

TECHNOLOGY LAW

Section Newsletter, State Bar of Georgia

Fall 2003

ANNUAL MEETING OF THE TECHNOLOGY LAW SECTION -

New Officers for 2003 and the "Technical, Business and Legal Aspects of Wi-Fi"

On May 15, 2003, Alston & Bird LLP hosted the 2003 Annual Meeting of the Technology Law Section. At the meeting, the Section elected new officers for the 2003-2004 fiscal year. The Section's new officers are:

Chair: Ann K. Moceyunas

Vice Chair: Janine Anthony Bowen, McKenna Long & Aldridge, LLP

Secretary: Suellen Bergman, Powell Goldstein Frazer & Murphy, LLP

A highlight of the Annual Meeting was a presentation on the wireless networking technology popularly referred to as "Wi-Fi." John Sweeney, Director of Product Strategy and Development for Scientific-Atlanta, Inc., provided attendees with an overview of the technology of Wi-Fi. Mr. Sweeney's presentation was followed by a discussion of the legal implications of Wi-Fi, presented by Donald L. Hackney of Arnall Golden Gregory, LLP. (For additional information on the implications of Wi-Fi communications on an attorney's ethical obligations, please see Chuck Ross' article elsewhere in this issue.)

The Section congratulates its new officers. In addition, the Section extends its sincerest thanks to Messrs. Sweeney and Hackney for their informative commentary regarding Wi-Fi and to Alston & Bird LLP for hosting the 2003 Annual Meeting.

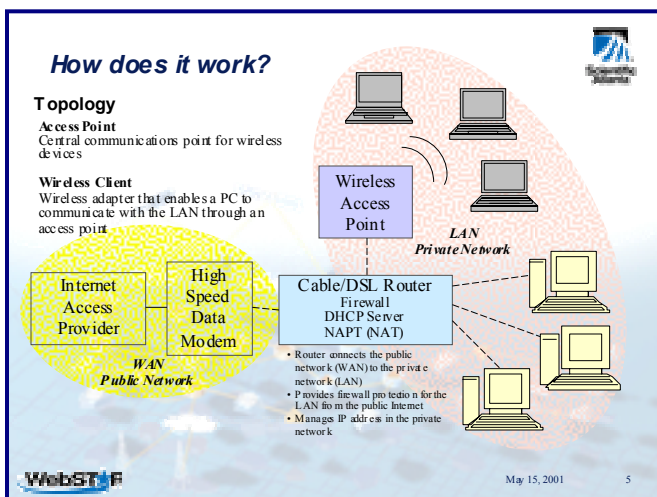
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Arnall Golden Gregory

WI-FI: FCC REGULATIONS

47 C.F.R. Part 15

- Use of spectrum is unlicensed
- Systems can be installed anywhere without regulatory approval
- Wi-Fi devices are regulated under 47 C.F.R., Part 15
- §15.5: Operators of devices using unauthorized spectrum do not have any vested or recognizable right to continued use of any given frequency by virtue of prior registration or certification of equipment

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Please contact:
Michael K. Stewart
Editor
(770) 399-9500
mstewart@fh2.com

EDITOR'S NOTES *By Michael K. Stewart*

Hello, and welcome to the Fall 2003 issue of the Technology Law Section Newsletter. This issue marks the first issue I have overseen in my tenure as Editor; I hope you find the information presented herein both informative and useful in your day-to-day practice.

Though this issue was not originally conceived as having a specific focus topic, it appears that, by a happy coincidence, this issue highlights various aspects of "IP" relevant to the technology practitioner. Of course, when it comes to technology law, "IP" can mean different things to different people.

To most of us, the first phrase that comes to mind when we hear the acronym "IP" is "intellectual property." This is undoubtedly because, as practitioners of technology law, we can never lose sight of the fundamental legal principles that govern our client's creation, use or exploitation of given technology; intellectual property is a body of law implicated by almost any technology transaction. In this issue, we are fortunate to have several contributors provide insights into various intellectual property considerations that may impact a given technology. Jason Bernstein provides a "how-to" for properly perfecting a security interest in intellectual property assets (a popular method for leveraging the value of technology assets), while Robert Mercer discusses the effect of bankruptcy on the licensee-licensor relationship. Scott Petty continues to keep the Section up-to-date on the latest developments in the intersection between technology and intellectual property law in his regular IP Update column; this time, Mr. Petty focuses on the royalty-free patent license policy recently announced by the World Wide Web Consortium (W3C).

However, because technology lawyers spend so much of their workday knee-deep in technology terminology, the acronym "IP" also brings to mind the term "Internet protocol," the venerable communications standard that continues to underpin many of the latest "whiz bang" technologies we encounter in our day-to-day practices. "Voice over Internet Protocol," or VoIP, is one such IP-based technology currently enjoying increased attention. In this issue, Charles Hudak explains the basics of VoIP technology and the legal environment surrounding this form of telephony.

Of course, as always, this issue is also filled with commendable contributions on a variety of technology-related topics beyond those outlined above. Thank you to all who have taken the time to contribute to this issue.

In parting, I'd also like to extend my sincerest thanks to Suellen Bergman, outgoing Editor of the Newsletter and Secretary of the Section. During her two years of exemplary service to the Section as Newsletter Editor, Suellen set a uniformly high standard for the quality for the Newsletter. In addition, Suellen provided me invaluable assistance and guidance in the preparation of this issue.

Michael K. Stewart is an Associate with Friend, Hudak & Harris, LLP, where he advises clients on technology, intellectual property and E-commerce-related issues. Mr. Stewart earned his J.D., magna cum laude, from the University of Georgia in 1998, and he earned a B.A. in History from Emory University in 1990. Mr. Stewart may be reached at (770) 399-9500 or via e-mail at mstewart@fh2.com.



TECHNOLOGY LAW SECTION

Ann K. Moceyunas
Section Chair
ann@moceyunas.com
404-252-0598

Janine Anthony Bowen
Section Vice Chair
McKenna, Long & Aldridge, LLP
jbowen@mckennalong.com
404-527-4000

Suellen W. Bergman
Section Secretary
Powell, Goldstein, Frazer & Murphy
sbergman@pgfm.com
404-572-6705

L. Kent Webb
Chair Emeritus
Womble Carlyle Sandridge & Rice, PLLC
lkwebb@wcsr.com
404-572-2707

Michael K. Stewart
Section Newsletter Editor
Friend, Hudak & Harris, LLP
mstewart@fh2.com
770-399-9500

Charles F. Hollis III
Webmaster
Hunton & Williams
chollis@hunton.com
404-888-4224

Johanna Merrill
Section Liaison
State Bar of Georgia
404-527-8774
Johanna@gabar.org

Technology Law is published four times per year (quarterly) by the Technology Law Section of the State Bar of Georgia, 104 Marietta Street, N.W., Atlanta, GA 30303. Opinions and conclusions expressed in articles herein are those of their authors and are not necessarily those of the Section. Copyright © 2003 Technology Law Section of the State Bar of Georgia. All rights reserved.

FROM THE CHAIR *By Ann K. Moceyunas*

It was another award-winning year for the Section! Under the leadership of Kent Webb, 2002-2003 Section Chair, the work of our Executive Committee was recognized with the State Bar of Georgia Section Achievement Award in May 2003. This award was received by two sections, Technology Law and Health Law, in recognition of their achievements during the prior year. Many thanks to Kent Webb for all of his contributions as Chair (he joins a great group of alumni!).

The Executive Committee of the Technology Law Section is the group of lawyers who make happen all the section activities, including the quarterly CLE meetings, the annual Technology Law Institute, Volunteer Days, the quarterly newsletter, and the Website www.computerbar.org. Without them, this section would not be the value it is for your section dues. Consider becoming an active member of the Section by either joining the Executive Committee or volunteering to help in one or more of the specific activities of the Section. For more information, contact me at ann@moceyunas.com, our Section Vice-Chair Janine Anthony Bowen jbowen@mckennalong.com, or our Section Secretary Suellen W. Bergman sbergman@pgfm.com.

Ann K. Moceyunas is an attorney in Atlanta, practicing in the area of technology. She most recently served as General Counsel for a payroll-processing and benefits technology company. She earned a J.D. in 1984 from University of Buffalo School of Law and a B.A. in 1981 from Binghamton University. She is a part-time Assistant Professor in the CS/IS Department at Kennesaw State University.



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DRAFTING TIPS TO HELP PROTECT LICENSEE RIGHTS IN THE EVENT OF A LICENSOR BANKRUPTCY¹

By Robert Mercer

Congress enacted section 365(n) of Title 11 of the United States Code, 11 U.S.C. §§ 101-1330 (as amended and supplemented, the “Bankruptcy Code”) in the Intellectual Property Licenses in Bankruptcy Act of 1988 (the “Act”) in the wake of *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985), to help protect the rights of licensees when licensors file bankruptcy. S. Rep. No. 100-505 at *2. In *Lubrizol*, the Fourth Circuit approved a debtor/licensor’s rejection² of a nonexclusive license of a metal coating technology. Such rejection not only stripped the licensee of the right to rely upon the debtor to perform under the license, it also stripped the licensee of the right to use the license. In response to the decision, Congress passed the Act because of the concern that, without its passage, parties which would formerly have accepted licenses would insist upon outright assignments, which Congress viewed as “wasteful and cumbersome.” *Id.* at *3-4.

Under section 365(n) of the Bankruptcy Code, licensees have two options when a debtor/licensor rejects their license. Consistent with their rights before the enactment of the Act, licensees may elect to have the license treated as terminated and assert a claim arising from the termination against the estate. 11 U.S.C. § 365(n)(1)(A). On the other hand, licensees may elect to retain their rights as such rights existed immediately before bankruptcy. 11 U.S.C. § 365(n)(1)(B). If licensees do not make an election to retain their rights, they may be deemed to have elected to have the licenses treated as terminated. *In re El Int’l*, 123 B.R. 64, 67 (Bankr. D. Idaho 1991).

When negotiating an intellectual property license on behalf of a licensee, it is important to consider the impact of the licensor filing bankruptcy. Central to that consideration is section 365(n) of the Bankruptcy Code.

¹ The author gratefully acknowledges the assistance of Penn Nicholson, Suellen Bergman, Everett, Stephanie, and Lisa Baker.

² Pursuant to section 365(a) of the Bankruptcy Code, with court approval, a debtor may reject a contract. Ordinarily, upon rejection, the contract is terminated and the non-debtor party has a claim for contract rejection damages.

The following are suggested considerations related either directly or indirectly to section 365(n):

1. **Define the “Intellectual Property.”** Under section 365(n) of the Bankruptcy Code, “intellectual property” includes patents, copyrights, trade secrets, and semi-conductor mask works, but does not include trademarks, trade names, or service marks. 11 U.S.C. § 101(35A); *Licensing by Paolo, Inc. v. Sinatra (In re Gucci)*, 126 F.3d 380, 394 (2d Cir. 1997) (includes patents, copyrights, trade secrets, and semi-conductor mask works but excludes trademarks); S. Rep. No. 100-505 at *5 (“The bill does not address the rejection of executory trademark, trade name or service mark licenses by debtor-licensors.”). To help resolve doubt regarding whether the licenses involve “intellectual property,” place a provision in the agreement that the licenses involve “intellectual property” within the meaning of section 101(35A) of the Bankruptcy Code and, to the extent possible, characterize the licenses in the agreement to fit the definition of “intellectual property” contained in section 101(35A).
2. **Obtain a Perfected Security Interest.** The licensee should try to obtain a perfected³ security interest in the license with an after-acquired property clause. In addition to improving the licensee’s chances of obtaining payment on its claim, a perfected security interest will give the licensee significant leverage. For instance, the licensee may request stay relief to foreclose on the license if its perfected interest in the license is not adequately protected. 11 U.S.C. § 362(d)(1). Given that section 365(n) of the Bankruptcy Code does not protect trademarks, trade names, or service marks, as discussed above, when representing a trademark, trade name, or service mark licensee, obtaining a perfected security interest is particularly important.⁴ [For more on perfecting a security interest in intellectual property, see Jason Bernstein’s article in this issue – ED.]

³ If the security interest is not properly perfected, it will be subject to avoidance by the debtor. 11 U.S.C. § 544(a). Although a discussion of perfecting security interests in the various types of intellectual property is beyond the scope of this article, it bears noting that most prudent counsel perfect such interests under the UCC and the appropriate federal filing system (*e.g.*, Patent and Trademark Office).

⁴ This article assumes that the licensee cannot obtain an outright assignment of the license.

3. **Include a Liquidated Damages Provision.** To the extent that the licensee elects to assert a claim against the estate rather than retaining its rights under the license, the licensee may have to litigate with the debtor to establish the amount of the licensee's claim for the licensor's termination of the license. Unlike the debtor, which has chosen the jurisdiction and which already has counsel lined up, the licensee may be forced to hire an attorney in a distant jurisdiction. Assuming that the licensee does not have a secured claim, the distribution on the claim will probably be small. Therefore, even though their enforceability is not free from doubt,⁵ to the extent that litigation can be streamlined through liquidated damages, it would often be in the interest of the licensee.
4. **Minimize "Royalty Payments."** If the licensee elects to retain its rights under the license agreement after the debtor/licensor rejects the license, the licensee must make royalty payments to the licensor. 11 U.S.C. § 365(n)(2)(B). To the extent possible, it is helpful to allocate the amount the licensee is paying for the debtor/licensor's specific performance (*e.g.*, training and maintenance) as well as for licenses which are not considered "intellectual property" for purposes of section 365(n) of the Bankruptcy Code (*e.g.*, trademarks, trade names, or service marks). The reason such allocation is important is that, even if the licensee elects to retain its rights under the license, the debtor will not have to specifically perform and will not have to allow the use of licenses which are not "intellectual property." Indeed, it may be helpful to set out such items in a separate agreement.
5. **Maintain the Right of Recoupment.** When a licensee elects to retain its rights under a rejected license, it is deemed to waive its set off rights. 11 U.S.C. § 365(n)(2)(c)(i). There is no mention, however, of recoupment.⁶ The right of recoupment is significant because it could reduce the licensee's exposure for royalty payments on a dollar-for-dollar

basis. The license agreement should expressly reserve the licensee's right to recoup its claims arising from the licensor's breach against royalty payments. In addition, the license agreement should contain detailed factual recitals which would support the argument that the royalty payment and the licensee's claims arise out the same transaction and occurrence, which is the test for whether recoupment applies.

6. **Don't forget the Escrow Agreement.** When drafting an escrow agreement for a source code, include a provision that the escrow agreement is an "agreement supplementary" to the license agreement within the meaning of section 365(n)(1) of the Bankruptcy Code. This should help ensure that the escrow agreement is enforceable. Further, there should be two agreements: one between the licensor and the escrow agent and the other between the licensee and the escrow agent. This should help ensure that the licensor's bankruptcy does not impede the effectiveness of the agreement. Last, because the licensee is only entitled to the licensed material as of the petition date (it is not entitled to postpetition improvements), the licensor should be required to update the escrowed material on a regular basis.

Mr. Mercer practices bankruptcy law at the law firm of Powell, Goldstein, Frazer & Murphy, LLP. He graduated from the University of Georgia (B.A. 1993) and earned his law degree from Mercer University (J.D. 1996). He may be reached at (404) 572-6976 or by e-mail at rmerc@pgfm.com.



⁵ Compare *In re Independent American Real Estate, Inc.*, 146 B.R. 546, n.46 (Bankr. N.D. Tex. 1992) (holding liquidated damage provision in rejected contract enforceable and discussing contrary authority) with *El Int'l*, 123 B.R. at 68 (liquidated damage provision in rejected contract unenforceable); *In re TransAmerican Natural Gas Corp.*, 79 B.R. 663, 667-68 (Bankr. S.D. Tex. 1987) (same).

⁶ Set off and recoupment are related concepts involving adjustment of claims. For instance, if A holds a claim against B and if B holds a claim against A, either set off or recoupment may apply. The important distinction in this context is that for recoupment to apply, A's claim against B and B's claim against must arise from the same transaction and occurrence.

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For more information or to sign up, contact Ann Moceyunas, Volunteer Coordinator at ann@moceyunas.com.



RECORDING SECURITY INTERESTS IN INTELLECTUAL PROPERTY *By Jason A. Bernstein*

Your client has just taken a security interest in a company's assets, which include patents, trademarks and/or copyrights. Obviously, you need to record this security interest to protect your client, but what can you record and where? The following chart summarizes suggestions for accomplishing this.

METHOD AND LOCATION OF RECORDATION			
	FEDERAL	STATE UCC-1	REGISTER IT?
PATENTS	✓	✓	
TRADEMARKS-U.S. REGISTRATIONS OR APPLICATIONS <i>(see caution below)</i>	✓ * (USPTO)	✓ *	
TRADEMARKS-COMMON LAW (UNREGISTERED)		✓	✓
COPYRIGHTS-REGISTERED	✓ (Copyright Office)		
COPYRIGHTS- UNREGISTERED		✓	✓

*I recommend both federal and UCC-1 filings.

After you record the security interest in an unregistered copyright, it is a good idea to register the copyright with the U.S. Copyright Office. You will not be able to sue an infringer (exclusively federal jurisdiction) unless you have the registration certificate. Early registration (prior to or within 3 months of first publication or distribution) may entitle the owner to statutory damages and attorneys fees. Otherwise, only actual damages may be recoverable.

If your client takes a security interest in a U.S. trademark application, but no commercial use of the trademark has yet begun, be aware that the trademark law prohibits assignment of "intent-to-use" trademark applications until the proper filing has been done evidencing use of the mark. The exception to this rule is if an assignment of the mark is accompanied by an assignment of that part of the business to which the mark pertains (15 U.S.C. § 1060(a)). Be careful of this exception; the violation of this may result in the abandonment of the trademark application and possibly loss of trademark rights. Therefore, make sure you look at what assets are part of the security interest.

For trademarks, the official Notice of Recordation of a security interest or assignment can be expedited usually within 48 hours of filing by fax. This is compared to the normal 3 months if done by regular mail and processing. It is preferable to record a trademark assignment within 3 months of execution of the assignment. If there are international trademark registrations, consider the proper filings for in each country.

Jason A. Bernstein is a Partner with Powell Goldstein Frazer & Murphy, LLP, where he practices in patent, trademark, software, and copyright law, and handles related business matters. Before joining Powell Goldstein, Mr. Bernstein was president of his own law firm for twelve years, and prior to that, worked as the director of multifocal technology at Ciba Vision Corporation, as patent and general counsel for Murex Corporation; and as a patent attorney for the American Hospital Supply Corporation. Mr. Bernstein received his J.D. from the University of Miami in 1983 and a B.S. from Vanderbilt University in 1980.



LEGISLATIVE UPDATE – SUMMARY OF TECHNOLOGY-RELATED LEGISLATION ENACTED DURING THE 2003 SESSION OF THE GEORGIA GENERAL ASSEMBLY

By Ronald V. Jackson

The 2003 Session of the Georgia General Assembly was certainly record-setting. The session, which convened on January 13th and adjourned on April 25th, had considerable staying power and was the longest session in 130 years. Also, the beginning of the 2003 Session marked the swearing-in of the first Republican Governor in 130 years, the first-ever Republican majority in the Senate, and the election of a new House Speaker for the first time since 1974. Amidst these notable changes, the General Assembly addressed several contentious issues such as amending Georgia's predatory lending law, changing the state flag, and increasing the "sin tax" on tobacco products in connection with the creation of a balanced state budget. Needless to say, technology-related bills did not top the agenda of either house during 2003. Nevertheless, the 2003 Session did result in the enactment of a few laws related to the technology and telecommunications industries.

The economy and its effect on the telecommunications and technology sectors manifested itself in House Bill 121, which amended the General Appropriations Act for state fiscal year 2003, and House Bill 122, the General Appropriations Act for state fiscal year 2004. In order to balance the state budget as required by the Georgia Constitution,¹ budgeted state expenditures, including amounts allocated for telecommunications and technology spending, were reduced. HB 121 and HB 122, for instance, respectively provide for \$474,463 and \$712,144 "austerity adjustments" (*i.e.*, reductions) in amounts to be provided to the Georgia Technology Authority.

Notwithstanding the foregoing, it appears that the General Assembly gave back at least a portion of those reductions. Under the Georgia Distance Learning and Telemedicine Act of 1992, the General Assembly authorized the use of a Universal Service Fund ("USF") to support the implementation of a statewide distance learning and telemedicine network and to provide funding to medical and educational

institutions.² Under this act, the Georgia Technology Authority ("GTA") is the sole administrator of the USF and is authorized to disburse USF awards in accordance with the directions of the Distance Learning and Telemedicine Network Governing Board. HB 456 provides that during the 3-year period beginning July 1, 2003, USF funds do not have to be used exclusively for distance learning and telemedicine purposes but may also be used for any lawful purpose "that supports enterprise information technology needs." While HB 456 thus appears to authorize the use of USF funds towards a wide variety of enterprise information technology efforts in Georgia, it is not clear how much money actually remains in the USF.³ Moreover, appropriations under HB 121 and HB 122 authorize the use of "Universal Service funds for GTA to upgrade [the] PeopleSoft Human Resources application to the version supported by PeopleSoft." As a result, it appears that HB 456 may actually have a much narrower effect on the development of enterprise information technology in Georgia.

In a nod to the once mysterious "Project Ginger" and the subsequently unveiled Segway™ "scooter," Senate Bill 37 provides that "electric personal assistive mobility devices" (or "EPAMDs") -- self-balancing, two non-tandem wheeled devices designed to transport only one person⁴ -- may, in certain instances, be operated on state and local sidewalks and roadways. Interestingly, SB 37 prohibits the transport of hazardous materials on such devices. SB 37 also provides that a person convicted of operating his EPAMD while under the influence of alcohol or

²O.C.G.A. § 50-5-190 *et seq.*

³ Under O.C.G.A. § 50-5-200(b), local exchange companies were previously permitted to obtain USF disbursements to offset expenses incurred while implementing certain toll-free calling areas throughout the State of Georgia.

⁴ ". . . and having an electric propulsion system with average power of 750 watts (1 horsepower) and a maximum speed of less than 20 miles per hour . . . when powered solely by such propulsion system *and ridden by an operator who weighs 170 pounds.*" *Emphasis supplied.*

¹ Ga. Const. 1983, Art. III, Sec. IX, Para. IV.

any drug “to a degree which renders him or her a hazard” shall be guilty of a misdemeanor and a fine not to exceed \$500.

HB 462 amends provisions of the criminal code, including the Computer Pornography and Child Exploitation Prevention Act of 1999⁵, by broadening the activities constituting the sexual exploitation of children and expanding the definition of computer pornography. HB 462 amends O.C.G.A. § 16-12-100 to provide that it is unlawful for any person to knowingly create, reproduce, publish, promote, sell, exhibit, or possess with the intent to sell or distribute not only any visual medium which depicts a minor engaged in any sexually explicit conduct, but now also any visual medium depicting “a portion of a minor’s body” engaged in such conduct. HB 462 also provides that the possession or control of such material is unlawful. Under HB 462, the offense of computer pornography now includes, among other things, the intentional or willful compilation, transmission, and dissemination of any materials, by means of computer, for the purpose of offering or soliciting sexual conduct of or with an “identifiable child,” or the visual depiction of such conduct. HB 462 defines an “identifiable child” as a person that was a child at the time such visual depiction was created or whose image as a child was used in the creation of the visual depiction. A “visual depiction” includes not only any visual image, but also any undeveloped film or data stored on a computer disk or by other electronic means which is capable of conversion into a visual image or which has been modified to show an identifiable child engaged in sexually explicit conduct. Notably, owners and operators of Internet services and online services and bulletin boards are prohibited from willfully permitting a subscriber to utilize their services to commit computer pornography, but are not to be held liable for any action taken in good faith when providing such services.

To protect customers’ personal information and to limit identity theft, the General Assembly previously passed legislation which generally prohibits businesses from discarding records containing a customer’s personally identifiable data (*i.e.*, customer records) without first taking reasonable steps to ensure that no

unauthorized person obtains access to a customer’s sensitive information.⁶ Thus, a business that wrongfully discards customer records may be fined \$500 for each wrongfully disposed record up to a total fine not to exceed \$10,000. HB 213 clarifies that the Governor’s Office of Consumer Affairs may only impose such penalties after a notice and hearing. HB 213 also adds additional protections intended to combat identity theft. First, HB 213 restricts the account information that may be printed on a customer’s receipt of a payment card transaction. Specifically, HB 213 provides that a business may not print more than the last 5 digits of a customer’s account number, or the account expiration date on a receipt given to a customer. Receipts printed using electronic payment card processing devices that were first used on or after July 1, 2004, must comply with these prohibitions effective July 1, 2004. Receipts printed using electronic payment card processing devices that were first used before July 1, 2004 must be in compliance by July 1, 2006. Thus, business owners may need to upgrade software or hardware used to process customers’ payment card transactions. Violators will be subject to a \$250 penalty for the first violation and up to \$1,000 for a second or subsequent violation. Notably, these prohibitions only apply to payment card transactions that are electronically processed. HB 213 expressly exempts transactions in which the customer’s account information is processed solely by handwriting or by making an impression or copy of the payment card. Finally, HB 213 prohibits the use of scanning and re-encoding devices to read or capture payment card account information with the intent to defraud the cardholder, the issuer of the payment card, or a merchant. Each violation is a separate offense punishable by 1 to 3 years imprisonment or a fine not to exceed \$10,000, or both. Any person found guilty may also be ordered to make restitution to any consumer or business victim of the fraud and the court is authorized to issue any order necessary to correct any public record containing false information as a result of the violation.

HB 194 amends the Uniform Athlete Agents Act⁷ to provide that its provisions regarding the formation and enforceability of contracts using electronic records or signatures conform to the requirements of

⁵ See O.C.G.A. § 16-12-100.2.

⁶ See O.C.G.A. § 10-15-1 *et seq.*

⁷ O.C.G.A. § 43-4A-1 *et seq.*

Section 102 of the federal Electronic Signatures in Global and National Commerce Act (the “E-Sign Act”) and thus are exempt from preemption by the E-Sign Act. HB 194 also amends Georgia law regulating the operations of ticket brokers⁸ and has implications for individuals or businesses selling tickets over the Internet. First, HB 194 eliminates the requirement that a person engaged in the business of a ticket broker must maintain a permanent place of business in the state. Instead, HB clarifies that a “ticket broker” includes any person involved in the business of reselling tickets to entertainment events held within Georgia for a premium in excess of face value, or any person that maintains a permanent place of business in Georgia and is involved in the business of reselling, at a premium, tickets to entertainment events held inside or outside Georgia. Notably, HB 194 also provides that an “original purchaser”-- a person who buys one or more tickets with the intent of using the tickets for his or his invitees use – may, for purposes of any criminal prosecution or civil action, be rebuttably presumed to be a ticket broker if the original purchaser resells more than 6 tickets to the same event or resells tickets to an event for more than 105 percent of their face value. Ticket brokers are required to apply to the Georgia Athletic and Entertainment Commission for a ticket broker’s license and HB 194 increases the annual license fee from \$400 to \$500. More importantly, HB 194 authorizes municipalities and counties to enact ordinances requiring individuals offering tickets for resale in such municipality or county to, in certain instances, purchase a permit for a fee not to exceed \$150. Finally, in addition to requiring ticket brokers to provide certain price, cancellation and refund disclosures to customers, HB 194 requires ticket brokers offering tickets for resale through any print, broadcast, or Internet advertisement to also list their ticket broker license number. Thus, individuals or businesses seeking to resell tickets over the Internet may possibly be required to comply with both state and local ticket broker regulations.

Since January 1, 1999, Georgia law has, with certain exceptions, prohibited the placement of unsolicited commercial telephone solicitations to any residential telephone number that has been placed on the so-

called “Georgia No-Call List” at the subscriber’s request.⁹ Whether Georgia’s no call law has noticeably reduced the number of unsolicited telemarketing calls placed to Georgia homes is debatable, but the extent to which many people increasingly rely on wireless telephone service to supplement (or even replace) their wireline telephone is increasingly evident. In response, SB 272 amends Georgia’s no call law to also permit wireless telephone subscribers to submit their telephone numbers for inclusion on the to the Georgia Public Service Commission managed No-Call List. SB 272 also provides that for each instance in which a person is found to have knowingly compiled or disseminated information from the no-call database for any illegitimate purpose shall be guilty of a misdemeanor and subject to a fine of up to \$1,000.

Finally, HB 279 relaxes Georgia’s bingo regulatory regime by permitting bingo licensees to lease bingo equipment from non-licensees, and also brings bingo into the electronic age by allowing bingo games to be played using electronic or computer devices. Is Wi-Fi enabled bingo just around the corner?

In the next issue, this column will take a look at technology-related bills that were introduced but not enacted during the 2003 Session of the General Assembly and thus may, and in some instances automatically must, be considered during the 2004 Session.

Ronald V. Jackson is an Associate with Friend, Hudak & Harris, LLP, where his practice includes advising clients on matters involving federal, state, and local telecommunications law, regulation and advocacy. Mr. Jackson earned his J.D. from the Emory University School of Law in 1996, and he earned a B.A. in History from Millsaps College in 1992. Mr. Jackson may be reached at (770) 399-9500 or via e-mail at rjackson@fh2.com.



⁸ See O.C.G.A. § 43-4B-1 *et seq.*

⁹ O.C.G.A. § 46-5-27.

“W3C ADOPTS ROYALTY-FREE PATENT POLICY FOR INTERNET TECHNOLOGY STANDARDS”

By W. Scott Petty

The World Wide Web Consortium (W3C) recently announced a royalty-free patent license policy governing the creation of industry standards for Internet technologies. (See W3C Patent Policy, May 20, 2003, www.w3c.org/Consortium/Patent-Policy-20030520.html.) The W3C patent policy requires all members who participate in developing a W3C Recommendation to agree to license their relevant, essential patents for the endorsed technology on a royalty-free basis. While the W3C has adopted a patent policy that enables industry standards for Internet technologies to be implemented on a royalty-free basis, the drafters of this policy also added provisions recognizing that unique situations may arise where a W3C Recommendation might include patented technologies which are available only on a license fee basis.

In the months leading up to the W3C's controversial adoption of a royalty-free patent policy, members of the open-source software communities favored a proposal that provided for an interoperable Web infrastructure unencumbered by patent royalty requirements. In contrast, some large companies supported a proposed patent policy allowing patent holders to make an endorsed technology available to all parties on a “Reasonable And Non-Discriminatory” (RAND) royalty basis. The W3C's adoption of a royalty-free patent policy in May 2003 represents a compromise to the controversial issue of handling patents in the process of creating Web standards, as the policy attempts to reconcile the interests of patent owners with the demands of open source software advocates.

The W3C's patent policy establishes: (1) the definition of a W3C royalty-free license; (2) licensing goals and objectives for W3C Recommendations for an “industry” standard; (3) licensing requirements that working group participants must abide by as a condition to participating in the creation of a W3C Recommendation; (4) patent disclosure rules; and (5) the definition of “essential [patent] claims.” Parties who participate in the development of a W3C Recommendation must agree to license their essential patent claims, *i.e.*, patents which block interoperability of a technology standard, on a royalty-free basis and to disclose all of their patents which would be essential to implement the W3C Recommendation. The disclosure rules require a patent holder to make upfront, timely disclosures of relevant patents and pending patent applications on an ongoing basis during the creation of a technology standard. This disclosure requirement is intended to address past situations where a patent holder would successfully urge a working group to adopt a certain standard and then belatedly reveal that their proprietary technology was an essential claim for the implementation of the standard.

While the W3C patent policy embraces a royalty-free license requirement and a patent disclosure obligation, the policy also allows participants in a working group, under certain circumstances, to exclude specific patent claims from the royalty-free requirement for the creation of a W3C Recommendation. To seek this patent claim exclusion, however, a patent holder must specifically identify the exclusion shortly after publication of the first public working draft of a W3C Recommendation. This early disclosure requirement is intended to reduce the

likelihood that a Working Group would identify a “blocking” patent only after the group had completed substantial work toward the adoption of a technology as an endorsed standard. Working groups have the flexibility of considering the endorsement of royalty-bearing license terms in their Recommendations to cover unique situations that might arise where circumstances make it impossible or unwise for a desired technology to be included in a Recommendation on a royalty-free basis.

When the W3C becomes aware that a technology proposed by a working group for inclusion in an Internet standard is not available on a royalty-free basis, the consortium will convene a “Patent Advisory Group” (PAG) to investigate the issue. The PAG is empowered to recommend a legal analysis of the patent or to instruct the working group to attempt to design around the patent or to remove the patented feature from the technology standard under consideration. As a last resort, the PAG may instruct the working group to stop all work in the area related to the proprietary technology and to transfer the proposed technology standard to another standards organization. Should these avenues fail to reach a result consistent with W3C licensing objectives, the PAG may recommend to the W3C that the technology be included in a standard on a non-royalty-free basis. In order for this recommendation to be adopted, however, the licensing terms of the proprietary technology must be publicly disclosed for review by the W3C Director, the W3C membership, and the technology community.

As the W3C numbers nearly 500 members, including major corporations such as AOL Time Warner, Apple Computer, AT&T, Hewlett-Packard, Motorola, Nokia, and Oracle, the W3C’s decision to adopt a royalty-free patent policy may induce other consortia developing technical standards to embrace a royalty-free patent license ideology. One such organization, IDEAlliance, has recently announced plans to adopt the W3C’s patent policy for its development groups. However, the royalty-free patent license approach implemented by the W3C may cause certain large software industry players to encourage the creation of industry standards by other, more patent friendly standards bodies. For example, some patent holders currently elect to propose their Web services specifications to the Organization for the Advancement of Structured Information Standards (OASIS). In the absence of extending an incentive of patent royalties, W3C working groups may be forced to choose from a smaller pool of available technologies because patent owners may decline to participate in the creation of a W3C-endorsed standard. While the W3C royalty-free patent policy represents a decisive victory for open source software advocates in the ongoing debate with software patent holders, it is still far from certain what patent licensing position will carry the day in the long run.

* Nicholas A. Pilgrim, a summer associate with King & Spalding LLP and a law student at University of Chicago, contributed to the research and preparation of this article. His contributions are gratefully acknowledged. *

W. Scott Petty, a Patent Attorney with King & Spalding LLP, focuses on intellectual property issues in the fields of computer software, communications, and financial services. Scott can be contacted by telephone at (404) 572-2888 or via electronic mail at spetty@kslaw.com.



DO VCS SQUEEZE OUT ENTREPRENEURS?

By Dennis J. Gerschick, CPA, Attorney, CFA

Introduction

Many start-ups and early-stage companies find it difficult, if not impossible, to raise additional capital in this environment. There are many reasons for this, including the dot com bubble bursting, September 11th, the war in Iraq, the economic malaise, etc. Many venture capitalists (VCs) have either stopped or cut back on funding start-ups or very early stage companies. Many VCs are focusing on their existing portfolio companies and not on new investments. Others are insisting on a company having recurring revenues and are taking much more time in making their investment decisions. For those companies that can attract venture capital, the capital is often invested in a “down round” which reduces the existing shareholders’ ownership percentage and the value of their interest. Just as many investors overreacted during the .com craze, many investors are also overreacting on the downside in this environment. During the dot com craze, market conditions favored the entrepreneur. Many raised millions of dollars using extremely high valuations, which means that the ownership percentage of the investors was smaller. If the investors didn’t like the proposed valuation, they had the option to walk away. Too many investors during that period let their greed get the better of them and many have since suffered the consequences. The key point is that the current market conditions set the terms – both in good and bad markets for entrepreneurs and investors alike.

Dealing with a new financing round in this environment raises many questions, including: Do venture capitalists take advantage of entrepreneurs? Do they cram down unfair provisions on the entrepreneurs? Do they impose onerous but fair provisions? What is the difference between “tough but fair” provisions and “unfair” provisions? Where is the line drawn? Is the VC acting as a “Trojan horse” coming in with more money hoping to then take over the company and “kick” the entrepreneur out or reduce his interest and other early stage investors to a nominal amount?

Numerous Interrelated Issues

There are many interrelated issues that should be addressed and considered carefully. Many founders of companies view the company as “their company.” Is this really fair or realistic? I tell entrepreneurs, if they are the sole shareholder, officer, director, employee and they contribute all of the necessary capital, then the company is theirs and they can do whatever they want with it. However, once a founder starts involving other individuals in the company or takes money from outside investors, then the company is no longer theirs. Instead, the company is a shared enterprise of which the costs and benefits are to be divided, as agreed upon. I analogize companies to a pie and the real question is to consider what each party contributes to the pie and how big a slice of the pie they should receive. Not everyone’s contribution is the same or of equal value. Further, the parties should consider whether the founder is entitled to the biggest slice or not.

A fact that many founders have difficulty accepting is that their contribution to the company may not be all that significant or valuable. Forming a corporation or limited liability company is relatively easy and can be done quickly and without much expense. In short, forming a business entity is not, by itself, a value creating exercise. The real focus should be on who is creating the value and who can add to the value of the company and rewarding those individuals appropriately. In many cases, the founder has the idea for a new business and the “vision” of what it can be. However, many founders are their own worst enemy and are often an obstacle or impediment to the company’s success. Ideas are a “dime a dozen” and in many cases are not that valuable. Real value creation is the result of taking an idea and implementing it and then operating an efficient business. Building a company is extremely difficult and is often not an exciting or glamorous process. It involves a lot of hard work, focusing on numerous mundane details that are not exciting to talk about at cocktail parties. Many founders simply do not like to handle the day-to-day boring details

of growing and operating a business, but rather prefer to talk about “strategy.” Individuals who can take a business from start-up to a Fortune 500 corporation are few and far between. Bill Gates and Michael Dell are exceptions to the rule. There are many reasons for this but the key factor is that the skills needed to manage a start-up or early-stage companies vary substantially from the skills needed to manage a Fortune 500 corporation. Most individuals do not have the skills to do both and many may not have the inclination.

Most VCs acknowledge that the management team is very important to the success of the company. VCs want a management team that is competent, hard-working, enthusiastic and motivated. A related question is: what is needed to keep them motivated? The answer often includes a meaningful equity interest or stock options. When is an equity interest “meaningful”? Again, there is no single answer; many factors should be considered, including what is the likely value of the interest upon a liquidation event? A 4% interest in a \$500 million business might be meaningful while a 10% in a \$20 million business may not be to that particular entrepreneur. The key question may be: what percentage amount should the equity interest be in order to keep the management team focused on increasing the value of the company, rather than just going through the motions to get a paycheck?

No one likes a “down round.” Venture capitalists do not like down rounds because they generally report this development to their limited partners. It has two effects: one it suggests that the VC “overpaid” for the fund’s initial investment. Two, it lowers the value of the investment reported to the fund’s limited partners. However, in most cases, a down round is better than no round because it allows the company to continue and offers some hope for improvement.

An important issue is whether VCs take advantage of the situation and offer to contribute more money on terms that are “unfair” to the other shareholders who do not participate in funding the down round. I will not argue that no VC has ever taken advantage of the situation. However, I prefer to believe that most VCs do not and most

try to help increase the company’s value for the benefit of all shareholders. Remember a down round may be “one step back, two steps forward” so every shareholder will benefit in the long term.

Money is like the fuel that powers the rocket ship. Assume that the rocket is running out of fuel and is not expected to reach its destination. What happens then? Consider who is in charge of operating the rocket. Do they have a plan for this contingency? Typically, the founder is the CEO and often owns the largest percentage of the company’s stock and he is in control. Often, in early stage companies, the founder-CEO has the most to gain if the company succeeds. The founder-CEO is forced to seek additional capital, and he usually goes back to the original investors. This makes sense because they already have done their due diligence before making their original investment, they know the company and its management team. If the VC is viewed as a partner of a shared enterprise, what is its obligation at that point? If they are not legally obligated to contribute more money, are their morally obligated? If so, on what terms? Who decides what the terms of the new investment should be? At that point, the investors have two options. First, they can tell the founder that they have lost confidence in him because the company did not make as much progress as they expected – whether their expectations are realistic or not is another issue. Also, whether the company came up short because of identifiable management mistakes or for reasons beyond their control (9/11) is yet another issue. Another question may be: did the company stumble because it was following the VC’s suggestions or mandates or because management ignored the VC’s suggestions? In any event, the investors may elect to not invest anymore money. Alternatively, the investors may elect to contribute more money but frequently the terms of the additional investment will be much more beneficial to the investors and onerous to the founder. Important questions include: how much more onerous? Can they be onerous but fair? When do the onerous terms become “unfair”? What are the criteria for determining when the terms offered by existing investors to invest more capital are “unfair”? Are

“unfair terms” like pornography – will we recognize them when we see them?

To minimize the odds of realizing adverse consequences of a down round, founders can do several things to help themselves. **First**, I urge founders to consider carefully who they are accepting money from. Many entrepreneurs treat money as a commodity and think only about the amount invested. Founders/entrepreneurs would be well-advised to consider other factors about their potential co-shareholder. What is the reputation of the investor? Are they known for treating entrepreneurs fairly or badly? What other value can the investor add besides money? Do they have valuable contacts or expertise? How do the investors react when the company does not meet its projections? What is the investor’s reputation in handling a down round? Is the investor litigious or do they act in a reasonable, civil manner? There are numerous other factors to consider but the key point is that it is foolish to think that “all money is green” and it doesn’t matter where it comes from. Entrepreneurs would be well advised to get to know their VC-partner before accepting their money. VCs often do extensive due diligence on the company and its management team. The management team should do some due diligence on potential investors.

Second, the VC-entrepreneur relationship is like every other relationship. The success of it depends upon clear and regular communication, commitment, a sense of fair play, give and take, mutual benefit and other factors. Rarely do one-sided relationships last for a long time. Just as married couples often date before getting married, VCs and entrepreneurs should get to know one another before the investment is closed. They should spend time talking with one another. Do they share a common vision for the company? Do they agree upon the business plan? Do they share common values? Can they work well together? Can they resolve differences in a civil, respectful manner?

Third, a common mistake that founders often make is to take the least amount of capital from outside investors that they believe they can get by with. Founders do this because they hate reducing their ownership percentage of the company. This is often a “penny wise but pound foolish” approach but it is

a common mistake that often haunts the founder. A frequent result of this approach is that the company runs out of capital without accomplishing all of the steps that the founder had anticipated when he accepted the capital from the outside investors. I urge entrepreneurs to increase the amount of capital they think they will need and to include some margin of safety; this is for everyone’s benefit. Founders should understand that raising capital takes a substantial amount of time and should anticipate the need for additional capital as early as possible and start pursuing it. Founders frequently hope that the business will improve and they won’t have to seek additional capital and often “sit on their hands” until it is too late.

There is another school of thought on this topic. Some believe that entrepreneurs should only accept the least amount of capital necessary. The thought is that less capital keeps the entrepreneurs “hungry” and “necessity is the mother of invention.” With excess cash in the bank, some may be tempted to waste money or get lazy. During the dot com craze, millions of dollars were spent foolishly, especially in advertising. There is no single right or wrong answer that is appropriate for every company. Entrepreneurs should do an honest self-assessment – how do they perform under pressure? How confident are they that they can get to the next milestone with the capital on hand? Will the market conditions for raising capital be the same or better at that time?

Fourth, if any investor proposes to invest additional money under very onerous terms that will substantially reduce the other shareholders’ ownership percentage, the other shareholders should ask whether they can co-invest, along with such investor, on the same terms and conditions. In many cases, however, this will not be a viable option for several reasons. Often, the existing shareholders, especially the founders and seed investors, are not willing to invest any more money in the company. Consequently, the founder should make every effort to seek capital from new investors who may offer more attractive terms.

Fifth, some people have suggested getting a formal valuation report or appraisal done in order to determine whether the terms proposed by an investor are reasonable or not. There are several problems with

this suggestion. One, is the cost of an appraisal and the amount of time that will be needed to get it done. Second, while some valuation experts may disagree, it is extremely difficult to accurately value an early-stage company. There are many reasons for this but one is that the value of the company comes from its expected future financial results. It is very difficult to accurately predict the future financial performance of an early-stage company, especially one that is involved with cutting edge technology or is creating new markets. Obviously, an early-stage company does not have a lot of history to evaluate and use as a basis for a prediction of the future. Further, no investor is obligated to accept the value suggested by any third party or "valuation expert." Value is subjective and is often like beauty – it is in the eye of the beholder. As a practical matter, the golden rule may apply – the one with the gold makes the rules. If the founder does not like it, he should seek capital from other sources.

Sixth, some have suggested that companies go into "hibernation" and start operating again when market conditions improve. This often is not feasible for several reasons. One, it may require laying employees off who may be forced to get a new position elsewhere. Such employees may not be willing to come back later when the company comes out of hibernation. Two, the effect on the company's reputation may not be good. Three, the business world waits for no company. While the company may wish to go into hibernation because it is hard to raise capital in this environment, competitors will go forward and continue to make as much progress as they can. When the company does come out of hibernation, it may find that the competition has left it in the dust.

Seventh, I often tell founders that there are many ways to "skin a cat." Creative deal makers can often find a way to bridge the gap and address each parties' concerns. For example, the investors may propose investing additional money on very onerous terms, which would significantly reduce the founder's ownership percentage. However, the founder may be able to negotiate additional stock options or an option to buy stock from investors at attractive prices if the company reaches certain agreed upon targets. The key is to deal with people who are known for their integrity, fairness, and reasonableness and avoid those who are litigious.

The "Flip Side"

In most disputes, rarely is one side completely blameless while the other side is solely responsible for the problem. Instead, most often, each side is partially to blame. The fact is greed often controls people's decisions – this is true for both entrepreneurs and investors. Entrepreneurs often complain about being "squeezed" or having their ownership percentage reduced drastically in a down round. What about the "flip side"? During the dot com craze, many entrepreneurs were able to raise large sums (often \$20 - \$30 million) at extremely high valuations. If entrepreneurs insisted on extremely high valuations, were they squeezing the investors or simply taking advantage of the market conditions prevailing at that time? I do not feel sorry for the VCs who invested during the dot com bubble who later lost their investment; many let their greed get the better of them. The VCs at that time had the choice of accepting the inflated valuations or walking away. Entrepreneurs certainly didn't voice any concern about getting squeezed during the dot com craze because at that time market conditions favored the entrepreneur. Now that the market conditions have changed to favor the investors, some entrepreneurs complain.

Entrepreneurs should also consider the alternative. What would happen if the VC did not invest any additional money? In most cases, the business would fail and have no value. In most cases, entrepreneurs are under no obligation to accept more money from any investor. If they do not like the proposed terms, they can reject it and find their own solution. I urge entrepreneurs to consider whether it is better to own a smaller slice of a growing pie or a larger slice of a decreasing pie? I also urge people to put egos aside and not to make emotional decisions. Instead, entrepreneurs need to deal realistically with the harsh reality of the current market condition and take some comfort in knowing that market conditions will improve at some point in the future and will favor them again.

Unusual Case?

I heard a story about an entrepreneur who raised capital from a group of venture capitalists. Under the terms of the investment, the VCs had the right to appoint a majority of the directors. I understand that later the VC-directors voted to raise additional capital (from themselves) and the terms of the new capital caused the founder's ownership percentage interest to be reduced to a negligible amount. He felt that the VCs squeezed him out. I don't have all of the details. I would be interested in knowing many facts including: how much money did the investors contribute in total? Over what period of time? How much progress did the company make? How close to its projections did the company come? What caused the company's problems? How much money did the founder contribute? How much was the founder paid as salary? Why did he agree to give the VCs control over the board? Before doing so, did the founder seek legal advice? If he did, what was the advice? Did the founder make suggestions to the VCs about the terms of the financing that were rejected?

Even though I don't have all the facts, I still want to make several points. First, VCs often serve as directors of their portfolio companies. However, they should act carefully and meet their fiduciary duty to protect the interests of all shareholders, not just their own interest. Second, VC/directors who propose to invest additional money in the company should abstain from voting on their own proposal. I don't know if that was done in this case or not. If it was, then independent directors approved the

proposed terms presumably because they thought it was in the company's best interests. Is something better than nothing? Third, most VC/directors are sensitive to the perception that they might be overreaching or taking advantage of the situation. Consequently, the prudent course of action is to encourage the company to seek capital from new investors on the best terms it can find. If the company cannot find any new investors, that is one indication of the market conditions. A good practice is to allow every shareholder to participate in any new round of financing and contribute their pro rata portion so they can maintain their ownership percentage. I understand that the company ultimately failed so the investors lost their money.

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Do you have a venture capital topic you'd like to see covered here, or a specific question you'd like to see answered? I welcome suggestions for new topics to be addressed in future columns, and will, from time to time, answer reader questions in this column. Please send any comments, suggestions or questions directly to me at dgerschick@aol.com.

Dennis Gerschick is an attorney, CPA and chartered financial analyst. Gerschick practiced law for 16 years before starting a VC fund; Gerschick is President of VenCap Advisory Group, Inc., which is the general partner of Vencap Opportunities Fund, L.P., a venture capital fund in Atlanta, Georgia. He can be reached at 770-420-8460 and at DGerschick@aol.com.

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NET ETHICS, PRIVACY AND INFORMATION SECURITY COMMITTEE

By W. Charles (Chuck) Ross

Wireless or “Wi-Fi” internet access is the new buzzword for today’s mobile savvy. Airports, bookstores, coffee shops and even McDonalds are now offering wireless internet access to their customers. While this has certainly made it easier for an attorney to keep up with the voluminous amount of e-mail to be read daily, it opens up a new ethical issue: is the client’s confidentiality being protected?

A few years ago, when e-mail communication with clients became as common as a telephone call, this Committee looked at the issue of client confidentiality in e-mail communications. The Committee, on behalf of the Technology Law (then Computer Law) Section, requested a Formal Advisory Opinion from the State Bar. Ultimately, a formal opinion was not issued, as the Bar reasoned that current State and Federal law covered this issue under wiretapping and eavesdropping statutes.

However, wireless adds a new wrinkle to this issue. An ever-increasing number of laptops and personal digital assistants are being sold with built-in wireless capability. The technology, which allows wireless connections to access points or “hotspots,” is open to abuse on a larger scale than with traditional wired communications. Many articles have been written on the issue of wi-fi security and lack thereof. At some point, a client’s e-mail is going to be intercepted, and that is why there must be some formal guidance to protect an attorney faced with this scenario. Bearing this in mind, this committee has begun researching this issue with the possibility of a new Request for a Formal Advisory Opinion from the State Bar.

We are currently in the preliminary phase of this research and approval from the Section will be required before such a request can be made. Look for more on this in upcoming issues. If anyone is interested in this issue please feel free to e-mail me at chuck.ross@gwinnettcounty.org.



As always, participation in this committee is welcome to all members of the State Bar. If you are interested in joining the Committee or would like to participate in any of these topics please call me at 770-822-8400 or e-mail me at chuck.ross@gwinnettcounty.org.

GEORGIA LAW UPDATE

By *Gerardo M. Balboni II, Balboni Law Group, LLC*



Todd R. Bair, Bair Law Group, LLC

The Second quarter was relatively quiet for Georgia courts. Only two cases had relevance to counsel to technology companies.

Brogdon v. Pro Futures Bridge Capital Fund, L.P., 580 S.E.2d 303 (Ga. App. 2003)

This case involves a financing transaction that went bad. In *Brogdon v. Pro Futures Bridge Capital Fund, L.P.*, 580 S.E.2d 303 (Ga. App. 2003) the Georgia Court of Appeals considered the enforceability of a “put” agreement between Brogdon, the CEO of NewCare Health Corporation (“NewCare”), and Pro Futures Bridge Capital Fund, L.P. (the “Fund”). The Fund purchased \$2 Million of NewCare securities pursuant to a subscription agreement. The subscription agreement provided that the NewCare securities were restricted securities and could not be resold for one year and then only in accordance with Rule 144 promulgated pursuant to the Securities Act of 1933. In connection with the offer and sale of securities, Brogdon, the CEO of NewCare, entered into a put agreement which required Brogdon to repurchase the NewCare securities purchased by the Fund upon demand of the Fund for a period of one year from the closing. The Fund made a demand on Brogdon under the put agreement and Brogdon refused to purchase the NewCare securities held by the Fund.

Brogdon argued that the subscription agreement and the put agreement should be integrated and be construed as a single contract. Brogdon claimed that the provisions in the subscription agreement had to be performed by the Fund before Brogdon had to perform the obligations under the put agreement. Thus, Brogdon claimed that he was not required to perform under the put agreement until the Fund had held the NewCare securities for a full year, as required by the terms of the subscription agreement. The Court disagreed, because such a construction would render the put agreement “illusory” and deprive the Fund of the benefit of its bargain in negotiating for the put agreement. The court noted that the existence of a merger clause in the subscription agreement undercut Brogdon’s argument that the put agreement and the subscription agreement should be integrated and read as a single agreement.

Practice Tips.

1. **Merger Clauses.** We probably have all been guilty of adding a merger clause without carefully considering the impact. This case illustrates the importance of considering the scope of the merger clause. While it is not certain that the outcome would have been different, specifying in the merger clause that the put agreement and the subscription agreement together were the exclusive statement of the agreement of the parties might have allowed the court to infer that the parties intended that contracts be read together.
2. **One Agreement or Two?** When confronted with related transactions, the lawyer drafting the documents should consider if one agreement is better than two or more agreements. Often the decision of one document or two is made with reference to what form is available. We have all been involved in venture capital transactions in which there are multiple agreements, such as co-sale, voting, registration rights, investor rights, and so on, that could easily be combined into a single agreement. Perhaps if in this transaction Brogdon had insisted on a single agreement, he would have been in a better position to argue for integration. An objection to the strategy of a single agreement is the scope of the liability of Brogdon. In a single agreement, Brogdon might

have been required to make representations and warranties on behalf of NewCare, which would possibly have exposed him to additional obligations.

3. **Plain English.** This case also suggests the importance of drafting style. The court would have had an easier time accepting Brogdon's argument if there were a clear statement of the intent of the parties.

AFLAC Incorporated v. Chubb & Sons, Inc., 581 S.E.2d 317 (Ga. App. 2003)

This case involves the denial of coverage for Y2K remediation expense under an insurance policy. In *AFLAC Incorporated v. Chubb & Sons, Inc.*, 581 S.E.2d 317 (Ga. App. 2003), the Georgia Court of Appeals considered a denial of coverage for Y2K remediation expenses under an insurance policy which provided for coverage for "direct physical loss or damage to" covered property. The policy covered all personal property of the insured, including computer systems. The court concluded that coverage was intended for "an actual change in the insured property then in a satisfactory state occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so." The court concluded that the software was designed with an inability to process 21st century dates, and that the Y2K remediation cost was "an ordinary cost of doing business."

What would you do?

A client brings you the following problem: A former employee has established a website that is critical of the client's employment practices. The former employee has been sending unsolicited email to all of the client's employees that is critical of the client's employment practices, warns the client's employees of the dangers that the client's employment practices pose to the careers of client's employees, suggests the employees move to other companies, and urges employees to visit the former employee's website for additional information. The email provides a method to "opt out" of the email.

Every time one of the mass mailings occurs, the client's management and supervisory employees spend a significant amount of time responding to employee questions and comments. The client asks you if he can sue the former employee to enjoin him from sending the emails or to obtain damages. The client acknowledges that the former employee breached no computer security barriers, the emails didn't cause any physical damage or functional disruption of the client computer systems, nor deprive client of the use of its computers. The client claims that it suffers economic damage from the loss of productivity of its employees from reading and reacting to the emails, and from efforts to block the messages.

What would you recommend?

The California Supreme Court faced this fact pattern in *Intel Corporation v. Kowish Kenneth Hamidi*, 30 Cal. 4th 1342, 71 P.23d 296 (S103781 June 30, 2003). The court held that under California law, although unsolicited email was actionable under the tort of trespass to chattels, Intel failed to establish that Hamidi's email messages damaged Intel's computer systems or impaired their functioning. The court went on to conclude that the tort of trespass to chattels requires an injury to the company's interest in its computers. Intel's computers worked as intended and were unharmed by Hamidi's communications. Therefore, Intel suffered no injury to its interest in its computers. The court used the following analogy to explain the distinction between injury to chattels and the injury Intel suffered: "the personal distress caused by reading an unpleasant letter would [not] be an injury to the recipient's mailbox . . . [nor would] the loss of privacy caused by an intrusive phone call, be an injury to the recipient's telephone equipment."

The dissenting opinions in the case make persuasive arguments that comment h of Section 218 of the Restatement 2d of Torts provides grounds for Intel to obtain the relief it sought because there are circumstances "where the value to the owner of a particular type of chattel may be impaired by dealing with it

in a manner that does not affect its physical condition.” The dissenting opinions suggest that Intel should have the right to prevent the use of its equipment to display Hamidi’s messages.

This is a case worth reading and reflecting upon, as it provides focus on the conflict between free speech and the rights of property owners.

Gerardo M. Balboni II, is a member of Balboni Law Group, LLC, and a 1984 graduate of the Cumberland School of Law of Samford University. He may be reached via telephone at (404) 812-3111 and via e-mail at gbalboni@balaw.com.

Todd R. Bair, is a member of Bair Law Group, LLC and a 1992 graduate of Emory Law School. He may be reached via telephone at (706) 548-7700 and via e-mail at tbair@bairlaw.com.



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This Year’s Topics and Speakers:

Technology Law Litigation – a 360° view. This module is not only for litigators, but also those lawyers who may need to explain technology litigation to their clients. Our speakers include:

- View from the Bar – Emmet J. Bondurant, Bondurant, Mixson & Elmore
- View from the Bench – Hon. Stanley F. Birch, Jr., U.S. Eleventh Circuit Court of Appeals; Hon. J. Owen Forrester, United States District Court, Northern District of Georgia; Hon. Hilton Fuller, Superior Court of DeKalb County.
- Views from the Client – E. Alan Arnold, Sr. Attorney, Hartsfield Atlanta International Airport; Lauren McGurk Seeger, General Counsel, McKesson Information Solutions; Christopher T. Schenken, Vice President, UPS Global Innovations, Inc.; J. Henry Walker, IV, Chief Litigation Counsel, BellSouth Corporation.
- View from the Jury – Angela L. Abel, Vice President Browne DecisionQuest

Looking Backward and Forward – legal updates. What you all come for at the Institute, the technology law updates and a look at the cutting edge. Our speakers include:

- Copyright Update – Joseph M. Beck, Kilpatrick & Stockton, LLP
- Trademark Update – Allen L. Greenberg, Duane Morris, LLP

- Ethics Update – Jenny K. Mittelman, State Bar of Georgia
- Cutting Edge Update – Joyce Nuszbaum, General Counsel, Omnexus

Cutting Edge Internet Law Issues – what’s lurking out on the World Wide Web.

Our speakers include:

- Marketing on the Internet – Pete Wellborn, Wellborn & Butler LLC
- Internet Licensing Issues – Douglas M. Isenberg, Needle & Rosenberg PC
- Internet Contracting Issues – Andrew Flake, Arnall Golden & Gregory LLP
- “Ask the Experts” Roundtable – Andrea Foster, Southeastern Regional Director, Federal Trade Commission; John P. Hutchins, McKenna Long & Aldridge LLP; Pete Wellborn, Wellborn & Butler.



Technology Law Hot Topics – thirty minutes deep on topics you need to know. Our speakers include:

- HIPAA Compliance, the technology issues – H. Carol Saul, Epstein, Becker & Green PC
- Identity Theft – Andrea Foster, Southeast Regional Director, Federal Trade Commission
- Cybersecurity – Timothy D. Hugo, Executive Director, CapNet
- Licensing Software To the Government – Jeffrey A. Belkin, Alston & Bird LLP
- Recent Tax Issues for Internet & Software Transactions – Peter G. Stathopoulos, Morris, Manning & Martin
- Online Games and Contests – Janine Anthony Bowen, McKenna Long & Aldridge LLP

How: Watch for your flyer in the mail from ICLE in Georgia to register (and by e-mail). You can also get registration information at the ICLE in Georgia Website (www.iclega.org).

Thanks to our Institute Planning Committee



Suellen W. Bergman, Powell, Goldstein, Frazer & Murphy; Megan Bosse, Morris, Manning & Martin LLP; Janine Anthony Bowen, McKenna Long & Aldridge; Stephen Combs, Morris, Manning & Martin LLP; Guanming Fang, Arnall, Golden & Gregory; Lawrence H. Kunin, Morris, Manning & Martin; David Lilenfeld, Stokes, Lazarus & Carmichael, LLP; Ann K. Moceyunas, Attorney at Law; Mari L. Myer, Friend, Hudak & Harris; Brad K. Slutsky, King & Spalding; and Michael Vollmer, Attorney at Law.

THE PROS (AND CONS) OF .PRO

By Suellen W. Bergman

Domain names are the way to identify oneself on the Internet. Now lawyers have a new way to identify their professional practice or name on the Internet: the new¹ “.pro” top level domain name.²

The launch date for this Internet domain designed especially for professionals such as lawyers³ was July 2003. RegistryPro, Inc., a wholly-owned subsidiary of Register.com, Inc., is the exclusive operator of the .pro top-level domain and has its headquarters in Atlanta, Georgia.

The specific domain for the legal profession will be “.law.pro” for an attorney who is currently licensed in the United States.⁴ For example, a lawyer could register JoeSmith.law.pro. The .pro domain name “will also be available to professional companies and associations, which can register a .Pro and leverage the new extensions to enhance their member services.”⁵

Eligibility for a .pro Domain Name

In order to register a “.pro” domain name, the registrant must show his or her professional certification and undergo a cross-verification process.⁶ RegistryPro has partnered with ChoicePoint to authenticate the identity and professional eligibility information submitted by registrants⁷ (*i.e.* ChoicePoint will independently cross-reference the information to verify the license information in the jurisdiction in which the registrant claims to be a licensed attorney). To prove eligibility for a .pro domain name, applicants must submit professional and personal information, including the country of residence, full legal name, home address, date of birth, last four digits of social security number, type of profession, jurisdiction, professional license number, date issued, name as it appears on license, and the address where the professional license was issued.⁸

Advantages and Features of a .pro Domain Name – Digital Certificates

RegistryPro’s “.pro” domain will permit lawyers to be able to sign contracts online using built-in technologies that encrypt communications and enable digital signatures. “All .pro names are issued with a digital certificate and an online passport that facilitates secure communications and transactions.”⁹ A digital certificate is a kind of Internet security technology: “it is an electronic credential that can provide assurances to people you are dealing with on the Internet of your identity, the privileges you hold, or other characteristics.”¹⁰

¹ The new top level domain “.pro” is the last of new top level domains approved by the Internet Corporation for Assigned Names and Numbers (ICANN) in November 2000 to become fully operational.

² The domain name system of the Internet allows users to refer to web sites by using names, such as www.cnn.com rather than IP addresses assigned to each computer on the Internet, which are numeric (such as 121.0.87.65). Domain names are composed of a series of character strings (called “labels”) separated by dots. The right-most label in a domain name is referred to as its “top-level domain” (TLD). <http://www.icann.org/tlds/>.

³ Doctors and accountants are also currently eligible to get a .pro domain name. www.registrypro.com. Sloan Gaon, RegistryPro’s COO, says that RegistryPro plans to expand the domain to include architects and other professionals in the future. Andy Sullivan, *New Domain for Doctors, Lawyers, Available in July*, REUTERS, April 23, 2003.

⁴ www.gtld.com/dotpro.html.

⁵ <http://www.registrypro.com/corporate/>.

⁶ www.registrypro.com/products/details.php.

⁷ Techlinks, *RegistryPro Partners with ChoicePoint to Authenticate Professional Eligibility of .Pro Registrants*, May 21, 2003, available at www.techlinks.net/ShowTechlinksNew.cfm?PRID=6255.

⁸ <http://www.registrypro.com/support/faq.php>.

⁹ *New .pro Domain Name Nears Launch*, WEB HOSTING INDUSTRY NEWS, April 24, 2003, www.thewhir.com/marketwatch/reg042403.cfm.

¹⁰ InfoSec Law Group, PC, *Digital Certificates are Essential Tools for Professionals Working on the Internet*, March 2003, available at <http://www.registrypro.com/downloads/certificate.pdf>.

This digital certificate is worthwhile to attorneys because attorneys have an obligation¹¹ to keep client records, communications and personal information confidential and secure. RegistryPro's professional level digital certificate provides the following levels¹² of digital trust using public key cryptography:

- Authentication - provides proof of a digital identity (this means the sender and the recipient are really who they say they are);
- Confidentiality - maintains privacy and confidentiality of content (this can alleviate concerns about the inadvertent disclosure to accidental recipients of misdirected emails, faxes, and postal mail);
- Integrity - ensures the content has not been changed or altered;
- Non-repudiation - provides proof that the communication was sent; and
- Access Control - limits access to documents only to authorized persons (even when an attorney is working in his or her office computer systems by remote access).

These benefits of a digital certificate give attorneys confidence in online transactions and online communications.

The non-repudiation aspect of a digital certificate can create evidence of a transaction that could be used in a lawsuit or other proceeding to enforce the transaction. In addition, a digital certificate's non-repudiation aspect can also assist attorneys in making electronic court filings, since it will provide evidence that the filing was indeed sent. Secure email is not the only online benefit of a digital certificate; one can also use a digital certificate for digital notarizations and digital signatures.

The Disadvantages - .Pro is Pricey

In addition to showing eligibility, applicants must pay an annual fee of up to \$300. This is steep compared to ".com" domains, which can be registered for less than \$20 per year. The additional services that RegistryPro provides, such as security features for the encryption and digital signatures, account for the higher price (the digital certificate for digitally signing and encrypting email is included in the purchase price of the domain). Also, a lawyer must maintain his or her eligibility to be registered, as eligibility is verified at the time of registration and will be re-verified at least annually upon the registrant's digital certificate annual renewal.¹³

Due to the cost involved, lawyers who already have email encryption and a .com or other domain name may not want to obtain a .pro domain name. For example, lawyers at large law firms may find that sticking with their firm's name is just as if not more prestigious than having "law.pro" at the end of their email addresses.

Taking the .Pro Plunge - How to Register a .pro Domain Name

You can obtain your own law.pro domain name by first visiting one of these accredited registrars: 007 Names, All Domains, Bulk Register, CSC Corporate Domains, DirectNIC, DomainPeople, Domains2bSeen, Encirca, Mark Monitor, Register.com, Register.IT, Secura, and Spot Domain. Then provide self-certified registration information that can be cross-verified, and when prompted, click on a site to download and install .ProCert. .ProCert is RegistryPro's professional level certificate which provides the ability to digitally sign all email communications, encrypt email to your clients, and ensures the security and privacy of emails.

The sunrise period began April 23, 2003, for trademark and service mark holders who have a nationally registered trademark issued prior to September 30, 2002. The sunrise period allows mark holders to begin reserving .pro names by submitting registrations that exactly match their trademarks in the .pro domain.¹⁴ To avail oneself of the

¹¹ This obligation stems not only from general principles providing for the confidentiality of attorney-client communications, but also from Rule 1.6(a) of the ABA Model Rules of Professional Conduct and from the Gramm-Leach-Bliley Act, Pub. L. No 106-102, 113 Stat. 1338 (1999), which applies to some attorneys who are "significantly engaged" in financial activities and who may deal with personally identifiable financial information of consumers.

¹² <http://www.registrypro.com/support/faq.php>

¹³ www.alldomains.com/newtlds/pro.html

¹⁴ *New .pro Domain Name Nears Launch*, WEB HOSTING INDUSTRY NEWS, April 24, 2003, www.thewhir.com/marketwatch/reg042403.cfm.

.pro name during the sunrise period or the live registration, lawyers should go directly to RegistryPro's Website for information and to find an authorized registrar.

Future .pro Features

RegistryPro anticipates releasing an enterprise product near the end of August, 2003. This new offering will provide varying levels of digital certificates for attorneys, paralegals, office managers, research assistants, and lawyers' "end-user" clients.¹⁵

Suellen W. Bergman is an Associate in the Intellectual Property and Technology Group at Powell, Goldstein, Frazer & Murphy, where she practices technology, intellectual property, and Internet law. She earned her J.D., cum laude, from the University of Georgia in 1996 after receiving a B.A. in Mathematics and a B. A. in English Literature from Washington University in St. Louis, MO, in 1993. Mrs. Bergman may be reached at 404-572-6705 or sbergman@pgfm.com.



Volunteer Update *By Ann K. Moceyunas*

The last Saturday in July, our volunteers from the Technology Law Section experienced not only the digital divide in full force, but a language divide as well at TECH CORPS Georgia. We were scheduled to assist two different classes, one for high school students participating in a special English-as-a-Second-Language grant project, the other an introduction to the Internet for adults in the local community. Sharon Miller, the Director of Education, was out sick (a most rare occasion), leaving one instructor, Chris Miller, the Executive Director, to teach both classes. He combined the two into an Internet introductory class.

We volunteers helped by serving as "spotters," standing behind the students to make sure they could follow the instructor. The catch was that over half of the students (a mixture of adults and kids) spoke little, if any, English. My high school Spanish class was well before the words "Internet" and "Web browser" were in the vocabulary, so the best I could do was point. We found that some of

the kids were able to translate for their parent. I learned that Yahoo provides its Web site and e-mail service in several languages. And I found a common language in music, using "Britney Spears" with the teenage girls as a search phrase to practice using a search engine.

TECH CORPS Georgia has two locations, one in East Point (where we volunteer) and the other in Buckhead (the computer recycling division called FreeBytes). The East Point community has seen a tremendous growth in its Hispanic population and, likewise, TECH CORPS Georgia has seen its clientele and their needs change.

Many thanks to our volunteers, Mike Vollmer, Suellen Bergman, and Ron Jackson, for their time. Our next Volunteer Day will be in October; watch your e-mail for the announcement. If you have a Pentium I or better PC and monitor to donate, you can get more information at www.freebytes.org or www.techcorpsga.org.

Ann K. Moceyunas is an attorney in Atlanta, practicing in the area of technology. She most recently served as General Counsel for a payroll-processing and benefits technology company. She earned a J.D. in 1984 from University of Buffalo School of Law and a B.A. in 1981 from Binghamton University. She is a part-time Assistant Professor in the CS/IS Department at Kennesaw State University.



¹⁵ Telephone interview with Amy K. Moorhouse, RegistryPro Vice President of Marketing (15 May 2003).

VOIP -- IS REGULATION AROUND THE CORNER?

By Charles A. Hudak

In recent years, there has been steady growth in the development and offering of voice over Internet protocol ("VOIP") services. The primary reason -- VOIP services usually offer consumers a smaller telephone bill by almost eliminating altogether charges for long distance telephone calls.

Although many in the technology industry have closely monitored the development of VOIP, the Federal Communications Commission ("FCC") and many state public service or utility commissions (collectively "PSCs") thus far have taken a "hands-off" approach to adopting a definitive regulatory framework applicable to VOIP services. However, as VOIP telephony continues to improve and more closely resemble or replace traditional, regulated, circuit switched telecommunications services, the potential increases for both federal and state regulation of VOIP services.

What is VOIP?

VOIP is a telephony service in which voice communications are transmitted over the public Internet or private Internet protocol ("IP") networks, and includes computer-to-computer, computer-to-phone and phone-to-phone voice communications services. In order to transmit a VOIP call, voice signals are converted into IP packets; those voice packets are then separately routed over the public Internet or over other transmission facilities, and are reassembled up on call termination.

Users of Internet services have long had the ability to place computer-to-computer voice calls over the Internet by installing "clunky" microphones and software in personal computers to convert voice signals into IP packets and vice-versa. Unfortunately, such computer-to-computer calls have had only limited utility, have been plagued by poor quality (*e.g.*, delays, gaps and echoes), and have required multiple users to remain on-line in order to conduct real time communications.

Today, unlike those early "do it yourself" VOIP solutions, VOIP providers employ the use of specialized IP infrastructure, including gateways, access routers, gatekeepers and other equipment, to monitor, transmit and receive VOIP transmissions in order to ensure that voice packets are accurately disassembled and reassembled on a real-time basis. Those gateway facilities also perform conversions of voice signals from circuit switched protocol (*i.e.*, time division multiplexing) to IP -- and back again -- in order to permit VOIP calls to be placed to and from ordinary telephones.

Are VOIP Providers Subject to Federal and State Regulation as "Traditional" Telephone Companies?

The attachment of regulation to VOIP services will very likely depend upon whether such services are classified as "information services" or "telecommunications services" under the Communications Act of 1934, as amended (the "Act"),¹ and how such services are treated under analogous state statutes.

The term "information service" refers to the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the

¹ 47 U.S.C. § 151 *et seq.*

management of a telecommunications service.”² Generally, neither the FCC nor the various state PSCs regulate the provision of information services.

Providers of common carrier “telecommunications services,” on the other hand, are subject to extensive FCC and state PSC regulation. The term “telecommunications service” refers to the “offering of telecommunications for a fee directly to the public . . . regardless of the facilities used.”³ In that definition, the term “telecommunications” means the “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”⁴ FCC regulation of interstate and international telecommunications service providers entails compliance with rate disclosure requirements, non-discrimination obligations, reporting and fee requirements, and interconnection, network interoperability and other obligations. State PSC regulatory requirements applicable to providers of intrastate telecommunications services generally mirror those federal requirements.

Since the late 1990’s, the FCC has periodically reviewed regulatory issues arising from the provision of VOIP services, but has consistently refrained from adopting a definitive regulatory framework applicable thereto. First, in 1998, the FCC reported to Congress⁵ that certain forms of phone-to-phone IP telephony services appeared to lack “the characteristics that would render them ‘information services’ within the meaning of the statute, and instead [bore] the characteristics of ‘telecommunications services.’”⁶ In its analysis, the FCC viewed phone-to-phone IP telephony as merely providing voice transmission without any capability for generating, acquiring, storing or transforming information in the manner contemplated by the definition of “information services.”⁷ The FCC emphasized, however, that its conclusion was only a tentative determination and that it could not make a “definitive pronouncement” about the regulatory classification of VOIP service until it had a more complete record “focused on individualized service offerings.”⁸

Next, in April 1999, U S West, Inc. filed with the FCC a petition for a declaratory ruling, requesting that the FCC confirm that traditional carrier access charges apply to certain phone-to-phone IP telephony services.⁹ Access charges are paid by long distance telecommunications carriers to compensate local telephone companies for use of local telephone lines, local switching and local transport functionalities when originating or terminating long distance telephone calls. However, instead of using U S West’s filing as the impetus for adopting a definitive regulatory framework for VOIP services, the FCC apparently disregarded it -- neither issuing a Public Notice of the petition nor seeking comments from the telecommunications industry.

Finally, in April 2002, AT&T Corp. filed with the FCC a second petition for a declaratory ruling, requesting (this time) that the FCC confirm that traditional carrier access charges do not apply to VOIP services.¹⁰ In response to that filing, the FCC commenced a proceeding to address the thorny regulatory issues arising out of VOIP services. That proceeding is currently ongoing at the FCC.

² 47 U.S.C. § 153(20).

³ 47 U.S.C. § 153(46).

⁴ 47 U.S.C. § 153(43).

⁵ *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11,501 (1998).

⁶ *Id.* at ¶ 89.

⁷ *Id.*

⁸ *Id.* at ¶ 90.

⁹ *Petition of U S West, Inc. for Declaratory Ruling Affirming Carrier’s Carrier Charges on IP Telephony*, Petition for Expedited Declaratory Ruling (filed with FCC Apr. 5, 1999).

¹⁰ *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, Petition for Declaratory Ruling (filed with FCC Oct. 18, 2002).

As a result of AT&T's filing, it appears now, more than ever, that the FCC will soon adopt a regulatory framework applicable to VOIP services. The effect on the developing VOIP industry, however, could be severe.

What Are the Potential Effects of VOIP Regulation?

The business landscape currently applicable to VOIP services could change substantially if providers of those services become subject to "traditional" telephone company regulations. First and foremost, the overall costs borne by VOIP providers to carry long distance voice calls might increase, with a corresponding increase in charges assessed on users of VOIP. Currently, VOIP providers and other information service providers are treated from a regulatory perspective as end users, not telecommunications carriers, and thus are not required to pay traditional carrier access charges. By purchasing monthly, fixed rate, originating and terminating connections from a local telephone company in the same fashion as any other business customer, VOIP providers have been able to reduce or to eliminate certain costs associated with carrying long distance telephone calls. Those reduced or eliminated costs typically have been passed through to consumers, and as a result, VOIP has become known as a "cheap" alternative to traditional telephone service. If VOIP services are deemed to be "telecommunications services" and if VOIP providers are required to pay access charges like any other telecommunications carrier, the cost of providing VOIP service could increase substantially over current levels.

Along with absorbing new costs, VOIP providers also might be required to implement changes to comply with new operational and regulatory requirements. For instance, if VOIP services are classified as "telecommunications services," VOIP providers might be required to make expensive upgrades to their networks to implement carrier access arrangements. Similarly, VOIP providers may also be required to collect and to remit a myriad of federal and state telecommunications taxes and regulatory surcharges (*e.g.*, universal service, telecommunications relay service) in connection with VOIP services. Existing and new contracts with consumers, service providers and telecommunications carriers may also need to be reviewed and revised. Even the manner under which VOIP providers currently offer their services might need to be modified -- inasmuch as VOIP providers might be required to comply with FCC and state PSC-imposed nondiscrimination and rate disclosure requirements.

In short, the potential effects of FCC or state PSC regulation of VOIP services could be far-reaching and disruptive to the developing VOIP industry. Let's watch the headlines and see what the FCC has in store for us.

Charles A. Hudak is a Partner with Friend, Hudak & Harris, LLP, where he advises clients on telecommunications, information service and cable television issues. Mr. Hudak earned his J.D. from the Emory University School of Law in 1994, and he earned an A.B. in Political Science from Duke University in 1991. Mr. Hudak may be reached at (770) 399-9500 or via e-mail at chudak@fh2.com.



Next Section Event

Quarterly Meeting

Thursday, August 21, 2003

12:00 p.m. to 1:00 p.m.

McKenna Long & Aldridge, LLP
303 Peachtree St., N.E., Suite 5300

Topic: ***CopyRights and CopyLefts:
What you need to know about open source software***

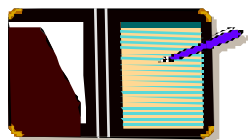
Speakers:

Dick Gaylor, Professor

Professor, C.S./I.S. Department, Kennesaw State University (on the Perspective of Open Source Proponents)

Todd McClelland

Attorney at Law, Alston & Bird (on the Risks and Legal Considerations of Open Source Software)



Calendar of Upcoming Events

Quarterly Technology Law Section Event

August 21

McKenna Long & Aldridge, LLP

Topic: "CopyRights and CopyLefts:
What You Need To Know About Open Source Software"

18th Annual Technology Law Institute, Technology Square

October 8 & 9

Tech Corps Georgia

October 18

Deadline for contributions to Winter 2003 Newsletter
(no focus topic)

October 31

State Bar Mid-Year Meeting

January 15-17, 2004

(Mid-Year Section Meeting TBA)

Deadline for contributions to Spring 2004 Newsletter
(focus on Technology Licensing)

January 30, 2004

