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Bits and Bytes from the Section

By **Susanna Brennan, 2015-2016 Chairperson, Information Technology Law Section**

Happy New Year IT Law Section Members!

I hope you enjoyed your holidays and are having a great 2016 so far. I’m excited that we have at least two upcoming events this year that I hope you can attend.

On the evening of Wednesday March 16, 2016 at the Auburn Hills Campus of Cooley Law School, we’ll be holding our quarterly Council meeting (which all Section members are invited to attend), followed by a presentation and panel discussion on the new European privacy rules. This is a joint event with the International Law Section of the State Bar of Michigan and will include cocktails, dinner and networking. We’re hoping the event will be a great mix of both Sections as well as law students and other attorneys interested in information technology law and international privacy law.

On Thursday, September 8, 2016, we’re holding our 9th Annual Information Technology Law Seminar, featuring an all-day education event and networking at St. John’s Inn in Plymouth. The Seminar includes breakfast, lunch, and an evening cocktail reception. We’re in the stages of putting together the topics and speakers for the event and are looking forward to sharing more details as the planning comes together.

Please save the dates on your calendars – additional details, including registration information, to follow. Once again, I hope your year is off to a wonderful start and I look forward to seeing you at our events! ■

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a partnership between the
State Bar of Michigan Pro Bono Initiative
and the **Intellectual Property Law Section**

The State Bar of Michigan has an exciting new program that matches patent attorneys willing to provide pro bono patent prosecution services with low-income inventors!

The State Bar of Michigan facilitates the intake and the screening of inventor requests, as a legal aid organization would, then refers requests to volunteer attorneys.

The Michigan Pro Bono Patent Project is accepting

- Registrations from patent attorneys
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For more information regarding the **Michigan Pro Bono Patent Project:**
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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.

Bitcoin/Blockchain

By Vincent I. Polley, Editor of MIRLN

Bitcoin may have had its genesis in late 2008, although its creator remains unknown. It is increasingly usable for low-cost, medium-value Internet transactions; the Bitcoin currency has a volatile value (it has fallen and risen by over 75% in the last 12 months).

Governments are still wrestling with the proper characterization of Bitcoin—is it a “currency” or an investment? How would it be regulated? Can it be regulated?

More interesting than Bitcoin, per se, is the underlying technology: the concept of the Blockchain. Essentially, all Bitcoin transactions are all separately logged (and confirmed) in a single, distributed ledger — the Blockchain. As each transaction occurs, it is embedded (using cryptography) into the distributed blockchain. The updated blockchain is replicated across the Internet.

The power of the blockchain approach (high-speed, distributed, tamper-proof, etc.) lends itself to powerful new applications, which banks (and others) are beginning to explore. E.g., using blockchain technologies to supplant real-estate records offices or financing statement filings under the UCC; recording wedding vows; providing notary-like document authentication and time-stamping; and the list grows.

My MIRLN e-newsletter has included bitcoin-related stories since 2011. Below, a few from recent issues...

For basic how-to information about Bitcoin:

- Start with: [A beginner's guide to Bitcoin](#) (Boing Boing, 4 June 2014)
- [The 9 most useful Bitcoin data resources](#) (Coindesk, 10 August 2014)
- [Is Bitcoin money?](#) (Anita Ramasastry, 9 Sept 2014)
- [Why Bitcoin matters](#) (Marc Andreessen in New York Times, 21 Jan 2014)

For varying regulatory approaches to Bitcoin, and thinking:

- [FinCEN issues Bitcoin-friendly ruling for miners](#) (CoinText, 27 Dec 2013)
- [Federal Election Commission says political action committees can accept payment via Bitcoins](#) (Techdirt, 9 May 2014)
- [Is UCC Article 9 the Achilles heel of Bitcoin?](#) (Credit Slips, 10 March 2014)

- [Research examines blockchain securities under US commercial law](#) (Coindesk, 27 August 2015)
- [Bitcoin is officially a commodity, according to US regulator](#) (Bloomberg, 17 Sept 2015)
- [Winklevoss twins' bitcoin site gets banking charter](#) (The Hill, 5 Oct 2015)
- [EU's top court rules that bitcoin exchange is tax-free](#) (Bloomberg, 22 Oct 2015)
- [A Bitcoin charm offensive on law enforcement](#) (WaPo, 22 Oct 2015)

For new applications of the underlying blockchain:

- [Data security is becoming the sparkle in Bitcoin](#) (New York Times, 1 March 2015)
- [IBM reported to be developing blockchain-based currency transaction system](#) (Slashdot, 13 March 2015)
- [Nine of world's biggest banks join to form blockchain partnership](#) (Reuters, 15 Sept 2015)
- [Stampery now lets you certify documents using the blockchain and your real identity](#) (TechCrunch, 20 Nov 2015)
- [Why the blockchain, not bitcoin, is what's fascinating builders](#) (ReadWrite, 6 Jan 2016)

Finally, as a follow-up from “Cybersecurity for Law Firms” in the August 2015 issue of *Michigan IT Lawyer*, see these recent articles from MIRLN:

- [Law firms lacking cybersecurity measures have 'significant ground to make up'](#) (LegalTechNews, 1 Oct 2015)
- [ABA survey exposes law firm ignorance over information security](#) (JD Journal, 21 Oct 2015)
- [DHS giving firms free penetration tests](#) (Krebs on Security, 8 Dec 2015)
- [A cyber attack is headed your way](#) (ALM, 16 Dec 2015)
- [Half of law firms do not have a data protection committee](#) (SC Magazine, 16 Dec 2015)
- [Add two more states to those that have adopted duty of technology competence](#) (Robert Ambrogi, 23 Dec 2015) ■

The State of Information Technology Law – 2015

By David R. Syrowik, Brooks Kushman P.C., Southfield, Michigan

Introduction

Following the Supreme Court's Alice opinion, the U.S. District Courts as well as the Federal Circuit have confirmed software patent owners' worst nightmares. The following are a number of exemplary decisions:

Planet Bingo: computer-aided methods and systems for managing the game of bingo are patent-ineligible because they are directed towards an abstract idea and they lack an inventive concept sufficient to transform the claim subject matter into a patent-eligible application;

Ultramercial: a method for distributing copyrighted material in exchange for viewing advertisements is patent-ineligible, because showing advertisements in exchange for viewing content is an abstract idea, and because "the claims simply instruct the practitioner to implement the abstract idea with routine, conventional activity";

BuySAFE: methods for performing steps for guaranteeing a party's performance of its online transaction are patent-ineligible because they "do not push or even test the boundaries of the Supreme Court precedents under section 101"; and

Content Extraction: methods for "1) extracting data from hard copy documents using an automated digitizing unit such as a scanner, 2) recognizing specific information from the extracted data, and 3) storing that information in a memory" are patent ineligible at the pleading stage and affirming the district courts grant of defendant's Rule 12(b) (6) motion to dismiss.

One of the few decisions supporting software patents was DDR Holding which held patent-eligible "systems and methods of generating a composite web page that combines certain visual elements of a "host" website with content of a third-party merchant," therefore they do not broadly and generically claim "use of the Internet" to perform an abstract business practice (with insignificant added activity).

PATENTS – Case Law – U.S. Supreme Court

Apotex Inc. v. UCB, Inc., 90 BNA's PTCJ 2470

The Supreme Court ruled on June 22, 2015 that the patent expiration rule in *Brulotte v. Thys Co.* which said that "a patentee's use of a royalty agreement that projects beyond the

expiration date of the patent is unlawful per se" remains intact. The court said that "the intersection of two areas of law: property (patents) and contracts (licensing agreements)" creates a "superpowered form of stare decisis," requiring "a superspecial justification to warrant reversing *Brulotte*."

Commil USA, LLC v. Cisco Systems, Inc., 90 BNA's PTCJ 2164

The Supreme Court ruled on May 26, 2015 that a belief that a patent is invalid isn't a defense to a charge of induced infringement. Reversing the Federal Circuit, the Court holds that Cisco Systems Inc. couldn't overturn a \$63.8 million jury award based on its argument that it believed Commil USA LLC's Wi-Fi related patent claims were invalid as indefinite, not enabled and lacking adequate written description support.

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

Internet Patents Corp. v. Active Network, Inc., 90 BNA's PTCJ 2463

The U.S. Court of Appeals for the Federal Circuit on June 23, 2015 ruled that preserving user-entered data on Internet forms while the user goes back and forth in a web browser isn't an idea eligible for a patent under Section 101 of the Patent Act.

OIP Techs., Inc. v. Amazon.com, Inc., 90 BNA's PTCJ 2386

The U.S. Court of Appeals for the Federal Circuit on June 11, 2015 ruled that online retail operator Amazon.com successfully kicks out OIP Technologies' patent on computer-implemented methods for "pricing a product for sale" under 35 U.S.C. § 101.

Williamson v. Citrix Online LLC, 90 BNA's PTCJ 238

On June 16, 2015, an *en banc* U.S. Court of Appeals for the Federal Circuit ruled that the "strong" presumption that a court should not invoke means-plus-function analysis when a claim lacks the word "means" is not so strong any more. In a revised opinion, the court says that its prior standard had "shifted the balance struck by Congress in passing 35 U.S.C. § 112, para. 6, and has resulted in a proliferation of functional claiming untethered to § 112, para. 6 and free of the strictures set forth in the statute.

Allvoice Developments US, LLC v. Microsoft Corp., 90 BNA's PTCJ 2157

The U.S. Court of Appeals for the Federal Circuit on May

22, 2015 ruled that the voice-recognition software of Microsoft doesn't infringe a patent owned by Allvoice Development. The Federal Circuit also says that certain claims of the patent were invalid because they "merely claimed software instructions."

Eon Corp. IP Holdings LLC v. AT&T Mobility LLC, 90 BNA's PTCJ 1915

The U.S. Court of appeals for the Federal Circuit on May 6, 2015 ruled that EON patent asserted against smartphone firms affirmed invalid for indefiniteness for failure to disclose an algorithm corresponding to a software function.

Intellectual Ventures I LLC v. Capital One Bank (USA), N.A., 90 BNA's PTCJ 2539

The U.S. Court of Appeals for the Federal Circuit on July 6, 2015 ruled that a software "brain" managing content of a website based on user data wasn't an inventive concept, and thus didn't make the abstract idea of customizing website content patent-eligible.

SpeedTrack, Inc. v. Office Depot, Inc., 90 BNA's PTCJ 2540

The U.S. Court of Appeals for the Federal Circuit on June 30, 2015 ruled that SpeedTrack's online product search patent can't be infringed by customers using an application sold by Oracle under the Kessler doctrine.

Versata Dev. Grp., Inc. v. SAP Am., Inc., 90 BNA's PTCJ 2626

The U.S. Court of Appeals for the Federal Circuit on July 9, 2015 backed a Patent Trial and Appeal Board decision that Versata Software's patent on software for pricing products was ineligible. The decision is good news for SAP America, but an even bigger win for the PTAB and its definition of challengeable business method patents.

JVC Kenwood Corp. v. Nero, Inc., 90 BNA's PTCJ 2967

The U.S. Court of Appeals for the Federal Circuit on August 17, 2015 ruled that general allegations of patent infringement against users of Nero Inc.'s DVD software are not sufficient to support indirect infringement claims against the company.

Akami Techs., Inc. v. Limelight Networks, Inc., 90 BNA's PTCJ 2897

The U.S. Court of Appeals for the Federal Circuit on August 13, 2015 allowed joint direct patent infringement by an internet application service provider.

Microsoft Corp. v. Motorola, Inc., 90 BNA's PTCJ 2834

The U.S. Court of Appeals for the Ninth Circuit on July 30, 2015 affirmed a number of judgments against Motorola Mobility – now owned by Google – related to its failed attempt to get Microsoft Corp. to pay patent royalties for Xbox system sales. The court's decision will have a significant impact on all owners of "standard-essential" patents, who have agreed to grant licenses on reasonable and non-discriminatory terms.

Progressive Cas. Ins. Co. v. Liberty Mut. Ins. Co., 90 BNA's PTCJ 3023

The U.S. Court of Appeals for the Federal Circuit on August 24, 2015 affirmed the cancellation of five different business method patents by the Patent Office.

Walker Digital, LLC v. Microsoft Corp., 89 BNA's PTCJ 81

The U.S. Court of Appeals for the Federal Circuit on November 6, 2014 ruled that Google, Microsoft and auction systems don't infringe a Walker Digital patent.

Triton Tech of Tex., LLC v. Nintendo of Am., Inc., 88 BNA's PTCJ 528

The U.S. Court of Appeals for the Federal Circuit on June 13, 2014 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.

In re Wirth, 88 BNA's PTCJ 529

The U.S. Court of Appeals for the Federal Circuit on June 12, 2014 ruled that a feature that displayed users' names in website's URL was obvious.

Gemalto S.A. v. HTC Corp., 88 BNA's PTCJ 587

The U.S. Court of Appeals for the Federal Circuit on June 19, 2014 ruled that Google and Android smartphone makers do not infringe Gemalto's patent on processing apps written in high-level languages such as Java.

X2Y Attenuators, LLC v. Int'l Trade Comm'n, 88 BNA's PTCJ 651

The U.S. Court of Appeals for the Federal Circuit on July 7, 2014 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.

Ultramercial, Inc. v. Hulu, LLC, 89 BNA's PTCJ 166

The U.S. Court of Appeals for the Federal Circuit on November 14, 2014 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.

Golden Bridge Tech., Inc. v. Apple Inc., 87 BNA's PTCJ 743

The U.S. Court of Appeals for the Federal Circuit on July 14, 2014 ruled that a stipulation in an Information Disclosure Statement submitted to the Patent and Trademark Office during reexamination 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 scope did not cover the way their mobile phones communicate to base stations.

Align Tech., Inc. v. Int'l Trade Comm'n, 88 BNA's PTCJ 805

The U.S. Court of Appeals for the Federal Circuit on July 18, 2014 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.

Mformation Techs., Inc. v. Research In Motion Ltd., 88 BNA's PTCJ 1107

The U.S. Court of Appeals for the Federal Circuit on August 22, 2014 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.

Planet Bingo, LLC v VKGS LLC, 88 BNA's PTCJ 1112

The U.S. Court of Appeals for the Federal Circuit on August 26, 2014 ruled that computerized management of bingo games is an unpatentable abstract idea under 35 U.S.C. § 101.

BuySafe, Inc. v. Google, Inc., 88 BNA's PTCJ 1180

The U.S. Court of Appeals for the Federal Circuit on September 3, 2014 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.

Interval Licensing LLC v. AOL, Inc., 88 BNA's PTCJ 1172

The U.S. Court of Appeals for the Federal Circuit on September 10, 2014 affirmed that most of Interval licensing, Inc.'s patent claims asserted against "pop-up" notifications by AOL, Apple, Google and Yahoo are invalid.

Williamson v. Citrix Online, LLC, 89 BNA's PTCJ 8

The U.S. Court of Appeals for the Federal Circuit on November 5, 2014, in a split decision, vacated patent noninfringement by Citrix, Webex distributed learning tools.

Content Extraction & Transmission LLC v. Wells Fargo Bank, N.A., 89 BNA's PTCJ 52

The U.S. Court of Appeals for the Federal Circuit on December 23, 2014 ruled that a patent directed to scanning a check at an ATM, then collecting, reviewing and sorting the data was ineligible subject matter under 35 U.S.C. § 101.

DDR Holdings, LLC v. Hotels.com, L.P., 89 BNA's PTCJ 370

The U.S. Court of Appeals for the Federal Circuit on December 5, 2014 ruled that a patent directed to retaining the "look and feel" of a host website on a third-party merchant's website was eligible subject matter under 35 U.S.C. § 101. The majority says that while claims in plaintiff's patent were not directed to an invention that was all that "technologically complex," they nonetheless "recite an invention that is not merely the routine or conventional use of the Internet."

Nazomi Commc'ns, Inc. v. Microsoft Mobile Oy, 89 BNA's PTCJ 294

The U.S. Court of Appeals for the Federal Circuit on November 26, 2014 again prevented Nazomi from asserting its Java-related patents against Microsoft.

Ericsson, Inc. v. D-Link Sys., Inc., 89 BNA's PTCJ 295

The U.S. Court of Appeals for the Federal Circuit on December 4, 2014 ruled that any court that submits to a jury a question of apportioning damages for infringement of a patent that has been adopted as a technological standard will have to take note of guidelines issued by the Federal Circuit. Vacating a federal district court's refusal to reconsider damages awarded by a jury against the makers of laptops and wireless routers that had used an Intel chip for Wi-Fi capability, the court remands the damages matter for further consideration.

PATENTS – Case Law – U.S. District Courts

***Enfish, LLC v. Microsoft Corp.; Cal. Inst. Of Tech. v. Hughes Commc'ns Inc.*, 89 BNA's PTCJ 87, 88**

The U.S. District Court for the Central District of California on November 3, 2014 denied 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.

***Eclipse IP LLC v. McKinley Equip. Corp.*, 88 BNA's PTCJ 1181**

The U.S. District Court for the Central District of California on September 4, 2014 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.

***Every Penny Counts Inc. v. Wells Fargo Bank N.A.*, 88 BNA's PTCJ 1255**

The U.S. District Court for the Middle District of Florida on September 11, 2014 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.

***Cascade Computer Innovation LLC v. Motorola Mobility Holdings, Inc.*, 88 BNA's PTCJ 1250**

The U.S. District Court for the Northern District of Illinois on September 14, 2014 ruled that a patent license to Android developer Google allows Samsung and HTC devices to use the patented operating system.

***Open Text S.A. v. Alfresco Software Ltd.*, 88 BNA's PTCJ 1331**

The U.S. District Court for the Northern District of California on September 19, 2014 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.

***Cogent Med. Inc. v. Elsevier Inc.*, 88 BNA's PTCJ 17**

The U.S. District Court for the Northern District of California on September 30, 2014 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.

***Amdocs (Israel) Ltd. v. Openet Telecom, Inc.*, 88 BNA's PTCJ 1684**

The U.S. District Court for the Eastern District of Virginia on October 24, 2014 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.

***Advanced Auctions LLC v. eBay Inc.*, 89 BNA's PTCJ 1520**

The U.S. District Court for the Southern District of California on March 26, 2015 ruled that an Internet-based auction patent claimed a patent-ineligible abstract idea under 35 U.S.C. § 101.

***Hewlett Packard Co. v. Service Now Inc.*, 89 BNA's PTCJ 1275**

The U.S. District Court for the Northern District of California on March 10, 2015 ruled that a software patent was patent ineligible under 35 U.S.C. § 101.

***Smartflash LLC v. Apple Inc.*, 89 BNA's PTCJ 1120**

A jury in the U.S. District Court for the Eastern District of Texas on February 24, 2015 told Apple to pay Defendant \$532.9 million because Apple's iTunes software infringed plaintiff's patent.

***Vehicle Intelligence & Safety LLC v. Mercedes-Benz USA, LLC*, 89 BNA's PTCJ 881**

The U.S. District Court for the Northern District of Illinois on January 29, 2015 ruled that a patent directed to impaired driver screening is ineligible subject matter under 35 U.S.C. § 101.

***Open Text S.A. v. Box, Inc.*, 89 BNA's PTCJ 795**

The U.S. District Court for the Northern District of California on January 20, 2015 ruled a patent directed to providing a collaborative workspace through a computer network was ineligible subject matter under 35 U.S.C. § 101.

***Bascom Research, LLC v. LinkedIn, Inc.*, 89 BNA's PTCJ 604**

The U.S. District Court for the Northern District of California on January 5, 2015 ruled that a patent directed to establishing relationships between documents over the Internet was ineligible subject matter under 35 U.S.C. § 101.

KomBea Corp. v. Noguar, L.C., 89 BNA's PTCJ 525

The U.S. District Court for the District of Utah on December 23, 2014 ruled that a patent directed to allowing telemarketing agents to incorporate computer-recorded information into a sales call as ineligible subject matter under 35 U.S.C. § 101

iPLea, LLC v. K12 Inc., 89 BNA's PTCJ 525

The U.S. District Court for the District of Delaware on December 17, 2014 ruled that a patent directed to a computer-aided learning system was ineligible subject matter under 35 U.S.C. § 101.

MyMedicalRecords, Inc. v. Walgreen Co., 89 BNA's PTCJ 528

The U.S. District Court for the Central District of California on December 23, 2014 ruled that a patent directed to a secure access to medical records over the District was ineligible subject matter under 35 U.S.C. § 101.

Apple, Inc. v. Samsung Elecs. Co., 89 BNA's PTCJ 301

The U.S. District Court for the Northern District of California on November 25, 2014 ruled that Samsung must pay ongoing royalties for continuing infringement by its smartphones and tablets of Apple's patents on certain features.

Golden Bridge Tech., Inc. v. Apple, Inc., 89 BNA's PTCJ 1930

The U.S. District Court for the Northern District of California on May 1, 2015 ruled that Apple loses bid to overturn jury's verdict that Golden Bridge patent not invalid for obviousness.

Smartflash LLC v. Apple Inc., 90 BNA's PTCJ 2549

The U.S. District Court for the Eastern District of Texas on July 7, 2015 awarded Apple a new trial over a \$533 million patent damage award over its iTunes software.

Telebuyer, LLC v. Amazon.com, 90 BNA's PTCJ 2765

The U.S. District Court for the Western District of Washington on July 27, 2015 ruled that Amazon.com successfully "knocks out" a 1994-filed patent on an enhancement in e-commerce. The court holds that under *Alice v. CLS Bank*, six asserted patents "describe nothing more than what buyers and sellers have done since the dawn of commerce," only using a generalized computer function.

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***Elec. Frontier Found. v. Personal Audio, LLC,*
89 BNA's PTCJ 1697**

The Patent Trial and Appeal Board on April 10, 2015 ruled

that several claims of a patent that has been asserted in controversial lawsuits against a series of prominent podcasters were invalid for obviousness and anticipation.

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

***Automated Solutions Corp. v Paragon Data Sys., Inc.,*
88 BNA's PTCJ 581**

The U.S. Court of Appeals for the Sixth Circuit on June 25, 2014 affirms need to specify what portions of software are protectable under the Copyright Law.

Paycom Payroll, LLC v. Richison, 88 BNA's PTCJ 735

The U.S. Court of Appeals for the Tenth Circuit on July 11, 2014 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.

Spear Mktg. Inc. v. BancorpSouth Bank, 90 BNA's PTCJ 2567

The U.S. Court of Appeals for the Fifth Circuit on June 30, 2015 ruled that Spear Marketing had a losing copyright infringement claim, not a trade secret misappropriation claim, when it alleged that BancorpSouth Bank stole confidential ideas underlying its cash management software.

AStar Grp., Inc. v. Manitoba Hydro, 90 BNA's PTCJ 2774

The U.S. Court of Appeals for the Second Circuit on July 27, 2015 ruled that registration of copyrights using screenshots of text and artwork related to its software – instead of the software itself – dooms an infringement claim.

COPYRIGHTS – Case Law – U.S. District Courts

Fox Television Stations, Inc. v. AereoKiller, 90 BNA's PTCJ 2711

The U.S. District Court for the Central District of California on July 16, 2015 ruled that an internet broadcaster of live television might be entitled to a compulsory license. Granting a motion for summary judgment, the court says that FilmOn was a "cable system" entitled to a compulsory license under the Copyright Act's definition, because the company operated a facility that received broadcast signals, reformatted those signals and retransmitted them to the viewing public.

Abbey House Media, Inc. v. Apple Inc., 89 BNA's PTCJ 242

The U.S. District Court for the Southern District of New York on November 21, 2014 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.

***CBS Broad, Inc. v. FilmOn.com, Inc.*, 88 BNA's PTCJ 855**

The U.S. District Court for the Southern District of New York on July 24, 2014 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.

***Fox News Network, LLC v. TVEyes, Inc.*, 88 BNA's PTCJ 1160**

The U.S. District Court for the Southern District of New York on September 9, 2014 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.

***UMG Recording Inc. v. Escape Media Corp. Inc.*, 88 BNA's PTCJ 128**

The U.S. District Court for the Southern District of New York on September 29, 2014 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.

***Briggs v. Blomkamp*, 86 BNA's PTCJ 1477**

The U.S. District Court for the Northern District of California on October 3, 2014 ruled that the 2013 movie “Elysium” did not incorporate elements that were substantially similar to protectable elements of a screen play 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.

***Maxient, LLC v. Symplicity Corp.*, 88 BNA's PTCJ 1694**

The U.S. District Court for the Eastern District of Virginia on October 23, 2014 ruled that conversion-based, but not false

pretense-based computer fraud claims were preempted by the Copyright Act.

***Fox Broad. Co. v. Dish Network LLC*, 89 BNA's PTCJ 747**

The U.S. District Court for the Central District of California on January 12, 2015 ruled that Dish Network Corp.’s service which lets users watch live TV shows on their mobile phones and tablets doesn’t infringe broadcasters’ copyrights. The Court rejects claims that Dish Anywhere isn’t different from Aereo Inc.’s streaming-television service, which the Supreme Court found illegally used antennas to capture live programs and send them to subscribers over the Internet.

***Live Face on Web, LLC v. Emerson Cleaners, Inc.; Live Face on Web, LLC v. Lineas Corp.*, and *Live Face on Web, LLC v. Unlimited Office Solutions, LLC*, 89 BNA's PTCJ 554**

The U.S. District Court for the District of New Jersey on December 11, 2014 ruled in three different but related cases that where copyrighted software was distributed to website viewer, claim for infringement established.

COPYRIGHTS/DMCA – Case Law – U.S. Courts of Appeals

***Wolk v. Photobucket.com, Inc.*, 88 BNA's PTCJ 520**

The U.S. Court of Appeals for the Second Circuit on June 17, 2014 ruled that Photobucket is entitled to safe harbor protections under DMCA.

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

***Oppenheimer v. Allvoices, Inc.*, 88 BNA's PTCJ 521**

The U.S. District Court for the Northern District of California on June 10, 2014 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.

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

***NetJets Inc. v. IntelliJet Corp. LLC*, 89 BNA's PTCJ 1121**

The U.S. Court of Appeals for the Sixth Circuit on February 20, 2015 ruled that the trial court failed to consider all relevant uses of the “IntelliJet” Trademark for software when it ordered cancellation of the trademark registration.

***Radiance Found, Inc. v. Nat’l Ass’n for the Advancement of Colored People*, 90 BNA's PTCJ 2168**

The U.S. Court of Appeals for the Fourth Circuit on May 19, 2015 ruled that an online article satirizing the NAACP over its position on abortion did not use the organization’s marks in

connection with goods or services merely due to the presence of fundraising activities elsewhere in the website's layout.

***Multi Time Machine, Inc. v. Amazon.com, Inc.*, 90 BNA's PTCJ 2556**

The U.S. Court of Appeals for the Ninth Circuit on July 6, 2015 ruled that Amazon.com search results may create confusion by pointing to competitor goods.

***Fortres Grand Corp. v. Warner Bros. Entm't, Inc.*, 88 BNA's PTCJ 1056**

The U.S. Court of Appeals for the Seventh Circuit on August 14, 2014 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.

TRADEMARKS – Case Law – U.S. District Courts

***Allen v. IM Solutions, LLC*, 89 BNA's PTCJ 1293**

The U.S. District Court for the Eastern District of Oklahoma on March 2, 2015 ruled that using a "hidden browser plug-in" to trigger a pop-up window that allegedly diverted Internet users from law firm websites to other law firms did not give rise to a trademark claim.

***Choose Energy, Inc. v. Am. Petroleum Inst.*, 89 BNA's PTCJ 1709**

The U.S. District Court for the Northern District of California on April 8, 2015 ruled that the chooseenergy.org website, which encouraged voters to engage in conversations about energy in the lead-up to the 2014 elections and was taken offline after those elections, didn't offer a "service" within the meaning of the Lanham Act. The court accordingly dismisses the Lanham Act trademark infringement claims that Choose Energy Inc. had brought against the American Petroleum Institute.

***Switch, Ltd v. Firespotter Labs.*, 88 BNA's PTCJ 1687**

The U.S. District Court for the District of Nevada on October 24, 2014 ruled that purely speculative harm from domain name registration didn't support injunction.

***Kelly Servs., Inc. v. Creative Harbor, LLC*, 90 BNA's PTCJ 3037**

The U.S. District Court for the Eastern District of Michigan on August 21, 2015 ruled that submitting a mobile application to Apple Inc.'s App Store wasn't sufficient to establish its use in commerce. The decision also clarifies that app stores such as Apple's or Google's aren't distributors for trademark law purposes, because they do not purchase and resell apps.

TRADEMARKS – Case Law – U.S. Patent and Trademark Office

***In re Datapipe, Inc.*, 88 BNA's PTCJ 676**

The Trademark Trial and Appeal Board on July 7, 2014 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.

***Meridian Rack & Pinion, In re*, 90 BNA's PTCJ 1786**

The Trademark Trial and Appeal Board (TTAB) on April 21, 2015 ruled that "Buy Auto Parts" is generic and adding ".com" doesn't make the phrase distinctive.

***Urock Network, LLC v. Sulpasso*, 90 BNA's PTCJ 270**

The Trademark Trial and Appeal Board on July 17, 2015 ruled that a Pennsylvania Internet radio service's failure to prosecute its opposition to a trademark registration attempt precluded it from pursuing a cancellation petition. The board says that the final judgment in the opposition proceeding was preclusive, even though it had been based on a procedural, rather than substantive, finding.

TRADEMARKS/TRADE DRESS – Case Law – U.S. Courts of Appeals

***Apple Inc. v. Samsung Elecs. Co.*, 90 BNA's PTCJ 2083**

The U.S. Court of Appeals for the Federal Circuit on May 18, 2015 took \$382 million off of a \$930 million jury verdict for Apple and against Samsung in their long-running war on smartphone intellectual property. The appeals court reverses the district court's decision that iPhone features were protectable under trade dress principles.

TRADEMARKS/TRADE DRESS – Case Law – U.S. District Courts

***Lepton labs, LLC v Walker*, 88 BNA's PTCJ 1401**

The U.S. District Court for the Central District of California on September 23, 2014 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.”

TRADE SECRETS – Case Law – U.S. District Courts

Burnett v Ford Motor Co., 89 BNA's PTCJ 1639

The U.S. District Court for the Southern District of West Virginia on April 3, 2015 ordered the parties to agree on a procedure through which software source code for defendant's electronic throttle control system would be disclosed to plaintiff but not at the expense of revealing defendant's trade secrets to defendant's competitors.

RIGHT OF PUBLICITY – Case Law – U.S. District Courts

Malony v. T3 Media, Inc., 89 BNA's PTCJ 1380

The U.S. District Court for the Central District of California on March 6, 2015, dismissed a complaint by plaintiffs – players on the 2001 Men's Division III National Collegiate Athletic Association championship team – asserting California and state law right of publicity claims against a company that operated a website that sold licensed photographs from NCAA championship events. ■

'Save the Date' for the 2016 IT Law Seminar!

The 9th Annual Information Technology Law Seminar

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

Thursday, September 8, 2016
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 a.m., 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 2016) as an IT Law Section Council Member can be emailed to Susanna Brennan at brennsc@kellylawregistry.com.



2016's Hot Topics in Information Technology Law

Drone regulation, the latest implications of 3D printing, "geofencing," an update on crypto currencies and the "right to be forgotten" are just a few of the topics that Information Technology Attorney Kathy Ossian will cover in this informative session. Hear how new technologies may impact your organization and gain insight toward minimizing risk and liabilities. Space is limited! For more information, visit <http://www.ossianlaw.com/upcoming-events>

Wednesday, January 20, 2016, 7:30 am - 9:00 am

Location: Ossian Law P.C.

Complimentary admission includes continental breakfast. Networking from 7:30 to 8:00 am. Presentation starts at 8:00 am.

Thursday, January 28, 2016, 6:00 pm - 7:30 pm

Location: OU Inc. Shotwell-Gustafson Pavilion

Complimentary admission includes heavy hors d'oeuvres. Networking from 6:00 to 6:30 pm. Presentation starts at 6:30 pm.



IT Law Section - Writing Competition!

Each year the IT Law Section seeks student essays for Edward F. Langs Writing Awards. A total of up to \$3,000 is available for distribution for 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. Please share this opportunity with law school faculty, staff and students who may be interested!

2016 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 is available for distribution 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, 2016**, and emailed to dsyrowik@brookskushman.com.