

# Computer Law News

A Publication of the Minnesota State Bar Association Computer Law Section

## Winter 2005-06

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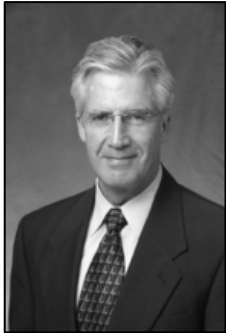
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## REPORT FROM THE CHAIR

by Thomas R. Sheran

• *Moss & Barnett, PA*



This year's Council will again focus on ways to share our Section's broad expertise in the computer and information technology fields. One of our goals is to assemble useful transaction documents and make them available to members at our Section's Website. This will involve the combined effort of our Contracts Committee (chaired by Dan Tysver and Kevin Brady) and our Website Committee (chaired by Mike Luzum). If you have a useful confidentiality agreement that you are willing to share, please contact Dan Tysver at [dtysver@bitlaw.com](mailto:dtysver@bitlaw.com).

In October of this year, the Section sponsored its 14th annual Computer Law Institute – a full day CLE seminar that drew 139 attendants from a wide range of practice areas. Credit for this success goes to planning committee members, Christine Brick (co-chair), Damien Riehl, Kendra Richgels, Jen Salyers and Colleen Schmidt. Additional practice-improvement programs will be presented following the Council's regular monthly meetings on the second Tuesday of each month from September through April. These programs are put together by our Noon-Time CLE committee (Chaired by Kendra Richgels and Vanessa Beardsley); Technology Roundtable Committee (Chaired by Gary Weinstien and Chris Evans); Case Law Update Committee (Chaired by Jim Blomquist and Kate Andresen) and Legislative Committee (Chaired by Allen Oh). The location is the MSBA Offices (600 Nicollet Mall, 3rd Floor City Center, Minneapolis), and there's no charge to Section members. Those who attend are invited to observe the Council's regular business meeting beginning at 11:30 at the same location. It's a great way to learn about our Section's activities and, perhaps, become interested in joining the Council. For more information regarding this year's program schedule, check the meeting notices posted to our website, at [www2.mnbar.org/sections/computer\\_law](http://www2.mnbar.org/sections/computer_law).

In addition to providing instructional programs, the Section will continue electronic publication of this Newsletter—which affords members an opportunity to publish short articles on relevant topics. Members who are interested in submitting an article for publication should contact Newsletter Editor Damien Riehl at [DARiehl@rkmc.com](mailto:DARiehl@rkmc.com).

The Section's website includes a description of all of the Council's standing committees and their activities. I invite you to become involved by contacting a committee chair directly. If you have any thoughts about how to improve our Section, please contact me ([SheranT@Moss-Barnett.com](mailto:SheranT@Moss-Barnett.com)) or any of the other Council members.

Happy Holidays.

## EDITOR'S REPORT by Damien A. Riehl

• *Robins, Kaplan, Miller & Ciresi LLP*

Over the past year, the Computer Law Section has continued to improve its programs. The Noontime CLE committee has done a great job in organizing entertaining speakers with timely and relevant topics. Because few areas of the law move more quickly than those involving technology, these presentations have proven to be an important benefit of membership.



Similarly, the presentations at the annual Computer Law Institute were first-rate and replete with valuable information. The topics included issues relevant to litigators and transactional attorneys alike—from licensing to data privacy to spyware to system agreements. Particularly entertaining was Hon. James M. Rosenbaum's discussions of electronic evidence and the possible effect of proposed rule changes that attempt to accommodate what is becoming a ubiquitous part of litigation today.

I look forward to continuing to observe and assist with this section's continued improvements. If you would like to contribute an article or notify the section of a case that may be of interest to our members, please contact me at [DARiehl@rkmc.com](mailto:DARiehl@rkmc.com). Also, please feel free to give me any suggestions on how we can make this publication address your needs more fully.

## 2005-06 SCHEDULE OF EVENTS

Tues., Dec.. 13	<b>Section Meeting</b>	11:30 at MSBA HQ, City Center
Tues., Jan. 11	<b>Section Meeting</b>	11:30 at MSBA HQ, City Center
Tues., Feb. 14	<b>Section Meeting</b>	11:30 at MSBA HQ, City Center
Tues., Mar. 14	<b>Section Meeting</b>	11:30 at MSBA HQ, City Center
Mon., Apr. 3	<b>Newsletter Submission Deadline</b>	
Tues., Apr. 11	<b>Section Meeting</b>	11:30 at MSBA HQ, City Center
May (TBA)	<b>Annual Meeting</b>	

## TREASURER'S REPORT

by Christopher R. Hilberg  
• *Dorsey & Whitney, LLP*



The Computer Law Section operates on a fiscal calendar from July 1 to June 30 and continues to be financially sound. To date, this year's collected membership dues have reached \$5,262.50. The section's balance as of October 31, 2005, was \$8,509.64. The largest expense in the current fiscal year was \$648,18, which covered the catering costs for the Networking Luncheon at the Computer Law Institute on October 6, 2005.

## NOONTIME CLE REPORT

A noontime CLE was held on Tuesday, November 8, 2005. David Allgeyer from Lindquist & Vennum, PLLM spoke on "This System Isn't What We Thought We Were Getting: Litigating Computer System Failures and Perceived Failures." Attendance was good, with approximately 30 attendees. The committee is in the process of seeking speakers for the next noontime CLE, to be held on February 14, 2006.

## RECENT CASES OF INTEREST – 2005

James Blomquist • *Felhaber Larson Fenlon & Vogt*  
Katheryn Andresen • *Bonnabeau Salyers Stites Doe Andresen*  
Greg Stark<sup>1</sup> & Bryan Chant<sup>2</sup> • *William Mitchell College of Law*

### Arbitration

#### **Clarus Medical v. Myelotec** **(D. Minn. Sept. 9, 2005)**

Arbitration Clause

The case involved a trademark license dispute. Clarus as licensee filed suit, but Myelotec, as licensor, demanded arbitration in accordance with the terms of the license. Although the license did provide that all disputes are to be resolved by arbitration, it further indicated that "notwithstanding any provision of this section to the contrary, each party shall be entitled to seek injunctive and other equitable relief in any court . . . ." The district court held that under the Eighth Circuit standard the wording in the license was not sufficient to allow for court ordered injunctive relief.

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## **Copyright**

### **Krause v. Title Serv (2d Cir. Mar. 21, 2005)**

Copyright / Software – Owner software copy may adapt as essential step in utilization

Software developer created several key software programs for company either as an employee or independent contractor during a span of tens years. After a dispute he left taking source code for some programs, but leaving other source code behind. Companies circumvented the “lock” on the code and modified it to fix bugs and keep it functioning for two years until they could replace it. Software developer sued in federal court alleging copyright infringement. The federal district court rendered summary judgment for the company under 17 U.S.C. § 117(a)(1). Holding company qualified as “owner of a copy of a computer program” and therefore was allowed to adapt that program in order to utilize it.

An interesting side light is that the federal district court decision in favor of the company was rendered in October 2003 and the second circuit affirmed about 18 months later, in March 2005. In a footnote, the appellate court notes that the company had brought suit in state court in July, 1996, but as of October 2003, the state court action was still pending in New York.

### **Altera v. Clear Logic (9th Cir. Sept. 15, 2005)**

Copyright – Reverse Engineering – EULA

This case involved application specific integrated circuits (ASICs) and programmable logic devices (PLDs). Altera manufactures PLDs which are subject to a EULA which prohibits reverse engineering and which authorizes use “for the sole purpose of programming logic devices manufactured by Altera.” The SemiConductor Protection Act specifically allows reverse engineering for the purpose of teaching, analyzing, or evaluating concepts, but a competitor may not reverse engineer to create a second mask work which is substantially identical to the original. In this case, the court held that Clear Logic was guilty of infringement because it induced customers to breach the Altera EULA and its reverse engineering was not permissible. Altera was awarded damages of \$30.6 million plus \$5.4 million in pre-judgment interest and \$394,791 in costs.

### **Davidson & Assoc. v. Jung (8th Cir. Sept. 1, 2005)**

Copyright – Reverse Engineering – EULA

The Copyright Act does not preempt a breach of contract claim when the contract, which was entered into at arms length, negotiates away a user’s enumerated rights under the Copyright Act.

Davidson & Associates develops and distributes numerous computer games. Each game includes an End User License Agreement (“EULA”) and Terms of Use agreement (“TOS”), both of which require the user to agree not to reverse engineer the software. Davidson eventually launched an on-line gaming service. As a copy protection mechanism, the service authenticated each player’s copy of the game before allowing them to sign in.

Some users of this service, including Jung, became dissatisfied with it, for reasons unrelated to the copy protection mechanism, and created another network compatible with Davidson’s games. In order to create a fully compatible network, Jung reversed engineered the software so he could determine how data was communicated between the game and the service. Unlike Davidson’s service, Jung’s network did not attempt to authenticate the copy of the game before allowing the user to use the network.

Davidson sued Jung, alleging, inter alia, breach of the EULA and TOS and circumvention of copyright protection systems. On appeal, Jung argued that the breach of contract claim was preempted by federal copyright law; thus, he would have been allowed to reverse engineer the software as a fair use. The Eighth Circuit disagreed and explained that the states are free to permit their citizens to enter into contracts that waive their right to reverse engineer software even though that particular right is enumerated as a fair use under the Copyright Act. Moreover, since Jung's network allowed users to sign in using pirated copies of the game, the court held that this was sufficient to constitute a violation of the anti-circumvention provisions of the Act.

### **Egilman v. Keller & Heckman (D. Columbia Nov. 10, 2005)**

DMCA – Password – Circumvention

Egilman had claimed that the defendant law firm had violated the Digital Millennium Copyright Act ("DMCA") by accessing his website utilizing a user name and password belonging to someone else. The law firm allegedly downloaded material from the website and used those materials to impeach Egilman's credibility in certain litigation and to convince a judge to sanction Egilman for having violated a court order prohibiting persons, including expert witnesses, from publishing statements concerning a pending case. The court held that accessing a computer system through unauthorized use of a valid password does NOT constitute circumvention of a technological measure in violation of the DMCA.

### **Webloyalty.com v. Consumer Innovations, LLC 2005 U.S. Dist. Lexis 791 (D. Del. Sept. 26, 2005)**

Copyright Infringement; ad and sell page on website

Following a 1 day bench trial the court awarded Plaintiff statutory damages of \$25,000 for each of two works infringed, attorney fees of \$226,000 and \$43,000 in costs. The court noted that the defendant's testimony denying "copying" was incredible given that their draft sell page was identical to Plaintiff's and even included the Plaintiff's telephone number! In a footnote the court chastised defense counsel for eliciting testimony that was "palpably preposterous". Interestingly the defense attorney's webpage notes that he lectures on legal ethics and he provides a link to the decision at [Webloyalty.com, Inc. v. Consumer Innovations, LLC](#), Cil. No. 04-90-KAJ, 73 U.S.P.Q. 2d (BNA) 1898 (U.S. Dist. Lexis 791 2005).

### **Kay Berry, Inc. V. Taylor Gifts, Inc.; Bandwagon, Inc. (3d Cir. Aug. 30, 2005)**

Copyright Infringement; protectable expression; registration.

Good summary of copyright registration requirements and errors by various courts. Work in question was "Garden Accent Rocks," which are decorative, cement-cast, outdoor sculptures typically resembling rocks or stones, inscribed with writings from the public domain. Copyright registration was based on a catalog of such works. District Court rendered summary judgment for defendant determining that copyright registration was invalid and that the sculptural work was not entitled to copyright protection. USCA 3 reversed and remanded.

<http://caselaw.lp.findlaw.com/data2/circs/3rd/043809p.pdf>

## **Paramount Pictures Corp., v. John Davis. (E.D. Pa. Dec. 2, 2005)**

Copyright Infringement; Peer-to-Peer (P2P) and Internet Distribution.

The court clarified copyright infringement was complicated by internet and P2P technologies. The court held that there were both first propagators and subsequent infringers, with the first propagator being the key infringer on a "but for" assessment.

### **Trademark**

## **Schwans v. Kraft Pizza. (D. Minn. 2005)**

Schwans and Kraft are the two largest producers and suppliers of frozen pizzas. After spending \$500,000.00 on consumer tests related to a new brand name, Schwans adopted the new brand "Brick Oven" for a new line of pizza. The evidence indicated that Schwans spent over \$17 million in advertising and marketing that new brand. Kraft decided to put "pricing pressure" on Schwans by offering a very inexpensive pizza product with a label indicating that it was "Brick Oven Style." The court held that Schwans' "Brick Oven" as a generic term entitled to no trademark protection. The court noted that the PTO had rejected three separate applications by Schwans to register its trademark, and each time the PTO had indicated that refusal was because the mark was generic.

## **Frosty Treats v. Sony Computer Entertainment. (8th Cir. July 25, 2005)**

Frosty Treats is one of the largest ice cream truck street vendors in the nation. Its trucks carry the label "Frosty Treats" in stylized printing and also show a decal of a happy faced clown admonishing children to "watch cars – cross at rear." Frosty Treats sued Sony because Sony was marketing a "twisted metal" video game which depicted an ice cream truck and a clown character with a scary face. The court held that the term "Frosty Treats" is generic and that there was no infringement since the marks utilized by the defendant had a distinctively different appearance than the marks claimed by the plaintiff.

## **Gander Mountain v. Cabela's (D. Minn. Aug. 18, 2005)**

Trademark – License Agreement

When Gander Mountain experienced financial difficulty in the mid 1990s, it cut a deal with Cabela's in order to obtain \$35 million in cash. Cabela's obtained \$20 million in inventory, paid \$7.5 million for certain customer lists and also paid \$7.5 million for a trademark license and non-competition agreement, whereby Cabela's obtained the right to use the "Gander Mountain" trademark for catalog sales and Gander Mountain agreed that it would not use its mark for any catalog sales. The court granted summary judgment in favor of Cabela's finding that the exclusive license agreement regarding the Gander Mountain catalog sales trademark was enforceable. Thus, Gander Mountain could not utilize that trademark with regard to catalog sales.

### **Patent**

## **Pfizer, Inc., v. TEVA Pharmaceuticals USA, Inc. \_\_\_ F.3d \_\_\_, 2005 WL 3110828 (Fed. Cir. Nov. 22, 2005)**

Patent – Public Interest in Granting Injunction

Patent owner sought injunction on claim of infringement against a competitor drug company. USDC NJ granted injunction and defendants appealed. The court held that as owner was likely to win on infringement claim, either by literal infringement or under

doctrine of equivalents. This upheld USDC NJ's finding that harm to patent owner if no injunction granted would exceed harm to defendant if it was granted. The USDC NJ also found that public interest favored granting the injunction despite Teva's argument that public interest should want cheaper drugs and encourage competition.

## **Computer Law**

### **Prudential v. Prusky (E.D. Pa. July 2005)**

E-contract

Prudential sought declaratory relief and Prusky counterclaimed alleging violation of the Electronic Signatures Act at 15 U.S.C. § 7001. Prusky argued that Prudential was obligated to accept telefax or electronic communications. The court held that the E-Sign Act does not require a party to accept electronic signatures.

### **SuperValu v. Quality Farms. (D. Minn. Oct. 6, 2005)**

E-mail – UCC Statutes of Frauds

In refusing to grant Quality Farm's motion for summary judgment, the court held that the e-mails exchanged by the parties were sufficient to satisfy the UCC requirement for a writing with regard to contracts in excess of \$500. In that regard, the court cited the Minnesota UETA at 325L.07 requiring legal recognition of electronic records, signatures and contracts.

### **HGI Assoc., Inc., v. WETMORE Printing Co. 427 F.3d 867 (11th Cir. Oct. 4, 2005)**

Breach of Contract and Defense of "Copyright Estoppel"

Software buyer sued seller for breach of contracts. The USDC S.D. FL held for buyer and cross-appeals were taken. The doctrine of copyright estoppel precluded any possible claim by seller of that the manufacturer's copyrights were violated by the contracts. When the seller repudiated the contract, the buyer could recover lost profits by reselling the software, but the seller still had the right to claim this recovery was inexcusable under the circumstances.

### **Madison River Mgmt. Co., v. Business Management Software Corp.**

**387 F.Supp.2d 521 (M.D.N.C. Aug. 31, 2005)**

Breach of Contract not Copyright Infringement for Excessive Use Beyond Contractual Terms

Business Management licensed software to Madison River, upon discovering that Madison River was significantly using more copies than licensed, including nightly copying of the generated database, Business Management brought suit for breach of contract and copyright infringement. While the court held for Business Management, it clearly indicated that excessive use under a license was to be dealt with as a breach of contract and not as a claim for copyright infringement because there was a breach of covenant addressing such use. In addition, the nightly copying of the database did not constitute "fair use" because the software as well as the raw data was copied and was another indicator of breach of contract.

## **Litigation**

### **Zutz v. Case Corp. (8th Cir. Sept. 7, 2005)**

Reckless misrepresentation is recognized as a cause of action in Minnesota

Zutz Farms decided to purchase two drills from Case. The primary consideration Zutz Farms had in deciding which drill to purchase was whether the drills would be compatible with their practice of incorporating herbicide into the soil before planting crops. In their negotiations, the independent dealer, Case's brochure, and a Case representative stated that the drills would be suitable for Zutz Farms' needs.

After purchasing the drills, Zutz Farms discovered that the Case drills caused significant damage to their crops. Consequently, Zutz Farms sued Case alleging breach of express and implied warranty, reckless misrepresentation, and a violation of the Minnesota Consumer Fraud Act. In response, Case argued that reckless misrepresentation is not recognized as a cause of action in Minnesota.

The Court rejected Case's argument and explained that there are three types of misrepresentations that fall under the category of fraud: reckless misrepresentation, negligent misrepresentation, and deceit. The Court then explained that a prima facie case for misrepresentation requires: (1) a false representation by a party of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made as of the party's own knowledge without knowing whether it was true; (3) with the intent to induce another to act in reliance thereon; (4) that the representation cause the other party to act in reliance thereon; and (5) that the party suffered pecuniary damage as a result of the reliance.

The Court found the jury's determination that Case committed negligent misrepresentation was supported by the evidence. The Court found that the Zutz's had reasonably relied upon the statements made by the implement dealer, Case's field representative, and Case's marketing materials regarding the drill's fitness for use with pre-plant-incorporated herbicides. Testimony by Case's expert that the drill was never tested for compatibility with pre-plant-incorporated herbicides confirmed that Case's assertion of fitness had been made without knowledge of the truth or falsity of the representations.

The Court also remanded this case for further review of the express warranty, finding that there is a factual conflict regarding the date of sale – statute of limitations and the warranty disclaimer. Under Minnesota law, a seller creates an express warranty that the goods shall conform to "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain." Minn. Stat. §§ 313(1)(a)-336.2 (2005).

### **Autotech Technologies LP, v. Automationdirect.com (N.D. Ill., Nov. 23, 2005)**

Preliminary injunction sought, but genuine issues of fact required a hearing which led to summary judgment

AutoTech brought suit for a preliminary injunction. During the initial hearing before the court, the judge concluded genuine issues of fact were established and called for a new hearing. During the second hearing, the judge not only concluded an injunction was inappropriate, but also granted summary judgment to ADC that there was no infringement.

## INTERNET GOVERNING BODY ICANN APPROVES NEXT GENERATION OF TOP LEVEL DOMAIN NAMES

by Jamie N. Nafziger  
• *Dorsey & Whitney, LLP*



To reflect the increasing complexity and ever-greater customization of Internet Web sites, ICANN (Internet Corporation of Assigned Names and Numbers) has approved the designation of three new generic Top Level Domain Names (TLDs) — .mobi, .travel, and .jobs — and is reviewing five more TLDs.

Applications for domain names in the .jobs and .travel TLDs are now being accepted. ICANN has approved the .mobi TLD, and details regarding the beginning of registration will soon be available. In addition, ICANN has preliminarily approved the launch of five more TLDs — .asia, .post, .cat, .tel, and .xxx — and has entered into commercial and technical negotiations with the sponsors of these TLDs. An application for a .mail TLD was considered and rejected by ICANN.

<b>Accepting Applications</b>	.jobs .travel
<b>Approved</b>	.mobi
<b>Preliminarily approved</b>	.post .cat .tel .xxx .asia

### .mobi

For the majority of potential registrants, the .mobi TLD will be the most interesting of the new TLDs. The .mobi TLD will allow a company to have a companion website to its .com website that is specifically designed for easy access by mobile devices. The .mobi ICANN application was cosponsored by Ericsson, GSM Association, HP, Microsoft Corporation, Nokia, Orange, Samsung Electronics Company, Ltd., Sun Microsystems, TIM, 3, T-Mobile International, and Vodafone. These companies formed a joint venture company, mTLD Top Level Domain, Ltd., to manage the .mobi TLD. The 90 day sunrise registration period is expected to begin in the first half of 2006.

According to the sponsor's website, located at [www.mtldinfo.com](http://www.mtldinfo.com), .mobi will indicate Internet services that are committed to employ best common practices for optimized mobile usage to provide users with a simple, predictable, high-quality experience when they are accessing Internet-based content through a mobile device. It will provide a recognizable TLD that indicates that the associated website will be easy and convenient to use if accessed with a mobile device. After the launch of the .mobi TLD, most .com websites may eventually have companion .mobi websites, with the .mobi websites formatted for optimal accessibility by a portable device, such as a BlackBerry device or a cellular phone.

The specifics regarding registration and standards for the TLD have not been announced. However, there will be a 90-day sunrise period during which registrations will only be available to a company or organization that either (a) wishes to register a domain name corresponding to a registered trademark to which it has rights in the .mobi TLD for use, or (b) wishes to reserve its registered trademark to prevent registration by others, but does not wish to use the domain name. Trademark owners who register on the basis listed in (b) will be able to convert the domain name to a usable domain name in the future. Registration in the sunrise period will be on a first-come, first-served basis, and the prospective registrant will be required to prove it has a registered trademark. During the sunrise period, the domain name requested must correspond exactly to the textual

elements of the registered trademark (with the exception that spaces or punctuation which appear in the registered trademark and can be represented by hyphens or eliminated).

With the mobile Internet industry expected to continue its recent boom, when the `.mobi` TLD sunrise period opens for registration, businesses should register their key trademarks and `.com` domain names in the `.mobi` TLD. After the sunrise period, businesses should consider defensively registering common misspellings and variations of marks to prevent them from being registered by third parties. Whether there will be registration restrictions after the sunrise period expires is still uncertain. Trademark owners should submit applications during the sunrise period to protect their trademarks.

## **.jobs**

If a company consistently has numerous job postings, it may want to consider registering a `.jobs` domain name. Applications are being accepted now. Domain names will be registered on a first-come, first-served basis for organizations whose rights in the domain name can be validated.

The `.jobs` TLD is intended to promote employers' recruitment activities. The `.jobs` ICANN application was sponsored by the Society for Human Resource Management (SHRM). The `.jobs` TLD is expected to make exploring career options simpler for the end user. Companies can register `companyname.jobs` to allow job searchers to go directly to the company's career information, thereby reducing home page congestion and confusion. The TLD is being operated by Employ Media of Cleveland, Ohio, with SHRM acting as the formal policy administrator.

Registration in the `.jobs` TLD is limited and is subject to a verification process. According to Employ Media's website, located at [www.employmedia.com](http://www.employmedia.com), a registrant must be: (1) tasked with hiring or other human resources duties on behalf of their own employer organization; (2) authorized to purchase their `companyname.jobs` on behalf of their employer organization; (3) agree to abide by the `.jobs` Use Policies; and (4) agree to abide by the SHRM Code of Professional Conduct. Finding an employee who meets these standards should not prove difficult for any organization or company that has a human resources department or an employee serving in a human resources role.

The registrations are limited to the legal name of the employer and/or an abbreviation or name by which the employer is commonly known. Trademarks will not be allowed to be registered in the `.jobs` TLD except in the case where the trademark is also the name of the employer organization. Prospective registrants will be required to submit a qualification document which proves the status of the applicant as an employer, such as an Internal Revenue Service Form 941 (Employer's Quarterly Federal Tax Return) in the United States.

## **.travel**

If a company is in the travel industry, it should consider registering a `.travel` domain name. Pre-authentication of domain name applications is underway, with a limited launch running through December 26, 2005. The full launch will begin on January 2, 2006.

The `.travel` TLD is intended to allow consumers to easily find travel information. The `.travel` ICANN application was sponsored by a consortium of travel industry members. The `.travel` TLD is restricted to verifiable participants in the travel industry. This includes travel agents, tour operators, airlines, hotels/resorts, restaurants, car rental companies, cruise lines, bus/coach operators, bed and breakfast houses, ferries, passenger rail lines, theme parks, convention and visitor's bureaus, national tourism offices, travel guide/magazine publishers, camp facility operators, computer reservation/travel technology providers, and travel-consumer research organizations.

To register a `.travel` domain name, a prospective applicant must first be authenticated as a travel industry participant. The information supplied will be reviewed and authenticated by

an applicable association, a non-industry third party, or the Registry. Authenticated applicants must also have rights to use the name applied for either through use or registration. Each applicant will be required to submit documented proof of use of the name for review by the authenticating organization. If multiple applicants for the same domain name submit proof of use of the name, the domain name will be awarded on a first-come, first-served basis.

## **.asia**

If a company has a commercial presence in Asia, it may want to consider registering a `.asia` domain name, once they become available. The `.asia` TLD is intended for Asian businesses and non-profits and Asian branches of international entities. The `.asia` ICANN application was sponsored by DotAsia, a new non-profit, with initial funding from Afilias. It was supported by, and intends to be run by, country-code top-level domain name (ccTLD) registries throughout Asia once the TLD is launched. It anticipates being the Asian equivalent of the `.eu` TLD in the European Union.

## **.post**

If a company is in the postal industry, it may want to consider registering a `.post` domain name, once they become available. The `.post` TLD is intended to be a standard identifier for the postal industry that will allow members to differentiate themselves from non-postal entities. The `.post` ICANN application was sponsored by Universal Postal Union (UPU), a specialized agency of the United Nations responsible for postal services. Although the specific restrictions on registration have not been announced, according to UPU's website, the following entities will be eligible to register `.post` domain names: designated post offices (DPOs), post offices and other DPO locations, other postal operators (such as private companies), restricted unions, communities, associations, foundations and unions related to postal services, registered partners, trademarks and brand names of UPU and members, UPU-regulated services, country-regulated services, international generic functions, and national generic functions.

## **.cat**

The `.cat` TLD will be reserved for the Catalan linguistic and cultural community. The `.cat` TLD application was sponsored by Associacio puntCAT. The specific restrictions on `.cat` registrations have not been announced, but according to the ICANN application, it will be limited to the use and promotion of the Catalan language and culture.

## **.tel**

According to the sponsor's application, the `.tel` TLD community will consist of individuals and/or businesses who wish to have a universal identity, brand, or name in the Internet-Communications space, as well as providers of Internet-Communications services and related content. Internet-Communications is any form of intercommunications activity (voice, combined voice/data, or messaging) between individuals and/or businesses, which is dependent, in part or whole, on the Internet as the means of transport. This is a for-profit venture by the sponsor organization. It appears the sponsor organization envisions individuals and businesses placing contact and personal information on websites associated with `.tel` TLDs.

## **.xxx**

The `.xxx` TLD is intended to be a voluntary TLD specifically for adult-oriented websites. ICANN determined that the application, by ICM Registry, Inc. (ICM), met the criteria established for applications. Accordingly, ICM is in technical and commercial contract negotiations with ICANN. Most recently, in early December 2005, ICANN postponed its

decisions on the contracts due to political pressure from several governments and interest groups.

## Conclusion

To most businesses, the new TLDs of most significance will be the .mobi and .asia TLDs. As more and more consumers purchase mobile devices to access the Internet, businesses will need to make their web sites mobile-friendly. In addition, as business in Asia grows, the .asia TLD may become as appealing as the .eu domain name has become in the E.U. Finally, the other new TLDs will be appropriate for particular businesses in particular industries as well.

## EXPORTING PRODUCTS OR TECHNOLOGY? ASSESS BEFORE YOU SHIP OR TRANSMIT

by Asmah Tareen  
• Fredrikson & Byron, PA

*This article originally appeared in the November 2005 issue of Fredrikson & Byron's International Focus and is being reprinted with permission.*

Last year, dozens of U.S. companies were charged and heavily fined for violating U.S. export laws. These included charges against a Cincinnati company (\$17,500) for attempting to ship window shade fabric to Iran through France; a Missouri company (\$222,000) for exporting firearms scopes and mounts to Canada, Mexico, Argentina, and several other countries without licenses; and an Oregon company (\$560,000) for exporting semi-conductor microchips and releasing related technical data to China and Chinese national employees without licenses. The companies have all been required to implement export management systems to facilitate future compliance.



Export violations can be triggered by the intended destinations, purchasers, or end uses; the nature of the products (e.g. technology); or a combination of these. For companies that export products to many destinations worldwide, it is critical to have an export management system in place. This system should assess individual orders prior to shipment and confirm that they are not prohibited under U.S. export laws and that no additional authorizations from government agencies are required.

## Regulations and Agencies

The Office of Foreign Asset Control (OFAC) in the Department of Treasury administers federal statutes that impose the United States' economic sanctions and restrict exports to embargoed countries and restricted entities and individuals.

The Bureau of Industry and Security (BIS) in the Department of Commerce is responsible for enforcing the Export Administration Regulations (EAR) that govern the export of products (particularly software, hardware, or other types of technology) from the United States. The EAR regulate the export of items that have a predominantly civilian application but could also have military or strategic (dual) use.

Defense-related items or services listed on the Munitions List in the International Traffic in Arms Regulations (ITAR) are governed by the Office of Defense Trade Controls (DTC) in the Department of State.

## **Embargoed and Restricted Countries**

All U.S. exporters have to assess whether their destination country or end-user triggers export restrictions or additional requirements. A wide variety of exports are prohibited if the destination is in Cuba, Iran, or Sudan. Specific items may be authorized for export to these countries under a license. In addition, various U.S. government sanctions programs and orders affect transactions with individuals or entities in Burma, North Korea, and Syria. The sanctions and embargoes continue to evolve and change with the political climate; for example, numerous restrictions on exports to Iraq and Libya were lifted in 2004. Exporters should stay informed regarding the most current U.S. embargo and sanction programs and continue to incorporate the latest restrictions and allowances into their export management systems.

## **Restricted Individuals and Entities**

U.S. exporters must check a number of lists to confirm that they are not exporting products to individuals or entities who are specifically prohibited from receiving exports or otherwise engaging in trade with U.S. parties. These include the Denied Persons List, individuals (many in the U.S.) whose export privileges have been denied, maintained by the BIS; the Entity List, organizations deemed to be involved in the proliferation of weapons of mass destruction or likely to create a risk of use in or diversion to proliferation activities, maintained by the BIS; the Specially Designated Nationals and Blocked Persons List, individuals and organizations that are blocked pursuant to various sanctions programs administered by OFAC; and the Debarred List, blocked individuals and entities, maintained by the DTC. The BIS also maintains a short "Unverified List" of parties who are not restricted but will raise a red flag and potentially delay transactions.

In addition, exports are restricted if the exporter is aware that the end-user will engage in prohibited activity, particularly in relation to nuclear, missile, chemical, or biological weapons. This includes both actual knowledge and an awareness of a high probability of occurrence. Exporters have a duty to not cut themselves off from information that would typically come to them in the course of a transaction and to watch for "red flags" (many identified by the BIS).

## **Transaction-specific analysis under EAR**

Any time software or technology is exported, exporters must analyze whether the transaction is permitted under the EAR and whether a license or other authorization requirement is triggered. A very small percentage of total U.S. exports actually require such a license. However, exporters must assess each product and its technical capabilities (e.g. encryption capability) and how it is classified under the EAR, where it is being sent, who the end-users will be, how end-users will use the product, and whether it will be re-exported. Products or applications with specific military capabilities that appear on the Munitions List are subject to the higher scrutiny of the DTC (including a requirement to register the company with the DTC) and the license requirements of the ITAR.

The EAR define exports very broadly to capture shipments, transfers, and transmissions (including via e-mail, fax, or telephone) of items or data outside of the United States. This includes releases of technology or software to foreign embassies or consulates within the United States and all foreign nationals. (The definition of foreign national excludes naturalized U.S. citizens, U.S. permanent residents, and certain "protected individuals" under the Immigration and Naturalization Act (8 U.S.C. 1324b(a)(3)), such as certain eligible refugees and asylees.

The EAR includes categories and descriptions of technology products on its Commerce Control List. These are:

- 0 – Nuclear Materials, facilities, and equipment**
- 1 – Materials, Chemicals, Microorganisms, and Toxins**
- 2 – Materials Processing**
- 3 – Electronics**
- 4 – Computers**
- 5 – Telecommunications and Information Security**
- 6 – Sensors and lasers**
- 7 – Navigation and avionics**
- 8 – Marine**
- 9 – Propulsion Systems, Space Vehicles, and related Equipment**

Each category includes a number of specific entries under Export Control Classification Numbers (ECCNs). U.S. exporters must determine if a product falls on the Commerce Control List and, if it does, determine its ECCN. The ECCN listing provides cross-references to a Commerce Country Chart in the EAR, notes about any special restrictions for the item, and information to help determine whether a license or other action is required prior to export. Note that in many cases, a license exception may be available. However, this typically requires a case-by-case analysis of categories of license exceptions under the EAR.

### **Requirements under ITAR**

If the BIS determines that a product is primarily military in scope, it will send the information on to the DTC. The DTC also independently searches, seeks out, and regulates companies that manufacture, export, or broker defense items. Such companies are required to register with the DTC before applying for any export licenses.

Certain 'technical data' and classified items not on the Munitions List also are subject to regulation by the DTC.

Companies that frequently export products and technology should create and implement export management systems consisting of internal processes to assess and ensure compliance on a transactional basis and to substantially reduce liabilities for U.S. export law violations.

## **Calling All Addresses!**

If you received a hard copy of this issue, it means that the MSBA does not have your e-mail address. Less than 3% of our members still receive this newsletter via the quaint "snail mail" method. Don't be left behind!

We value your inbox privacy. We promise that we will not provide your e-mail address to any third party. **Please submit your e-mail address** to 612.333.4927 or [mkempton@statebar.gen.mn.us](mailto:mkempton@statebar.gen.mn.us).

## COMPUTER LAW SECTION MEETING MINUTES

by Steven C. Lieske

• *Oppenheimer Wolff & Donnelly, LLP*

### Minutes from September 13, 2005

**Attendees:** Thomas Sheran (Chair), Kari Wangensteen (Vice-Chair), Chris Hilberg (Treasurer), Steven Lieske (Secretary), Kate Andresen (Past Chair), Vanessa Beardsley, Jim Blomquist, Chip Brink, Steve Buckingham, John Carney, Chris Evans, Frank Farrell, Jr., Charles Johnson, Michael Luzum, Allen Oh, Kendra Richgels, Carolyn Sandberg, John Taft, Dan Tysver, Gary Weinstein, Kevin Brady, Dimitri Williams, Robert Hankoff



#### Call to Order.

**Minutes.** Minutes of Annual Meeting on May 26, 2005 were amended to show Jim Blomquist's attendance. The amended minutes were approved.

**Treasurer's Report.** At the end of June 2005, the balance is \$5,042.57. This does not reflect the dues that were paid starting on July first.

#### Committee Assignments:

**Nominations/Bylaws Committee** – Chip Brink

**Newsletter** – Damien Riehl

**Noontime CLE** – Kendra Richgels and Vanessa Beardsley

**Case law** – Kate Andresen and Jim Blomquist

**Legislative** – Allen Oh

**Membership/Law Student Outreach** – Steve Buckingham  
(John Taft, vice chair)

**Web site** – Michael Luzum

**Technology Roundtable** – Gary Weinstein (Chris Evans, vice chair)

**Contracts** – Dan Tysver (Kevin Brady, vice chair)

**Annual Meeting** – Kari Wangensteen

**Computer Law Institute** – Kari Wangensteen

**Old Business.****A. Scheduling of monthly Meetings, Noontime CLEs and Roundtables**

11:30-1:00 second Tuesday of the month. A presentation after the meeting will usually be made.

Because the Computer Law institute is in October, we will not have a presentation in connection with October's monthly meeting.

Carolyn Sandberg has a speaker who has volunteered to speak.

**B. Report on the October 6, Computer Law Institute**

Calendar conflicts with MIPLA's Midwest IP Institute were discussed. Kari Wangenstein will investigate possible dates and will schedule next year's institute.

**C. Legislative coordinator:** "Each section is asked to designate a legislative coordinator who will receive bills of interest and serve as the contact person for the [MSBA Council's] Legislative Committee on legislative matters."

Chris Hilberg volunteered to serve as the legislative coordinator.

**D.** Last year, Hamline requested financial support for their IP Moot Court program. MIPLA provides some financial support but it does not cover all of the program's expenses.

Steven Lieske investigated and at least one local law school does not have an IP Moot Court program.

This could take the place of the former essay contest held by the Section. It also follows the MSBA's goals of planning programs to engage law students.

The membership/law school outreach committee was asked to investigate and to make a recommendation on whether or not to make contributions to the programs.

**New Business.****MSBA 2005-06 Recommended Goals and Projects**

- Increase diversity on your section council and in membership.
- Recruit members for the Legislative Grass Roots Network.
- Plan programs to engage law students and new lawyers in your section activities.
- Develop events that encourage out-state participation.
- Assign a council member as webmaster to update and expand information on your section's web page.
- Increase the number of CLEs offered to members.
- Publish four newsletters or develop a consistent form of communicating information to members.

Nominations committee will work to encourage out-state attorneys to run for offices.

Carolyn Sandberg will contact the various minority law groups to encourage participation.

**Motion to Adjourn.**

Steven Lieske.

## Minutes from October 11, 2005

**Attendees:** Thomas Sheran (Chair), Kari Wangensteen (Vice-Chair), Chris Hilberg (Treasurer), Steven Lieske (Secretary), Damien Riehl, Vanessa Beardsley, Jim Blomquist, Chip Brink, Steve Buckingham, Charles Johnson, Michael Luzum, Allen Oh, Kendra Richgels, Carolyn Sandberg, Dan Tysver, Gary Weinstein, Kevin Brady, Jackie McGlearey

### Call to Order.

**Minutes.** The minutes of the 13 September 2005 meeting were approved.

**Treasurer's Report.** The 31 August 2005 statement shows a balance of \$8,889.57. This compares to one year ago when the section had approximately \$8,800. Members were reminded to pay their dues.

### Committee Reports:

**Nominations / Bylaws.** No report. Jim Blomquist reported that an old version of the bylaws seems to be posted on the web site.

**Newsletter.** Damien is accepting ideas for articles. The deadline is November 1st.

**Noontime CLE.** No report.

**Case Law.** Two new cases were discussed by Jim Blomquist. Jim said has 2 William Mitchell students (Greg S. and Ryan C.) interested in helping with writing up case overviews. The committee is in the process of writing up summaries for six more cases.

**Legislative.** Allen Oh reported that he is working with the MSBA legislative committee and that legislative proposals must be submitted by October 31st. Gary Weinstein remarked that the UCC is unclear about perfecting interest in domain names. This process might make it easier for Minnesota businesses to borrow money with a security interest in a domain name registration. Jim Blomquist thought this would be an interesting roundtable discussion.

**Membership / Law Student Outreach.** Steve Buckingham reported that there is a career night at William Mitchell on October 12th. Kari Wangensteen said she may be able to attend.

The committee has decided that it would like to have a meeting at each of the law schools this year. Gary Weinstein moved and it was seconded to authorize \$200 for each school at the discretion of the Student Outreach committee. The motion passed.

**Website.** Jackie McGleary, a practicelaw.org representative, presented an overview of practicelaw.org. Mike Luzum reported that the web site is indeed out-of-date.

**Technology Roundtable.** No report.

**Contracts.** Dan Tysver and Kevin Brady reported that their goals are to find the resources that already exist; and to accumulate from practitioners different sample language for various types of clauses.

**Annual Meeting.** No report.

**Computer Law Institute.** Kari Wangensteen reported that the Institute had 139 attendees (including faculty) and that we have been offered 19 October 2006 as

the date for next year's institute. Kari will check to see that is MEA weekend or a Jewish holiday. Chris Hilberg, Dan Tysver, Jim Blomquist and Carolyn Sandberg volunteered to help with next year's Institute.

### **Old Business.**

### **New Business.**

Tom Sheran will send around a list of upcoming meetings for committees to sign up for making presentations. The noontime CLE committee will find a speaker for the November meeting.

### **Motion to Adjourn.**

Steven Lieske.

## PUBLICATION SUBMISSION GUIDELINES

The Computer Law Section welcomes submissions for publication in this newsletter. If you submit an article, please adhere to the following guidelines:

**Subject Matter** – Submit any articles of interest to the members of the Computer Law Section, including recent issues on technology licensing, patents, copyright, trademark, or Internet technology. Articles previously published in other publications are acceptable, if current. Preference is given to local authors.

**Article Length** – Submitted articles should be less than 3,500 words and should not exceed 5,000 words.

**Article Format** – A journalistic style is preferred over the style of law reviews, CLE materials, or legal briefs. The structure of the article should consist of a "catchy" lead, a "thesis paragraph" tersely stating the general theme of the article, an exposition of the topic, and a summary conclusion.

**Footnotes** – Keep law-review-style footnotes to a minimum, as this is a journalistic publication. All footnotes should be in the form prescribed by the Uniform System of Citations ("Bluebook"). 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, as article information and footnotes are not checked for accuracy.

**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 the author's practice areas, experience, etc., to a minimum.

**Photographs** – Photographs of article authors and Section events are encouraged. Digital photographs are preferred, although prints are also acceptable.

**Submission Deadline** – The *Computer Law News* is published twice a year: in December and in May. Submission deadlines are approximately 4 weeks prior to publication and are listed in the Calendar of Events for the prior issue. Microsoft Word files sent via e-mail are preferred, though other formats are permissible.

**Distribution** – The newsletter is distributed via e-mail and is also posted on the Computer Law Section's website. Any section members who has not submitted an e-mail address is sent a hard copy via U.S. mail.

**Questions** – Contact Editor Damien A. Riehl at [Damien\\_Riehl@mnd.uscourts.gov](mailto:Damien_Riehl@mnd.uscourts.gov)

# COMPUTER LAW SECTION NEW MEMBER/COMMITTEE/OFFICER INTEREST FORM

- Enclosed is my check in the amount of \$35 payable to the MSBA.  
(Mail 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](mailto:mkempton@statebar.gen.mn.us).

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Employer \_\_\_\_\_

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City/State/Zip \_\_\_\_\_

Phone \_\_\_\_\_ Fax \_\_\_\_\_

E-mail \_\_\_\_\_

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.

	Chair	Join
<b>Annual Meeting</b>	_____	_____
<b>Computer Law Institute</b>	_____	_____
<b>Case Law Reports</b>	_____	_____
<b>Contracts</b>	_____	_____
<b>Law School Outreach</b>	_____	_____
<b>Newsletter Editor</b>	_____	_____
<b>Noontime CLE Programs</b>	_____	_____
<b>Legislative Liaison</b>	_____	_____

**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:**

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

# 2005-06 COMPUTER LAW SECTION COUNCIL

## Section Council

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