based, but not false pretense-based computer fraud claims were preempted by the Copyright Act. *Maxient, LLC v. Symplicity Corp.*

#### **TRADE DRESS – Case Law – U.S. District Courts**

As reported at 88 BNA's PTCJ 1401, on September 23, 2014, the U.S. District Court for the Central District of California stated that it is plausible for a party to have enforceable trade dress interest in its website design. The court calls protection of website design a “fairly unsettled issue,” but says that most courts to address the issue agree it “can rise to the level of trade dress under certain circumstances.” *Lepton Labs, LLC v. Walker.*

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

As reported at 88 BNA's PTCJ 1687, on October 24, 2014, the U.S. District Court for the District of Nevada ruled that purely speculative harm from domain name registration didn’t support injunction. *Switch, Ltd. v. Firespotter Labs.*

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

As reported at 88 BNA's PTCJ 676, on July 7, 2014, the Trademark Trial and Appeal Board ruled that the “Your Cloud” mark is merely descriptive of the personalized data storage and cloud computing services offered under the mark, affirming a refusal to register the mark. *In re Datapipe, Inc.* ■

# Draft of the Information Technology Law Section's Annual Section Meeting Minutes from September 24, 2014

*Following is a draft of the Information Technology Law Section's Annual Section Meeting Minutes from September 24, 2014.*

*Please review and provide feedback to [michael@gallo.us.com](mailto:michael@gallo.us.com) by July 30, 2015.*

*A revised version of these minutes will be presented for approval at the IT Law Section's next annual meeting, which is targeted for September 10, 2015, during the luncheon at the 8<sup>th</sup> Annual Information Technology Law Seminar!*

**State Bar of Michigan  
Information Technology Law Section  
Annual Section Meeting Minutes  
September 24, 2014 - DRAFT  
The Inn at St. John's, Plymouth, Michigan**

## Call to Order

With Ronald Nixon, Chair, presiding, a quorum of Section Members was confirmed and the meeting was called to order at 12:45 PM. A list of attendees is attached as 'Exhibits'.

## Approval of September 2013 Annual Section Meeting Minutes

After a motion to approve the September 25, 2013 Annual Section Meeting Minutes was made and seconded from the floor, the motion passed unanimously.

## Officer Reports

Mr. Nixon and Christopher Mourad reported that to date, the Section has a net income of approximately \$6,700 for the current fiscal year, and a total fund balance of approximately \$53,000. The exact net income for 2013/2014, and total fund balance, will be impacted by the financial results of the 7<sup>th</sup> Annual Information Technology Seminar.

## Election of Slate of Council Members

Mr. Nixon identified the following nominated slate of council members for a three year term from 2014-2017:

- Isaac T. Slutsky – P71975
- Keith A. Cheresko – P32663
- Jeanne Marie Whalen (Moloney) – P72253
- Daniel John Henry – P68296

After a motion to approve the slate of nominations was seconded from the floor, the motion passed unanimously.

## New Business

None.

## Adjournment

The meeting was adjourned at 12:50 PM following a motion made and seconded from the floor. ■

*Cosponsored by the Business Law, Information Technology Law,  
and Intellectual Property Law Sections of the State Bar of Michigan*

## **First Annual Entrepreneurial Law Institute**

### **May 28-29, 2015 - Detroit**

#### **Accelerate Your Client's Journey to Success!**

Plug into Michigan's entrepreneurial energy at an event that brings together all the key players. Become an essential advisor to your clients for the long haul with expert advice on critical issues affecting new businesses. Plus, connect with the movers and shakers of Michigan's growing start-up scene!

#### **Benefits of Attending**

- Build relationships that matter, and help start-up companies succeed at every stage with advice from prominent lawyers, accountants, entrepreneurs, and investors
- A complete Core Concepts track covering all of the basics including an interactive workshop filled with best practices on how to interview an entrepreneur
- Timely topics on securing funding, including crowdfunding
- A hands-on tax and accounting workshop with leading lawyers and accountants
- Get the nuts and bolts of venture capital and angel investing from a longtime angel investor
- Intellectual property specialists explain how to protect innovation and avoid mistakes
- Informative sessions covering real estate, employment issues, and import/export, plus marketing, branding and ecommerce

For more information: [www.icle.org/eli](http://www.icle.org/eli)



## **'Save the Date' for the 2015 IT Law Seminar!**

### **The 8<sup>th</sup> Annual Information Technology Law Seminar**

*Sponsored by: Information Technology Law Section of the State Bar of Michigan*

**Thursday, September 10, 2015**

**The Inn at St. John's, 44045 Five Mile Road, Plymouth, Michigan**

As in previous years, the IT Law Section is planning an educational and entertaining event. The seminar will begin with a light breakfast at 8 AM, include a luncheon, and will be followed with a complimentary cocktail reception for networking with friends, both old and new!

Recommendations for speakers and topics are always welcome!

The annual IT Law Section and Council meetings will be held during the luncheon, and will include election of Section Officers and Council Members.

Nominations for a three year term (beginning September 2015) as an IT Law Section Council Member can be emailed to [michael@gallo.us.com](mailto:michael@gallo.us.com).

## Michigan Court of Appeals - Most Influential Decision?

IT Law Section Members,

This year marks the 50th anniversary of the Michigan Court of Appeals, and the occasion is being celebrated under the auspices of a group chaired by Judge William Whitbeck. The Celebration Committee is asking State Bar sections to identify the most influential Michigan Court of Appeals decision for that Section's practice area, and to provide a one sentence explanation for that choice. Input will be used by the program planning committee to help inform the celebration activities.

Janet Welch and Judge Whitbeck are asking sections to tackle the question during February, and provide the case name, citation, and one sentence description.

Members of the IT Law Section are welcome to submit nominations to [michael@gallo.us.com](mailto:michael@gallo.us.com) by **Friday, February 27, 2015**! One nomination will be submitted on behalf of the *IT Law Section* to the *Michigan Court of Appeals 50th Anniversary Celebration Committee*. Please ensure your submission includes the **case name**, **citation** and a **one sentence disposition**.

Thank you! ■



## IT Law Section - Writing Competition!

Each year the IT Law Section of the State Bar of Michigan seeks student essays for Edward F. Langs Writing Awards. A total of up to \$3,000 is divided between up to six award winning essays that contribute to the knowledge and understanding of information technology law, which are published in the Section's newsletter, the Michigan IT Lawyer. This year, submissions must be postmarked by June 30, 2015, and emailed to [dsyrowik@brookskushman.com](mailto:dsyrowik@brookskushman.com).

Complete essay competition rules are listed below, and available at <http://connect.michbar.org/itlaw/newsletter/news>. Please share this opportunity with law school faculty, staff and students who may be interested!

### 2015 Edward F. Langs Writing Award Essay Competition Rules

1. Awards will be given to up to six 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 endnotes 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 up to \$3,000 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*. (Previous issues of the *Michigan IT Lawyer* can be accessed at <http://connect.michbar.org/itlaw/newsletter/newsletters/>.)
7. Essay must be submitted as a Microsoft Word document, postmarked by June 30, 2015, and emailed to [dsyrowik@brookskushman.com](mailto:dsyrowik@brookskushman.com). ■

