

## Exhibit 6a

**BNA, INC.**

# ELECTRONIC COMMERCE & LAW



VOL. 9, NO. 46 PAGES 995-1032

**REPORT**

DECEMBER 8, 2004

**HIGHLIGHTS****EU Lawmakers Reform UDRP for Dispute Resolution in .eu Domain Space**

When the .eu domain space opens for business in summer 2005, trademark owners will find a familiar dispute resolution scheme but one with subtle differences that may make it easier for rights holders to prevail while at the same time giving respondents more latitude in mounting a defense. While the legal test for recapturing a domain name more or less tracks the ICANN dispute process, the European Commission modifies the ICANN rules to address perceived shortcomings there. **Page 1003**

**Profitability Concerns Trump Right to Private Copy of DVDs**

A senior official with the motion picture industry's European public policy group reviews a recent French court decision establishing limits on the right to make private copies of digital works protected by technological measures. The decision, which found that private copying of DVDs jeopardizes the copyright owners' ability to exploit the film, "validat[es] long-held views regarding the scope of the private copying exception," the official says. **Page 999**

**Real Estate Agent Licensing Statute Violates First Amendment**

A California real estate licensing statute, which prohibits real estate marketing by unlicensed individuals, except for print newspaper publishers, violates the First Amendment rights of a Web business that published real estate listings online, a federal district court in California declares. The court rules that the state law's disparate treatment of identical print and online advertising triggered the First Amendment's exacting strict scrutiny review, a standard that was not met here. **Page 1025**

**ICANN Makes Limited Progress on Registration Database Reforms**

The three special task forces created to develop new policies on issues of domain name registration information collected by registrars and stored in Whois databases have made progress on privacy concerns, but are failing to find common ground on improving the accuracy of registrant data and responding to claims of fraud, according to a report released at the Internet Corporation for Assigned Names and Numbers meeting in Cape Town. ICANN also decides to take another look at a WIPO plan to broaden the reach of the domain name dispute resolution process. **Page 1001**

**Device Installed Between Keyboard, CPU Not Covered by Wiretap Act**

The unauthorized interception of a computer user's keystrokes through the use of a device surreptitiously installed on a cord connecting the keyboard to the computer's processing unit is not a violation of the federal Wiretap Act, a federal district court in California rules. **Page 1023**

**Supreme Court Agrees to Hear *Brand X* Cable Modem Case**

The Supreme Court decides to review a Ninth Circuit decision finding cable modem service to be partially a "telecommunications service," subject to traditional open-access requirements. **Page 1015**

**ALSO IN THE NEWS**

**TAXATION:** President Bush signs legislation extending the Internet tax moratorium for another three years. **Page 1004**

**DATABASE PROTECTION:** The "substantial investment" of resources that triggers database protection under EU law is the effort expended in gathering, organizing, and verifying pre-existing data and not in creating new material, the European Court of Justice rules. **Page 1020**

**COPYRIGHTS:** The "good faith belief" of infringement required under the Digital Millennium Copyright Act to justify "take down" of an offending Web site is a subjective standard, the Ninth Circuit holds. **Page 1018**

**COPYRIGHTS:** A federal trial court rejects, again, the theory that credit card companies can be held liable for encouraging infringement. **Page 1015**

**COPYRIGHTS:** A dozen "John Doe" defendants were improperly lumped into a single copyright suit, a federal district court rules. **Page 1016**

**EXPERT REPORT**

**ELECTRONIC DISCOVERY:** Ethan A. Berghoff, of Baker & McKenzie LLP in Chicago, discusses the challenges that can arise when conducting e-discovery in international litigation. **Page 1026**

# Court Proceedings

## Telecommunications

### Supreme Court Agrees to Hear Case On Classification of Cable Modem Service

The Supreme Court Dec. 3 announced that it would review a Ninth Circuit decision finding cable modem service to be partially a "telecommunications service" (*FCC v. Brand X Internet Services*, U.S., No. 04-281 review granted 12/3/04).

The court also granted review in a similar case filed by the National Cable and Telecommunications Association (Docket No. 04-277) against Brand X Internet Services, which also takes issue with the appeals court's finding that cable modem service is in part a telecommunications service.

In both cases, the petitioners argued that the Ninth Circuit ignored a 2002 decision by the Federal Communications Commission that cable modem service is an "information service" only. NCTA especially said that the appeals court failed to defer to the expert agency as required under the *Chevron* doctrine of deference to agency rulemaking.

A three judge panel from the Ninth Circuit ruled in October 2003 that cable modem service was both a telecommunications and an information service (8 ECLR 957, 10/15/03). However, the panel made its decision based on a previous decision, rather than on the merits.

How a service is classified, either a telecommunications service or an information service, has significant regulatory implications. Telecommunications service providers, such as local exchange carriers, are heavily regulated under Title II of the Communications Act—particularly with the obligation to allow nondiscriminatory access to their networks. If the high court reverses the Ninth Circuit's *Brand X* decision, local exchange carriers would not be required to permit rivals to use their existing network facilities.

For this reason, Internet service providers, supported by consumer advocates, favor the telecommunications service classification.

## Copyrights

### Mere 'Economic Influence' Over Infringer Doesn't Constitute Contributory Infringement

The ability of credit card companies to exert economic influence over merchants who use their payment systems to peddle infringing images on the Web is an insufficient basis to establish secondary liability under copyright law, the U.S. District Court for the Northern District of California ruled Dec. 3 in an opinion designated as unpublished (*Perfect 10 Inc. v. Visa Int'l Serv. Ass'n*, N.D. Cal., Case No. CV 04 00371 JW (PVT), 12/3/04).

The latest ruling in the case once again rejected a theory of liability that could have turned Visa and MasterCard into the copyright police of the Internet.

Along the way, the court also rejected the publisher's claims of contributory trademark infringement, for largely the same reasons.

This is the second time Perfect 10 Inc. has lost its bid to hold Visa and MasterCard secondarily liable. In August, the court dismissed Perfect 10's original complaint because the alleged nexus between credit card companies providing payment services and the acts of infringement taking place on the merchant Web sites was "too attenuated," the court held. However, the court granted the publisher leave to amend its copyright and trademark infringement allegations to more firmly establish such a relationship.

In that earlier opinion, the court held that credit card processors are neither contributorily nor vicariously liable for the copyright infringement that occurs on their merchant-clients' Web sites because, essentially, they do not have any control over what goes on there. 2004 WL 1773349 (N.D. Cal. Aug. 5, 2004) (9 ECLR 688, 8/11/04).

Perfect 10's amended complaint added further details about the mechanics of credit card payment systems in an effort to show that Visa and MasterCard have the contractual clout to force merchants to desist from illegal activity by threatening to pull the plug on their e-commerce capabilities.

**Not Much New in Amended Complaint.** But in a motion to dismiss, the credit card companies responded that the amended complaint does little more than provide further details about a payment system the court has already absolved of liability.

"Simply providing more specifics concerning the alleged regulations and merchant agreements does not solve Perfect 10's pleading problem—these regulations and contracts do not constitute the requisite control over the infringing activity, or requisite material contribution to the alleged acts of infringement," Visa argued.

Even if Perfect 10 has notified Defendants of the infringing activities on the disputed Web sites, Visa argued, such knowledge does not trigger liability where the defendant does not provide the site or facilities that enable that infringement, Visa argued, citing *Metro-Goldwyn-Mayer Studios Inc. v. Grokster*, 380 F.3d 1154, 1160 (9th Cir. 2004) (9 ECLR 720, 8/25/04), a case decided after the district court dismissed the original complaint.

The court agreed. "Defendants provide neither the site, nor the facilities, nor the means for infringement to the Stolen Content Websites. Defendants simply operate payment systems."

In papers filed with the court, Visa argued that adopting a policy equating the contractual right to terminate merchants to the exercise of control over copyright infringement "would establish copyright owners as Mas-

ters of the Internet, to whose enforcement interests all others must bow.”

District Judge James Ware shared that concern. It would set a “dangerous precedent” to equate “mere economic influence” over a copyright infringer to contributory copyright infringement, he said. “Under Plaintiff’s logic, private individual websurfers who patronize the Stolen Content Websites, while knowing that they infringe others’ copyrights, commit contributory copyright infringement—simply by creating demand, the preeminent economic influence, for the Stolen Content Websites’ goods and services.”

The court dismissed with prejudice the first amended complaint in its entirety, including allegations of unfair competition, false advertising, and violation of the right of publicity.

Howard King of King, Holmes, Paterno & Berliner LLP, Los Angeles, for Perfect 10. Mark Jansen of Townsend and Townsend and Crew LLP, San Francisco, for Visa Int’l Serv. Ass’n.

Full text of decision at <http://pub.bna.com/eclr/Dec3order0400371.pdf>

### Copyrights

#### MPAA Must Sue Each File-Sharer Separately, Cannot Group Absent Showing of Relationship

It was inappropriate for movie studios to group a dozen unnamed defendants into one suit regarding alleged online distribution of movies when there was no showing that the alleged infractions were somehow related, the U.S. District Court for the Northern District of California ruled Nov. 16 (*Twentieth Century Fox Film Corp. v. Does 1-12*, N.D. Cal., No. C 04-04862 WHA, 11/16/04).

Staying the lawsuit with respect to all but one defendant, the court denied the plaintiffs’ request for discovery of identifying information regarding those defendants.

The suit was brought by several members of the Motion Picture Association of America as part of a widespread legal campaign against numerous individuals suspected of sharing unauthorized copies of digitized motion pictures over the Internet. In this particular case, the defendants sought to learn the identities of a dozen Internet users.

Judge William Alsup ruled that joining otherwise unrelated defendants in one suit violated Fed. R. Civ. P. 20. He compared the circumstances to those in the “DirecTV” cases, in which Judge James Ware of the U.S. District Court for the Northern District of California came to a similar conclusion.

The court stayed the case with regard to all but one of the defendants, barring a showing by the plaintiffs that the occurrences of infringement by the various defendants were somehow related.

**Court Considers Renewed Motion.** In a renewed motion filed several days later, the movie studios argued that joinder of all Does is proper because each of the Does subscribes to the same Internet service provider. The plaintiffs pointed to dicta in a DirecTV case, in which another judge held that joinder of cable thieves may be proper if the plaintiffs could establish that each defen-

dant bought his/her bootleg device from the same vendor.

But the court found this comparison unwarranted, pointing out that the DirecTV case cited by the movie studios did not stand for the proposition they claimed it did. There, the court ruled on whether the plaintiff had shown it joined the defendants on the basis of a common vendor and not whether such joinder was proper.

The fact that the Does may share a common ISP is unavailing, District Judge William Alsup ruled. Without more to connect the defendants, the fact they all subscribe to the same ISP “amounts to no more than a claim that 10 unrelated defendants engaged in distinct and unrelated conduct.”

In an order issued Dec. 1, the court once again denied the movie studios’ request to take discovery on the other 11 Doe defendants.

Full text of Nov. 16 decision at <http://pub.bna.com/eclr/0404862.pdf>

### Copyrights

#### Constitutionality of Post-1976 Copyright Laws Is Affirmed as Applied to 1964-1977 Works

The Copyright Renewal Act of 1992, the Sonny Bono Copyright Term Renewal Act, the Copyright Act of 1976, and the Berne Convention Implementation Act are all constitutional as applied to works created between 1964 and 1977, the U.S. District Court for the Northern District of California held Nov. 19 (*Kahle v. Ashcroft*, N.D. Cal., No. C-04-1127 MMC, 11/19/04).

Granting the government’s motion to dismiss two archivists’ challenges to the constitutionality of these statutes, the court rejected the contention that the change to an “unconditional” copyright regime under those laws placed burdens on the plaintiffs’ ability to make those works available to the world. Applying the Supreme Court’s reasoning in *Eldred v. Ashcroft*, the court turned back the plaintiffs’ assertions that the statutes violated the “limited times” and “progress of science” limitations of the copyright clause by extending the terms of existing copyrights and eliminating the formalities of registration, renewal, and deposit.

**Application to Pre-1978 Works Challenged.** Plaintiff Brewster Kahle is a principal of the Internet Archive. The aim of that project is to make available online works whose copyrights have expired and “orphaned” works, that is, out-of-print works or works whose authors have no interest in enforcing those rights because they no longer have commercial value. The Internet Archive’s Internet Bookmobile also delivers hard copies of public domain works for \$1 each.

Plaintiff Richard Prelinger is a principal of Prelinger Associates Inc., which is the creator of the Prelinger Archives, a collection of “ephemeral” films, such as advertisements, educational films, industrial films, and amateur films, made available for use as “stock footage.” The archives are held by the Library of Congress. Prelinger continues to engage in the collection of ephemeral works and make them available for use.

The plaintiffs asserted that a series of congressional acts unconstitutionally interfere with their ability to collect and distribute public domain works and orphaned

1 of 46 DOCUMENTS

Copyright 2004 Warren Publishing, Inc.  
WASHINGTON INTERNET DAILY

NOVEMBER 26, 2004

**SECTION:** Vol.5, No.227

**LENGTH:** 262 words

**HEADLINE:** Courts

**BODY:**

Cal. adult site Perfect 10 sued Google for "giving users free usernames and passwords" to its pay service. The suit, filed Nov. 19 in U.S. Dist. Court, L.A., also says Google shows stolen Perfect 10 photos on other websites, enabling people to view without paying. Perfect 10 recently lost its bid to hold MasterCard and Visa responsible for similar alleged copyright infringement when a U.S. dist. judge threw out the case (WID Nov 17 p2). That case is awaiting appeal. -----

A Malaysian resident who ran a website that charged users to watch pirated films was ordered by a Cal. court to pay 23.8 million to movie studios. The MPAA sued Tan Soo Leong and his company MasterSurf for operating Film88.com, which MPAA Dir.- Worldwide Anti-Piracy Operations John Malcolm said "set up an international web of servers designed to shelter the venture from liability." Malcolm said Leong operated a similar site, Movie88.com, out of Taiwan until authorities there shut it down. -----

A federal judge fined a Cal. man 300,000 for allowing copies to be made of 2 movies he received as part of promotions for the Oscars. U.S. Dist. Judge Stephen Wilson granted a default judgment against L.A. resident Carmine Caridi, who was a member of the Academy of Motion Picture Arts & Sciences and had received DVDs of "Mystic River" and "The Last Samurai" in 2003. Caridi, who had small parts in the Godfather films, made the films available for digital copying to Russel Sprague of Ill., who later pleaded guilty to copyright infringement (WID April 17 p6).

**LOAD-DATE:** November 24, 2004

Monday, November 22, 2004

THE NATIONAL LAW JOURNAL/WWW.NLJ.COM

# IN BRIEF

## California regulator sues four insurance giants

FOUR MAJOR INSURANCE COMPANIES paid a broker tens of millions of dollars in hidden kickbacks in exchange for winning contracts with some of the largest U.S. companies, California Insurance Commissioner John Garamendi alleged last week.

A lawsuit filed in San Diego Superior Court names MetLife Inc., Prudential Financial Inc., Cigna Corp. and UnumProvident Corp. An attorney for Cigna said he does not believe the company violated any laws or regulations. A Prudential spokesman said the company had not yet been served, and had no comment. The other companies did not immediately return phone calls seeking a response.

## Ill. court tosses gun suits

THE ILLINOIS SUPREME COURT threw out two lawsuits accusing gunmakers of knowingly letting weapons fall into the hands of gang members and other criminals, ruling last week that the manufacturers cannot legally be blamed for street violence.

Both rulings were unanimous, but five of the seven justices were so disturbed by allegations raised in the case that they wrote a separate opinion urging the Legislature to create tougher gun regulations.

*From staff and wire services.*

The lawsuits claimed the defendants created a public nuisance by pouring guns that are used to kill into the Chicago area.

## Med-mal payouts on Web chills settlements

NEARLY FIVE MONTHS after a New Jersey state government Web site began posting doctors' malpractice histories, the publicity may be having a chilling effect on settlements.



AM DUR: Doctors' cool to data on Web.

Lawyers on both sides of the aisle say that some doctors, faced with a confidential settlement ending up on the Internet, are opting to take their chances in court. They are exercising the right available under most medical malpractice policies to withhold their consent to settle, even when it goes against the wishes of their carriers.

"Doctors do not want to settle at all now that it has to be reported to the databank for any payment whatsoever," says defense lawyer Richard Amdur.

Amdur used to settle about a third of his cases but estimates that the figure has dropped recently to 10% to 15%. The impact is mainly felt in cases under \$100,000, said Amdur of Eatontown, N.J.'s Amdur, Maggs & McGann.

## Stolen porn suit mixed

CREDIT CARD COMPANIES aren't liable when someone uses their charge card to buy purloined pornography, a federal court in San Jose, Calif., ruled last week.

Ruling from the bench, U.S. District Judge James Ware tossed out a copyright and trademark infringement suit brought against Visa International Service Association and MasterCard International Inc. by Perfect 10 Inc., which publishes an adult magazine and operates an adult Web site.

Perfect 10 claims hundreds of Web site operators around the world are selling its trademarked images of women—and that the credit card companies that process these transactions are liable for contributory and vicarious copyright infringement. *Perfect 10 v. Visa Int'l*, No. 04-0371.

## Wolf Block hikes salaries

AFTER THINKING ABOUT the firm's place in the shifting marketplace for nearly six weeks, management at Philadelphia's Wolf, Block, Schorr and Solis-Cohen has announced that it will raise starting salaries from \$107,000 to \$115,000.

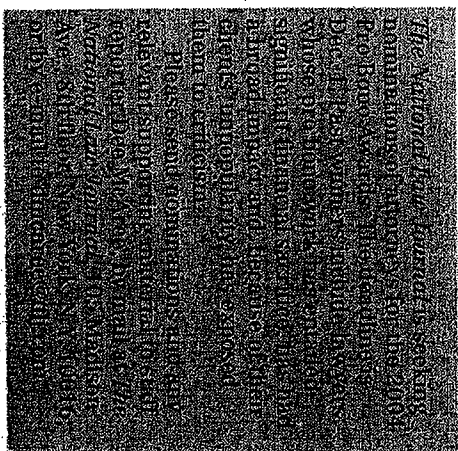
The move becomes effective at the beginning of the firm's next fiscal year, Feb. 1, 2005. Lawyers in the firm's Philadelphia and Cherry Hill, N.J., offices will receive the raises, but firm officials said they were still deciding what to do for associates in offices in New York; Roseland, N.J.; Wilmington, Del.; and Harrisburg, Pa.

## Judge levels 55-year sentence, urges appeal

UTAH U.S. DISTRICT Judge Paul G. Cassell sentenced a man to 55 years and a day in prison last week for first-time drug and weapon offenses.

Cassell questioned the longevity of the sentence in *State v. Weldon Angelos*, No. 02-CR-708 (D. Utah 2004), calling it "out of the realm of reason," but beyond his power to change because of mandatory minimum sentencing. He urged Angelos to appeal.

The case garnered attention due to an amicus brief filed to the court by 29 prominent former judges, urging Cassell to declare the sentence unconstitutional. [NLJ, Aug. 23, J.]



The National Law Journal (ISSN 0163-7325) is published weekly except the last week of the year by The New York Law Publishing Co., 345 Park Avenue South, New York, NY 10010. Annual subscription rate is \$179; outside U.S. \$338. For subscription inquiries call (800) 274-2893 or write to The National Law Journal, Circulation Department, 345 Park Avenue South, New York, NY 10010. Periodicals postage paid at New York, NY and additional mailing offices. POSTMASTER: Send address changes to The National Law Journal, Circulation Department, 345 Park Avenue South, New York, NY 10010.

3 of 46 DOCUMENTS

Copyright 2004 Warren Publishing, Inc.  
WASHINGTON INTERNET DAILY

NOVEMBER 17, 2004

**SECTION:** Vol.5, No.221

**LENGTH:** 244 words

**HEADLINE:** Courts

**BODY:**

Credit card companies aren't liable when consumers use their cards to buy copyright-infringing pornography, a federal court ruled Mon. Judge James Ware, U.S. Dist. Court, San Jose, threw out a copyright and trademark infringement suit brought against Visa and MasterCard by Perfect 10, publisher of a skin magazine and website. In the lawsuit, Perfect 10 claimed that "hundreds" of site operators around the world are offering its copyrighted pictures of women for sale and that credit card companies that process transactions on those images are guilty of "contributory and vicarious copyright infringement." Perfect 10 attorney Howard King, who previously represented musicians Metallica and Dr. Dre against P2P service Napster, said the company plans to appeal. A lawyer for MasterCard said "this was an extremely aggressive... attempt to apply a Napster theory" to the credit companies. He added that the credit companies "are very confident in the 9th Circuit," where the case will be appealed. -----

As promised, the MPAA filed civil lawsuits against individual file sharers who it believes illegally downloaded copyrighted motion pictures. "The motion- picture industry must pursue legal proceedings against people who are stealing our movies on the Internet," said MPAA Pres. Dan Glickman. The Assn. also announced it will make new software available to help parents identify and remove illegal movie files from their children's computers.

**LOAD-DATE:** November 16, 2004

# Stolen porn suit censored by S.J. judge

**By Brenda Sandburg**  
RECORDER STAFF WRITER

Credit card companies aren't liable when someone uses their charge card to buy purloined pornography, a San Jose federal court ruled Monday.

Ruling from the bench, U.S. District Judge James Ware tossed out a copyright and trademark infringement suit brought against Visa International Service Association and MasterCard International Inc. by Perfect 10 Inc., which publishes an adult magazine and operates an adult Web site.

Perfect 10 claims hundreds of Web site operators around the world are selling its trademarked images of women — and that the credit card companies that process these transactions are liable for contributory and vicarious copyright infringement.

Andrew Bridges, a partner in Winston & Strawn's San Francisco office representing MasterCard, said Perfect 10 was trying



## James Ware

The federal judge blocked a porn purveyor from suing credit card companies for infringement.

"to impose a commercial blockade on anyone accused of infringement."

Ware found the credit card companies "are not obliged to manage their merchants away from infringement," Bridges added.

Perfect 10's attorney, Howard King, of Los Angeles' King, Holmes, Paterno & Berliner, said his client would appeal to the Ninth Circuit U.S. Court of Appeals.

"It's an area where the copyright law has not been directly applied, but it's logical given the case law," King said, citing suits against Napster and Grokster Ltd., whose

software programs allow music file-sharing over the Internet.

While the courts ruled against Napster — which subsequently sold its assets and is now a subscription service — the Ninth Circuit found Grokster did not infringe copyrighted music since it did not have a centralized index it could police.

King, who also represented Metallica and Dr. Dre in a suit against Napster, said Grokster had no direct contractual relationship with infringers and no ability to deny them access to copyrighted material. By contrast, he said, MasterCard and Visa have a direct contract with the Web site operators infringing Perfect 10's images and have the ability to cancel that contract.

The only way to stop the wholesale theft of copyrighted images "is going to the people who benefit financially from it," King said. "A worldwide theft ring is being fenced by the processors."

See **STOLEN** page 9

Ch  
major  
Andr  
Silve  
Johnu

T

ing  
mi  
Su  
on  
co  
or  
to  
De  
rer

## LEGAL HIRE

**PARALEGAL/MANAGEMENT POSITIONS WORK WITH THE BEST!**

**SR. Lit Para:** Penin Firm, P a +. Trial a must. 5+ yrs exp. . . . \$900K  
**HR Manager:** Top Tier Firm, Growth potential unlimited. . . . \$900K  
**Practice Support Coordinator:** Overseas Vendors, training. . . . 100K  
**Trademark Para:** Penin Firm, Busy & growing group, 5+ yrs. . . . 85K  
**Corp Para:** SF Internl Firm, 4+ yrs exp, Public/Private work. . . . 85K  
**Lit Para:** SF 5+ yrs exp, Trial exp a +. Supervise. . . . 80K  
**Lit Para:** Top SF Firm, 3+ yrs. General Lit, handle own cases. . . . 60K

**LEGAL SECRETARY/SUPERVISOR POSITIONS**

**Corporate Secy, M&A, Securities, Int'l firm (SF) . . . to 70K**  
**Patent Prosecution Secy's, top firms, (SF & Penin) . . . to 70K**  
**Trademark Secy, 5 yrs. + exp, leading IP firm (SF) . . . to 70K**  
**Corporate Secy for Managing Partner, (Penin) . . . to 68K**  
**Litg. Secy - Bankruptcy Partner, Int'l firm (SF) . . . to 68K**  
**Floater/Lit. Secy, LA based firm, travel benefit (SF) to 62K**  
**Litg. Secy, large firm exp, to Partner/Assoc. (SF) . . . to 62K**  
**Litg. Secy for Maritime Partner, nice perks (SF) . . . to 60K**  
**Lit. Secy/Office Mgr, small firm, Quickbooks (SF) . . . to 60K**  
**Litg. Secy, mid-size firm, MS Office Suite (E. Bay) . . . to 60K**  
**Litg./Corp Secy, Partner/Assoc., Int'l firm (SF) . . . to 60K**

**CALL CHRIS CROWLEY, BEVERLY JOHNSON OR PAT HURLEY**  
**MANY MORE TEMP & PERM BAY AREA JOBS AVAILABLE!!**  
 120 Montgomery Street, Suite 820 San Francisco CA 94104  
 (415) 391 2060 voice (415) 391 6118 fax  
 email pathways@pathwayspersonnel.com



Phone (415) 749-5404 • Email: classifieds@therecorder.com

**ANDERSON STAFFING, INC.**

100 Bush Street, Suite 528, SF, CA 94104  
 415-296-7770 phone • 415-296-7771 fax  
 Katy@advantage-legal.com

**ADVANTAGE LEGAL**

**SR. Lit Paras (3):** PA/Lit case & supervisory exp a +/IP helpful 90s  
**Lit Secs (2):** Top SF firm/3 wks vac/\$105 commute/month DOE  
**EAC/Corp Sec:** SF/Support environmental Tr/BA duties . . . to 68K  
**Corp Sec:** MP/Support Mgt Pn/good benef/office . . . to 60s  
**File & Operations Clerks:** SF - pls call for details! . . . 30s

**ADVANTAGE LEGAL**

**SR. Lit Paras (3):** PA/Lit case & supervisory exp a +/IP helpful 90s  
**Lit Secs (2):** Top SF firm/3 wks vac/\$105 commute/month DOE  
**EAC/Corp Sec:** SF/Support environmental Tr/BA duties . . . to 68K  
**Corp Sec:** MP/Support Mgt Pn/good benef/office . . . to 60s  
**File & Operations Clerks:** SF - pls call for details! . . . 30s

**LEGALISTS**

Since 1957

Y . . . . . to \$175K  
 TT . . . . . to \$140K  
 (Palo Alto) to \$95K  
 (P) . . . . . to \$70K  
 . . . . . \$555  
 . . . . . to \$62K  
 . . . . . to \$50K  
 . . . . . to \$48K  
 . . . . . \$555  
 . . . . . to \$45K  
 Phone: 415-421-9400

EMBER 16, 2004



# STOLEN

Continued from page 1

— is inexcusable.”  
 choed the previous three-  
 sion, written by Senior  
 an Jr.

did was to delegate a  
 to a nonprofessional to  
 ledge of the law is a  
 trade. Bureaucratization  
 is not acceptable for our  
 man wrote.

er, Neil Papiano of Los  
 n, Yoakum, Papiano &  
 lanned to appeal to the  
 ourt.

ling] is at odds with oth-  
 would expect that the  
 would want to bring all  
 her,” Papiano said.

ot be reached for com-

*Pincay v. Andrews*, 04

*Thorney's e-mail address*  
*recorder.com.*

, he and Clare also claim  
 Marcus were “faced with  
 r from an abusive father  
 roblem and who associ-  
 nvolved in illegal drugs.  
 erate to remain separa-  
 r and to continue living  
 rents.”

who represented Melis-  
 ie custody battle, said  
 allegations of drug use  
 ie were “knowing and  
 also said her client had  
 1 in a separate bankrupt-  
 nying the same allega-

) practitioner in Garden  
 enged the veracity of the  
 ; she personally knows  
 een in Placer County for  
 celebrating her father’s  
 id she has stayed at his

nd like something some-  
 an adult if they didn’t  
 r asked.

es and Marcus contend  
 so desperate in 2001  
 o go to the Bahamas by  
 future husband joining  
 fannes says she felt that  
 ng to protect Williams  
 everything was done

Beverly Hills-based Perfect 10 claims credit card companies have a “special relationship” with the infringing Web site operators since they have enhanced requirements for processing the transactions of such high-risk merchants and impose higher fees for disputed charges on them.

The case, of course, could have ramifications for businesses in general. And King and Bridges said Ware was cautious about how broadly his decision may be applied to other industries and other plaintiffs.

Bridges said the application of the Napster case in *Perfect 10 v. Visa International*, 04-0371, shows how law made in extreme cases can later be applied in different scenarios.

“A lot of copyright [litigation] is being pushed by pornographers who are trying to take advantage of cases brought by more mainstream media,” Bridges said.

*Senior Writer Brenda Sandburg's e-mail address is bsandburg@therecorder.com.*

## TAX SAVINGS

- > Maximum tax deduction allowed by any plan type on a fully guaranteed basis
- > Benefits up to \$13,750 a month for life
- > Benefits are completely guaranteed
- > Significant asset accumulation in short period of time
- > Plan assets are protected from lawsuits and creditors
- > Ideal for small business or professional firms with few or no employees

For more information call, write or fax:

William A. Higgins  
 or  
 Jean A. Amundsen  
 369 B Third Street #322  
 San Rafael, CA 94901  
 (415) 785-1685 • Fax (415) 785-1695  
 amukay@aol.com

## THE RECORDER

ESTABLISHED IN 1877

ALM

MAIN OFFICE AND EDITORIAL DEPARTMENT  
 10 United Nations Plaza, 3rd Floor, San Francisco, California 94102-3368  
 (415) 749-5400 • E-mail: editor@therecorder.com • www.therecorder.com • callaw.com

Editor in Chief: Scott Graham  
 Managing Editor: Greg Mitchell  
 Associate Editors: Jason Hoppin, Mike McKee, Lori Patel  
 Projects Editor: Steven Pressman  
 Photography Editor: Jason Doly  
 News Editor: Candice McFarland  
 Copy Editor: Kathleen McBride  
 Senior Writer: Brenda Sandburg  
 Reporters: Jahna Berry, Jeff Chomey, Jill Duman, Marie-Anne Hogarth, Justin M. Norton, Justin Scheck, Pam Smith  
 Contributing Writers: William Bedsworth, Lawrence J. Siskind

Publisher: Christopher J. Braun  
 Art Director: Tess Hermann  
 Production Designer: Tim Williams  
 Production Advertising Coordinator: David Chin

### Department Directory

Circulation ..... (415) 749-5406  
 Editorial  
 San Francisco ..... (415) 749-5500  
 Sacramento ..... (916) 448-2935  
 San Jose ..... (408) 295-6345  
 Classified ..... (415) 749-5404  
 Display Advertising ..... (415) 749-5444  
 Public Notices Advertising ..... (415) 749-5555  
 Other Departments ..... (415) 749-5400  
 Faxes:  
 San Francisco  
 Editorial ..... (415) 749-5549  
 Other ..... (415) 749-5449  
 Sacramento ..... (916) 448-3705

## Current Developments

With respect to the right and ability to supervise, the Ninth Circuit held that unlike Napster, the defendants in this case did not operate and design an "integrated service" that they monitored and controlled. Accordingly, plaintiffs had not satisfied the third element for vicarious copyright infringement.

### Copyright

#### Credit Card Companies Cannot Be Held Liable for Customer Infringements

Perfect 10, Inc., brought suit against Visa, MasterCard, First Data Corp., Cardservice International, and Humboldt Bank, and the defendants moved to dismiss the action. [*Perfect 10, Inc. v. Visa Intl. Serv. Assoc.*, No. C 04-0371 (N.D. Cal. 08/06/04), available at [http://www.eff.org/IP/DMCA/20040806\\_Order\\_re\\_Motion\\_to\\_Dismiss.pdf](http://www.eff.org/IP/DMCA/20040806_Order_re_Motion_to_Dismiss.pdf).] Plaintiff provides adult entertainment services, including a magazine and Web site featuring nude models. Plaintiff owns the copyrights in most of the images displayed in its magazines and on its Web site.

At the center of this case is a group of Web sites that publish material that allegedly infringes plaintiff's copyrights and trademarks. Typically these are sites that claim to display pornography featuring prominent actresses. Plaintiff referred to these Web sites as "Stolen Content Web Sites." Defendants allegedly provided financial services to these Stolen Content Web Sites, allowing them to process Visa and MasterCard cards as a method of payment.

Plaintiff alleged that the Stolen Content Web Sites engaged in direct infringement and that defendants were liable for contributory

and vicarious copyright infringement. The court found that the gravamen of the complaint was that, despite receiving notice of the alleged infringing activity committed by third parties, defendants had materially contributed to and controlled the alleged infringing activity by providing financial services to the alleged infringers.

To prevail on a claim for contributory infringement, plaintiff must show that (1) defendants had knowledge of the infringing activity and (2) induced, caused, or materially contributed to that infringing activity. Defendants did not dispute their knowledge but vigorously denied that they had materially contributed to the alleged infringement.

The district court found that there was no evidence of material contribution. Defendants provide content-neutral services and do not promote the Web sites that use their services. Nor do defendants have content-specific regulations with which merchants must comply before using defendants' services. Defendants do not hold out certain merchants as being providers of a particular quality of product. Defendants are concerned solely with financial aspects of the Web sites, not their content. Accordingly, the court dismissed the claim for contributory copyright infringement.

The district court next considered the claim for vicarious copyright infringement, noting that plaintiff needed to prove that defendants had (1) the right and ability to control the infringing activity and (2) a direct financial benefit from the infringing activity.

Plaintiff claimed that defendants had the right and ability to control the alleged infringing activity based on two grounds. First, because the

provision of financial services is essential to the survival of the allegedly infringing Web sites, defendants could dictate content by threatening to revoke their services if the sites did not comply with their standards. Second, defendants had in place internal regulations governing the provision of service to high-risk merchants, including adult entertainment Web sites.

The district court found that neither ground constituted the right and ability to control the alleged infringing activity, however. First, the only enforcement mechanism that was within defendants' power is the threat of rescinding their financial services. The Web sites would be able to continue their alleged infringing conduct, however, regardless of whether defendants blacklisted them. Therefore, defendants' ability to rescind their services did not indicate control over the sites' alleged infringing actions, the court reasoned.

Second, the existence of defendants' internal regulations had no bearing on the ability or right of defendants to control the conduct of a third party. Even if, as plaintiff contended, defendants monitored the Web sites on a regular basis, defendants still would have no basis for dictating content to those sites. Third-party sites are not bound by defendants' internal regulations. Defendants had no contractual right to dictate the Web sites' content. Nor do defendants have the authority to shut down the Web sites' servers, delete any infringing material they find, or prevent the transmission of such material. For these reasons, plaintiff had not demonstrated the right and ability to control the infringing activity, and the vicarious copyright infringement claim failed.

6 of 46 DOCUMENTS

Copyright 2004 ALM Properties, Inc. All Rights Reserved.  
E-Commerce Law & Strategy

October 18, 2004

**SECTION:** NEWS; Vol. 21; No. 6; Pg. 6

**LENGTH:** 1951 words

**HEADLINE:** e-Commerce DOCKET SHEET;  
E-Commerce Law & Strategy

**BODY:**

Criminal Provisions  
Of VA Anti-Spam Statute  
Valid Under Constitution,  
CAN-SPAM Act

The Virginia anti-spam statute, which makes sending certain unsolicited bulk commercial e-mail a felony, is not invalid under the Commerce Clause or other provisions of the U.S. Constitution or the federal CAN-SPAM Act. *Commonwealth of Virginia v. Jaynes*, No. 15585 [Va. Cir. Ct. Aug. 11, 2004]. The court rejected numerous arguments by three defendants charged with felonies under the Virginia statute, finding, among other things, that the statute was not an unlawful, content-based prior restraint on speech. The court also ruled that the statutory prohibition against the use of false e-mail transmission and routing information didn't violate the defendants' right to correspond anonymously. The court added that the statute did not violate the Commerce Clause, because the state had a legitimate interest in protecting networks, servers and their subscribers within the state, and the prohibition against the use of false transmission or router information did not unduly burden interstate commerce. The court noted, too, that the Virginia statute fell within the exception in the pre-emption provision of the federal CAN-SPAM Act, which allows states to enforce anti-spam laws prohibiting "falsity or deception" in commercial e-mail messages.

P2P Software Distributors  
Not Secondarily Liable For  
Users' Infringement

Peer-to-peer file-sharing software distributors are not contributorily or vicariously liable for copyright infringement committed by those who use the software. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, No. 03-55894, 2004 U.S. App. LEXIS 17471 [9th Cir. Aug. 19, 2004]. The court concluded that the software is capable of "substantial non-infringing uses" within the meaning of the U.S. Supreme Court decision in *Sony Corp. v. Universal City Studios*, 464 U.S. 417 [1984] [the "Betamax" case], despite the allegations of the plaintiff copyright owners that the vast majority of the software use was for infringing purposes. The court found that the design of the software was "of great import" in analyzing the issue of secondary liability, and noted the evidence showing that the software was designed so that the software developers did not maintain operational control over the network the software created. The court concluded, therefore, that the software developers did not have "reasonable knowledge of specific infringement" by the software users, nor did the distributors "materially contribute" to the infringement. The court similarly concluded that the defendants were not liable for vicarious infringement, because they lacked ability to block individual users' network access.

E-Commerce Law &amp; Strategy October 18, 2004

## Offering Credit Payment

## Services Doesn't Set

## Secondary Liability

The mere provision of credit-card payment services to allegedly infringing Web sites doesn't give rise to secondary liability for copyright- and trademark-infringement, and other California state law causes of action. *Perfect 10, Inc. v. Visa International Service Assn*, No. C 04-0371 JW, 2004 U.S. Dist. LEXIS 15895 [N.D. Cal. Aug. 5, 2004]. The court ruled that the plaintiff's contributory copyright and trademark liability claims were insufficient because the plaintiff had not pleaded facts supporting a conclusion that the payment services assisted in the Web sites' infringing activities, such as by providing the means of distribution, transfer or storage of the works. The vicarious liability claims were ruled insufficient because there were no facts supporting a conclusion that the payment services had the right to dictate the Web sites' content, such as by requiring the sites to shut down or delete infringing material. Theories of secondary liability for various state law claims were also rejected. The court found that secondary liability for claims of unfair competition was barred under California law. Theories of secondary liability for violation of rights of publicity and false advertising were rejected for failure to establish that the services aided and abetted the violations. Secondary liability claims for libel and intentional interference with economic relations were rejected as time-barred and otherwise legally insufficient.

## e-Article Copies

## Outside 1st Context

## Aren't Copyright Revision

Reproduction of copyrighted images in an electronic periodicals database was not a privileged "revision" under Section 201[c] of the Copyright Act where the images could be viewed individually, outside the context in which they appeared in the original periodical. *Auscape International v. National Geographic Society*, No. 02 Civ. 6441 [S.D.N.Y. Aug. 12, 2004]. The court concluded that the result was compelled by the U.S. Supreme Court decision in *The New York Times v. Tasini*, 433 U.S. 583 [2001], which involved electronic versions of magazine articles. The court came to the opposite conclusion about publication of microform copies of the publications containing the copyrighted images, finding that the images appeared "in precisely the position in which [they] appeared" in the original publication, and thus the publication was a privileged revision.

## 1st Sale Doctrine Doesn't Apply To 'Academic' License

The limitations in an "academic" license of software to an educational institution indicate that the transaction was a license rather than a sale. *Novell, Inc. v. Unicom Sales, Inc.*, No. C-03-2785, 2004 U.S. Dist. LEXIS 16861 [N.D. Cal. Aug 17, 2004]. The court noted numerous restrictions in the license that were inconsistent with a sale transaction, including the 1-year license period, the use limitation to the academic institution's students and employees, and the requirement that the software be returned at the end of the 1-year period. The court accordingly rejected the argument that the software developer's copyright and trademark infringement claims against a subsequent reseller of the software were barred by the first-sale doctrine.

## Buyer, Anti-trust Factors

## Weighed In Embedded

## Software Decision

A competitor's access to copyrighted software embedded in a garage-door opening system is not unauthorized within the meaning of the Digital Millennium Copyright Act [DMCA] where the manufacturer did not prohibit consumers from using third-party transmitters in conjunction with the system. *The Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, No. 04-1118 [Fed. Cir. Aug. 31, 2004]. The court narrowly construed the act's anticircumvention provisions, commenting that accepting the manufacturer's position "would allow any manufacturer of any product to add a single copyrighted sentence or sentence fragment in a product, wrap the copyrighted material in a trivial 'encryption' scheme, and thereby gain the right to restrict consumers' rights to use its products in conjunction with competing products," raising questions of antitrust and copyright misuse. The court also commented that the anticircumvention provisions of the DMCA were not intended to "eliminate all existing consumer expectations about

## E-Commerce Law &amp; Strategy October 18, 2004

the public's rights to use purchased products because those products might include technological measures controlling access to a copyrighted work."

## GPL-Licensed Software

## Doesn't Waive Rights

## In Resulting Code

The use of the "Bison" parser licensed under the GNU General Public License [GNU GPL] to create software code does not prevent a developer from asserting proprietary rights in the code output by the parser. *Computer Associates International v. Quest Software, Inc.*, No. 02 C 4721, 2004 U.S. Dist. LEXIS 11832 [N.D. Ill. June 28, 2004]. Under the GNU GPL, the court noted, a user of the code making up the Bison program is restricted from claiming proprietary rights in any subsequent modification or distribution of the code. The court found, however, that the license accompanying the Bison parser contained a specific exception for output files the parser created, releasing such files from license restrictions.

## Search Term Sale 'Use In Commerce' Under Lanham Act

Allowing advertisers to bid on trademarked terms and pay search-engine operators to be linked to those trademarks constitutes a "use" of those trademarks "in commerce" under the Lanham Act. *Government Employees Insurance Co. v. Google, Inc.*, No. 1:04cv507 [E.D. Va. Aug. 25, 2004]. The court declined to dismiss the trademark owner's infringement claims, concluding that when the search-engine operators sold the rights to link advertising to the trademark terms, they were "using the trademarks in commerce in a way that may imply that defendants have permission from the trademark holder to do so." The court also declined to dismiss claims of contributory and vicarious trademark infringement, finding that the trademark owner's complaint alleged facts sufficient to support a conclusion that the search-engine operators exercised "significant control" over the content of advertising appearing on their search-results pages.

## Domain Name Use

## For Critical Comment

## Ruled Protected Speech

An injunction prohibiting a domain-name holder from linking to Web sites containing disparaging or negative commentary concerning a trademark holder is an invalid content-based restriction on noncommercial speech. *Nissan Motor Co. v. Nissan Computer Corp.*, No. 02-57148 [9th Cir. Aug. 6, 2004]. The court concluded that injunctive relief under the Federal Trademark Dilution Act [FTDA] was improper because the links to disparaging commentary fell within the exception in the FTDA for "noncommercial use" of a mark. The court commented that the links to negative commentary about the plaintiff and its litigation with the defendant "reflect a point of view" that is protected by the First Amendment. The court also ruled, however, that the defendant's use of the domain name for automobile-related advertising constituted actionable trademark infringement, and upheld the trial court's entry of summary judgment on those uses. The court remanded for further proceedings on the plaintiff's FTDA claims, including factual determinations concerning when the plaintiff's mark became famous, and whether the plaintiff could show actual dilution of the mark under the standard set by the U.S. Supreme Court in *Moseley v. V Secret Catalogue*, 537 U.S. 418 [2003].

## Lack Of Standards

## In Trademark License

## Constitutes Abandonment

A trademark license that does not contain any "distinct or cognizable" limits on the quality of goods that may be produced or distributed under the mark is a "naked license," that granting constitutes an abandonment of the trademark. *Halo Management, LLC v. Interland, Inc.*, No. C-03-1106, 2004 U.S. Dist. LEXIS 15563 [N.D. Cal. Aug. 10, 2004]. The trademark license gave the licensee the right to "worldwide use and registration" of the mark and imposed only the obligation that the licensee "employ reasonable commercial efforts" to maintain the mark's business value. The court noted that the trademark license did not contain any "explicit or definite quality control terms" nor were there any "objective, enforceable terms" that guided or limited the licensee's use of the mark. Furthermore, the court noted, the licensee did not reserve the right to terminate the license if the licensee breached its obligation to maintain the mark's "positive business value."

E-Commerce Law & Strategy October 18, 2004

**LOAD-DATE:** November 24, 2004

# The Politics of Publishing

by ROBIN PECK

In this time of elections I am reminded of Theodore Roosevelt, who stated in *The Cult of Information* that "information is never neutral, it is political through and through." If I want to drive that point home then I need look no further than the National Institutes of Health (NIH) and the percolating debate about how political forces will reshape the publishing of biomedical research.

This past July the U.S. House Committee on Appropriations recommended that the NIH consider the effects of providing open access to articles that it funds. This research would be required to be deposited in PubMed Central (PMC) when the article is accepted by a journal for publication. If the NIH paid for any part of the article's publication (such as open access journal fees) then PMC would provide immediate access. If the NIH did not support the publication costs then PMC provides open access 6 months after the article is

published. The NIH has until Dec. 1 to re-eval its plans for implementation in 2005.

The actions of the NIH are running in parallel with a parliamentary inquiry in the U.K. And some, most notably Association of American Publishers' president Pat Schroeder, have questioned in an open letter why the U.S. has not undergone a similar inquiry before launching forward with this proposal. "The House has held no hearings and has established no evidentiary record," states Schroeder. While a valid consideration, I have to wonder if such an inquiry would render a radically different outcome given the multinational nature of the participants.

## Enter the Taxpayers

Whatever the final outcome of the NIH proposal, the political landscape for biomedical research has been significantly, if

not permanently, altered by the introduction of taxpayers into the mix. During the year we have been discussing open access, the taxpayers have pretty much been an abstraction in retrospect. When you think about it, this is somewhat ironic since paying taxes is universal. But taxpayers are mobilizing, and issues that previously could be overlooked or ignored are on the table. How do we determine how biomedical research should best serve the taxpayers who paid for it? And how long do we keep systems in place supporting an old way of doing something if the taxpayers want it to be different?

Public Knowledge (<http://www.publicknowledge.org>), a new Washington-based advocacy organization, declares as its core conviction that some fundamental democratic principles and cultural values—openness, access, and the capacity to create and compete—must be given new em-

bodiment in the digital age. Its Web site warns: "Here's troubling news: while the U.S. government has doubled the budget of the National Institutes of Health (NIH) over the last five years, you probably cannot afford to read the results of NIH-funded research. When you search the web, looking for the latest in medical information, you'll find a lot of self-published opinion, rumors, and anecdotes. You'll find very little peer-reviewed research, even if it is based on NIH research grants fund."

This belief that the public has the right to biomedical research was demonstrated on Aug. 26 when GlaxoSmithKline agreed to settle consumer fraud charges with the State of New York agreeing to "make all reasonable efforts to post data to the company's (clinical trial) register within stated time frames." This register will be publicly accessible on the company's Web site.

"This settlement is transformational in that it will provide doctors and patients access to the clinical testing data necessary to make informed judgments," said New York State Attorney General Elliot Spitzer, in an article that appeared in *The New York Times*.

(continued on page 18)

## ISSUES

# Who's Responsible for Copyright Infringement?

by GEORGE H. PIKE

Assume for the moment that I am sitting at my computer (which I am). Instead of finishing this column, I log on to Kazaa and download a half-dozen songs and a current Hollywood film. Next, I upload some of Annie Leibovitz's photographs onto my pop culture Web page. Then, I go to eBay to sell a number of knock-off Louis Vuitton handbags that I got in Mexico. Under present law, it is fair to say that each of these acts infringes someone else's copyright or trademark.

But the reality of the Internet means that I am only one of thousands or, in the case of downloading music and films, one of millions of people engaging in this kind of activity. Just so there is no illusion, these types of actions involving copyrighted or trademarked items are infringements under the copyright law. If one is caught, the penalties can be severe. The campaign by the Recording Industry Association of America (RIAA) to sue music downloaders has brought these kinds of actions and their consequences to the public eye like nothing before. For the infringer, however, the odds of being caught remain low. For the copyright or trademark owner, the

price of targeting the infringers remains quite high, if you can even find them.

## Who Else to Sue?

This has led many owners to pursue not only individual infringers, but also other potentially responsible parties—on the grounds that they contributed to the infringing activity. In one recent case, a number of film studios and music companies sued the developers and distributors of peer-to-peer file sharing software. In another case, the adult magazine and Web site *Perfect10* sued credit card companies for contributing to the theft of copyrighted images sold (using the credit cards) by competing adult Web sites. In August 2004, Tiffany & Co. sued eBay for hosting sales of counterfeit Tiffany jewelry.

The legal concepts involved in these cases are known as contributory and vicarious liability. Contributory copyright liability applies when a person or business knows of the infringing acts and materially contributes to the acts. Vicarious copyright liability requires a direct financial benefit to a person or business resulting from the infringement, plus the

(continued on page 16)

## Insights

# Thoughts About Federated Searching

by PETER JACSO

The words *federal* and *federated* do not always conjure up positive images. Still, "federated" is the most expressive adjective when it comes to the consolidated retrieval of results in response to a query sent to several databases hosted by different online information systems. Federated searching consists of transforming a query and broadcasting it to a group of disparate databases with the appropriate syntax, merging the results collected from the databases, presenting them in a succinct and unified format with minimal duplication, and allowing the library patron to sort the merged result set by various criteria.

## The Need for Federation

Large libraries spend more than \$1 million a year for the digital archives of journal publishers, and for abstracting and indexing and full-text databases. Still, few patrons discover these digital archives, and even fewer use them happily and regularly because they're not exposed well on many libraries' home pages. Other drawbacks include different interfaces and search languages, and often

their names don't provide enough clues to choose them when looking for information about a topic.

Many of the host names (Athena, Dynix, Sirsi, EOS) and database acronyms (ABI, PAIS, INSPEC, ISTA, CINAHL, Scirus, Scopas) are as Greek to library patrons as the names of the food on the menu in a, well, Greek restaurant. Do you know what's common in all the databases whose acronyms I just mentioned? They all contain relevant materials for library and information science and technology.

Learning about these databases' availability is one thing. Getting to them by clicking through the labyrinth on many library Web sites is another. Making patrons use them—while applying the strict semantic and syntax rules of Boolean and proximity operators to terms looked up from the thesauri—is yet another thing. It's no surprise that patrons are happy if they make it through one database and catch just a few small "fish." They don't go to see if another database may have more and/or better results. Most give up and angrily leave whatever database they were using. Then they'll go to Google and

(continued on page 20)

### Publishing

(continued from page 17)

#### The ATA

In an unprecedented move, more than 40 organizations (representing a diverse range of interests such as the Christopher Reeve Paralysis Foundation, the Arthritis Foundation, and the American Association of Law Libraries) have joined forces to form the Alliance for Taxpayer

Access (ATA). Binding these groups together is the overriding principle that American taxpayers are entitled to open access to the peer-reviewed scientific articles based on NIH funding (but not the institutional repositories of un-vetted research as some in the media have mistakenly reported).

According to ATA, these reports will be used by "millions of physicians, public health professionals, patients, students, and teachers, which will accelerate the rate of return on the taxpayers'

initial investment." The ATA further argues that the widespread dissemination of these reports is "an essential, inseparable component of our nation's investment in science."

If the director of the NIH has his way, the taxpayers may get what they are seeking. In an article that appeared in *The Scientist*, Elias Zerhouni told commercial and nonprofit publishing executives in a July 18 meeting held at the NIH that "The public needs to have access to what they've paid for," Congress,

he added, also demanded evidence of the agency's productivity. "I need to manage the portfolio," he said. "The status quo just can't stand."

Rozzak also wrote that the "control of facts—even the apparent control of facts—begets power. It creates the impression of competence; it confers the very ability to govern." In this political juggernaut of publishing, who then has the right to control the facts? Let's put this in a different context. Here in the U.S. we allowed telecommunication to be served by a monopoly, and it worked to deliver landlines. Then it outlasted its usefulness and Congress changed the laws, effectively breaking up AT&T. Recently Congress changed the laws again and said that telephone numbers could be attached to a person, and many (myself included) dumped our landlines for cell phones and broadband cable. Progress, it seems, marches on.

How progressive will NIH turn out to be? We will find out soon enough. I wouldn't be surprised if the National Science Foundation, the National Endowment for the Humanities, and all other U.S.-funded research will soon follow the same path. Because, as they say, you can't fight city hall.

(On Sept. 8, in a draft policy, NIH revised its position that would call for articles to be made available 6 months after publication, even if NIH paid for the publication costs.)

Robin Peck is associate professor at Simmons College. Her e-mail address is robin.peck@simmons.edu.

### Legal Issues

(continued from page 17)

right and ability to supervise the infringers. Vicarious liability often arises in employment and similar relationships.

#### Napster

The fall of the original Napster peer-to-peer music downloading service illustrates these principles. When Napster was sued by the recording industry, the court found that Napster knew its users were infringing copyrights and that its centralized servers materially contributed to the infringing. Napster also had the right and ability to supervise infringers through its licensing agreement, which threatened to block access for violations of Napster's copyright policy. Napster's defenses that at least some of the downloading was legitimate and that fair use could apply to other downloading were not enough to defeat liability.

Other cases have held that the landlord of a flea market was liable for the sale of bootleg recordings by its vendors. Some printers and recording studios have also been held liable for infringement by their customers. In many of these cases, the tar-



get of the suit is a person or business that provides some sort of infrastructure support for infringement. A flea market, VCR, centralized server, software application, or credit card company all share the common theme of providing a mechanism where-in infringement can take place. On the other hand, these mechanisms often support non-infringing activities as well.

### The Supreme Court and the VCR

The challenge for courts in addressing these suits is determining whether the mechanism is primarily designed to facilitate infringement or only incidentally supports infringement. In a landmark decision, the U.S. Supreme Court held that Sony Corp. was not liable for infringement in the manufacture and sale of the (then newfangled) videocassette recorder. The court held that while Sony knew that VCRs could be used for infringing, they could also be used for "commercially significant non-infringing uses."

Card has been dismissed. On Aug. 19, the Ninth Circuit Court of Appeals found that the distributors of the Grokster and Kazaa peer-to-peer applications were not liable for contributory copyright infringement. The court found commercially significant non-infringing uses for Grokster and Kazaa and, absent centralized servers like Napster, no ability for them to supervise the infringers.

The Grokster decision could emerge as another landmark case and could impact information industry practices. For

all the misuse of peer-to-peer file sharing by illegal downloaders, it remains a nearly perfect mechanism for wide distribution of content at virtually no cost. Any digital file that can be created can be made available to a worldwide user base at the push of a button. At least one commentator has suggested reducing or eliminating copyright protection for digital works because the costs for distributing content (printing plants, CD/DVD presses, etc.) are negated. Creators would be compensated by a fee assessed on the

computers, burners, and servers that "distribute" the works. While that notion may be a bit far-fetched, the Supreme Court's endorsement of the legality of peer-to-peer may encourage content creators to give a fresh look at this intriguing distribution alternative.

*George H. Pike is director of the Barco Law Library and assistant professor of law at the University of Pittsburgh School of Law. His e-mail address is pike@law.pitt.edu.*

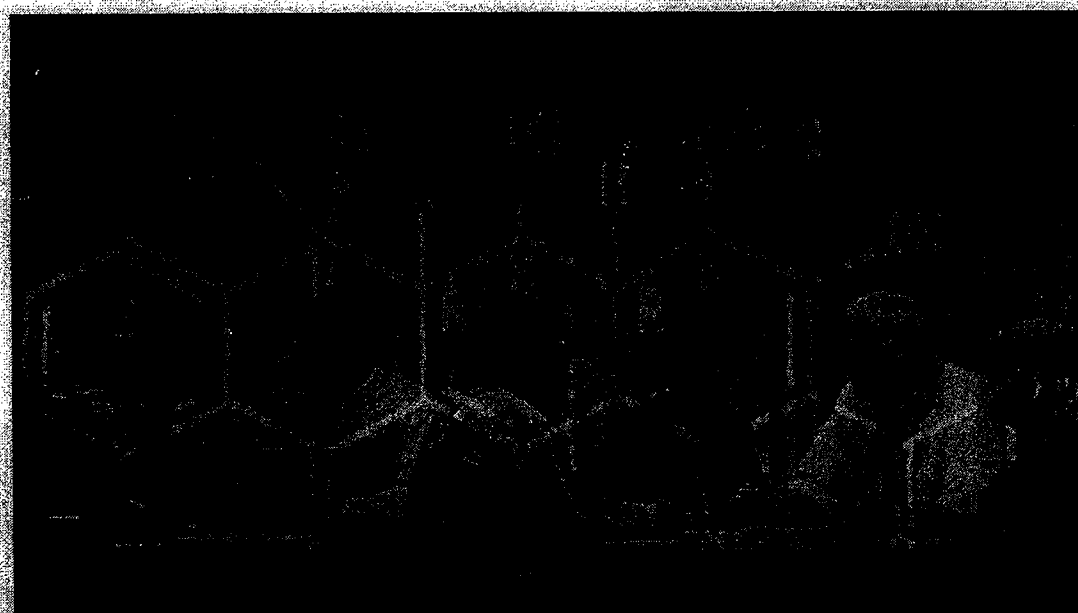
**Napster knew its users were infringing copyrights and that its centralized servers materially contributed to the infringing.**

Not surprisingly, the digital information era has seen a substantial increase in these types of cases. Digital copying is substantially easier and of higher quality. Copyright owners find it very difficult, if not impossible, to pursue individual infringers. While the RIAA has filed more than 3,000 lawsuits against music downloaders, there remain more than 2.6 million regular Kazaa users. Contributory and vicarious liability suits allow owners to target a manageable number of defendants and, if successful, eliminate the foundations that support the infringing activity.

Equally not surprising are concerns that expanding contributory and vicarious liability will inhibit innovation in new technologies. Critics are also concerned that expanded liability will further restrict fair use by tightening the copyright owners' hold on their works.

### Mixed Results

The recent lawsuits have met with mixed success. Tiffany is in the early stages of its lawsuit against eBay. In a case arising from the original Napster, the recording industry has been allowed to pursue a vicarious liability suit against several of Napster's investors. By contrast, Perfect10's suit against Visa and Master-



Precise thinking requires precise searching.

With STN, you can find exactly the science and technology information your business needs to make important decisions. A change in molecular stereochemistry can radically alter the strategic direction of your entire research project and possibly your entire company. That's why STN gives you so many ways to research substances, your competitors, and your industry. Our tightly integrated system ties together published research, journal literature, patents, structures, stereochemistry, trade names, physical properties, sequences, and other data from the world's largest collection of chemical substance information—CAS Registry. So when you're dealing with issues vital to your business, use STN and get the results you want. Precisely.



Science from every perspective.

#### JAPAN

STN Japan is available in Japanese and English. For more information, contact STN Japan at 03-5561-5000 or visit our website at [www.stn.com/japan](http://www.stn.com/japan).

#### EUROPE

STN Europe is available in English. For more information, contact STN Europe at +44 (0)1223 326000 or visit our website at [www.stn.com/europe](http://www.stn.com/europe).

#### NORTH AMERICA

STN North America is available in English. For more information, contact STN North America at 1-800-368-6778 or visit our website at [www.stn.com/northamerica](http://www.stn.com/northamerica).

**Copyright of Information Today is the property of Information Today Inc. and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.**