

Computer Law News

A Publication of the Minnesota State Bar Association Computer Law Section

Winter 2003-2004

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Computer Law Executive Board: Tom Sheran, Treasurer, Chris Schulte, Chair, Christine Brick, Secretary, Katheryn Andresen, Vice-Chair

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Report From the Chair

By: Chris Schulte

I am happy to report that the Section is off to a good start this year and we hope to continue to offer the same level of services to which our members are accustomed under our previous two chairs, Dan Tysver (2002-03) and Sandra Sedo (2001-02). Our thanks to Dan and Sandra on a job well done.



My goals for this year are threefold: (1) Maintain the high quality programming and newsletters that our sections enjoys; (2) increase member participation on committees and (3) increase Council member participation in chairing committees.

With respect to the programming and newsletters we are blessed to have a very active membership contributing to these efforts. Every October we co-sponsor the Computer Law Institute with Minnesota CLE. Our most recent Institute took place October 30, 2003 and was well received by the 150 attendees. Our keynote speaker was Jeffrey Ritter of Kilpatrick & Lockhart of Washington, D.C. who spoke on the emergence of a new area of law in the technology field, "systems law". Also, we were delighted that Vance Opperman and U.S. Attorney Thomas Heffelfinger agreed to debate the Patriot Act and its impact upon the electronic realm. In all, the Institute lived up to its historical standards in large part due to the hard work of the planning committee and Liz Misiaveg-Patel of Minnesota CLE. Kate Andresen, our Section Vice Chair will Chair the Institute for 2004.

Dianne Plunkett Latham is chairing the Newsletter committee for her fifth year, and based on her generous donation of time and effort, our Section Newsletter has been a wonderful resource for our members. We are pleased to note that Damien Riehl has agreed to become an Assistant Editor.

As for increasing participation, we are working on having all committees co-chaired by Council members and we are seeking general members who have an interest in joining a committee. Work on a committee often leads to a chair position, which in turn, provides a member the opportunity to be elected to the Council. Work on a committee has other advantages, including the ability to share thoughts about computer law issues and law practice with colleagues

in the area. If you would like to volunteer for any committee, please contact me at cschulte@meagher.com.

On that note, we are still looking for a Case Law Committee Chair and an Annual Meeting Committee Chair. The Case Law Committee Chair makes reports at the Section Council meetings on cases of current IT law interest. The Annual Meeting Chair plans the June annual meeting and election of officers. If you are interested in either of these opportunities, please contact me.

I would like to mention that the MSBA Internet Committee is now a part of the Computer Law Section. Our first decision with respect to the committee was to bring back the rather popular round table events that made this committee so popular. Council members Jim Blomquist, Dan Tysver and Gary Weinstein have graciously agreed to co-chair this effort. Look for more information on our website at www.mnbar.org/sections/computer_law/index.htm (or go to mnbar.org and click on "Sections").

Finally, please consider attending one of our monthly Council meetings. The end of each meeting concludes with a revolving substantive discussion lead by the chair of either our contract, case law or legislative committees. Our noontime CLE committee is also working on programs for a Council meeting as well as independent stand-alone programs through the next year. We meet every second Tuesday of the month at 11:30 a.m. in the MSBA offices, 3rd floor of City Center. Lunch is served at the meeting.

If you have any questions or comments about the Section please contact me at cschulte@meagher.com or 612-338-0661.

Editor's Report

By: Dianne Plunkett Latham

I was sorry to learn that Tina Jalivay, MSBA Section Services Coordinator, left the MSBA on Aug. 22nd. Tina had been doing all of our Newsletter PageMaker editing for the past three years. Tina did an excellent job and her services will be missed. We all wish Tina the best in her new endeavors. We are fortunate that in October, Mary Kempton accepted the MSBA's offer and is now our Section Services Coordinator. Mary has PageMaker experience and I am looking forward to working with her in producing the newsletter this year. Please help us welcome Mary.



and share your knowledge with the Section by offering an article.

The Computer Law Section now has 265 members. For 18 of those members, the MSBA has no e-mail address, or about 7%. If you received a hard copy of this newsletter, it means that the MSBA does not have your current e-mail address. Without your e-mail address, the Computer Law Section will not be able to send you notices for technology law CLE's scheduled on short notice. Those without e-mail also receive their newsletters one or two weeks later than those whose newsletters are sent via e-mail.

Damien Riehl has agreed to become an Assistant Editor of the Computer Law Section Newsletter. Damien is an attorney with Jardine, Logan & O'Brien and he will be helping locate articles of interest for our readers. If he contacts you about submitting an article, please cooperate

Newsletter Submissions – Please e-mail your newsletter submissions to me at PlunkettDi@mn.rr.com. These can include articles, photographs, committee reports, CLE notices and other information of interest to the members of the Computer Law Section.

Treasurer's Report

By: Tom Sheran

During the month of September the Section received \$276 in revenue and incurred \$329.11 in expenses. The ending balance as of 9/30/03 was \$9,179.84.



2003-2004 Schedule of Events

12-2-03	Technology Law Roundtable Bring your lunch and join in a lively discussion on the <i>Lexmark</i> Case with Prof. Sharon K. Sandeen of Hamline Univ. Law School	11:30 -1:00 MSBA Hdqt, City Center
1- 13-04	Section Council Meeting	11:30 at MSBA Headquarters, City Center
2-10-04	Section Council Meeting	11:30 at MSBA Headquarters, City Center
3-9-04	Section Council Meeting	11:30 at MSBA Headquarters, City Center
4-1-04	Newsletter Submission Deadline	
4-13-04	Section Council Meeting	11:30 at MSBA Headquarters, City Center
5-11-04	Section Council Meeting	11:30 at MSBA Headquarters, City Center
6-TBA-04	Annual Meeting	TBA

Computer Law Section Meeting Minutes

April 8, 2003

Attendees: Daniel J. Tysver (Chair), Megan Harper (MSBA Liaison), Steven Buckingham, Frank Farrell, Barbara J. Grahn, William A. Hefner, Charles A. Johnson, Dianne Plunkett Latham (via telephone), Todd Lindberg (guest), Carolyn M. Sandberg, Carla Condiff Schauman, Sandra M. Sedo, Thomas R. Sheran, John A. Taft

Call to Order: The Chair called the meeting to order at 11:45 a.m.

Minutes: The minutes from the March 11, 2003 meeting were approved.

Treasurer's Report: There was no Treasurer's report.

Committee Reports:

Newsletter: Dianne Plunkett Latham reported that Tina Jalivay is working on the first draft of the newsletter. The only information that is still needed are the details about the annual meeting. She is aiming for a publication date in May. This will be the last newsletter of the year. Diane will continue shepherding the newsletter next year.

Noontime CLE: Tom Sheran reported that no speaker has as yet been lined up for the May noontime CLE. The Council discussed possible ideas/speakers:

- 1) Tax
- 2) Internet – copyright/1st Amendment issues. Possible speaker might be Dr. Burke, Intellectual Property professor at the U of MN Law School.
- 3) Internet Security – no viable speakers on this topic have been identified
- 4) Cyber Crime – Possible speaker might be someone from the local FBI office.

Contracts: Dan reported that Chris Schulte, Kate Andresen and Christine Brick, none of whom could attend the meeting, remained interim co-chairs.

Law Student Outreach: Carla/Charlie reported on William Mitchell. About 10 - 12 students who were interested in the practice of computer law attended their session. They had thought the session would be offset with the MSBA SIPLA presentation but, instead, the school scheduled them at the same time. Both felt that next year the Council should make sure there were no conflicts with any planned outreach sessions.

Dan will be doing the outreach at the U of MN Law School. Chris and Jim Blomquist had a session at Hamline scheduled for April 11, 2003.

Web Site Committee: Minutes from the March meeting are posted on the website. An attempt will be made to get electronic versions of the cases Jim presented at the March meeting posted on the website as well. Chat room remains frozen in time. Two persons who had trouble getting into the room were contacted but have not responded.

Computer Law Institute: No report.

Case Law/Legislation: Jim Blomquist was absent so no case law report.

Bylaws Committee: Jim, Caroline, Steve are working on the bylaw revision. They have recommended positions language drafted, but need to finalize and type those recommendations. Once finalized, they will be presented to the Council.

Name Change: No action since last meeting. The bylaws are being drafted with a blank spot left for any name change. The issue will be discussed at the annual meeting. There was some discussion of whether a straw poll of members should be undertaken but the Council agreed there was no special urgency to undertake a poll.

Annual Meeting: Steve, Jim and Carla are finalizing details. The Council agreed on Town and Country for the location. Either Jim Blomquist's partner or Judge Boylan would be possible sponsors for access to the facilities. The Council discussed possible meeting dates and it was decided that Carla will contact the Country Club to determine availability for the second week in June, mid-week. Carla hoped to have those details finalized by April 15, 2003 and will send an email to Diane so that the announcement can go in the newsletter. Carla reminded the Council that ballots must be mailed 30 days in advance of the Annual Meeting.

Nominations Committee: John agreed to send an email to section council members to get an explicit commitment from them as to whether they wish to be nominated for council membership next year. Dan suggested that council members see if anyone they know wants to run for the council. He also agreed to send an email to the entire section asking them to notify John if they are interested in running for council membership. There is one officer position open. Historically, officers have moved up one position.

Old Business: No old business.

New Business: The Chair noted that Section dues are at the top end of the dues range. Since membership is currently around 287, a slight decrease, the Council voted to leave dues at the same amount with no increase for 2003-2004.

Dan Tysver introduced a guest attending the meeting for informational purposes – Todd Lindberg. Todd has been working in Internet security/sales and would like to move back into legal practice in the area of computer law.

Motion to Adjourn: The meeting was adjourned at 12:15 p.m.

Meaghan Harper
Acting Secretary

May 13, 2003

Attendees: Daniel J. Tysver (Chair), Christopher Schulte (Vice-Chair), Christine M. Brick (Treasurer), Megan Harper (MSBA Liaison), James A. Blomquist, William Hefner, Charles Johnson, Dianne Plunkett Latham (via phone), Carolyn M. Sandberg, Carla Condiff Schauman, Thomas R. Sheran, and Ron Marmo

Call to Order: The Chair called the meeting to order at 11:35 a.m.

Minutes: The minutes from the April 18, 2003 meeting were approved.

Treasurer's Report: The balance is \$8512.88.

Committee Reports:

Newsletter: Dianne Plunkett Latham reported that the last Newsletter of the year was distributed in April. The April issue included several good articles.

Noontime CLE: Tom Sheran reported that at 12:00, following the meeting Joe Roushar of KnowledGenetica would be presenting a noon-time CLE on Privacy, Security and Compliance: Issues Related to Recent Mandates. In addition Tom reported that he has several additional topics for future noontime CLE's and that such topics could be utilized during the next annual period.

Contracts: There was no new activity reported.

Law Student Outreach: Christine Brick reported that the SIPLA sponsored events at William Mitchell, University of Minnesota and Hamline were successful but next year there should be effort to ensure other law school sponsored events.

Web Site Committee: Bill Hefner reported that March updates have been posted and that he will be posting April updates this week.

Computer Law Institute: Carla Condiff Schauman reported that an October date is anticipated. There is a meeting scheduled for Thursday, May 15th for planning, and participation of the section members was encouraged. The format is going to be similar to last year's event with group sessions in the morning and breakouts in the afternoon. Megan Harper suggested that we use the MSBA website to advertise the Institute.

Legislation: Jim Blomquist reported that he developed a Recent Cases of Interest handout that was available at the meeting and due to lack of time, it would not be reviewed during the meeting but could be reviewed at everyone's leisure.

Elections Committee: Jim Blomquist reported that the ballot was mailed the week of May 5th and elections will occur during the annual meeting, June 10th. Bill Hefner noted that his name was on the ballot but he is not interested in participating.

Annual Meeting: Carla Condiff Schauman reported that the annual meeting is scheduled for June 10 at the Town & County Club commencing at 4:30 pm. Notice of the meeting was sent the week of May 5th. At the Annual Meeting the ballot and By-laws will be voted on. Carla inquired as to whether the section would like a speaker at the Annual Meeting. Members suggested that having a speaker and offering CLE credits may boost attendance. Carla and Tom Sheran to work on determining speaker availability, Tom Sheran suggested that Dan Burke, Intellectual Property Professor at the University of Minnesota may be the best option. If a speaker is confirmed notice to the section will be sent via e-mail.

Old Business: No old business.

New Business: The Chair noted that the Executive Council met on May 7th with Jim Blomquist, Steve Buckingham and John Taft to review the proposed Bylaw revisions. The Bylaw revisions were approved by the Executive Committee and were mailed to the section members on May 8th. A vote to approve the Bylaws will occur at the annual meeting. Jim Blomquist explained that most revisions related to clean up and that the issue of section name change would not be addressed this year. Specific changes mentioned by Jim included: changing references from "Chairperson" to "Chair," revisions to the nomination process, and inclusion of a council member removal provision which was drafted based upon best practices obtained during the Bylaws' Committees review of other section bylaws.

Motion to Adjourn: The meeting was adjourned at 12:05 p.m.

Christine Brick
Treasurer, and Acting Secretary

September 9, 2003

Attendees: Chris Schulte – Chair, Katheryn Andresen - Vice Chair, Christine Brick – Secretary, Thomas Sheran – Treasurer, Daniel Tysver - Past Chair, James A. Blomquist, Carla Condiff Schaumann, Shelly Gilbertson, Barbara Grahn, Charles E. Johnson, Steven Lieske, Dianne Plunkett Latham, Kendra Richgels, Carolyn M. Sandberg, Sandra Sedo, Colleen Schmid, John P. Sumner, Gary Weinstein, Alan Oh, Julie Finch, and Kari Wangensteen, Renee Anderson – MSBA Staff

Call to Order: The Chair called the meeting to order at 11:40 a.m.

Introductions: The attendees did introductions.

Minutes: There were no minutes from the June 2003 Annual Meeting.

Treasurer's Report: The balance from June 2003, was approximately \$4,000.

2003-2004 Structure: Keep the same meeting structure 11:30-12:30 every Second Tuesday. Skip December.

2003-2004 Goals: Maintain the quality of the section. Obtain full counsel participation (through chairing and participating in committees) and seek non-council participation for transition into 2004.

2003 –2204 Committee Chairs: Noontime CLE – Steven Lieske and Tom Sheran
Contracts – Gary Weinstein and Jen Salyers
Computer Law Institute – Kate Andresen
Newsletter-Dianne Plunkett Latham, Asst. Editor position open
Case Law- open
Legislative- Julie Finch
Elections – John Sumner
Law Student Outreach – Colleen Schmid and Shelly Gilbertson
Bylaws – open

CLI: Annual CLI October 30, 2003

Old Business: 1. Open Council Membership Slots - Verify Chris Hilberg's Interest. Bill Hefner is a council member but need to verify interest. Action - Chris will talk with Bill and Chris to determine interest.

2. Internet Committee – The Internet Committee was dissolved. Should The Computer Law Section add a new Committee to deal with Internet Issues? Action – New Committee to be formed with Gary Weinstein, Jim Blomquist, Dan Tysver, and Barb Grahn serving as chairs

3. Website committee – Current and Potential Activities include: Post newsletters, monitor chat capabilities, posting materials like Presentation Materials. Action - Need to find a committee chair.

Committee Reports:

Newsletter: Dianne Plunkett Latham – deadline November 1st. Committee Chairs to send reports to Dianne. Case Law Material to be sent by Jim to Dianne. Meeting Minutes – Kate to send March minutes to Dianne. Looking for an Asst. Editor. Looking for Articles.

Bylaws: Get the amended Bylaws to the Board of Governors before the December Board Meeting. Jim Blomquist to forward to Christine Brick who will work with the MSBA to obtain Board Approval.

Meeting Adjourned at 12:30 to discuss Case Law – Case Law discussion to be led by Jim Blomquist.

Christine Brick
Secretary

October 14, 2003

Attendees: Chris Schulte – Chair, Christine Brick - Secretary, Thomas Sheran – Treasurer, Daniel Tysver - Past Chair, Frank Farrell; John Sumner; Jim Blomquist; Jen Salyers Colleen Schmid; Larry Thomas; Gary Weinstein Carolyn Sandberg; Julie Finch; Kendra Richgels; Dianne Plunkett Latham; Bill Hefner; Steve Buckingham; Larry Thomas; John Taft, Carla Condiff-Schaumann and Steven Lieske Non-Council - Damien Riehl; Alfous Bauer; John Thomas; Brad Bolin; Delegates Mark McNeill and Sonya Southward Attending. Renee Anderson – MSBA Staff

Call to Order: The Chair called the meeting to order at 11:45 a.m.

Introductions: The non-council attendees did introductions.

Minutes: September Minutes will be approved at the November meeting.

Treasurer's Report: The balance from August 2003 was \$9,232.95.

Noontime CLE: The next noontime CLE is scheduled for November.

Contracts Committee: Discussed their 2003-2004 Plan:
1. Plug in to informal roundtable series. Take 2 or 3 during year and get involved in the planning (introductory, intermediate and advanced)

2. Work with Computer law Institute to fit a contracts topic in the October 2004 CLI

3. Work with the noontime CLE group.

Case Law Committee: Currently there is no chair for the Case law Committee. Jim Blomquist pulled some cases for review and discussion, distributed them during the meeting. Legislative Update. Julie Finch committee chair will discuss her legislation updates at the end of this meeting.

Computer Law Inst: CLI October 30, 2003. Jason Lewis will not be present and Tom Heffelfinger will take his place. Carolyn Sandberg will be the moderator.

Law Student Outreach: Colleen Schmid and Shelly Gilbertson met with Christine Brick, previous Law Student Outreach Committee Chair regarding tips on reaching out to the law schools. Shelly made contact with St. Thomas. Colleen Schmid and Shelly Gilbertson will reach out to the other law schools this week.

Internet Committee: Dan Tysver reported that there is ambiguity as to who they are, what they do, etc. His understanding is to plan roundtables and brown bags separate from the monthly meeting. Agreed to grow informal group and continue to report on monthly activities.

Website: Bill Hefner discussed the activities of the website committee chair.

Newsletter: Dianne Plunkett Latham reported that she is looking for committee reports and still looking for an assistant. In addition, Dianne is looking for articles.

Old Business: 1. Open Council Membership Slots
Chris Hilberg was nominated for council membership. Motion was approved. Bill Hefner has agreed to be a member, and his membership is now consistent with the roster.

New Business: Julie Finch announced Hamline and University of Minnesota are looking for Moot Court judges.

Meeting Adjourned at 12:25 to discuss pending Legislation – discussion led by Julie Finch.

Christine Brick
Secretary



Mary Kempton, MSBA Section Services Coordinator

Calling All Addresses!

If you received a hard copy of this issue instead of a copy via the Internet, it means that the MSBA does not have your e-mail address. Less than 7% of our members still receive this newsletter via the quaint 'snail mail' method. Don't be left behind! Newsletters sent via e-mail arrive one to two weeks earlier than those sent via surface mail. Submit your e-mail address to the MSBA by contacting Roseanne Thompson at:

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Minneapolis, MN 55402
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email - rthompson@mnbar.org

Committee Reports

Annual Computer Law Institute

Katheryn Andresen is Chair of the 2004 Technology Law Institute. If you have any suggestions for speakers or topics, please contact her at 612-339-6900 or kaandresen@locklaw.com

Contract's Committee Report

By: Gary Weinstein & Jen Salyers

The Contracts Committee will be involved in the following three areas over the course of the next year, and welcomes the participation of anyone who has an interest, regardless of your experience with computer contracts.

Roundtable Discussion Groups. The Section plans to begin an ongoing program of informal Roundtable Discussions Groups. Our committee will plan two or three of these sessions to deal with computer contract issues.

Due to the wide ranging skills, experience and interests of members of the Section, we envision selecting topics that range in complexity as follows:

- One of the contracts-oriented roundtables will be aimed at “dabblers” in computer contracts. While anyone can attend, the session will be geared towards people who have a passing familiarity with computer contracts issues and want to hone their skills;
- A second roundtable will be geared towards experienced practitioners in computer contracts areas. Again, the roundtable would be open to Section members of all levels of experience; and
- If we run a third roundtable, we are considering doing it on a topic that would transcend the experience level of the attendees.

Computer Law Institute. The Contracts Committee will be responsible for a block of time during next year's Computer Law Institute. We envision planning sessions that are particularly suited towards computer contract issues.

Law Student Outreach Committee Report

By: Colleen Schmid

The Law Student Outreach Committee of the Computer Law Section has been communicating on a regular basis regarding its outreach efforts this year. It has made commitments to all four local law schools to provide speakers on a variety of topics and/or to participate in a Career Services Day commencing in January, 2004. Each law school sought different forms of interaction with the Computer Law Section. As a result, the Law Student Outreach Committee along with the members of the Computer Law Section expect to engage in a number of activities with the law schools to include: speaking on topical legal issues, conducting career panel discussions, and participating in Career Services Day. Currently, firm commitments include:

Feb. 3 - career panel discussion at the University of Minnesota Law School

Feb. 7 - participate in Career Services Day at Hamline Law School

The Law Student Outreach Committee encourages participation from anyone in the MSBA.

Nominations Committee Report

By: John Taft

The Nominations Committee has completed its work on the slate of endorsed candidates for 2003-2004. Our Section's Bylaws provide for a Section Council consisting of the officers and the immediate past Section Chair (5 people in total), and not less than three nor more than 25 additional people elected in accordance with the Bylaws, and any persons who become ex-officio members by action of the Bylaws.

We had four current members of the Section Council who indicated that they did not wish to be considered for re-election. These four members are Rebecca Comstock, William Hefner, Mehmet K. Konar-Steenberg and Gillian Rosenquist. We have five individuals who have indicated a desire to join the Section Council, including:

Steven Lieske, an attorney at Oppenheimer Wolff & Donnelly
Jen Salyers, an attorney at Thomas & Bonnabeau
Shelly Gilbertson, an attorney at Datacard Corp.
Gary Weinstein, an attorney at Faegre & Benson
Colleen Schmid, an attorney at UnitedHealth Group

The Slate of endorsed candidates of the Nominations Committee includes:

Section Officers

Chris Schulte - Chair
Katheryn Andresen - Vice Chair
Christine Brick - Secretary
Thomas Sheran - Treasurer
Daniel Tysver - Immediate Past Chair

Section Council

Miguel Azar
James A. Blomquist
Charles Brink
Stephen W. Buckingham
Carla Condiff Schaumann
Frank Farrell
Shelly Gilbertson
Barbara Grahn
William Hefner
Charles E. Johnson
Steven Lieske
Ronald P. Marmo
Dianne Plunkett Latham
Kendra L. Rubbright
Jen Salyers
Carolyn M. Sandberg
Sandra Sedo
Colleen Schmid
John P. Sumner
John A. Taft
Gary Weinstein

Noon CLE Committee Report

By: Steven Lieske

The noontime CLE committee will set up several CLE presentations throughout the year. The next CLE will be on Thursday, November 20th at the MSBA offices. Tim Krsul (a partner from Oppenheimer Wolff & Donnelly) will speak about online liabilities and issues with insurance policies for computer and online business activities. If you have ideas for future CLEs or would like to speak at one, please contact either Steven Lieske at SLieske@Oppenheimer.com or Chris Hilberg at CHilberg@Oppenheimer.com.

Technology Roundtable Discussion Syndicate

(f/k/a Internet Committee)

By: Jim Blomquist, Dan Tysver and Gary Weinstein, co-chairs

Don't just eat lunch—Learn something!

You are invited to come to a roundtable discussion of issues in the *Lexmark* case on **Tuesday, Dec. 2, 2003 from 11:30 -1:00** at the MSBA offices at 600 Nicollet Mall, Suite 380. Bring your lunch and join in a lively discussion.

You are invited to come to a roundtable discussion on the way in which the Digital Millennium Copyright Act (DMCA) is being used to prevent the use of third party add-ons and replacement parts. Specifically, we will talk about the recent *Lexmark v. SCC* decision and the related recommendations of the Copyright Office.

In this case, *Lexmark* has argued that the DMCA's prohibition against circumventing access control technologies prevents SCC, a third-party toner manufacturer, from selling a toner cartridge compatible with *Lexmark's* laser printers. Similar arguments have been made by the manufacturer of a garage door opener to prevent the sale of compatible third-party remotes. One can imagine similar arguments being made by medical device companies to prevent the use of third party disposable components with their copyrighted software.

Professor Sharon K. Sandeen of Hamline University Law School is expected to join us and provide a short opening statement for discussion. Here are some links to relevant info:

www.itworld.com/Man/2683/031030lexmarkdmcapindex.html

www.freedom-to-tinker.com/archives/000248.html

http://www.scc-inc.com/special/oemwarfare/pdf_lawsuit/CopyrightOfficePetition.pdf

http://www.eff.org/IP/DMCA/Lexmark_v_Static_Controls/20030303-finding-of-facts.pdf

Sarbanes-Oxley and IT: Beware of Magic Bullet Solutions

By: Michael Flemming*

In their ongoing efforts to comply with the Sarbanes-Oxley Act of 2002, companies have turned to their Information Technology (“IT”) departments to help them manage their new financial reporting responsibilities. Many are finding that adjusting to new regulatory realities requires system-wide reconfigurations or even entirely new technology systems. Such projects usually require purchasing new software, redeploying internal resources, and engaging outside service providers. Wherever there is major change, of course, there is also the risk of disrupting business processes as new systems are rolled out.



must evaluate and assess the company’s internal control over financial reporting, which is, as it sounds, a very process-intensive task. Furthermore, management will need to document the process to enable the company’s auditors to perform the procedures required to issue an attestation report on management’s assessment. Management must also certify that they have disclosed to the company’s auditors and audit committee all “significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the company’s ability to record, process, summarize and report financial information.”

While corporate compliance law may be the initial reason for this exercise, there are other “legal” aspects to consider in this process. Buyers of Sarbanes-Oxley solutions should take care to remember other legal doctrines – including those of contract, warranty and intellectual property – since those other laws will greatly influence the success of the project. Moreover, buyers should be wary of ‘magic bullet’ solutions – those that promise instant and easy compliance. Any wise buyer of Sarbanes-Oxley solutions should follow certain basic principles and practices in their purchase and implementation of new or improved IT systems.

The financial reporting systems in every modern company are essentially intertwined with the company’s IT systems, which are designed to maintain financial records, process and record transactions, and protect systems from being used without management authority. Thus, by obligating management to make statements concerning the effectiveness of their financial reporting systems, the law essentially obligates managers to report on the effectiveness of the company’s technology systems. It is not unfair to suggest that executives can no longer view IT systems as black boxes that eat up and spit out numbers – rather, the executive must understand the IT systems well enough to assess their effectiveness and identify any inadequacies.

New Obligations - IT Solutions

There are many aspects of Sarbanes-Oxley that are likely to have implications for technology systems. New rules requiring insiders to report transactions in the company’s stock through the EDGAR system have prompted some companies to invest in software to bring the EDGAR filing process in-house. Section 802 of the law enforces records retention requirements. Investor relation’s components of corporate web sites are being overhauled. This is just the tip of the iceberg.

To reach that point, managers will demand that their companies undertake internal examinations of their existing systems to determine if they can certify their accuracy and integrity. Companies that cannot validate their current systems are faced with the likelihood of repairing or replacing their financial reporting systems.

One provision that has drawn particular attention in the IT world is Section 404, which requires management to evaluate and assess the integrity of the company’s financial reporting systems.

Section 404 obligations are coming into play very shortly. Most companies must provide the report on internal control and auditor attestation for fiscal years ending on or after June 15, 2004, while some smaller organizations must comply with reports for fiscal years ending on or after April 15, 2005.

Section 404 does not obligate companies to buy new IT systems. However, it is hard to imagine how the procedures required to comply with Section 404 could be accomplished without sophisticated IT solutions. Executive management

Principles for IT Purchases

Executives should keep a few basic principles in mind when thinking about IT purchases in light of Sarbanes-Oxley.

- *Avoid Too Much Too Soon*: Always keep in mind that Sarbanes-Oxley by itself has no requirement that a company spend large amounts of money on IT replacements. New purchases should only be made when they are required as a result of the ultimate responsibilities - accountability for attestation, quicker reporting, longer record keeping. Jumping into new systems for the sake of jumping will nearly always lead to overly expensive projects that have no clear purpose.
- *Do Not Look for Magic Bullets*: There are vendors who will be anxious to get in on the game of Sarbanes-Oxley-related systems sales, and, as always, there will likely be some vendors who claim more than they could possibly deliver. Remember that Section 404 compliance in particular is ultimately premised on the executive's ability to analyze and report on the accuracy and integrity of the company's systems. Running the best IT system in the world does not make the company compliant, because compliance still depends ultimately on the last link between the systems and the human being. Further, new systems that are designed to report events and complaints up to management are only as good as the information that is fed into them. But few vendors are willing or able to take that information from the very bottom of the chain to the top.
- *On the Other Hand...:* Under investing in necessary upgrades is just as dangerous as overspending. It will likely be necessary to temporarily put in place short-term solutions – often in the form of additional back channel reporting and auditing functions – to begin meeting compliance obligations today. Those solutions may be relatively inexpensive compared to a replacement of a whole system, but those types of solutions do not go to the root of the problem, which is more of a systemic process issue than it is any particular set of reports. If the executive believes a new set of reports is needed before Sarbanes-Oxley certifications can be issued, that is more than likely a red flag that the whole financial reporting system is in need of an overhaul. Moreover, the 'report' solution will always be, at best, something that requires constant tinkering to keep up with newly discovered problems, and is more than likely to be behind the times. It is usually better to avoid a continuing game of catch-up by looking at the big picture.
- *Avoid the Checklist Mentality*: Complicated topics such as Sarbanes-Oxley compliance beg for simplification. Companies know that there are many additional things they should be doing and many outside firms are advertising software products to help companies navigate these new rules and document their compliance. Again, it is important for companies to document their compliance with Sarbanes-Oxley for audit purposes and in the event of any shareholder litigation or regulatory investigation. However, many of the SEC rules specifically direct companies to avoid the "one size fits all" mentality and realize that appropriate procedures and policies need to be carefully tailored for the specific company. Ultimately, few checklists are going to be able to reflect a complicated decision tree that a company must consider, and they are especially poor at reflecting what happens the day after the list was filled out.
- *Document Everything, and Write It For Real People*: Few IT professionals will argue that their profession in general is traditionally tagged with one shortcoming – poor or missing documentation of what they have created and how it works. Under the new rules, executives can no longer rely on generalized "It's OK" messages, but rather will need to review documentation on how the systems work before they can be satisfied that the company's systems meet the new standards of care. That documentation must be written in a way that makes sense to the non-IT professional, but which allows for an intelligent decision by the actual decision maker. When new systems are being created, do not give short shrift to the documentation of what is being done – or the executives may, in the long run, be no better off than they were before the investment was undertaken.
- *Buy With Purpose, and Control the Buy*: This is not a rule limited to Sarbanes-Oxley considerations. There is always a need to invest in IT wisely and not let the process (or the vendor) get too much control over what is ultimately delivered. When undertaking major IT purchases, deliberative processes such as Requests for Proposals and competitive bidding and contracting are essential to success at a reasonable price. As lawyers, we cannot overemphasize the importance of the 'details' in any contract, such as the risk-shifting elements that rarely fit into a traditional Return on Investment analysis, but that can come back to haunt a company long after the project-closing dinners have turned cold. While major contract negotiation and deliberation can be expensive – and occasionally frustrating to business people who want results – the investment in time, money and patience will usually save the buyer many fold in missed cost overruns, failed solutions, poor documentation, and disputes. Attorneys who specialize in IT purchasing may be vital in the process, since their training and experience allows them to recognize and negotiate issues

particular to these purchases. Finally, corporate executives – at the very top – need to be ‘invested’ in the process, and make their interest clear to all levels of the corporation that are involved in the process.

- *Develop with Future Change in Mind:* While we may say today that some of the initial panic over IT systems changes arising from Sarbanes-Oxley may be overstated, that does not mean that something will not happen with the law tomorrow. If you are investing in new systems now, protect your investment by demanding that the systems be sufficiently flexible to cover future changes in the law without a need to replace the systems. Buzzwords like “scaleable” and “configurable” describe the concept: Do not invest in software that is inflexible and incapable of growth.

Conclusion

Most corporations are going to have some significant IT work to do as a result of Sarbanes-Oxley. Some companies

will find that their past implementations of IT resources were done in a way that is easily expanded and modified. Those companies will suffer less pain. Other companies, who might have put off modernization of their IT resources, may need to invest in wholesale replacement of their financial reporting systems. Most, of course, will be between those two extremes. However, by using deliberative purchasing processes aimed at the real purpose of Sarbanes-Oxley – to make financial reporting more reliable and transparent – companies can purchase new IT resources or fix or expand their existing resources in a way that will not only help the company comply with the new laws, but may even help the company do what it really wants to do – grow their business.

**Michael Fleming practices in intellectual property and technology transactions at Faegre & Benson. He was formerly the primary corporate counsel for e-commerce, intellectual property, advertising, and marketing at Musicland. He can be reached at mfleming@faegre.com.*

Current Cases

By: James Blomquist

September 2003

Barcelona.com, Inc. [CA 4,6/2/03] - Domain Name – Anti-Cybersquatting. USDC for the Eastern District of Virginia ordered transfer of the domain name to the city of Barcelona. The Fourth Circuit reversed.

The city owned 150 Spanish trademarks all of which include the word “Barcelona” such as “Teatre Barcelona.” The city initiated a UDRP proceeding. The WIPO panelist held in favor of the city and ordered the domain name transferred. The domain name holder then promptly filed action in the federal court in Virginia. The Federal Court held in favor of the City, essentially adopting the WIPO panelist’s decision noting the City’s rights under Spanish law.

As noted above, the Fourth Circuit reversed. The Court of Appeals noted that the UDRP contemplates judicial intervention. The ACPA gives the federal court jurisdiction, not the UDRP. Under the ACPA, the WIPO panelist decision is not entitled to any deference, but rather the federal court proceeding is de novo. The Court of Appeals noted that the ACPA specifically requires application of U.S. law, specifically the Lanham Act.



The Court of Appeals noted that the City could not have obtained a trademark in the word “Barcelona” alone, since that is a purely descriptive geographical term. The Court of Appeals also noted that fully one-half of the district court opinion related to the City’s “counterclaim” on which the Federal District Court ruled in favor of the City. The Court of Appeals pointed out that there was in fact never any counterclaim and therefore vacated that part of the District Court opinion.

Bowers v. Baystate Technologies [June 2003] - Reverse engineering; Shrinkwrap License. A news story in June 2003 reported that the U.S. Supreme Court has refused to hear an appeal from the U.S. Court of Appeals for the Federal Circuit.

The Federal Circuit Court had affirmed a decision of the U.S. District Court in Massachusetts, which awarded the plaintiff \$5.27 million in damages for breach of contract and patent infringement. The defendant in that case had obtained a copy of the plaintiff’s software and reverse engineered it in violation of the provision in the shrinkwrap license. The defendant then developed its own competing software.

The news story indicates that the U.S. Supreme Court's refusal to hear the case will tend to inhibit parties from reverse engineering where the shrinkwrap license prohibits it.

Mulcahy v. Cheetah Learning LLC [USDC MN 7/28/03] - Copyright infringement. This case was before Judge Magnuson. Since the defendant was found guilty of copyright infringement, the obvious pun may be to refer to this case as the "Cheater Learning Case."

The plaintiff has created test preparation materials for people taking the Project Management Professional (PMP) Exam. One of plaintiff's students alerted her to the fact that Cheetah materials were similar. Plaintiff then arranged for one of her employees to take the Cheetah course and thereby verify the accuracy of the student's allegation.

The defendant admitted that the Cheetah materials "may have been copied." One of defendant's employees admitted that he had worried about copyright infringement of plaintiff's materials and had tried to convince Cheetah to obtain some kind of license from the plaintiff. The court noted that entire sections of the Cheetah materials were identical or nearly identical to the plaintiff's materials.

The court rendered summary judgment as to liability, reserving the issue of damages and the court further issued a permanent injunction prohibiting Cheetah from use of its materials.

Ballistic Products, Inc. v. Precision Reloading, Inc., et al [USDC MN 7/28/03] - Domain names; personal jurisdiction. Rider, Bennett represented the plaintiff, and Al Hinderaker of Merchant and Gould represented the defendants. The case was argued before Judge Ann Montgomery.

The plaintiff, Ballistic, sells shot gun ammunition, reloading supplies and related materials through mail order catalogs and a website at ballisticproducts.com. The defendant, Precision, is a direct competitor utilizing mail order catalogs and an Internet website. Precision was well aware of the plaintiff's business.

Precision registered domain names involving two misspellings of the plaintiff's domain name. Precision has distributed over 200 catalogs to Minnesota residents, advertised nationally in publications sent to Minnesota, and has sold to over 200 customers in Minnesota. However, Precision has no property, bank accounts, telephone listings, registered agent, or sales force locate in Minnesota.

The court found that it did have jurisdiction over Precision and the individual employees involved in procuring the

domain names. Further, the court indicated that the cyber-piracy prevention statute (ACPA) applies to the use of a domain name that is identical or confusingly similar, and that the statute specifically provides for injunctive relief. The court issued a preliminary injunction against use of the confusing domain names and against registration of any similar domain names. The court further ordered that the domain names be transferred to the plaintiff.

October 2003

Zubulake v. UBS Warburg, (USDC SDNY 7/24/2003) - Sharing cost of electronic discovery. , (S. Scheidlin, 02CV1243)

The Court ordered the plaintiff to bear a significant part of the cost incurred in restoring and producing e-mails from defendant's backup tapes. The estimated cost of restoring and searching tapes was \$166,000 with an additional \$107,000 for attorney and paralegal review. The Court held that the plaintiff was not responsible for the defendant's attorney costs but should share some of the costs of restoring and searching. The Court specifically modified the list of factors previously articulated in *Rowe Entertainment v. William Morris Agency*, which had been criticized for too often resulting in a shifting of costs to the requesting party. The Court noted that the plaintiff in this case had been earning a salary of \$650,000 per year. The Court also noted that there appeared to be some evidence that the defendant had attempted to conceal and delete some e-mail harmful to its position.

DVD Copy Control Association v. Bunner, (Supreme Court California 8/25/2003) - Trade secret; free speech; preliminary injunction. <http://www.courtinfo.ca.gov/opinions/documents/S102588.PDF>

The Supreme Court of California held that under California trade secret law, a preliminary junction could be granted without violating the free speech clause of the state or federal constitution. The decision left open the issue as to whether the DVD code remained a trade secret despite prior publication of information regarding the code. The defendant, Bunner, had posted the code on a website allowing persons to circumvent DVD encryption technology. The *Bunner* case is noteworthy because it seeks to pursue trade secret relief rather than a cause of action under the Digital Millennium Copyright Act (DMCA).

Storey v. Cello Holdings, (CA2 10/9/2003) - Domain name dispute. <http://caselaw.findlaw.com/data2/circs/2nd/027281p.pdf>

The Second Circuit Court of Appeals vacated and remanded with regard to a District Court decision to impose sanctions on attorneys who brought a UDRP action even though a prior federal court case had been dismissed with prejudice. The Court of Appeals noted that facts occurring after the previous dismissal with prejudice could justify a new action, and the Court of Appeals noted that the District Court seemed to be confused in believing that the current case called for the Court to review the UDRP decision. The Court of Appeals properly noted that under the ACPA the Court determines the matter de novo.

Mid-List Press v. Nora, (USDC MN 7/31/2003) - Trademark; trade name; injunction against ex-corporate officer.

The Board Chairman of a Minnesota nonprofit corporation became upset when his daughter, the CEO, refused to publish a book of his poetry. The Board Chair proceeded to appropriate the corporation's trade name, trademarks and other intellectual property for his own use nearly putting the corporation out of business. According to an October 8, 2003 article in the on-line City Pages, the father has filed an appeal, although U.S. District Court Judge Doty has not yet ruled on damages.

Lowry's v. Legg Mason, (USDC Maryland 10/7/2003) - Copyright infringement.

An article in the Washington Post on Tuesday, October 7, indicates that a federal jury determined damages in excess

of \$20 million against Legg Mason for copyright infringement regarding its distribution of Lowry's electronic newsletter. Legg Mason apparently had paid a single \$700.00 annual subscription fee, but proceeded to distribute the electronic newsletter to a number of its 5,300 employees. The case involved approximately 250 separate copyrights. The jury awarded \$825,000 for lost revenue and assessed fines of \$50,000 or more per copyright violation.



Damien Riehl, Assistant Newsletter Editor

Back for more in '04



**MSBA 2004 Convention
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Computer Law Section

New Member/Committee/Officer Interest Form

Enclosed is my check in the amount of \$35 payable to the MSBA. (Send to Section Services, c/o MSBA, 600 Nicollet Mall, Suite 380, Minneapolis MN 55402.)

I am a current Computer Law Section member. The following information is address change information only. Address information can be faxed to 612/333-4927; or e-mailed to mkempton@statebar.gen.mn.us.

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If you are interested in joining one of the following committees for 2003-2004, or are willing to be considered for an officer or committee chair, please check below and send to Computer Law Section Chair.

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I would like to participate in the Section in the following ways:

___ Speak at a CLE ___ Contribute an article to the Newsletter

___ Other: _____

Check any of the following officer positions you would consider in the future:

___ Chair ___ Vice Chair

___ Secretary ___ Treasurer

___ Council member

I would like to see the Computer Law Section undertake the following: _____

MSBA Computer Law Section Newsletter Article Guidelines

By: Dianne Plunkett Latham, Editor

Subject Matter – Submit any articles of interest to the members of the Computer Law Section, as for example, recent issues on technology licensing, patents, copyright, trademark or Internet technology. Articles previously published in other publications are acceptable if current.

Article Length – Articles of 3,500 words or less, but not more than 5,000 words, are preferred as the newsletter is limited to 24 pages. It is published in multiples of 4 pages, due to the constraints of the hard copy version.

Article Format – Microsoft Word is preferred. Please contact the Editor before any other format is used. E-Mail submissions are preferred, although a disk or CD ROM is acceptable. Avoid the style of law reviews, CLE materials or legal briefs. A journalistic style is preferred. The structure of the article should include a “catchy” lead, followed by a “thesis paragraph” that tersely states the gist of the article. The exposition of the topic should then follow, with a summary at the conclusion.

Footnotes – Keep footnotes to a maximum of 25, as this is not a law review style publication. If footnotes are used, they should fall at the end of the article, not at the end of each page. All footnotes should be in the form prescribed by the *Uniform System of Citations*. Footnotes should be limited to citing specific authorities; ‘string’ citations and discursive notes are discouraged. The author is responsible for ensuring the completeness and accuracy of all references and citations. Article information and footnotes are not checked for accuracy.

Footer – Footers should contain only page numbers, not other information such as a date stamp, or an internal document number.

Copyright Notice – A Copyright notice is unnecessary. If the author wishes to include one, it should be placed at the end of the article, not on each page.

Title and By-Line – The article should include both a title and a by-line. The by-line should include both the author’s name and firm affiliation. It is not necessary to include any additional author biographical information. Keep any author practice areas, experience, etc., in the endnotes to a minimum.

Photographs – Photographs of Section events are encouraged. They may be in black and white or in color. Digital photographs are preferred, although prints are acceptable. If digital photographs are submitted, please e-mail them at the highest resolution available on your system. Submitting photographs on disk or CD ROM is acceptable.

Graphs and Charts – The use of graphs and charts should be kept to a minimum. They are very difficult, if possible at all, to input into the MSBA’s Pagemaker software. Often graphs and charts must be recreated manually, substantially delaying the formatting set-up time.

Submission Deadline – The Computer Law Section Newsletter is published twice a year in December and May. Submission deadlines are about 4 weeks prior to publication and are published in the Calendar of Events for the previous issue.

Distribution – The newsletter is distributed to members via e-mail. Those members without an e-mail address are sent a hard copy through the US mail. Fifteen extra copies are run.

Questions – Editor, Dianne Plunkett Latham, at: 952-941-3542 or PlunkettDi@mn.rr.com

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