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Barnes & Noble's 'browsewrap' agreement can't bind customer to arbitration, 9th Circuit rules

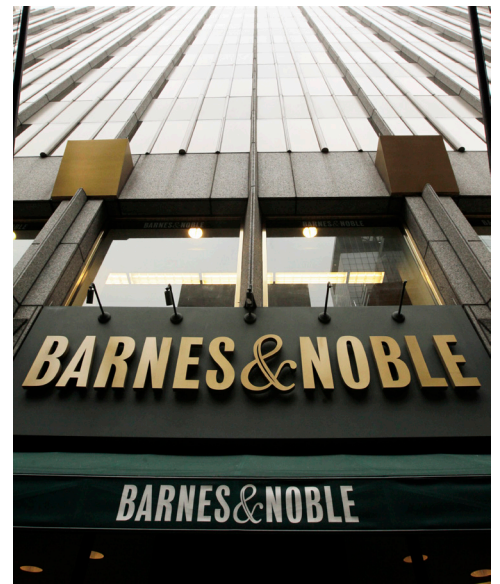
Barnes & Noble cannot bind a consumer to an arbitration clause in its website's terms of use because it never directed him to review the hyperlinked terms and, therefore, he never accepted them, a federal appeals court has affirmed.

Nguyen v. Barnes & Noble Inc., No. 12-56628, 2014 WL 4056549 (9th Cir. Aug. 18, 2014).

"This case should be a wake-up call for website owners who attempt to control site use by including a hyperlink to legal terms of use at the bottom of the webpage," said attorney **Seth D. Greenstein**, a partner in the Washington office of **Constantine Cannon**, who was not involved in the case.

Unlike with a clickwrap agreement that makes users click to accept the site's terms, users never have to affirmatively agree to these so-called browsewrap agreements. Therefore, a consumer can only be bound by its terms if a reasonable user would know to review them, the 9th U.S. Circuit Court of Appeals' opinion said.

"[The decision] signals that courts are increasingly reluctant to hold consumers bound by terms



REUTERS/Brendan McDermid

The dispute stemmed from Barnes & Noble's 2011 "fire sale" of Hewlett-Packard Touchpads on bn.com.

embedded in browsewrap agreements," said attorney **Allison Brehm**, a partner at **Kelley Drye & Warren**, who handles intellectual property and technology litigation. She was not involved in the case.

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Predictive coding 2.0

Joe White of e-discovery software and services provider Kroll Ontrack and Cliff Nichols of Day Pitney LLP discuss the benefits of predictive coding and how organizations can use this method in litigation, but also for early data assessment, as a compliance tool and to create defensible record-retention policies.

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Predictive coding 2.0

By Joe White, Esq., *Kroll Ontrack*, and
Cliff Nichols, Esq., *Day Pitney LLP*

Predictive coding is finally catching on.¹ While we have discussed for years its ability to dramatically decrease costs over standard linear review, there is a growing consensus that recognizes it as also performing more efficiently and accurately. Predictive coding can help cull through mountains of data, quickly identifying relevant and responsive documents, making the document review process much less time consuming for practitioners with a more accurate and precise result than previously accepted discovery search methods.

But this powerful technology should not be limited to discovery alone, as it is capable of much, much more. Imagine predictive coding being used to identify potential risks to a company before these risks develop into litigation. What if predictive coding could organize incoming e-mails in order of priority? What about a real-time review of outgoing documents that identifies potential leaks of trade secrets?

The idea of incorporating machine learning and predictive coding into everyday business tasks is not far-fetched. In fact, many retail companies have already implemented basic forms of the technology to create tools such as automated wish lists and product recommendations. The potential scope of application may be limitless.

WHY PREDICTIVE CODING?

In the discovery context, predictive coding is rapidly replacing keyword searches and other traditional search methods as it is accepted by judges and courts as a valid discovery method.² In fact, some courts have gone so far to say that keyword searching is “usually not very effective” and parties should use it in appropriate cases.³ In effect, this goes further than signaling its acceptance by



courts; it also implies that practitioners are well-advised to leverage the technology in suitable cases or lose out.

This judicial acceptance should also help pave the way for an expanded use of predictive coding outside of discovery. In-house counsel and compliance officers, invariably both cautious groups, can point to

the success of predictive coding and machine learning in discovery when determining how it can be effective in other areas.

So what is it that makes predictive coding so effective as opposed to other data search and filter methods? The answer to that question lies in the workflow of the predictive coding process and the inherent inaccuracy of other methods. Keyword searching can limit the number of documents reviewed but you are limited by your, often uninformed, imagination. Keyword searching only really helps you find documents that you already know, or suspect, exist. To the extent you find anything else, you stumble across it.

Predictive coding can help cull through mountains of data, quickly identifying relevant and responsive documents and making the document review process much less time consuming for practitioners.

Keyword searches can also produce over-broad or under-broad data sets. If too broad, it can still be a lot of work to review every document and pick out those that are relevant. If under-broad, the search may not produce all the relevant documents as it was limited by the contemplation of the searcher.

Though still a helpful tool, the major drawback of keyword searching is that it can be both over-broad and under-broad, *at the same time*. It's easy to envision a scenario where, in a gender discrimination suit, a keyword search of “female” may be so broad that it is a major task to review the responsive documents, while also being so narrow that it does not consider possibly relevant documents that do not use that descriptor. As U.S. Magistrate Judge Andrew J. Peck of the Southern District of New York put it, “In too many cases ... the way lawyers choose



Joe White (L) is a senior discovery services consultant for **Kroll Ontrack** in Eden Prairie, Minn., where he focuses on education, collaboration, support and product development for predictive coding and advanced technology intended to streamline and improve the process of finding and organizing relevant information. He can be reached at JWhite@KrollOntrack.com. **Cliff Nichols** (R) is e-discovery counsel and directs all electronic investigation at **Day Pitney LLP** in Stamford, Conn. He has significant and extensive experience representing financial institutions in connection with insider trading, fraud, and Securities and Exchange Commission compliance. He is recognized as a leader in the cost-saving and efficient use of predictive coding and other types of technology-assisted review. He can be reached at cenichols@daypitney.com.

keywords is the equivalent of the child's game of "Go Fish."⁴

This is one of the reasons that predictive coding is evolving as a preferred method of discovery search. What makes predictive coding exceptional is that you do not necessarily need to know what documents exist to find what you need. Predictive coding learns what you want, often before you do, and uses a scientifically verifiable way to find them.

HOW IT WORKS

Simply put, predictive coding works by having human experts manually "categorize" a subset of documents, which the technology then uses to create a predictive model. This model is applied to the larger data set and can be used to estimate the probability that a document belongs to each of the possible categories. Predictive coding can utilize a document's content features, such as words and phrases, and its metadata features and

that one-time folk song Justin Timberlake covered. But, you may have to hear Nena's "99 Luftballons," so nothing is perfect.

WHAT'S NEXT?

Many potential uses for predictive coding exist,⁵ and we discuss below three developing use cases where organizations and practitioners may use it to create value.

Early data assessment

While some practitioners may have familiarity in using predictive coding in the later stages of discovery, many may not have recognized its value in the early stages of a case before the data to be searched is even identified. Early data assessment, or EDA, ideally narrows the scope of potential important data, and gives attorneys information about the applicability of documents, early in the case. This is done by separating data into critical and non-critical groupings, and identifying and narrowing the number of actual key players and search terms.

bad behavior before it is too late. Predictive coding is a natural way to assess and detect risk patterns, and stop them from developing further.

As explained above, if trained properly, software can use predictive coding to identify any information it has been taught to detect as relevant. Therefore, predictive coding software could be trained to comb through all an organization's information to detect potential risks. These risk-signaling documents could then be grouped and reviewed to determine if a real risk to the organization exists. In this way, counsel could quickly take immediate corrective action, ideally preventing lawsuits before they occur.

The biggest challenge is training the computer program to identify the appropriate risks. No two cases are alike, but they often contain similar patterns. An organization need only identify what frequent, undesirable patterns exist in recurrent litigation and train the software to recognize these patterns.

Consider the recent litigation of *Securities and Exchange Commission v. Biomet Inc.*⁸ In that case, alleged violations of the Foreign Corrupt Practices Act cost Biomet \$22 million to settle. The SEC alleged that Biomet paid bribes to foreign, publicly employed doctors in violation of the FCPA. Allegedly, Biomet employees recorded these bribes as "consulting fees" or "commissions" using phony invoices. The SEC claimed that Biomet sent emails describing bribery in no uncertain terms.

With that knowledge, predictive coding could be used to train an email system to scan for patterns based on this type of activity. The software could detect a pattern of recorded consulting fees being paid to foreign officials and flag the records for further review, which could possibly save Biomet or other organizations millions the next time around. What makes predictive coding uniquely qualified from a compliance standpoint is that the technology can be trained to detect the emails that describe bribery, even if the word itself is never explicitly used.

This is one example, and it is easy to imagine others where predictively auditing an organization's documents in real time could reveal undesirable trends. Getting conservative and often frugal boards to see the "long game" and actually implement the technology may be difficult, however.

The idea of incorporating machine learning and predictive coding into everyday business tasks is not far-fetched.

decide how much weight to give each of those features. Therefore, it is not limited to exact matches in the same way as keyword searches. Not only does predictive coding help find which haystack the proverbial needle may be in, it also reduces the amount of hay in that stack.

An example of simple predictive coding in everyday life is the music website or mobile app Pandora. When you tell Pandora that you want to listen to "Led Zeppelin," for example, you have created a "seed set" that teaches Pandora that you want songs recorded by Led Zeppelin and that you may also like other British hard rock from the 1970s with strong guitar and sometimes-mystical themes. Pandora's software will automatically search for music that has some association to these characteristics.

In addition to Led Zeppelin music, Pandora may also suggest Deep Purple, Rainbow or Cream. By using the "thumbs up" or "thumbs down," you further train the program on what kind of music you are specifically looking for and the subset becomes smaller and more accurate. Before long, and with proper training, you'll never again have to listen to

This usually involves a process of searching, foldering, clustering, email threading and topic grouping. Unfortunately, predictive coding is not often implemented in these early stages, but it could produce immense value.

In addition to narrowing the scope of collection and refining the precision of collection, early use of predictive coding can be used to confidently effect settlement. In *New Mexico State Investment Council v. Bland*, the court recognized the value of using predictive coding in EDA.⁶ The court also noted that this approach avoided "prolonged and extensive discovery" and helped effect early settlement.⁷ The pre-discovery investigation involved multiple databases and more than 5 million documents. Using predictive coding, the investigative team was able to narrow the responsive documents down to under 50,000. The result was a much smaller human review.

Compliance tool

Stopping the genie before it gets out of the bottle can be difficult, but early detection of potential problems can reap great dividends. The problem is the difficulty of predicting

The “bird in the hand is worth two in the bush” perspective pervades business often with very real consequences.

Further, if predictive coding is used to “sweep” internal systems, and potential litigation risks are identified, this could trigger the duty to preserve data, as a court may rule that litigation is reasonably anticipated at the point of identification. Still, it is almost always better to identify potential problems early rather than be caught unaware later. The “head in the sand” approach does not play well with judges.⁹ In addition, operating a highly functional compliance program with systems that effectively identify lapses can positively impact the course of a government investigation in a significant way.

Defensible record retention policies

Finally, predictive coding can be and should be used to enforce and create record retention policies. We can use predictive coding to identify documents that should be kept — and more importantly which ones should not — so the glut of extraneous data can be defensibly decreased. Because of sheer volume, a more automated approach to records retention is the undeniable future of information governance.

In the discovery context, predictive coding is rapidly replacing keyword searches and other traditional search methods as it is accepted by judges and courts as a valid discovery method.

As many in legal and IT departments of organizations know, record retention policies are only good if employees follow them. Even if employees did their best to abide by a record retention policy, there is always a risk of human error as documents can easily be mis-categorized or deemed irrelevant when they are anything but. By amplifying quality training inputs with the speed and consistency of machine-supplied outputs, predictive coding can do much to reduce this risk by correctly identifying documents that must be kept.

Given the speed and volume at which data is created, it's not hard to imagine that the data stored on any organization's servers might become disorganized and chaotic. Consider a scenario in which documents containing numeric values often considered confidential (such as Social Security numbers, credit card information, phone numbers, etc.), are improperly stored in a non-secure location on company servers. Predictive coding could be used to group and categorize this data so it could quickly be determined whether it is ripe for deletion or if it should be moved to a more secure location. This use works best when coupled with the internal compliance and risk assessment features given in the previous example. In this way, businesses can build or enforce a record retention and information governance policy that is predictable, organized and defensible.

By organizing the data, and weeding out all unnecessary documents, businesses would be better equipped to more cost-effectively scan for potential litigation risks, as well as produce for the discovery stage of litigation should a suit be filed. The drawback of using predictive coding for records management and defensible deletion is the very reason many businesses choose not to delete any information at all: the risk of deleting something that may be discoverable in ongoing litigation. Such an approach, however, is unsustainable. Even if all the data were retained, this just puts off the inevitable, meanwhile spending more money and subjecting an organization to more risk later on when the data needs to be reviewed for litigation.

CONCLUSION

Predictive coding is a powerful technology that is currently not being used to its full potential. Organizations could use it for much more than merely responding to discovery requests. If its full capability was leveraged, there are countless use cases where the technology can drive value for organizations. EDA, risk assessment and records management are simply three examples of predictive coding's potential. The Nobel laureate Niels Bohr has been quoted as saying, “Prediction is very difficult, especially about the future,”¹⁰ but with predictive coding, it is not quite as difficult as it used to be. **WJ**

NOTES

¹ *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 193 (S.D.N.Y. 2012) (“Counsel no longer have to worry about being the ‘first’ or ‘guinea pig’ for judicial acceptance of computer-assisted review.”), *adopted sub nom. Moore v. Publicis Groupe SA*, 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012).

² *Id.* at 191 (“Computer-assisted review appears to be better than the available alternatives, and thus should be used in appropriate cases.”); *Nat’l Day Laborer Org. Net. v. U.S. Immigration & Customs Enforcement Agency*, 877 F. Supp. 2d 87, 109 (S.D.N.Y. 2012) (“[P]arties can (and frequently should) rely on ... [predictive coding].”); *Global Aerospace Inc. et al. v. Landow Aviation et al.*, No. CL 61040, 2012 WL 1431215 (Va. Cir. Ct., Loudoun County Apr. 23, 2012) (“[I]t is hereby ordered defendants shall be allowed to proceed with the use of predictive coding for purposes of the processing and production of electronically stored information.”). For analysis on how predictive coding works in a real world example, see generally *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 6-11-MD-2299, 2012 WL 7861249 (W.D. La. July 27, 2012).

³ *Da Silva Moore*, 287 F.R.D. at 191. See also *Nat’l Day Laborer*, 877 F. Supp. 2d at 109 (“Simple keyword searching is often not enough.”).

⁴ *Id.* at 190-191 (citing Ralph C. Losey, *Child’s Game of ‘Go Fish’ is a Poor Model for e-Discovery Search*, in *ADVENTURES IN ELECTRONIC DISCOVERY* 209-10 (2011)).

⁵ See, e.g., Brad Blickstein, *Predictive Coding: It’s Not Just For Discovery Anymore*, *INSIDE COUNSEL MAGAZINE*, May 22, 2014, <http://www.insidecounsel.com/2014/05/22/predictive-coding-its-not-just-for-discovery-anymore>, for a discussion of how predictive coding can impact legal billing.

⁶ 2014 WL 772860, at *5 (N.M. Dist. Ct. Feb. 12, 2014) (“In reviewing documents, Day Pitney implemented various advanced machine learning tools such as predictive coding, concept grouping, near-duplication detection and e-mail threading. [This] enabled the reviewers on the document analysis teams to work more efficiently with the documents and identify potentially relevant information with greater accuracy than standard linear review.”).

⁷ *Id.* at *17.

⁸ No. 1:12-CV-00454, *complaint filed* (D.D.C. Mar. 26, 2012).

⁹ *Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931, 934 (7th Cir. 2011) (“The ostrich is a noble animal, but not a proper model for an appellate advocate.”).

¹⁰ Felecity Pors, *The Perils of Prediction*, *June 2nd*, *THE ECONOMIST*, July 15, 2007, http://www.economist.com/blogs/theinbox/2007/07/the_perils_of_prediction_june.

Terminating sanctions warranted for deleting email evidence in copyright suit

By Melissa J. Sachs, Esq., Legal Writer, Westlaw Journal

A federal judge in Manhattan has sanctioned a non-practicing New York attorney for destroying relevant emails in a copyright infringement lawsuit against him and his financial consulting companies by granting judgment to the opposing side.

Regulatory Fundamentals Group LLC v. Governance Risk Management Compliance LLC d/b/a Manhattan Advisers et al., No. 13 Civ. 2493, 2014 WL 3844796 (S.D.N.Y. Aug. 5, 2014).

U.S. District Judge Katherine B. Forrest of the Southern District of New York found attorney Gregory V. Wood intentionally deleted thousands of relevant emails after the Regulatory Fundamentals Group demanded that he and his two businesses stop using its copyrighted content.

“Wood’s deletion of emails and his attempted cover-up put RFG in an untenable litigation position — the evidence of the scope of defendants’ alleged misconduct is gone forever,” the judge wrote.

She entered a judgment for RFG, which had sued Wood and his companies for infringement, saying anything “short of a terminating sanction would fail to account for the prejudice or sufficiently penalize Wood or deter others from engaging in such misconduct.”

Terminating sanctions involve the entry of default on liability issues and leave only the question of damages remaining.

The judge noted that Wood is a licensed New York attorney, is a graduate of Cornell Law School and has practiced at large law firms.

Although Wood was not a litigator, he “had at least a basic understanding of the moral, ethical and legal responsibilities of parties and their counsel not to destroy the very documents opposing counsel has requested in a pending lawsuit,” Judge Forrest said.

David Spears of **Spears & Imes**, who represented RFG in the infringement suit, commented on the decision.

“The court’s ruling that a terminating sanction should be imposed is appropriate because defendant Wood’s conduct in destroying evidence was so egregious,” Spears said.

Wood also commented on the ruling, responding directly to an email sent to his attorney, Afsaan Saleem.

“All relevant documents and emails were delivered to the plaintiff. I don’t know what more I could have done, so I am surprised and disappointed by the court’s ruling,” Wood said.

“I did nothing intentionally wrong and was as open, honest and forthright as I could have been,” he added.

According to the judge’s opinion, Wood incorporated Government Risk Management Compliance LLC, doing business as Manhattan Advisers, and Manhattan Advisers LLC after spending most of his career as a finance attorney.

To generate business for GRMC/MAL, he would email clients and potential clients with alerts about changes to financial regulations using RFG’s original content, Judge Forrest said.

RFG provides business and regulatory insight to the financial services industry through its password-protected database and copyrighted email alerts, the opinion said.

Wood entered into an agreement to use this content, but RFG contended he went beyond the contract’s terms by stripping RFG’s copyright information from the content and replacing it with GRMC/MAL’s information.

He then sent this modified content to email lists with 400 to 500 recipients between 10 to 20 times, Judge Forrest said. The exact number is unknown because Wood regularly deleted emails from his account, allegedly to save space on his computer.

Wood continued this practice even after he received a cease-and-desist letter from RFG in March 2013, which notified him of a possible legal action and his obligation to preserve evidence. He also continued to delete emails after RFG sued him and his



“The court’s ruling that a terminating sanction should be imposed is appropriate because defendant [Gregory V.] Wood’s conduct in destroying evidence was so egregious,” plaintiff’s attorney David Spears said.

companies one month later, Judge Forrest said.

During the course of litigation this year, he twice deactivated his corporate hosting account, which stored his website and email domains, according to the opinion.

If Wood had not deleted the emails, they would have shown how he and GRMC/MAL distributed RFG’s copyrighted content, who received the content and how often, and other relevant details to the infringement claims, the opinion said.

Because she found he “purposefully destroyed the documents to avoid liability,” Judge Forrest granted RFG’s motion for sanctions. **WJ**

Attorneys:

Plaintiff: David Spears, Spears & Imes, New York

Defendant: Afsaan Saleem, New York

Related Court Document:

Opinion: 2014 WL 3844796

See Document Section B (P. 27) for the opinion.

Gun website not liable for woman's murder, 7th Circuit rules

A website that allows users to buy, trade and sell firearms cannot be held liable for the murder of a 36-year-old woman who was killed by a handgun advertised on the site, a federal appeals court has held.

Vesely v. Armslist LLC, No. 13-3505, 2014 WL 3907114 (7th Cir. Aug. 12, 2014).

Armslist LLC, which runs a classified ad site for firearms and other accessories, had no special relationship with Jitka Vesel, a Czech immigrant who was shot more than 10 times and killed in a Chicago museum parking lot, the 7th U.S. Circuit Court of Appeals' opinion said.

Therefore, the website could not be liable for the intervening criminal acts of Demetry Smirnov, a Russian immigrant who confessed to killing Vesel after she spurned his romantic advances, the three-judge appellate panel affirmed.

The U.S. District Court for the Northern District of Illinois properly dismissed the lawsuit brought by Jitka's brother Alex, who spells his last name Vesely, the 7th Circuit ruled. Vesely's suit against the website, filed on behalf of himself and as administrator of his sister's estate, alleged wrongful death and negligence.

According to the panel's opinion, Smirnov and Vesel met online. After she rejected his romantic advances, Smirnov purchased a

.40 caliber handgun advertised on Armslist.com from Benedict Ladera in Seattle.

Before advertising the gun on Armslist, Ladera agreed to the website's terms and conditions, which stated that Armslist is not involved in any transaction. Ladera also agreed to abide by any applicable federal and state laws, the opinion said.

When Smirnov bought the gun, he lived in Canada, making the transaction with Ladera illegal because federal law, 18 U.S.C. § 922(a)(5), prohibits the transfer of a firearm to a resident of another state or country, the opinion said.

Smirnov used the handgun when he followed Vesel to a parking lot and killed her April 13, 2011, the opinion said.

He turned himself in, confessed to the murder and was sentenced to life in prison without parole. Ladera also pleaded guilty to the illegal sale and was sentenced to prison for a year and one day, the opinion said.

Vesely sued Armslist in December 2012, saying it was negligent because it facilitated illegal gun sales between users.

Excerpt from Armslist.com's terms & conditions

- I understand that ARMSLIST DOES NOT become involved in transactions between parties and does not certify, investigate, or in any way guarantee the legal capacity of any party to transact.
- I am responsible for obeying all applicable enforcement mechanisms, including, but not limited to federal, state, municipal, and tribal statutes, rules, regulations.
- If I am unsure about firearms sales or transfers, I will contact the Bureau of Alcohol, Tobacco, Firearms, and Explosives at 1-800-ATF-GUNS and visit the ATF website at <http://www.atf.gov>.

U.S. District Judge Charles Norgle dismissed the suit. He said Armslist was not liable for the intervening criminal acts of third parties and it did not have a special relationship to protect Vesel.

The appellate court agreed.

"Armslist permitted Ladera to place an advertisement on its website and nothing more. It did not invite Ladera or Smirnov to break the law," the panel said.

Therefore, Judge Norgle's dismissal was proper and he committed no error in rejecting any post-judgment motions, the 7th Circuit concluded. **WJ**

Attorneys:

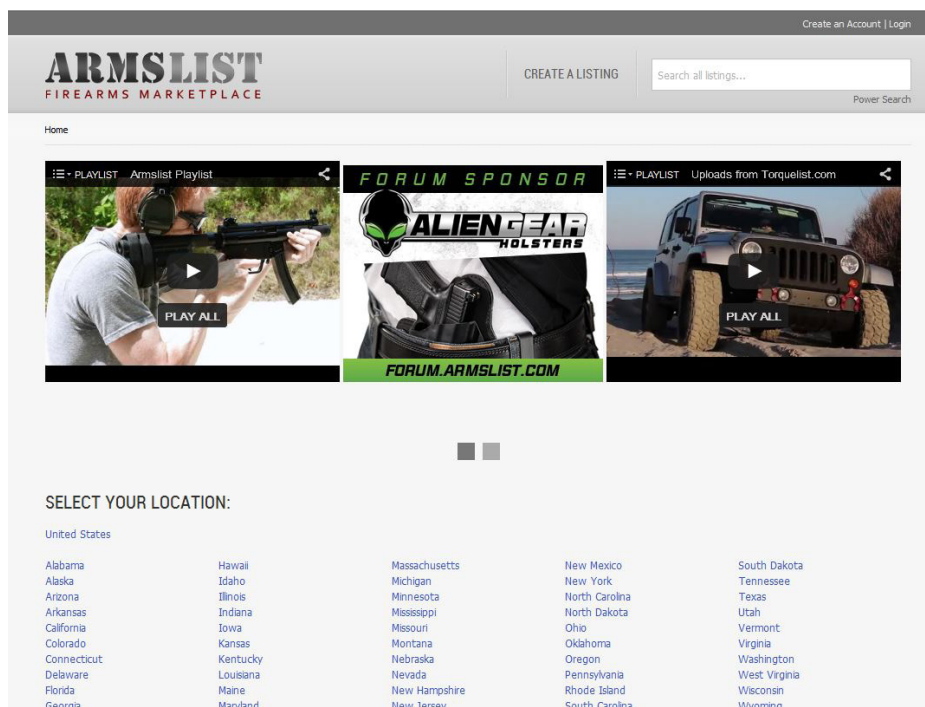
Plaintiff-appellant: Alexander D. Marks and Jay Dobrutsky, Burke, Warren, MacKay & Serritella, Chicago

Defendant-appellee: Andrew A. Lothson and James B. Vogts, Swanson, Martin & Bell, Chicago

Related Court Document:

Opinion: 2014 WL 3907114

See Document Section C (P. 39) for the opinion.



Courtesy of Armslist.com

The defendant in the case is Armslist LLC, which runs a classified ad site for firearms and other accessories. A screenshot of the site is shown here.

Execs owe Apple for costly 'anti-poaching' pacts, shareholder says

By Nicholas Gardner, Esq., Senior Content Writer, Westlaw Daily Briefing

Apple Inc. executives should compensate the computer maker for losses stemming from its alleged illegal agreements with other Silicon Valley firms not to recruit each other's high-tech workers, a shareholder says in a lawsuit filed in a California federal court.

Klein v. Cook et al., No. 14-cv-3634, complaint filed (N.D. Cal. Aug. 11, 2014).

Apple has faced damaging antitrust lawsuits as a result of its participation in the pacts, according to the derivative suit filed on behalf of the company in the U.S. District Court for the Northern District of California.

In a derivative suit, any money recovered goes to a company's treasury and not directly to shareholders.

Defendants named in the suit include Apple chairman Arthur Levinson, former chairman William Campbell, CEO Timothy Cook and the estate of the late Apple chief Steve Jobs.

Regarding Jobs, the suit says it seeks compensation only from Apple's insurance carriers that covered him during his time with the company, and not from the estate.

ANTITRUST SUITS

In September 2010, following an investigation, the Justice Department settled a civil antitrust suit against Apple, Adobe Systems Inc., Google Inc., Intel Corp., Intuit Inc. and Pixar Animation Studios.

The settlement bars the companies for a period of five years from "entering, maintaining or enforcing any agreement that in any way prevents any person from soliciting, cold calling, recruiting, or otherwise competing for employees," the department said in a statement.

On Aug. 8 U.S. District Judge Lucy Koh rejected as inadequate a proposed \$324 million settlement in a 2011 employee class-action antitrust suit pending against Apple, Adobe, Google and Intel. *In re High-Tech Employee Antitrust Litig.*, No. 11-cv-2509, 2014 WL 3917126 (N.D. Cal. Aug. 8, 2014).

The suit says the alleged anti-competitive conspiracy suppressed employee wages to the tune of \$3 billion.

In May the judge approved settlements totaling \$20 million with three other companies originally named in the suit — Intuit, Lucasfilm Ltd. and Pixar. She found those companies' participation in the alleged conspiracy to be substantially less harmful to the employee class than the remaining defendants' role.



REUTERS/Robert Galtbraith

NO 'COLD CALL' RECRUITING

The derivative complaint quotes emails beginning in 2004 between Jobs and high-level executives at Adobe, Google, Intel, Intuit and Pixar.

According to the complaint, during a 2005 call to Google co-founder Sergey Brin, Jobs said, "If you hire a single one of these [Apple] people that means war."

In response, Brin allegedly told Google's outside recruitment firm "not to make any new offers or contact new people at Apple until we have had a chance to discuss."

As a result of Jobs' threats, Google and Apple instituted internal no-cold-call policies regarding each other's employees, the suit says.

Apple ultimately had in place agreements with 25 other companies not to recruit each other's employees, it says.

HARM TO APPLE

According to the suit, none of Apple's regulatory proxy statements, quarterly filings or annual filings disclosed the DOJ investigation, the settlement or the final judgment entered in March 2011.

The suit says Apple "has expended, and will continue to expend, significant sums of money" because of the alleged misconduct.

The alleged harm includes: years of lost opportunities to hire more qualified employees that were employed at other companies; costs of defending and paying a settlement in the class action for violation of antitrust laws; costs of defending and settling the DOJ's allegations; and loss of reputation.

The defendants allegedly violated the proxy provision of § 14(a) of the Exchange Act, 15 U.S.C.A. § 78n, breached their fiduciary duties, engaged in gross mismanagement and wasted corporate assets.

The suit seeks compensation for Apple and reform of its corporate governance. **WJ**

Attorneys:

Plaintiff: Francis A. Bottini Jr., Albert Y. Chang and Yury A. Kolesnikov, Bottini & Bottini, La Jolla, Calif.

Related Court Document:

Complaint: 2014 WL 3899225

Accused bitcoin exchanger loses bid to narrow criminal charges

(Reuters) – A Florida man accused of engaging in a scheme to sell more than \$1 million in bitcoins to users of the illicit online marketplace Silk Road lost a bid to narrow his criminal case.

United States v. Faiella, a/k/a "BTCKing," et al., No. 14-cr-00243, 2014 WL 4100897 (S.D.N.Y., Foley Square Aug. 19, 2014).

Robert Faiella, 54, who prosecutors say was an underground exchanger of bitcoins, had urged a New York federal judge to dismiss one of two counts against him, operating an unlicensed money transmitting business, because bitcoins are not money.

But U.S. District Judge Jed Rakoff rejected that argument, saying bitcoin "clearly qualifies as 'money' or 'funds,'" under dictionary definitions, a position supported by legislative history in interpreting the law.

Defendant Robert Faiella urged a New York federal judge to dismiss one of two counts against him, operating an unlicensed money transmitting business, because bitcoins are not money.

"Bitcoin can be easily purchased in exchange for ordinary currency, acts as a denominator of value, and is used to conduct financial transactions," Judge Rakoff wrote.

The judge also rejected Faiella's arguments that his activities on Silk Road did not constitute "transmitting" money under federal law, saying that in sending customer funds to the website, he transferred the money to others for a profit.

A lawyer for Faiella did not immediately respond to a request for comment. A spokeswoman for Manhattan U.S. Attorney Preet Bharara declined comment.

Faiella and Charlie Shrem, 24, face trial Sept. 22. Shrem, one of the digital currency's most visible promoters, stepped down as vice chairman of the Bitcoin Foundation, a well-known trade group, soon after his arrest.



REUTERS/Benoit Tessier

Federal authorities shut down Silk Road last year, though a new Internet marketplace under the same name debuted in November. Prosecutors contend that Silk Road enabled users to buy and sell illegal drugs and other illicit goods and services.

Meanwhile, prosecutors from Bharara's office have charged Ross William Ulbricht with operating the site under the name "Dread Pirate Roberts."

He made similar arguments that bitcoin did not constitute money in claiming he was not involved in money laundering. U.S. District Judge Katherine Forrest in Manhattan rejected that contention in July, saying any other reading of the law would "be nonsensical." *United States v. Ulbricht*, No. 14-cr-68, 2014 WL 3362059 (S.D.N.Y. July 9, 2014). [WJ](#)

(Reporting by Nate Raymond in New York; editing by G Crosse)

Related Court Document:
Order: 2014 WL 4100897

SEC charges 4 promoters with manipulating marijuana-related penny stocks

The Securities and Exchange Commission has charged four people with manipulating the stock of microcap companies, including two related to the medical marijuana industry.

Securities and Exchange Commission v. Galas et al., No. 14-5621, complaint filed (W.D. Wash. Aug. 5, 2014).

The complaint filed in the U.S. District Court for the Western District of Washington illustrates how the agency is trying to uncover penny stock fraud through its recently created Microcap Fraud Task Force. Microcap companies are defined as those with market capitalization of between \$50 million and \$300 million.

"This was a carefully planned operation by [the defendants] to distort the performance of specific penny stocks as they were

promoters reaped more than \$2.5 million in illegal profits.

The complaint charges the following individuals:

- Mikhail Galas, 25, a stock promoter from Vancouver, Wash.
- Alexander Hawatmeh, 24, from Lincoln City, Ore., a member of Worthmore Investments, which owns a stock promotion website called stockhaven.com.
- Christopher Mrowca, 24, from Bradenton, Fla., a stock promoter who operates moneyrunnersgroup.com.

According to the SEC, one Internet advertisement for Hemp Inc. falsely claimed that the marijuana-related stock could reach "a REAL possible gain of OVER 2900 percent."

simultaneously promoted through social media and the Internet," Amelia A. Cottrell, associate director in the SEC's New York regional office, said in a statement.

The SEC has accused the four promoters of buying inexpensive shares of the stock and conducting prearranged, manipulative matched orders and wash trades to create the illusion of an active market in the companies.

Matched orders occur when a person buys or sells a security knowing a substantially similar order has or will be placed. Wash trades occur when a security is traded between two accounts to create the false appearance of active trading in the company.

These tactics were used to encourage investors to purchase the stock by giving the appearance that the stock prices were on the verge of rising substantially, the SEC said. The promoters could cash in when the stock rose based on the misleading information, it said.

The agency said the companies had little or no business operations at the time and the

- Tovy Pustovit, 20, from Vancouver, who owns a stock promotion website called Explosive Alerts.

The SEC's complaint also names Nadia Hawatmeh, 50, as a relief defendant for the purpose of recovering the ill-gotten gains in her broker account, which the defendants allegedly used to conduct some trades.

The companies traded include ISM International, Allied Products Corp., Aden Solutions Inc., GrowLife Inc., Hemp Inc. and Riverdale Oil & Gas Corp. GrowLife Inc. and Hemp Inc. purportedly are related to the medical marijuana industry, the SEC said.

GrowLife, based in Woodland Hills, Calif., purports to be in the oil recovery business and has set up subsidiary Legalizedpot.us to manage growers of legalized marijuana and hemp in various states, the SEC said. The commission issued an order April 10 temporarily halting trading in GrowLife securities.



REUTERS/Anthony Bolante

The Securities and Exchange Commission charged four people with manipulating penny stocks, including stocks of companies associated with the medical marijuana industry. A marijuana plant is shown here.

Hemp Inc. purports to provide products and services to the medical marijuana industry. The SEC noted its stock is not registered with the agency and is quoted on the over-the-counter trading platform.

According to the SEC, one Internet advertisement falsely claimed that the marijuana-related stock could reach "a REAL possible gain of OVER 2900 percent."

In May this year the SEC issued an investor alert warning the public about possible scams involving marijuana-related investments, noting that fraudsters often exploit the latest growth industry to lure investors with the promise of high returns.

The District Court on Aug. 13 issued a temporary injunction order restraining the individuals from further violations of federal securities laws, disgorgement and civil penalties.

The defendants are charged with violating Sections 17(a)(1) and (3) of the Securities Act, 15 U.S.C. § 77q(a)(1), and Sections 9(a)(1) and 10(b) of the Securities Exchange Act, 15 U.S.C. §§ 78i(a) and 78j(b).

In a parallel action, the U.S. attorney's office for the Western District of Washington announced criminal charges against Galas, Hawatmeh and Mrowca. [WJ](#)

Related Court Document:

Complaint: 2014 WL 4186304

Shareholders can pursue some claims even though merger failed

Although a proposed merger between Ebix Inc. and Goldman Sachs & Co. failed, unhappy Ebix shareholders can still proceed with claims against the software developer's directors over a bonus agreement that would have kicked in if the merger had succeeded, a Delaware Chancery Court judge has ruled.

In re Ebix Inc. Stockholder Litigation, No. 8526, 2014 WL 3696655 (Del Ch. July 24, 2014).

Vice Chancellor John W. Noble declined July 24 to dismiss the suit, finding that the lead plaintiffs, Gilbert C. Spagnola and the Desert States Employers & UFCW Union Pension Plan, stated three valid claims against the Ebix directors.

The judge granted Ebix's motion to dismiss several other claims as untimely or not subject to the court's jurisdiction. He also rejected derivative claims the plaintiffs

would have given him "appreciation rights" of 125,000 shares each year at a base price of \$23.84 apiece. The 2010 plan would have awarded him 1.1 million shares at a base price of \$7.95 because of a three-for-one stock split that occurred in late 2009, the suit says.

The plaintiffs claim Raina should instead have had the chance to buy the 1.1 million shares for \$37.32, their market price July 15, 2009, the day the board agreed to the new package. The board never formally or legally adjusted the base price to account for the stock split, the suit says.

At that meeting, the shareholder plaintiffs say, the board adopted the bonus agreement as an unreasonable device to discourage hostile takeovers in light of the company's attractive ratio of debt to revenue.

In his July 24 ruling, Vice Chancellor Noble said the plaintiffs can proceed with their non-monetary claims over the 2010 proxy statement and their allegation that it was unreasonable of the board to keep the bonus agreement in place. The investors cannot challenge the board's decision to adopt the agreement in the first place, the judge said, finding that claim untimely.

Ebix Inc. shareholders can sue the company's directors over a proposed merger even though the deal fell through, the judge said.

filed on the company's behalf, finding that they had failed to demand an internal investigation from the board or to show that such a demand would have been futile.

The allegations center on an acquisition-bonus agreement Ebix shareholders approved in 2010. The plaintiffs say the "2010 plan" would have given Chairman and CEO Robin Raina up to \$84 million if the merger had gone through even though he agreed to accept just \$32 million before the deal collapsed last June.

According to the suit, the board entered into an agreement with Raina in 1996 that

The board also allegedly obtained shareholder approval for the bonus agreement without ever announcing outright that it had reduced the base price to \$7.95. The new deal's details only emerged in bits and pieces between 2010 and 2012, the plaintiffs say.

According to the complaint, the board particularly misled shareholders when it recommended that they approve the 2010 stock incentive plan authorizing as many as 5 million additional shares of compensation for Ebix officers, directors and employees. The board accomplished that by omitting material facts from that year's annual meeting proxy statement, the suit says.

The ruling also allows the shareholders to proceed with their claim that the board members' compensation under the 2010 plan may have been based on material misstatements. Under that arrangement, the outside directors received stock options worth \$300,000, and Raina received 12,500 shares worth \$879,000, according to the opinion. [WJ](#)

Attorneys:

Plaintiffs: Michael Hanrahan and Paul A. Fioravanti Jr., Prickett Jones & Elliott, Wilmington, Del.

Defendants: Samuel A. Nolen and Catherine G. Dearlove, Richards Layton & Finger, Wilmington

Related Court Document:

Opinion: 2014 WL 3696655

Pay up, recording artists group tells GM, Ford in suit over royalties

An organization of performing artists has claimed in a federal class-action lawsuit that General Motors Co. and Ford Motor Co. have failed to pay required *quid pro quo* royalties under a federal law that allows them to use digital audio recording devices in the cars they manufacture.

Alliance of Artists and Recording Companies Inc. v. General Motors Co. et al., No. 14-1271, complaint filed (D.D.C. July 25, 2014).

Both GM and Ford offer devices in many of their models that allow consumers to record songs from CDs to the device's hard drive.

The Alliance of Artists and Recording Cos. is seeking injunctive relief and damages equal to 150 percent of the unpaid royalties from the car companies and Denso International America Inc. and Clarion Corp., which make the devices for GM and Ford.

The companies are violating the Audio Home Recording Act of 1992, 17 U.S.C. § 1001, according to the complaint filed in the U.S. District Court for the District of Columbia.

AHRA was enacted in response to digital recording technology that enabled consumers to easily copy and recopy digital music recordings, thus causing them to violate, even if unintentionally, the copyrights of recording artists and record companies, the suit says.

Under the AHRA, importers and distributors of digital audio recording devices are shielded from infringement suits if they pay royalties for each device distributed and if each device incorporates controls that prevent or impede serial copying, the complaint says.

The law prohibits the importation, distribution or manufacture of any digital audio recording device until a notice is filed with the Register of Copyrights.

The defendants are also required by the AHRA to deposit statements of account and pay royalties to the Copyright Office, but none of them have done so, the suit alleges.

The complaint seeks actual damages for unpaid royalties and statutory damages equal to \$2,500 for each digital audio recording device made, imported or distributed by the defendants. The number of alleged violations was not specified in the complaint. [WJ](#)

Attorneys:

Plaintiff: Dustin Cho, Covington & Burling, Washington; Jonathan M. Sperling, Covington & Burling, New York

Related Court Document:

Complaint: 2014 WL 3735190



REUTERS/Jim Young



REUTERS/Heinz-Peter Bader

Many General Motors and Ford Motor vehicles have devices that allow consumers to record songs from CDs to the device's hard drive. A recent lawsuit accuses the companies of not paying royalties under the Audio Home Recording Act.

GoDaddy says high court review of cybersquatting decision premature

By Jason Seashore, J.D., Senior Content Writer, Westlaw Daily Briefing

GoDaddy.com Inc. is urging the U.S. Supreme Court to hold off on reviewing the 9th Circuit's decision finding the Anticybersquatting Consumer Protection Act does not include a cause of action for contributory cybersquatting.

Petroleum Nasional Berhad v. GoDaddy.com Inc., No. 13-1255, opposition brief filed (U.S. Aug. 6, 2014).

In its memo opposing *certiorari*, the domain name operator says there is no circuit conflict with governing precedent and, therefore, no reason for the high court to consider the question.

Public oil company Petroleum Nasional Berhad, known commonly as Petronas and often identified with the Petronas Twin Towers in Kuala Lumpur, Malaysia, first learned of petronastower.net in November 2009, according to Petronas' initial complaint.

Someone had registered that domain name with GoDaddy and placed "highly offensive, obscene and pornographic materials" on the domain's corresponding website, the complaint says.

As the international owner of the "Petronas"

trademark, Petronas said it had the right to demand the removal of the infringing domains, and asked GoDaddy to "cease its direct and contributory infringement," the complaint says.

Asserting that its website is the "manifestation of the Petronas corporate identity," Petronas accused GoDaddy of cybersquatting and contributory cybersquatting under Section 43(d) of the Lanham Act, 15 U.S.C.A. § 1125(d).

GoDaddy responded stating it could not get "involved" in domain name disputes and Petronas brought suit. GoDaddy moved for judgment on the pleadings.

In September 2010 U.S. District Judge Phyllis Hamilton of the Northern District of California granted GoDaddy's motion, ruling that Petronas could not prove cybersquatting because GoDaddy had neither "used" the domain nor possessed a bad-faith intent to profit from it.

Turning to the contributory cybersquatting allegation, Judge Hamilton said Petronas had failed to show that GoDaddy directed or controlled the infringing domain, a requirement for proving contributory cybersquatting. However, she gave Petronas leave to amend its complaint.

Petronas subsequently filed an amended complaint and GoDaddy moved for summary judgment.

Judge Hamilton noted that the Uniform Domain Name Dispute Resolution Policy, commonly called the UDRP, "specifically prohibits registrars from becoming involved in disputes over domain name ownership."

However, the judge allowed discovery to "clarify the mechanics of what GoDaddy did."

Nevertheless, Judge Hamilton granted GoDaddy's summary judgment motion as to the contributory infringement allegation, finding no bad faith intent to profit from the Petronas mark on the part of GoDaddy or the

domain registrant.

On appeal, the 9th U.S. Circuit Court of Appeals affirmed Judge Hamilton's ruling, saying it would be "nearly impossible" for GoDaddy to "inject" itself into domain name disputes, as this would require monitoring 50 million domain names.

HIGH COURT REVIEW?

Petronas filed its petition for *certiorari* in April arguing that traditional contributory trademark infringement rules should apply to cybersquatting.

"Simply put, 'cybersquatting' under Section 43(d) is trademark infringement," the petition says.

Petronas maintained that the 9th Circuit's ruling contradicts congressional intent not to eliminate secondary infringement liability with the enactment of the ACPA, which amended the trademark statute.

"Simply put,
'cybersquatting' under
Section 43(d) is trademark
infringement," the
petition says.

Petronas urged the high court to decide the issue arguing that people want to protect their trademarks in cyberspace as they do everywhere else.

TOO EARLY FOR SUPREME COURT

In its brief opposing Petronas' petition, GoDaddy says it is too early for the high court to intervene over the question of whether the ACPA includes a cause of action for contributory cybersquatting.

Because the 9th Circuit is the only appellate court to have decided the issue, there is no circuit conflict to be resolved, the brief says.



REUTERS/Bazuki Muhammad

Malaysian oil company Petronas, which is often identified with the Petronas Twin Towers in Kuala Lumpur, shown here, sued GoDaddy.com for allowing an alleged cybersquatter to register the domain name petronastower.net.

Although Petronas cites differing district court decisions — which can't be used to establish a circuit conflict anyway — all but two of those cases were in the 9th Circuit and are no longer good law in light of the 9th Circuit's affirmation, GoDaddy says.

The two non-9th Circuit district court cases addressed the question in only a cursory fashion and "demonstrate that this Court's review would be premature" prior to reasoned consideration of the question outside the 9th Circuit, the brief says.

The issue should be allowed to "percolate" in the lower courts, GoDaddy says.

This case is also a "poor vehicle" for deciding the question, the brief says. Even if the ACPA included a cause of action for contributory cybersquatting, Petronas could not assert it because the district court found that the elements of such a claim are absent here, it says. **WJ**

Attorneys:

Respondent: Jonathan S. Massey, Massey & Gail, Washington; John L. Slafsky, Wilson, Sonsini, Goodrich & Rosati, Palo Alto, Calif.

Related Court Document:

Opposition brief: 2014 WL 3896324

NEWS IN BRIEF

LINKEDIN PAYS WORKERS \$6 MILLION IN BACK PAY AND DAMAGES

LinkedIn Corp. has paid 359 current and former workers nearly \$6 million in back pay and damages following a Labor Department investigation, the agency announced Aug. 5. According to the statement, the Labor Department investigated the online career networking company and found it violated federal wage laws at locations in California, Illinois, New York and Nebraska. The company failed to record all the hours worked and did not properly compensate employees for the time in violation of the Fair Labor Standards Act, the agency said. The company has agreed to pay \$3.3 million in back wages plus \$2.5 million in damages, according to the statement.

NAVY PICKS GENERAL DYNAMICS UNIT FOR \$16 MILLION COMPUTER JOB

General Dynamics Advanced Information Systems has won a contract worth more than \$16 million to manufacture specialized computer systems for E/A-18G aircraft used by the U.S. Navy and the government of Australia. The Defense Department said in an Aug. 18 statement that the systems are being provided to Australia as part of the Foreign Military Sales Program. Under the program, the United States buys goods and services from domestic contractors and sells them to friendly foreign nations. GDAIS will perform the work in Bloomington, Minn., and is scheduled to finish the job by August 2016.

FEDS SAY CHINESE NATIONAL HACKED CONTRACTOR'S COMPUTERS

The Justice Department said in an Aug. 15 statement that a Chinese national, Su Bin, has been indicted on charges of hacking into U.S. defense contractors' computers to steal military aircraft trade secrets. In an Aug. 14 grand jury indictment filed in the U.S. District Court for the Central District of California, prosecutors say that between October 2008 and May 2014 Bin and two unidentified co-conspirators illegally accessed Boeing Co.'s computers to obtain information on the company's C-17 military transport plane. Bin, acting from locations in California and outside the United States, also hacked into other contractors' computers to obtain trade secrets on the F-22 and F-35 fighter jets, the charges claim. If convicted, Bin faces up to 30 years in prison.

United States v. Bin, No. 14-CR-00131, indictment filed (C.D. Cal. Aug. 14, 2014).

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Twitter, blog cases show perils of mixing work, personal life online

By Melissa J. Sachs, Esq., Legal Writer, Westlaw Journal

Many employers have social media policies that govern when, where and how often employees may tweet, blog, “like” a status or comment. These policies may prohibit certain online activity at work. They may also have rules or guidelines for employees to consider whenever they’re interacting online — whether for work or play.

***Munroe v. Central Bucks School District et al.*, No. 12-03546, 2014 WL 3700325 (E.D. Pa. July 25, 2014).**

***Kincannon v. South Carolina Commission on Lawyer Conduct et al.*, No. 3:14-cv-02832, complaint filed (D.S.C., Columbia Div. July 14, 2014).**

***Maremont v. Susan Fredman Design Group Ltd.*, No. 10 C 7811, notification of docket entry issued (N.D. Ill. Aug. 6, 2014).**

Three recent cases show the variety of ways an online social media presence can affect a person’s employment, job prospects or professional reputation. Together, they highlight the blurring line between personal and professional life and show why employers and employees need to consider this “virtual reality.”

BUSTED FOR BLOGGING

In July, the Central Bucks School District in Pennsylvania, its superintendent and a high school principal defeated a federal court lawsuit alleging they wrongfully suspended, harassed and fired English teacher Natalie Munroe after they found out about her personal blog. In her posts, Munroe allegedly commented on issues of public concern like student accountability, but she also used inflammatory language about students, parents and her district colleagues, court records said.

The school district had a legitimate employment reason to dismiss her because it concluded “that the blog posts would erode the necessary trust and respect between

Munroe and her students,” U.S. District Judge Cynthia M. Rufe of the Eastern District of Pennsylvania said. The judge, therefore, granted the school district’s summary judgment motion and tossed Munroe’s case.

FIRST AMENDMENT RIGHT TO TWEET?

Attorney J. Todd Kincannon is famous on Twitter, according to a lawsuit he filed in the U.S. District Court for the District of South Carolina against the state’s Commission on Lawyer Conduct. Kincannon uses Twitter to express his political and religious views, tweeting satirical, self-deprecating remarks that are no more offensive than commentary from Howard Stern, Rush Limbaugh or Bill Maher, the suit says. His Twitter account has almost 60,000 followers.

Allegedly, people have filed complaints with the state bar, claiming to be offended by Kincannon’s tweets, the suit says. Despite his First Amendment rights, the bar’s ethics commission has been unlawfully investigating him for about two years for possible disciplinary violations for expressing his views on Twitter, Kincannon’s complaint says. His suit seeks damages, court fees, costs and an injunction to stop the purportedly unlawful investigations.

DON’T TWEET AS ME, EMPLOYEE SAYS

In September an interior design firm and its ex-social media manager will meet for a pretrial conference in Chicago federal court over allegations that the firm and its owners

accessed the former employee’s personal Twitter and Facebook accounts without her authorization. This is the only issue that remains pending in Jill E. Maremont’s 2010 lawsuit against Susan Fredman Design Group Ltd. and owner Susan Fredman in the U.S. District Court for the Northern District of Illinois.

Maremont says the defendants violated Illinois privacy laws, a federal communications law and a federal trademark law when they used her personal accounts while she was in the hospital recovering from a work-related injury. In 2011, the Chicago federal court tossed the state law claims. Last March, the judge ruled for the defendants on the false-endorsement trademark claim.

KEY TAKEAWAYS

These are just a few recent examples showing how the line between personal and professional identities, especially online identities, has become less clear.

Professionals, whether self-employed or working for a company, should always make sure they are complying with the social media policies that govern their jobs or professions. **WJ**

Related Court Documents:

Munroe opinion: 2014 WL 3700325
Kincannon complaint: 2014 WL 3686816
Maremont March opinion: 2014 WL 812401

'FIRE SALE'

The case stems from Barnes & Noble's 2011 "fire sale" of Hewlett-Packard Touchpads on bn.com.

Plaintiff Kevin K. Nguyen bought two tablets and received a confirmation email of his purchase Aug. 21, 2011. The next day, however, Barnes & Noble sent him an email canceling his order, allegedly because of "unexpectedly high demand," the opinion said.

Nguyen filed a proposed class-action lawsuit against the retailer for false advertising and deceptive business practices on behalf of himself and other consumers whose Touchpad orders were canceled.

Barnes & Noble moved to compel arbitration, saying Nguyen agreed to this alternative dispute resolution method when he used the site to make his purchase.

U.S. District Judge Josephine L. Staton of the Central District of California disagreed with the retailer and denied its motion to compel.

According to the record, Nguyen never read or clicked on the site's terms, despite a hyperlink on the bottom of each Web page.

Plus, Barnes & Noble never directed Nguyen to review the site's terms before he completed his online purchase, and, therefore, he had no notice of and never agreed to the arbitration provision, Judge Staton said.

REASONABLE NOTICE

Barnes & Noble appealed, but the 9th Circuit panel upheld the judge's decision.

According to the opinion, the panel looked to see whether Nguyen had reasonable notice of the browsewrap agreement. To reach



"[The decision] signals that courts are increasingly reluctant to hold consumers bound by terms embedded in browsewrap agreements," said Kelley Drye & Warren attorney Allison Brehm.

this decision, it considered the website's general design and the conspicuousness and placement of the hyperlinked terms.

The panel said other courts have considered the hyperlink's font, color and location — Is it underlined and blue or in color-contrasted text? Do users have to scroll to see the link or is it visible on every page?

Other courts have considered whether users are directed to review the hyperlink or given explicit notice that the site's terms will apply if they continue to use the site, the panel said.

Barnes & Noble included a green, underlined hyperlink to the site's terms in the lower left-hand corner of every checkout page, but it never directed Nguyen or other customers to read the terms, the panel said.

Nguyen, therefore, never had reasonable notice of the arbitration clause or other terms in the browsewrap agreement, the appeals court decided.

LESSONS LEARNED

Kelley Drye & Warren's Brehm commented on what this ruling may mean for future cases.

"Even a hyperlink in underlined, color-contrasting text on every page of the booksellers' website failed to provide sufficient notice," she said.

She also noted the lack of any other conspicuous reminder for users to review bn.com's terms when they completed their orders.

Constantine Cannon's Greenstein remarked that the court's opinion "accommodates a range of sophistication and 'technological savvy' of online purchasers by putting the onus on the website to draw the user's attention to any contractual terms."

Both Greenstein and Brehm said, however, there are still some cautionary lessons for site users.

"Consumers should be growing more and more accustomed to online terms of use given their widespread use and publicity," Brehm said.

Greenstein also reminded consumers that they "should recognize that posted terms and conditions can create binding obligations, regardless of whether they actually read every page of single-spaced boilerplate text online." **WJ**

Attorneys:

Defendant-appellant: Michelle C. Doolin, Leo P. Norton and Erin E. Goodsell, Cooley LLP, San Diego

Plaintiff-appellee: Gretchen Carpenter and Brian R. Strange, Strange & Carpenter, Los Angeles

Related Court Document:

Opinion: 2014 WL 4056549

See Document Section A (P. 21) for the opinion.

Q&A: THE 9TH CIRCUIT'S BROWSEWRAP DECISION

Westlaw Journal speaks with Constantine Cannon attorneys Seth D. Greenstein, a partner at the firm, and associate David Golden about *Nguyen v. Barnes & Noble Inc.*



WJ: What should websites take away from this case?

Seth D. Greenstein: This case should be a wakeup call for website owners who attempt to control site use by including a hyperlink to legal terms of use at the bottom of the Web page. Merely posting a hyperlink to terms of use, even in a conspicuous manner on every page, may not be enough to create

an enforceable contract with a site user. A prudent website owner needs do more to draw the user's attention to the rules governing site use or terms of sale, and put the user on notice that additional terms apply. To ensure creation of a binding contract with the user, particularly for commercial transactions, the website should require the user to click assent.

WJ: What about consumers?

SDG: The opinion accommodates a range of sophistication and "technological savvy" of online purchasers by putting the onus on the website to draw the user's attention to any contractual terms. However, consumers should recognize that posted terms and conditions can create binding obligations, regardless of whether they actually read every page of single-spaced boilerplate text online. If the consumer has actual or constructive notice that a commercial transaction, or even use of a website, is subject to posted conditions, a court will likely hold the consumer to those terms. While some of these terms might seem to the consumer onerous or unfair, courts regularly will enforce terms that, for example, limit the consumer's remedies or require arbitration of any grievances.



WJ: Is the 9th Circuit's ruling consistent with other federal appeals courts' decisions?

David Golden: The 9th Circuit expands upon two 2nd U.S. Circuit Court of Appeals precedents. In *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002), a link to an arbitration provision "submerged" at the bottom of a Web page was insufficient to impose license

conditions for downloaded software, particularly since users may visit the website only once. In *Register.com v. Verio Inc.*, 356 F.3d 393 (2d Cir. 2004), the court upheld terms of use where the defendant regularly scraped information from the plaintiff's website and admitted awareness of the terms. The 9th Circuit takes the 2nd Circuit decisions a step further by requiring a more effective forms of notice than a conspicuous hyperlink, or an affirmative act to demonstrate user assent.

WJ: Will this ruling affect other kinds of online contracts?

DG: While *Nguyen* concerned website terms of use, the 9th Circuit's opinion will apply to other categories of online contracts. The court reviews cases addressing various types of commercial and employment agreements, and concludes with the broad requirement that "the onus must be on website owners to put users on notice of the terms to which they wish to bind consumers."

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