

## Hot Topics - Computer Law Jan. 22, 2014

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### 1. **Terms of Use - Contracts**

#### 1.a *Click-On Terms Of Use (TOS) Creates Valid Assignment For Copyright Infringement*

The 4th Circuit held that an agreement to transfer ownership of a copyright in a photograph found in a website’s “click-on approved” Terms of Use (“TOS”, sometimes called Terms of Use “TOU”) was a valid assignment of the copyright. Metropolitan Regional Information Systems, Inc. v. American Home Realty Network, Inc., Case Nos. 12-2102, 12-2432 (4th Cir. July 17, 2013) (pdf available here). American Home Realty Network, Inc. (“AHRN”) and Metropolitan Regional Information Systems, Inc. (“MRIS”) compete in the real estate listing business. MRIS offers a fee-based online listing service to real estate brokers and agents, and AHRN takes listing data from online databases, such as MRIS, and makes the listing data directly available to consumers. MRIS sued AHRN for copyright infringement for AHRN’s unauthorized use of MRIS’s materials. The lower court entered an injunction against AHRN, prohibiting AHRN from displaying MRIS’s photographs on AHRN’s website. AHRN appealed and the Fourth Circuit affirmed.

MRIS offers its service (the “MRIS Database”) to real estate brokers and agents in several states in exchange for a subscription fee. The subscribers can upload their real estate listings to the MRIS Database. According to the TOS-TOU, upon uploading the photo, the subscriber assigns the photo copyright to MRIS. The assignment of the copyrights is included in the TOS-TOU, and the subscriber must accept the TOS-TOU before submitting a photograph. MRIS affixes the copyright symbol © on all photographs on the MRIS Database, and registers the MRIS Database with the Copyright Office each calendar quarter. AHRN runs a national real estate search engine and referral business and collects its data from a variety of sources, including the MRIS Database. AHRN expressly states that it did not create any of the data on its website.

MRIS sent AHRN a cease and desist letter in November 2011. AHRN offered to enter into a

licensing agreement with MRIS, but MRIS rejected the idea. In March 2012, MRIS filed suit against AHRN. MRIS then moved for a preliminary injunction to prevent AHRN from using MRIS's photographs while the lawsuit was pending. The lower court granted the injunction and AHRN appealed. While the appeal was pending, the lower court modified the injunction to prevent AHRN from using MRIS's photographs but not the compilation or textual elements found on the MRIS Database. AHRN appealed the modification of the injunction.

On appeal, AHRN argued that MRIS failed to show a likelihood of success on its copyright infringement claims because (1) MRIS's copyright registration for the MRIS Database did not properly register its copyrights for the individual photographs; and (2) MRIS does not have copyright interests in the photographs because the subscribers' electronic agreement to the TOS-TOU failed to transfer the rights.

A "compilation" is "formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101. Under the Copyright Act, a "compilation" can receive copyright protection. This copyright protection is independent from protection given to the compilation's individual components. Here, the MRIS Database is a "collective work" because it is made up of individual copyrightable components (the photographs), and thus, MRIS does not need to own the copyrights in the photographs to register the copyright for the MRIS Database. AHRN argued that MRIS's copyright registrations of the MRIS Database do not protect the photographs themselves because MRIS did not identify the names of the creators and titles of the individual photographs. The Court disagreed, stating that under the Copyright Act, MRIS's copyright registration of the MRIS Database as an automated database was not required to include such information. The Court found that MRIS owned the copyrights to the individual photographs before MRIS filed the copyright registration for the MRIS Database. Requiring a registrant to individually list each author of a preexisting work in a collective work would be inefficient and would impede the registrant's ability to receive copyright protection.

The Court noted that in August 2012, the Copyright Office promulgated a final rule amending the regulations governing the deposit requirement applicable to databases primarily composed of photographs. This new rule stated that "when a registration is made for a database consisting predominantly of photographs, and the copyright claim extends to the individual photographs themselves, each of those photographs must be included as part of the deposit accompanying the application." Final Rule, Deposit Requirements for Registration of Automated Databases That Predominantly Consist of Photographs, 77 Fed. Reg. 40268, 40270 (July 9, 2012). However, this was not in effect at the time of MRIS's registrations at issue in this case and therefore has no effect on the appeal. Thus, MRIS's identification of the photographs as preexisting works satisfied the Copyright Act's requirements, and MRIS was not barred from asserting copyright infringement.

The Court then turned to the merits of MRIS's copyright infringement claim. "MRIS must

prove two elements to establish copyright infringement: (1) ownership of a valid copyright; and (2) AHRN’s copying of constituent elements of the work that are original.” Metropolitan Regional Information Systems, Inc., Slip Op. P. 21. AHRN did not appeal the second element, so the Court only examined whether MRIS owned valid copyrights of the photographs on the MRIS Database. In order to validly assign the rights of the photograph to MRIS, the assignment had to be in writing and signed by the subscriber assigning the rights to MRIS. However, this requirement was meant to help resolve ownership disputes between the copyright authors (the subscribers) and the assignee (MRIS), and not between a third party (AHRN) and the assignee (MRIS).

The Court had to determine whether the act of clicking “yes” to MRIS’s TOS-TOU prior to uploading the copyrighted photographs was a signed, written transfer of rights to MRIS. Congress passed the E-Sign Act, which allows an electronic signature to have legal effect. An electronic signature is “an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.” 15 U.S.C. § 7006(5). Further, the E-Sign Act does not limit, alter, or affect requirements imposed by statutes, regulations, or laws “other than a requirement that contracts or other records be written, signed, or in nonelectric form[.]” Id. § 7001(b). Thus, the E-Sign Act was intended to limit, affect, or alter the written and signed agreement requirements of the Copyright Act. “To invalidate copyright transfer agreements solely because they were made electronically would thwart the clear congressional intent embodied in the E-Sign Act.” Metropolitan Regional Information Systems, Inc., Slip Op. P. 28. As a result, the Court found that the subscribers had validly conveyed their rights in the photographs to MRIS. As such, MRIS was likely to succeed on its claims of copyright infringement against AHRN. The Court affirmed the injunction.

#### 1.b *User Comments On A Public Interest Website Do Not Violate Website’s User Agreement*

The Appeals Court for the Fourth District Court of Appeals in California affirmed the special motion to strike a plaintiff’s complaint for being barred under the anti-SLAAP statute. Hupp v. Freedom Communications, Inc., Case No. #-57390 (Cal. 4th DCA, November 7, 2013) (pdf available here). Plaintiff Paul Hupp sued Defendant Freedom Communications, Inc., dba The Orange County Register (“the Register”), alleging breach of the Register’s user agreement with Hupp when the Register failed to remove comments on its website regarding Hupp. The Register filed a special motion to strike (anti-SLAPP) and the lower court granted the motion to strike Hupp’s complaint. Hupp appealed, arguing that his lawsuit is a standard breach of contract action not subject to an anti-SLAPP motion.

In March 2012, the Register published an article on its website concerning public safety pensions in Orange County, California. Many readers, including Hupp, posted comments on the article. A large portion of the comments were between Hupp and Defendant Mike Bishop. The Register argued that Hupp complained to the author of the article about five postings by Bishop and demanded that they be removed. Hupp argued that the Register violated its user agreement by

making public comments and failing to remove the comments about Hupp. He argued that the comments invaded his right of privacy, harassed him, and were harmful to him. The Register's User Agreement states that interactive areas of the Register's website are provided to the users as a way for users to express their opinions and share ideas and information. The User Agreement also stated that users who used the interactive areas, and that the Register reserved the right, but undertakes no duty, to review, edit, move, or delete any user generated content in its sole discretion.

The Register filed an anti-SLAAP motion under Code of Civil Procedure Section 425.16, which authorizes such a motion "against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue . . . ." Code of Civil Procedure Section 425.16(b)(1). The statute is meant to be construed broadly, and the anti-SLAAP motion must be granted unless a plaintiff can show that there is a probability for plaintiff to prevail on the claim. A SLAAP lawsuit is a civil lawsuit aimed to bring an economic advantage to the plaintiff over the defendant, not a lawsuit brought to vindicate a legally cognizable right of the plaintiff. "While Hupp's complaint does not generally fit the above description of a typical SLAPP suit, it is subject to an anti-SLAPP motion if it fits within the statutory definition, which includes having the purpose of punishing the Register for exercising its free speech rights. Hupp's appeal on this point provides only two sentences of argument and does not address the issues presented by the trial court's decision." Hupp, Slip Op. P. 5.

The Court first had to determine whether the Register made the required showing that Hupp's complaint arose from a protected activity. If so, then the Court would consider whether Hupp had demonstrated a probability of prevailing on his claim. The Register argued that its actions arise from acts in furtherance of its free speech rights. The Register argued that its maintenance of the website, which publishes public interest articles and allows user comments, facilitates free speech, and allows for the exchange of ideas and opinions. The California Supreme Court has held that publicly available websites are public forums for purposes of anti-SLAAP motions. Barrett v. Rosenthal, 40 Cal.4th 33, 41, fn. 4, (2006). The comments between Hupp and Bishop began as a conversation about the pension article posted on the Register's website. However, Bishop then asked Hupp if he was a vexatious litigant, stating that he had searched for Hupp on Google, and that Hupp was the subject of discussion on other websites. To support this, the Register submitted to the Court an appendix of 145 pages of lawsuit related documents concerning Hupp. The Register argued that the subject of vexatious litigants is an issue of public interest. The Court concluded that the Register's actions were in furtherance of its free speech rights. "Maintaining a forum for discussion of issues of public interest is a quintessential way to facilitate rights, and the Register has no liability for doing so." Hupp, Slip Op. P. 8.

The Court extended this holding to find that Hupp had not shown any probability of prevailing in this action. Hupp had failed to present any argument on the issue, and thus his lawsuit is barred. As a result, the Court affirmed the lower court's granting of the Register's anti-SLAAP motion.

Hupp then argued that there was an issue with document service. Hupp filed his complaint on March 22, 2012 and the Register was served on July 2, 2012. The Register had 30 days to respond, and on July 24, 2012, it filed an ex parte motion for an extension in order to file its anti-SLAAP motion. The motion was granted, and Hupp acknowledged receipt of the order on July, 30, 2012. On August 31, 2012, the Register filed the anti-SLAAP motion, the hearing was set for September 28, 2012, and on September 13, 2012 the process server filed an amended proof of service stating that the original had inadvertent incorrect information, and that service was completed by leaving copies of the documents with the security guard at the front gate of Hupp's residential community. This is a permissible means of service in California. Hupp filed a declaration by the security guard, who stated that he turned the process server away and did not receive any documents. Hupp filed his motion to strike the anti-SLAAP motion on September 24, 2012 for improper service, however he acknowledged receipt of the Register's motion on September 13, 2012. Counsel for the Register moved for a continuance, which was granted, and the anti-SLAAP motion was heard on October 18, 2012. The lower court granted the anti-SLAAP motion. The Court concluded that Hupp had admitted to receiving the Register's motion on September 13, 2012, and therefore he had 34 days before the rescheduled hearing on October 18, and had actual notice of the action in time to defend against the anti-SLAAP motion. As a result, the Register complied with all service requirements.

The Court affirmed the lower court's order granting the Register's anti-SLAAP motion to strike Hupp's complaint.

## **2. Online Reproduction of Print Material**

### *2.a Google Books Program Not Copyright Infringement Under Fair Use*

The U.S. District Court for the Southern District of New York held that Google's online book database, Google Books, did not infringe the copyrights of those books. The Authors Guild, Inc., et al. v. Google, Inc., Case No. 05-cv-08136-DC (S.D. NY, November 14, 2013) (pdf available [here](#)). Since 2004, Google has scanned over twenty million books after entering into agreements with several major research libraries. The digital copies of the books were sent to the participating libraries, Google created an electronic database of the books, and made the text available for online searching. However, Google did not obtain permission from the copyright holders for using the books. In 2005, Plaintiffs brought a class action lawsuit against Google for copyright infringement. The parties each filed motions for summary judgment on Google's defense of fair use under § 107 of the Copyright Act, 17 U.S.C. § 107. The Court granted summary judgment in favor of Google, and dismissed the case.

Plaintiff Jim Bouton is the owner of the copyright for the book "Ball Four." Plaintiff Betty Miles owns the copyright to the book "The Trouble with Thirteen," and Plaintiff Joseph Goulden owns the copyright to the book "The Superlawyers: The Small and Powerful World of the Great Washington Law Firms." These three books were scanned by Google and are available for search on Google's website without plaintiffs' permission. Plaintiff The Authors Guild, Inc. is

the largest organization of published authors in the U.S., and advocates for and supports the copyright and contractual interests of published writers. In 2004, Google introduced two digital book programs, the “Partner Program” involved “hosting” and displaying material provided by book publishers or rights holders, and the “Library Project” involved the digital scanning of books. The two programs together are the Google Books Program (“Google Books”). Google Books includes all types of books and genres, fiction and non-fiction, and both in-print and out-of-print books.

In the Partner Program, books are displayed with permission of the copyright holder, and is aimed to help publishers sell books. In 2011, Google stopped displaying ads in connection with all books. The Partners would give Google either a print or digital copy of the book and would decide how much of their books are browsable. Under the Library Project, Google scanned over twenty million books in their entirety, and participating libraries could download a digital copy of each book scanned from their collections. Google maintains digital copies of each book it scans. Google did not seek permission from the copyright holders, and did not compensate them for copying or displaying the books. In order for the books to be searchable, Google creates an overall index of all of the scanned books, which links each word or phrase in each book with all of the locations in all of the books where that word or phrase is found. Thus, when a user searches for a particular word or phrase, the search results include the most relevant books in which that word or phrase is found. A user can search for a book and be directed to an “About the Book” page, which contains information about that book, sellers of the book, libraries having the book, and sometimes snippets of excerpts from the book. There are no advertisements on the page. Google has security measures in place to prevent a user from being able to view an entire snippet-view book, ensuring that the user can only see the snippet sections and not the entire text.

Google Books has many benefits and has essentially become a research tool for users and libraries. It also allows literary scholars to study the texts of the books overall and examine how literary style has changed over time. Google Books expands access to books by offering people with disabilities alternative methods to books, and by assisting in interlibrary loans. It also helps to preserve books and make out-of-print books more available, alerting users to where they can find a print copy. Finally, Google Books benefits authors and publishers because the “About the Book” page offers links to sellers of the book and/or libraries carrying the book.

For purposes of the summary judgment motions on Google’s fair use defense, the Court assumed that Plaintiffs had established a prima facie case of copyright infringement. The Copyright Act has four non-exclusive factors to consider in determining whether use of a copyrighted work constitutes fair use. Under § 107, the court should consider: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and ( 4) the effect of the use upon the potential market for the value of the copyrighted work.” 17 U.S.C. § 107. In examining the first factor, courts must consider whether the use of the copyrighted work is transformative: did it simply copy the original work, or did it add something new, altering the original expression,

meaning, or message?

First, the Court looked to the purpose and character of Google's use of the books. The Court found the use to be highly transformative. "Google Books digitizes books and transforms expressive text into a comprehensive word index that helps readers, scholars, researchers, and others find books. Google Books has become an important tool for libraries and librarians and cite-checkers as it helps to identify and find books. The use of book text to facilitate search through the display of snippets is transformative." Authors Guild, Slip Op. P. 19. Additionally, Google's use is transformative in that it takes the text of the book and turns it into data for substantive research. Google Books is not a tool to read books, and thus it is transformative. Even though Google Books is mainly a commercial enterprise, it is still fair use because Google does not sell the scans of the books, the snippets of the books, Google does not place advertisements on the "About the Book" pages, and Google does not engage in direct commercialization of the books. The educational purposes of Google Books outweighs any commercial benefit to Google.

Second, the Court considered the nature of the books. Most of the books in Google Books are non-fiction, and the Copyright Act affords greater protection to works of fiction. The books have all been published, and are all available to the public. Thus, the second factor supports a finding of fair use.

Third, the Court examined the amount and substantiality of the books used by Google. Google scans the entire book and copies the verbatim expression. However, this can still be fair use. "Here, as one of the keys to Google Books is its offering of full-text search of books, full-work reproduction is critical to the functioning of Google Books. Significantly, Google limits the amount of text it displays in response to a search." Authors Guild, Slip Op. P. 23. However, the Court determined that this factor weighed slightly against a finding of fair use.

Finally, the Court reviewed the effect of Google's use of the books on the potential market. Plaintiffs argued that Google's use would negatively affect the market for books, and that Google's scans would serve as a replacement for books. The Court disagreed because Google did not sell the scans of the books and the scans themselves do not replace the books. "While partner libraries have the ability to download a scan of a book from their collections, they owned the books already -- they provided the original book to Google to scan." Authors Guild, Slip Op. P. 24. Further, Google implements security features to prevent a user from searching various terms in order to pull up snippets of the books to create the entire book text. Instead, Google Books can improve the market for these books by making them more available to the general public. Many authors have conceded that Google Books helps readers find their works, thereby increasing their audiences. As a result, this supports a finding of fair use.

The Court weighed the four factors together and found that Google's use of the books constituted fair use under the Copyright Act. The Court granted Google's motion for summary judgment, denied Plaintiffs' motion for summary judgment, and dismissed the complaint.

### 3. Website “Membership” Clubs and Counterfeit Goods

#### 3.a *TradeKey Liable For Users’ Sales Of Counterfeit Goods Bearing Chloe, Alfred Dunhill, Panerai, Montblanc, Cartier or Lange & Sohne Marks*

The District Court for the Central District of California found that a website providing services for people to sell counterfeit goods is liable for contributory trademark infringement and contributory counterfeiting. Chloe SAS, et al. v. Sawabeh Information Services Co., Case No. 11-4147 (C.D. Cal. October 8, 2013) (pdf available here). Plaintiffs sued 18 individual defendants for trademark infringement stemming from counterfeit goods that were promoted and sold online. The Court entered defaults for each of the individual defendants. Plaintiffs also sued Defendants Sawabeh Information Services Co. (“SISCOM”) and TradeKey (PVT) Ltd. (“TradeKey”), internet companies (collectively, “TradeKey Defendants”), for promoting and facilitating sales of the counterfeit goods. Plaintiffs moved for partial summary judgment against TradeKey Defendants on the claims of contributory counterfeiting, contributory infringement, unfair competition, and related state law claims. The Court determined that the facts were undisputed and granted the motion.

Plaintiffs manufacture and sell luxury goods. Plaintiffs alleged that TradeKey Defendants facilitated the sales of counterfeit products through their websites (the “TradeKey websites”). Plaintiffs alleged that TradeKey Defendants sold memberships to individuals, allowing them to operate through the TradeKey websites to advertise and sell counterfeit goods. TradeKey is a subsidiary of SISCOM. A large portion of TradeKey’s business comes from counterfeit goods. TradeKey makes money by selling memberships to the website, thereby allowing TradeKey to solicit wholesale buyers and distributors from around the world. The highest level of membership is the GoldKey membership, which costs \$3,000 for a one year subscription.

Plaintiffs hired private investigator Rob Holmes, who purchased a GoldKey membership. Holmes was contacted by TradeKey employee Farooq Khalil, who gave Holmes tips on successfully using the website. TradeKey reviewed Holmes’s homepage advertisement and replaced “replica” from the title with “Fashion Handbag” to mask the counterfeit nature of the product. Holmes found over 6,000 sellers listing Plaintiffs’ products without authorization. “Each Plaintiff has confirmed that none of the sellers on TradeKey.com were authorized by Chloe, Alfred Dunhill, Panerai, Montblanc, Cartier or Lange & Sohne, or their related companies, to sell genuine goods bearing Plaintiffs’ marks.” Chloe SAS, Slip Op. P. 3. Holmes purchased various counterfeit goods from different sellers on the website.

First, the Court held that Plaintiffs were entitled to summary judgment on their contributory counterfeiting claim. Plaintiffs had successfully established underlying direct counterfeiting by TradeKey members: there was no dispute that Plaintiffs own valid and protectable trademarks in their goods, and Plaintiffs presented evidence that TradeKey members were selling goods bearing those trademarks without permission. Plaintiffs presented evidence that Holmes found over 6,000 unauthorized sellers of their products, that Holmes was able to purchase counterfeit goods,

and that Plaintiffs studied detailed photographs taken by Holmes of the purchased goods to confirm that they were all counterfeit. Defendants failed to provide any persuasive arguments to counter these facts. Defendants attempted to argue that Holmes' company IPCybercrime failed to follow reliable procedures regarding the counterfeit goods. "Here, the only physical characteristic of the goods in question that is material to this case is whether they are, in fact, counterfeit replicas of Plaintiffs' products. Thus, to have changed the evidence at issue in this case in 'important respects,' IPCybercrime employees would have had to alter the goods they purchased to make them appear as though they were counterfeit. This argument is not only unpersuasive, but borders on the absurd[.]" Chloe SAS, Slip Op. P. 7.

Next, the Court determined that Plaintiffs had clearly proved that there was no factual dispute regarding TradeKey Defendants' knowledge that they were supplying their services to people who were engaged in trademark infringement. Plaintiffs provided evidence that TradeKey Defendants maintained "Replica Products" and "Replica Retention" sales divisions, showing their knowledge of the use of TradeKey.com for counterfeit goods. Holmes also testified that TradeKey employee Khalil told him that TradeKey did not have a problem with Holmes selling counterfeit goods.

The Court then looked to the element of control and found that TradeKey monitored and controlled all the aspects of TradeKey.com and the member listings. Thus TradeKey was in control. TradeKey is a wholly owned subsidiary of SISCOM, and thus SISCOM has direct control over TradeKey, and over TradeKey.com.

The Court held that Plaintiffs were also entitled to summary judgment on their contributory trademark infringement claim. The Court stated that this claim was largely redundant of the contributory counterfeiting claim.

Plaintiffs' success on their contributory counterfeiting and trademark infringement claims resulted in their success in their federal and state unfair competition claims. Under the Lanham Act, Plaintiffs had to prove the same elements for federal trademark infringement and federal unfair competition. "Whether we call the violation infringement, unfair competition or false designation of origin, the test is identical—is there a 'likelihood of confusion?'" New West Corp. v. NYM Co. of California, Inc., 595 F.2d 1194, 1201 (9<sup>th</sup> Cir. 1979). Counterfeiting is an attempt to pass off replica products as genuine goods, and thus embraces confusion.

Finally, the Court held that Plaintiffs were entitled to a permanent injunction. "Plaintiffs request that the Court enjoin Defendants from (1) permitting, allowing or facilitating customers, users, or members of [www.TradeKey.com](http://www.TradeKey.com), [www.saudicommerce.com](http://www.saudicommerce.com) and [www.b2bfreezone.com](http://www.b2bfreezone.com), or any other website affiliated with the TradeKey Defendants to post or display listings to buy, sell, manufacture or distribute products bearing Plaintiffs' marks or any 'colorable imitation' of Plaintiffs' marks; (2) displaying listings either using the Plaintiffs' marks or in response to search queries for Plaintiffs' marks on the Defendants' websites; (3) using Plaintiffs' marks as keywords, adwords, or any other type of metadata; and (4) allowing or advising any person or

entity on how to create or post listings for products Defendants know or have reason to know infringe Plaintiffs' marks." Chloe SAS, Slip Op. P. 12. In addition, Plaintiffs requested that the TradeKey Defendants be required to institute measures to ensure compliance with the injunction and provide the Court written confirmation of such compliance. "Furthermore, upon receipt of written notice, including email, the enjoined parties must remove or disable access to any listing that (1) Plaintiffs identify as infringing or (2) otherwise comes to the attention of the TradeKey Defendants as infringing. Finally, Plaintiffs request that Defendants be required to monitor their websites on an on-going basis 'to confirm each such website is in compliance with this Order.'" Chloe SAS, Slip Op. P. 12 (quoting Dkt. 532, Proposed Order). The Court granted Plaintiffs' requests. The Court granted summary judgment and the permanent injunction in favor of Plaintiffs.

#### **4. Computer Fraud and Abuse Act (CFAA)**

##### **4.a *Software Source Code Access Not Enough For CFAA And Copyright Act Preempts Common Law Unfair Competition***

The Northern District of California dismissed two claims stemming from alleged unauthorized use and reproduction of a copyrighted computer software. Metabyte, Inc. v. NVIDIA Corp., et al., Case No. 12-0044 (N.D. Cal. April 22, 2013) (pdf available here). Metabyte sued NVIDIA and others for copyright infringement and related claims, including unfair competition, arising out of the alleged theft of Metabyte's computer code by former employees. Defendants moved to dismiss, and the Court evaluated Metabyte's claims based on the Federal Computer Fraud and Abuse Act ("the CFAA"), 18 U.S.C. sec. 1030, and California's Unfair Competition Law ("UCL"). The Court granted the motion and dismissed both of Metabyte's claims.

Metabyte and NVIDIA are software companies. Defendants David Cook, Viatcheslav Gostrenko, Andrei Osnovich, Michael Yaroslavtsev, and Mikhail Krivega (the "Individual Defendants") were hired by Metabyte in the 1990s. The Individual Defendants had access to the source code for Metabyte Software and signed confidentiality agreements to prevent disclosure. Between 1999 and 2001, Individual Defendants left Metabyte to work for NVIDIA, which was working on developing its own version of the Metabyte Software. Metabyte alleged that Individual Defendants copied the source code for the Metabyte Software, took the code to NVIDIA, and that NVIDIA used the code to develop its own software.

##### **Alleged CFAA Violations**

Per the Court, the CFAA is "designed to target hackers who accessed computers to steal information or to disrupt or destroy computer functionality, as well as criminals who possessed the capacity to access and control high technology processes vital to our everyday lives." LVRC Holdings LLC v. Brekka, 581 F.3d 1127, 1130 (9th Cir. 2009). The CFAA is not a replacement for, or an enhancement to, misappropriation claims. Metabyte alleged that Individual Defendants copied the Metabyte Software source code and took it to NVIDIA in violation of their

confidentiality agreements. Defendants argued that the CFAA claims were baseless because Metabyte never alleged that any of the Individual Defendants actually accessed Metabyte's computers without authorization.

"The Court finds that Plaintiff has not pled facts giving rise to a valid claim under the CFAA. All of Plaintiff's facts suggest that even if any Individual Defendant did take any part of the Metabyte Software or any other proprietary material with him to NVIDIA, his access to that material occurred during his employment with Plaintiff. Moreover, Plaintiff never suggests beyond conclusory allegations that any Individual Defendant obtained such information without authorization or in excess of his authorization." Metabyte, Slip Op. Pp. 8-9. The Court dismissed Metabyte's CFAA claims.

### Unfair Competition

In the UCL claim, Metabyte alleged that NVIDIA engaged in unfair competition and unlawful and unfair business practices. Defendants argued preemption by the Copyright Act. A state law action is preempted under the Copyright Act if (1) the rights that Metabyte asserted under state law (UCL) are equivalent to rights protected by the Copyright Act; and (2) the Metabyte Software falls within the meaning of "subject matter" under the Copyright Act. Metabyte and the Defendants disagreed as to whether Metabyte's rights are equivalent to those protected by the Copyright Act. Metabyte argued that its UCL claim stemmed from misappropriation of trade secrets, therefore the UCL claim was not preempted. Defendants responded that Metabyte's argument about misappropriation of trade secrets is groundless because the UCL claim was based on the alleged use and reproduction of a copyrighted work. The Court agreed and dismissed Metabyte's UCL claim with prejudice.

## **5. Computer Software Patents - What is an Abstract Idea**

### *5.a Fractured Patent Appeals Court Casts Shadow Over Computer Software Patents*

The Court of Appeals for the Federal Circuit (the Federal Circuit), in a highly fractured en banc decision, throws doubt on the validity of many computer software patents in its recent decision, CLS Bank International v. Alice Corporation, Case No. 2011-1301 (Fed. Cir. May 10, 2013) (pdf available here). Rather than clarify the law as to whether computer program patents (with computer method claims, computer media claims and computer system claims) are patent eligible subject matter under the Patent Act, Section 101, 35 U.S. C. Sec. 101, the per curiam opinion notes "While Chief Judge Rader is correct to note that no single opinion issued today commands a majority, seven of the ten members, a majority, of this en banc court have agreed that the method and computer-readable medium claims before us fail to recite patent-eligible subject matter. In addition, eight judges, a majority, have concluded that the particular method, medium, and system claims at issue in this case should rise or fall together in the § 101 analysis."

Procedurally, the trial court had earlier held that certain claims of Alice’s patents were invalid under 35 U.S.C. § 101 as being abstract ideas which are not patentable subject matter under the Patent Act. The first Federal Circuit decision held that Alice’s patent claims were all patent eligible under § 101. CLS Bank Int’s v. Alice Corp., 685 F.3d 1341 (Fed. Cir. 2012), vacated, 484 F. App’x 559 (Fed. Cir. 2012). As noted, the Federal Circuit vacated its earlier ruling and, in this en banc case before all the appellate court judges, the Court affirmed “the district court’s judgment in its entirety and [held] that the method, computer-readable medium, and corresponding system claims ... recite patent-ineligible subject matter under 35 U.S.C. § 101.”

Because the opinions from the highly divided Court span 135 pages, only the per curium opinion is reported herein. The Court’s opinion is extensively quoted since condensation may further confuse our readers.

“The statute sets forth four broadly stated categories of patent-eligible subject matter: processes, machines, manufactures, and compositions of matter. As the Supreme Court has explained, Congress intended that the statutory categories would be broad and inclusive to best serve the patent system’s constitutional objective of encouraging innovation.” (citing Diamond v. Diehr, 450 U.S. 175, 191 (1981) and Diamond v. Chakrabarty, 447 U.S. 303, 308-09 (1980)).

“While the categories of patent-eligible subject matter recited in § 101 are broad, their scope is limited by three important judicially created exceptions. ‘[L]aws of nature, natural phenomena, and abstract ideas’ are excluded from patent eligibility, Diehr, 450 U.S. at 185, because such fundamental discoveries represent ‘the basic tools of scientific and technological work.’” (citing Gottschalk v. Benson, 409 U.S. 63, 67 (1972)).

“But danger also lies in applying the judicial exceptions too aggressively because ‘all inventions at some level embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas.’ Mayo Collaborative Servs. v. Prometheus Labs., Inc., 132 S. Ct. 1289, 1293 (2012). Taken too far, the exceptions could swallow patent law entirely.”

### Preemption

“For example, deciding whether or not a particular claim is abstract can feel subjective and unsystematic, and the debate often trends toward the metaphysical, littered with unhelpful analogies and generalizations. What is needed is a consistent, cohesive, and accessible approach to the § 101 analysis - a framework that will provide guidance and predictability for patent applicants and examiners, litigants, and the courts. As set forth below, the Supreme Court’s foundational § 101 jurisprudence offers the guideposts to such a system, one that turns primarily on the practical likelihood of a claim preempting a fundamental concept.”

Once the abstract idea is identified, the Supreme court has “measured the scope of the claims [in the Benson case] against the scope of that overarching abstract idea. In practice, the claims [in converting binary coded decimal (BCD) numerals into pure binary numerals] were ‘so abstract

and sweeping as to cover both known and unknown uses of the BCD to pure binary conversion' and would thus reach every application of the basic conversion algorithm, in contrast to earlier cases concerning patent-eligible process claims that had been cabined to discrete applications 'sufficiently definite to confine the patent monopoly within rather definite bounds.'" (citing Gottschalk v. Benson, 409 U.S. at 68 - 69).

In Benson, the Supreme Court said: "The mathematical formula involved here has no substantial practical application except in connection with a digital computer, which means that if the judgment below is affirmed, the patent would wholly pre-empt the mathematical formula and in practical effect would be a patent on the algorithm itself." Id. at 71 - 72. However in that Benson case, the predecessor of the Federal Circuit, the CCPA, had approved those patent claims and "had interpreted both claims as requiring a computer and had upheld them on that basis." See In re Benson, 441 F.2d 682, 687-88 (CCPA 1971).

"Six years later [after Benson], in Parker v. Flook, 437 U.S. 584 (1978), the Supreme Court again considered the patent eligibility of a computerized process - in particular, a method for updating alarm limits for continuously monitored industrial process variables (e.g., temperature or pressure) according to a disclosed mathematical formula."

"Although the claim would not wholly preempt' the mathematical formula, id. at 589, the [Supreme] Court nonetheless held that the claimed process fell under the abstract ideas exception to patent eligibility. In its analysis, the Court viewed the formula as an abstract principle and stated that the case must 'be considered as if the principle or mathematical formula were well known.' Id. at 592. The Court then asked whether, to confer patent eligibility, the claim contained sufficient substance beyond the abstract mathematical formula itself-that is, 'some other inventive concept in its application.' Id. at 594; see also id. at 590 ('A competent draftsman could attach some form of post-solution activity to almost any mathematical formula . . .'). Concluding that the field-of-use, monitoring, adjusting, and computer limitations were trivial or 'well known' under such an analysis, the Court held that the claims were not patent eligible, ...)"

In Diamond v. Diehr, 450 U.S. 175, 191 (1981), "[t]he claimed methods included steps for operating a rubber molding press that included constantly determining the temperature inside the mold, repetitively calculating the necessary cure time using a mathematical formula known as the Arrhenius equation, and opening the press whenever the elapsed cure time equaled the calculated necessary cure time."

"[T]he [Supreme] Court distinguished Flook on the basis that the claim there provided no substantive details regarding the method's actual performance— rather, '[a]ll that it provides is a formula for computing an updated alarm limit.' See id. at 186--87 (quoting Flook, 437 U.S. at 586). In contrast, in Diehr, the claimed process incorporating the Arrhenius equation also called for steps including 'constantly measuring the actual temperature inside the mold,' a step that was said to be new in the art. See id. at 178 – 79."

The Federal Circuit then discussed Bilski v. Kappos, 130 S. Ct. 3218 (2010). “Applying Benson, Flook, and Diehr, the Supreme Court held that the claims [in Bilski] failed to recite a patent-eligible process because they covered the abstract idea of hedging against risk. ‘Allowing [the claims] would pre-empt use of this approach in all fields, and would effectively grant a monopoly over an abstract idea.’ *Id.* at 3231.”

The Federal Circuit further considered Mayo v. Prometheus. “Accordingly, the claims [in Mayo] recited the specific steps of administering the thiopurine drug and determining the resulting metabolite concentration in the patient's blood, wherein a concentration above or below predefined thresholds indicated a need to adjust the drug dose. See *id.* at 1295 (claim 1).” “The Supreme Court held that those claims failed the § 101 test for subject-matter eligibility. Therefore, the question was ‘whether the claims do significantly more than simply describe these natural relations’; did they ‘add enough’ to the natural law to render the claimed processes patent eligible? *Id.* at 1297. Examining the other limitations, the [Supreme] Court concluded that the ‘administering’ and ‘determining’ steps were insufficiently limiting or inventive to confer patent eligibility.”

“First and foremost is an abiding concern that patents should not be allowed to preempt the fundamental tools of discovery—those must remain ‘free to all ... and reserved exclusively to none.’ Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127, 130 (1948).” Preemption features prominently in the Supreme Court's decisions of Mayo, 132 S. Ct. at 1301; Bilski, 130 S. Ct. at 3231; Diehr, 450 U.S. at 187; Benson, 409 U.S. at 72, O'Reilly v. Morse, 56 U.S. 62, 113 (1853) (rejecting a claim that would have broadly conferred "a monopoly" in the use of electromagnetism, "however developed, for the purpose of printing at a distance").

“To be clear, the proper focus is not preemption per se, for some measure of preemption is intrinsic in the statutory right granted with every patent to exclude competitors, for a limited time, from practicing the claimed invention. See 35 U.S.C. § 154. Rather, the animating concern is that claims should not be coextensive with a natural law, natural phenomenon, or abstract idea; a patent-eligible claim must include one or more substantive limitations that, in the words of the Supreme Court, add ‘significantly more’ to the basic principle, with the result that the claim covers significantly less. See Mayo 132 S. Ct. at 1294. Thus, broad claims do not necessarily raise § 101 preemption concerns, and seemingly narrower claims are not necessarily exempt. What matters is whether a claim threatens to subsume the full scope of a fundamental concept, and when those concerns arise, we must look for meaningful limitations that prevent the claim as a whole from covering the concept's every practical application.” (Citing Mayo at 1302).

“Thus, claim drafting strategies that attempt to circumvent the basic exceptions to § 101 using, for example, highly stylized language, hollow field-of-use limitations, or the recitation of token post-solution activity should not be credited.”

“Finally, the [Supreme Court's] cases urge a flexible, claim-by-claim approach to subject - matter eligibility that avoids rigid line drawing. Bright - line rules may be simple to apply, but

they are often impractical and counterproductive when applied to § 101.”

“Accordingly, the Supreme Court has rejected calls for a categorical exclusion of so-called business method claims and has held that the formulaic ‘machine-or-transformation’ test cannot be the exclusive means for determining the patent eligibility of process claims. Bilski, 130 S. Ct. at 3227-29. What is needed is a flexible, pragmatic approach that can adapt and account for unanticipated technological advances while remaining true to the core principles underlying the fundamental exceptions to § 101.”

“A preliminary question in applying the exceptions to such claims is whether the claim raises § 101 abstractness concerns at all. Does the claim pose any risk of preempting an abstract idea? In most cases, the answer plainly will be no.”

“In short, one cannot meaningfully evaluate whether a claim preempts an abstract idea until the idea supposedly at risk of preemption has been unambiguously identified. Although not required, conducting a claim construction analysis before addressing § 101 may be especially helpful in this regard by facilitating a full understanding of what each claim entails.” (Citing Bancorp Servs., LLC v. Sun Life Assurance Co. of Can., 687 F.3d 1266, 1273 - 74 (Fed. Cir. 2012)).

#### The Section 101 Inventive Concept - Substantive Claim Limitations

“The requirement for substantive claim limitations beyond the mere recitation of a disembodied fundamental concept has ‘sometimes’ been referred to as an ‘inventive concept.’ See Mayo, 132 S. Ct. at 1294 (citing Flook, 437 U.S. at 594). We do not read the [Supreme] Court's occasional use of that language in the § 101 context as imposing a requirement that such limitations must necessarily exhibit ‘inventiveness’ in the same sense as that term more commonly applies to two of the statutory requirements for patentability, i.e., novelty and nonobviousness. See 35 U.S.C. §§ 102, 103. The phrase ‘inventive concept’ originated with Flook, yet the Court began its discussion of § 101 in that case by stating that the question of patenteligible subject matter ‘does not involve the familiar issues of novelty and obviousness that routinely arise under §§ 102 and 103.’ 437 U.S. at 588.”

“An ‘inventive concept’ in the § 101 context refers to a genuine human contribution to the claimed subject matter.” “In addition, that human contribution must represent more than a trivial appendix to the underlying abstract idea. The § 101 preemption analysis centers on the practical, real - world effects of the claim. Limitations that represent a human contribution but are merely tangential, routine, well - understood, or conventional, or in practice fail to narrow the claim relative to the fundamental principle therein, cannot confer patent eligibility.”

“For example, the ‘administering’ and ‘determining’ steps in Mayo might have appeared to be concrete limitations representing true human contributions to the claimed methods ... Yet the Court held that those steps failed to render the claims patent eligible because, as a practical matter, they were necessary to every practical use of what it found to be a natural law and

therefore were not truly limiting. Mayo, 132 S. Ct. at 1298.”

“Also in Mayo, the [Supreme] Court instructed that the added steps, apart from the natural law itself, must amount to more than ‘well-understood, routine, conventional activity previously engaged in by researchers in the field.’ 132 S. Ct. at 1294. Similarly, token or trivial limitations, see Diehr, 450 U.S. at 191-92 (stating that ‘insignificant post-solution activity will not transform an unpatentable principle into a patentable process’), or vague limitations cast in ‘highly general language,’ Mayo, 132 S. Ct. at 1302, have failed to satisfy § 101. Finally, bare field-of-use limitations cannot rescue a claim from patent ineligibility where the claim as written still effectively preempts all uses of a fundamental concept within the stated field. Bilski, 130 S. Ct. at 3230 (discussing Flook and Diehr). Whether a particular claim satisfies the § 101 standard will vary based on the balance of factors at play in each case, and the fact that there is no easy bright - line test simply emphasizes the need for the PTO and the courts to apply the flexible analysis above to the facts at hand.”

To recap, claim limitations which do not support Section 101 patent eligible subject matter are: (1) well-understood steps, routine or conventional steps which are used by researchers in the field; (2) token or trivial limitations; (3) insignificant post-solution activity; (4) vague limitations cast in highly general language; (5) “extravagant language to recite a basic function” (see “Alice Patents” section below); (6) generic computer functionality that lends speed or efficiency to the performance; and (7) bare field-of-use limitations. These claim limitations effectively preempt all uses of a fundamental concept within the stated field.

#### Section 101 Inventive Concept Is Different Than Novelty and Nonobviousness

“Thus, the Supreme Court used the language ‘routine’ and ‘conventional’ in Mayo to indicate what qualities added to a natural law do not create patent-eligible subject matter. See Mayo, 132 S. Ct. at 1298. We do not therefore understand that language to be confused with novelty or nonobviousness analyses, which consider whether particular steps or physical components together constitute a new or nonobvious invention. Analyzing patent eligibility, in contrast, considers whether steps combined with a natural law or abstract idea are so insignificant, conventional, or routine as to yield a claim that effectively covers the natural law or abstract idea itself.”

#### Inventive Concept Is A Separate, Not A Threshold, Analysis And Issued Patents Are Presumed Valid

“Two other considerations are worth noting with respect to the § 101 analysis. First, some have argued that because § 101 is a ‘threshold test,’ Bilski, 130 S. Ct. at 3225, district courts must always consider subject-matter eligibility first among all possible bases for finding invalidity. That is not correct.”

“Second, it bears remembering that all issued patent claims receive a statutory presumption of

validity. 35 U.S.C. § 282; Microsoft Corp. v. i4i Ltd. P'ship, 131 S. Ct. 2238 (2011).”

### The Alice Patents in Suit

The patent owner Alice Corp. argued that the following claim limitations for “shadow accounts” made the computer method claims, the computer readable medium claims (so-called ‘Beauregard claims,’ named for In re Beauregard, 53 F.3d 1583 (Fed. Cir. 1995)) and the apparatus or computer system claims eligible patent subject matter.

### Computer Method Claims

Claim 33. A method of exchanging obligations as between parties including: (1) creating a shadow credit record and a shadow debit record for each stakeholder party and (2) at the end-of-day, the supervisory institution instructing ones of the exchange institutions to exchange credits or debits to the credit record and debit record of the respective parties in accordance with the adjustments of the said permitted transactions, the credits and debits being irrevocable, time invariant obligations placed on the exchange institutions.

“Briefly, the claimed process requires the supervisory institution to create shadow records for each party that mirror the parties' real-world accounts held at their respective ‘exchange institutions.’ At the end of each day, the supervisory institution irrevocably instructs the exchange institutions to carry out the permitted transactions.”

The Court found that the shadow accounts were “a form of escrow. CLS describes that concept as ‘fundamental and ancient,’ but the latter is not determinative of the question of abstractness. But whether long in use or just recognized, abstract ideas remain abstract. The concept of reducing settlement risk by facilitating a trade through third-party intermediation is an abstract idea because it is a ‘disembodied’ concept, In re Alappat, 33 F.3d 1526, 1544 (Fed. Cir. 1994) (en banc).”

“First, the requirement for computer implementation could scarcely be introduced with less specificity; the claim lacks any express language to define the computer's participation. In a claimed method comprising an abstract idea, generic computer automation of one or more steps evinces little human contribution. There is no specific or limiting recitation of essential, see SiRF Tech., Inc. v. Int'l Trade Comm'n, 601 F.3d 1319, 1332 - 33 (Fed. Cir. 2010), or improved computer technology, see Research Corp. Techs., Inc. v. Microsoft Corp., 627 F.3d 859, 865, 868 - 69 (Fed. Cir. 2010), and no reason to view the computer limitation as anything but ‘insignificant postsolution activity’ relative to the abstract idea, see Fort Props., Inc. v. Am. Master Lease LLC, 671 F.3d 1317, 1323 - 24 (Fed. Cir. 2012). Furthermore, simply appending generic computer functionality to lend speed or efficiency to the performance of an otherwise abstract concept does not meaningfully limit claim scope for purposes of patent eligibility.”

“With the term ‘shadow record,’ the claim uses extravagant language to recite a basic function

required of any financial intermediary in an escrow arrangement.”

“Finally, providing end-of-day instructions to the exchange institutions to reconcile the parties' real - world accounts with the day's accumulated adjustments to their shadow records is a similarly trivial limitation that does not distinguish the claimed method. According to the claim, each permitted transaction during the day prompts corresponding shadow record adjustments, which the exchange institutions must honor as ‘irrevocable’ payment obligations. E.g., '479 patent col. 65 11. 36-50. Whether the instructions are issued in real time, every two hours, or at the end of every day, there is no indication in the record that the precise moment chosen to execute those payments makes any significant difference in the ultimate application of the abstract idea.”

#### Computer-Readable Medium Claims

“As with the method claims, two other judges of this court, in addition to those joining this [per curium] opinion, similarly conclude that the computer-readable medium claims are not patent eligible.”

#### Computer System Apparatus Claims

The Federal Circuit noted the disjointed opinions of the Court on this topic and stated: “Before addressing these claims in particular, we again note that our colleagues on the court, other than those joining this opinion, have agreed that, at least in this case, the method, medium, and system claims should be considered together for purposes of § 101. Three other judges on this court - for a total of eight - have so concluded.”

A truncated version of Claim 1 of the Alice '720 patent stated: “1. A data processing system to enable the exchange of an obligation between parties ... a data storage unit having stored therein information about a shadow credit record and shadow debit record ... a computer, coupled to said data storage unit, that is configured to (a) receive a transaction; (b) electronically adjust; (c) generate an instruction.” The claim then closely followed the method steps.

“Indeed, Alice's method and system claims use similar and often identical language to describe those actions. Compare id. Other claims specify additional components, such as a ‘first party device’ and a ‘communications controller.’ See, e.g., '375 patent col. 66 11. 65 - 66.” “As illustrated by the obvious parallels between the method and system claims now before us, it is often a straightforward exercise to translate a method claim into system form, and vice versa. That much has long been recognized. See In re Johnston, 502 F.2d 765, 773 (CCPA 1974).”

“The computer - based limitations recited in the system claims here cannot support any meaningful distinction from the computer-based limitations that failed to supply an ‘inventive concept’ to the related method claims.”

“They set forth the same steps for performing third-party intermediation and provide for computer implementation at an incrementally reduced, though still striking level of generality. Instead of wholly implied computer limitations, the system claims recite a handful of computer components in generic, functional terms that would encompass any device capable of performing the same ubiquitous calculation, storage, and connectivity functions required by the method claims.”

“Despite minor differences in terminology, e.g., first and third ‘independent’ accounts instead of ‘shadow’ records, the asserted method and system claims require performance of the same basic process.”

“For all practical purposes, every general purpose computer will include ‘a computer,’ ‘a data storage unit,’ and ‘a communications controller’ that would be capable of performing the same generalized functions required of the claimed systems to carry out the otherwise abstract methods recited therein.”

“But that is not the question. The question we must consider is whether a patent claim that ostensibly describes such a system on its face represents something more than an abstract idea in legal substance. Claims to computers were, and still are, eligible for patent. No question should have arisen concerning the eligibility of claims to basic computer hardware under § 101 when such devices were first invented. But we are living and judging now (or at least as of the patents' priority dates), and have before us not the patent eligibility of specific types of computers or computer components, but computers that have routinely been adapted by software consisting of abstract ideas, and claimed as such, to do all sorts of tasks that formerly were performed by humans. And the Supreme Court has told us that, while avoiding confusion between § 101 and §§ 102 and 103, merely adding existing computer technology to abstract ideas — mental steps — does not as a matter of substance convert an abstract idea into a machine.”

Commentary: In conclusion, patent practitioners and the courts continue to “seek [a] framework that will provide guidance and predictability for patent applicants and examiners, litigants, and the courts.” CLS Bank v Alice Corp., Slip opn. P. 9. Given the Court’s fractured positions, although this opinion gives practitioners additional guidelines, the Court’s stated goal of predictability has not been achieved. The leap from “a form of escrow” (an abstract idea) to “shadow accounts” and end-of-day instructions for credits or debits which are “irrevocable, time invariant obligations placed on the exchange institutions” seems tenuous and not particularly predictable. Also, critical comments regarding claim drafting strategies and the use of highly stylized claim language ignores a patent practitioner’s obligation to draft patent claims as broad as possible to capture his or her client’s constitutional rights to reap the fruits of their invention.