



# INTELLECTUAL PROPERTY

The newsletter of the Illinois State Bar Association's Section on Intellectual Property Law

## Trademark Trial and Appeal Board not flip about the bird

By Steven L. Baron and Natalie A. Harris

The Trademark Trial and Appeal Board ("TTAB") ruled hands down against the maker of a beverage bottle that gives consumers the finger.<sup>1</sup> On September 19, 2011, the TTAB affirmed the United States Patent and Trademark Office's ("USPTO") refusal to register a trademark application for "a bottle in the shape of a hand with the middle finger extended upwards" on the grounds that the proposed mark is "immoral" or "scandalous" within the meaning of 15 U.S.C. § 1052(a).<sup>2</sup>

On March 12, 2008, Luxuria, s.r.o. ("Luxuria"), a Czech company, filed an application based on its international registration<sup>3</sup> depicting a beverage bottle flashing "the universal signal of discontent"<sup>4</sup> for beers and other alcoholic and nonalco-

holic beverages.<sup>5</sup> Following the USPTO's refusal, Luxuria appealed to the TTAB.

After the parties submitted their respective appeal briefs, Luxuria filed a remand request for consideration of additional evidence.<sup>6</sup> The allegedly late-breaking evidence included articles suggesting that the middle finger is losing its shock value;<sup>7</sup> can be used to express something as benign as excitement over new shoes<sup>8</sup> and is often used "in a cheeky and fun manner, between friends."<sup>9</sup> The TTAB determined that Luxuria failed to demonstrate "good cause" for the requested remand, in part because it was not clear that the material was not previously available.<sup>10</sup>

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## Torrent Wars: Copyright trolls, legitimate IP rights, and the need for new rules vetting evidence and to amend the Copyright Act

By Jeffrey Antonelli

A torrent<sup>1</sup> is a technical name for a new way of sharing electronic files across the internet. When the internet was young, people were encouraged to "surf the web" and explore a new way of sharing information across vast distances and in remarkable time. An e-mail from the United States to Europe could receive a reply in a matter of minutes. Electronic files containing a photograph, a document, or even a short movie clip could be downloaded with the click of a mouse. Using a 56k modem connection this

often took a few minutes (sometimes an hour or more). Millions became familiar with the progress bar watching it countdown from 0 to 100% complete. Then came Napster, a new software program that allowed faster distribution of those electronic files, opening up the ability to quickly share files with thousands or millions of others.

Today, a program called BitTorrent is spurring a new wave of internet file sharing, and along

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## Trademark Trial and Appeal Board not flip about the bird

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The TTAB allowed Luxuria to file a second request for remand supported by a showing of good cause, specifically recommending an affidavit regarding Luxuria's efforts during prosecution to obtain the additional evidence.<sup>11</sup> Luxuria did file a second request for remand, but did not lift a finger with respect to providing details about the steps it took to search for the evidence during prosecution. Accordingly, the TTAB denied Luxuria's request for remand.<sup>12</sup>

Luxuria filed its reply brief and attached the *very same* evidence it had sought to make of record through its prior requests for remand.<sup>13</sup> Luxuria crossed its fingers, hoping the TTAB would turn a blind eye. However, the TTAB caught Luxuria red-handed: "We cannot help but note the convergence between applicant's actions toward the Board and the message conveyed by its mark."<sup>14</sup> As a result, the TTAB disregarded Luxuria's entire reply brief, including the attached evidence.

Luxuria may have let an opportunity slip through its fingers by failing to make its evidence of record. The TTAB acknowledged that "[w]hether the mark consists of or comprises scandalous matter must be determined from the standpoint of a substantial composite of the general public (although not necessarily a majority), and in the context of contemporary attitudes."<sup>15</sup> Furthermore, some evidence properly in the record suggested that "the finger" can be a strange, friendly greeting for some" and that the gesture can be found in film, television and political contexts.<sup>16</sup> Luxuria may have laid its finger on critical evidence demonstrating the changing nature of the general public's perception of "the bird," but its procedural misstep cooked the goose.

The TTAB concluded that the gesture depicted by Luxuria's mark is the visual equivalent of the extremely offensive expletive "f\*\*\* you," and noted that "[j]ust as these words would be considered scandalous and immoral if used as a trademark. . . the visual depiction of these words by the finger gesture shown in applicant's mark is equally scandalous and immoral."<sup>17</sup> The TTAB's decision to point the finger at Luxuria appears particularly arbitrary in light of USPTO records reflecting live registrations for FUK U CONDOMS,<sup>18</sup> BIG PECKER wine<sup>19</sup> and BONG

SCHLONG crocheted fabric covers for glass water pipes and male penises.<sup>20</sup> It seems the TTAB may not quite have its finger on the pulse of contemporary attitudes towards scandal and immorality. ■

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2. *In re Luxuria s.r.o.*, 100 USPQ 2d 1146 (TTAB 2011).

3. According to the WIPO database for the Madrid System for the International Registration of Marks, Luxuria's mark (International Registration No. 969241) is registered in Australia, Japan, Namibia, Norway and Zambia. The same mark was refused registration in Belarus, China, Cuba, Cypress, Morocco, Mozambique, Serbia, Russian Federation, Singapore, Turkey and the Ukraine. <<http://www.wipo.int/romarin//detail.do?ID=0>>.

4. *People v. Meyers*, 352 Ill.App.3d 790, 794 (2nd Dist. 2004).

5. *In re Luxuria*, 100 USPQ 2d at 1146.

6. *In re Luxuria*, 100 USPQ 2d at 1147.

7. TTAB Proceeding No. 79055664, Applicant's Request To Suspend and Remand Appeal For Consideration of Additional Evidence, filed Nov. 30, 2009 at Ex. A (Martha Irvine, *Is the Middle finger Losing Its Shock Value?*, Columbian, Feb. 26, 2003).

8. *Id.* at Ex. B (Ira P. Robbins, *Digitus Impudicus: The Middle Finger and the Law*, 41 U.C. Davis L. Rev. 1403, 1407-8 (2008)).

9. *Id.* at p.3 and Ex. C.

10. *In re Luxuria*, 100 USPQ 2d 1147.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 1148, fn 3.


15. *Id.* at 1148 (citing *In re Boulevard Ent., Inc.*, 334 F. 3d 1336 (Fed. Cir. 2003)).

16. *Id.* at 1150.

17. *Id.* at 1151.

18. U.S. Serial No. 85322631

19. U.S. Serial No. 3621024

20.  The mark consists of the stylized text "BongSchlong protector." The word "protector" appears under the letters "Schlong" in "BongSchlong." The stem of the letter "B" is made from a phallus symbol. (U.S. Serial No. 85344882).

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## Torrent Wars: Copyright trolls, legitimate IP rights, and the need for new rules vetting evidence and to amend the Copyright Act

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with it an ocean of online copyright infringement. Those running the program post torrent files on immensely popular websites like the Pirate Bay. While filed to ostensibly catch and stop the online infringers, critics of this practice contend it is really about revenue. Consequently, the blogs on the internet came up with an addition to the English and legal lexicon: the copyright troll.<sup>2</sup>

According to many vocal critics,<sup>3</sup> a cottage industry of enterprising lawyers sprang up not to help the owners of copyrighted works stop online piracy, but to recoup lost income for movies that bombed at the box office. Worse yet, allegedly unethical lawyers are accused of not only using unprofessional tactics to “shake down” and harass alleged infringers<sup>4</sup>—many of whom were actually innocent—but of actually providing the copyrighted content online for BitTorrent distribution in order to induce copyright infringement.<sup>5</sup> Once the consumer used BitTorrent or similar peer-to-peer software to obtain the copyrighted work, the copyright owner’s computer network forensics team provided a log of internet addresses (internet protocol addresses, or “IP addresses”) to lawyers who filed lawsuits seeking the identity of these individuals. Settlement demand letters then followed. In the case relating to the recently dissolved Prenda law firm of Chicago, the infamous law firm received national attention after Los Angeles federal judge Otis Wright issued what has become known as the “Star Trek” sanctions order,<sup>6</sup> in which Judge Wright accused the lawyers associated with Prenda of “brazen misconduct and relentless fraud,” and referred the matter to the United States Attorneys Office, the Criminal Investigation Division of the IRS, and several federal and state bar associations for investigation.

This article provides practical advice for practitioners whose clients are on the receiving end of a summons for a federal copyright infringement lawsuit, or more commonly a call from a head of household who has received a notice from their Internet Service Provider (ISP) stating that a subpoena has been received requiring the ISP to release the subscriber’s personal identifying information to the copyright infringement lawsuit’s plain-

tiff. The article concludes by recommending a judicial “screening” process to prevent what the writer has seen as widespread wrongful accusations of copyright infringement, known as false positives, as well as a recommendation to amend the US Copyright Act to reduce the maximum statutory damages from \$150,000<sup>7</sup> to \$5,000 for consumers who do not distribute the copyrighted work for profit. These recommendations, if implemented, would reduce the extraordinarily high incidence of innocent individuals and families being targeted by copyright troll attorneys; and, likely, also have the effect of constraining new copyright infringing filings to those defendants who refused to pay a settlement demand of hundreds of dollars, rather than the current settlement demands of \$2,000 to \$20,000 or more currently seen today.

### The ISP notice

Typically, the consumer’s first notice about a federal copyright lawsuit will be a letter in the mail from their ISP, informing them that a lawsuit has been filed and a subpoena has been received to reveal their personal identity and contact information. The letter informs the consumer that the lawsuit alleges the home’s internet connect was observed taking place in a BitTorrent “swarm” on a specific date and time and their Internet Protocol (IP) address was logged in association with this online activity. The ISP will then provide the consumer until a certain date, usually 30 days from the date of the letter, and the opportunity to file objections with the court. Defendants can request that the subpoena be quashed or vacated, promising not to release the consumer’s information to plaintiff’s counsel unless and until the judge rules on the motion.

Oftentimes, motions to quash the subpoena are combined with motions to sever the defendant from the complaint if plaintiff has chosen to group a number of defendants into the same pleading (often referred to as “mass joinder” cases due to a previous trend by plaintiffs to attempt to group hundreds, or even thousands of defendants into the same complaint), asking that the subpoena be quashed as a consequence if the court

agrees to sever the defendants. As recently noted by Northern Illinois District Judge John Tharpe, Jr., “There is a split of authority<sup>8</sup> nationally and within this district over whether it is appropriate to join<sup>9</sup> in a single lawsuit many anonymous defendants who are alleged to have participated in a single BitTorrent swarm.... The disagreement among the courts centers on the question of whether claims against multiple defendants who participated in the same BitTorrent swarm arise out of the same transaction or series of transactions, as required for joinder under Rule 20(a)(2)(A).”<sup>10</sup> For Judge Tharpe, Jr., at the early stage of discovery, because BitTorrent “requires a cooperative endeavor among those who use the protocol,” and because “Plaintiff has limited its complaint to participants who are likely located in this district and who participated in a swarm over a relatively brief time frame....the Court will not *sua sponte* find misjoinder at this time and will grant the

Plaintiff leave of Court to issue the subpoenas it proposes.”

For those not in Judge Tharpe’s courtroom, the motion to sever and quash the subpoena may also request a protective order be entered allowing the defendant to proceed anonymously if the motion to sever is not granted. In order to have any realistic chance of success, the motion for protective order should only be presented if the underlying copyrighted work is adult in nature. However, in some circumstances it may be appropriate to ask for a protective order even if the copyrighted work is non-adult in nature, particularly if a showing can be made that plaintiff’s counsel has acted in a harassing manner in the past once they received the identifying information from the ISP.

### The settlement demand letter

In many BitTorrent copyright infringement cases, once plaintiff’s counsel receives the consumer’s identity information from the ISP, a settlement demand letter is immediately sent. These letters typically rely on citing cases whose outcomes may be outliers or have nothing to do with online infringement. Even when they are related to online infringement the cases cited may be those

in which the defendants acted particularly egregiously, not only violating the Copyright Act<sup>11</sup> but also committing perjury and spoliation of evidence resulting in especially high judgments.<sup>12</sup> For example, in the first reported BitTorrent case to go to trial, *Malibu Media v. Does* (EDPA), in addition to the defendant admitting at the eleventh hour before trial he actually *did* commit copyright infringement, he also then admitted that he had lied to the court in proclaiming his innocence, and tried to cover it up in wiping his computer hard drive clean. To many observers including the writer, this “bellwether” trial appears to have been a dud because there was no cross examination of the witnesses put on by plaintiff. Cross examination is an element most attorneys consider essential to the adversarial process and the truth-seeking purpose of trial. Yet, these cases and the settlement demand letters which cite them, understandably make clients extremely anxious even if they did not commit any copyright infringement. These letters usually state the consumer can make it all go away for a settlement payment, usually in the range of \$2,000 to \$5,000.<sup>13</sup>

### To settle or fight

It is no secret that litigation is expensive, and that fact is often used by plaintiffs as a factor in determining how much to demand in settlement. For an *innocent* defendant to choose not to pay a settlement of a few thousand dollars, and instead pay his or her attorney potentially tens of thousands of dollars or more in legal fees, clearly more than financial incentives must be at play. Often times, innocent defendants will pay a settlement of \$2,000 or so rather than live through the ordeal of fighting a lawsuit and paying that amount of money many times over for legal defense. Yet sometimes innocent parties are sometimes so angered at being named that even after full disclosure by their counsel as to the costs of competent defense, they will decide to fight rather than to settle.<sup>14</sup> Of course, this dynamic often changes when the settlement demanded is closer to \$10,000 or more, which occurs in cases of multiple alleged infringements by a copyright holder. Clients must be clearly advised that, strictly speaking in terms of money, it is likely to cost far less to settle than it is to defend the case. And, although the Copyright Act’s Section 505 expressly allows attorneys fees to be awarded to the prevailing party, including the defendant,<sup>15</sup> the award of at-

torneys fees is discretionary, not absolute<sup>16</sup>. Furthermore, with the civil burden of proof being mere preponderance of the evidence rather than beyond a reasonable doubt or a clearly convincing standard, it is entirely possible that a judge or jury could find in favor of the plaintiff even when there is no more evidence that defendant committed the copyright infringement other than the plaintiff’s proof that defendant’s IP address was logged in a BitTorrent swarm.

### Evidentiary problems—The failure to control for “false positives”

The computer science literature and federal courts across the country have cited problems with the reliability of BitTorrent copyright plaintiffs’ methods of so-called identification of infringers. For example, a 2008 study, “*Challenges and Directions for Monitoring P2P File Sharing Networks – or – Why My Printer Received a DMCA Takedown Notice*”<sup>17</sup> found that practically any Internet user can be framed for copyright infringement: “By profiling copyright enforcement in the popular BitTorrent file sharing system, we were able to generate hundreds of real DMCA takedown notices for computers at the University of Washington that never downloaded nor shared any content whatsoever.” “Further, we were able to remotely generate complaints for nonsense devices including several printers and a (non-NAT) wireless access point.” “Our results demonstrate several simple techniques that a malicious user could use to frame arbitrary network endpoints.” These results were affirmed years later in a study by the same authors, *The Unbearable Lightness of Monitoring: Direct Monitoring in BitTorrent*, <[www.cs.bham.ac.uk/~tpc/Papers/P2PMonitor.pdf](http://www.cs.bham.ac.uk/~tpc/Papers/P2PMonitor.pdf)> accessed on March 11, 2013.

Courts, too, are cognizant of the fact that not all IP addresses point to an actual infringer. See, e.g., *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 242 (S.D.N.Y. 2012) (estimating that 30% of the individuals whose names were disclosed to plaintiffs did not download the copyrighted material). The court in *SBO Pictures* stated: “the ISP subscriber to whom a certain IP address was assigned may not be the same person who used the internet connection for illicit purposes.”<sup>18</sup> Similarly, *In re Bittorrent Adult Film Copyright Infringement Cases*,<sup>19</sup> the district court explained that “it is no more likely that the subscriber to an IP address carried out a particular computer function ... than to say an individual who pays the

telephone bill made a specific telephone call.”<sup>20</sup> The court explained that due to the increasing popularity of wireless routers, it is even more doubtful that the identity of the subscriber to an IP address correlates to the identity of infringer who used the address.<sup>21</sup>

The Honorable Harold. A. Baker of the Central District of Illinois has stated, “Where an IP address might actually identify an individual subscriber and address[,] the correlation is still far from perfect.... The infringer might be the subscriber, someone in the subscriber’s household, a visitor with her laptop, a neighbor, or someone parked on the street at any given moment.”<sup>22</sup> Judge Baker was accurately articulating that IP subscribers are not necessarily copyright infringers,<sup>23</sup> and referred to an MSNBC article by Carolyn Thompson of a raid by federal agents on a home that was linked to downloaded child pornography. “Agents eventually traced the downloads to a neighbor who had used multiple IP subscribers’ Wi-Fi connections (including a secure connection from the State University of New York).”<sup>24</sup>

### The need for a court screening process

In BitTorrent copyright litigation, the connection between an IP address, an ISP subscriber, and the actual infringer is even more tenuous than in those situations illustrated in the child pornography raid above (where the problem is a “hijacked” wireless internet connections by a neighbor). In a nutshell, the additional problem posed in identifying copyright infringers in BitTorrent litigation is identity theft, where the infringer who is determined not to get caught simply fakes (or frames) the IP address of the computer account he or she is using.<sup>25</sup>

Much like the individual who wishes to get a job but has a criminal history and therefore uses a fake social security number in his or her employment application, in BitTorrent swarms, an IP address is often “made up” by the actual infringer through easily obtained software. The problem is, therefore, that the “made-up” IP address just happens to actually belong to someone else when the infringer is committing the infringer - possibly your client.

The writer believes that this unacceptably high incidence of identity theft, referred to in the computer science literature as “false positives”, poses a serious due process problem and some technological screening process must be used by the court prior to copyright

plaintiffs being granted leave to issue Rule 45 subpoenas to the ISPs to identify the account holder associated with the IP address. Somewhat analogous to the grand jury in criminal cases, this screening process would be a vetting of the technical evidence presented by the plaintiff just as a prosecutor must present evidence to a grand jury prior to an indictment being issued.

This court screening process can be added to Section 502 (Injunctions), Section 503 (Impounding and disposition of infringing articles) and Section 504 (Damages and profits) in a fashion similar to what the Maryland District Court has done with all cases filed by copyright plaintiff Malibu Media.<sup>26</sup> Maryland has appointed Professor William Hubbard, a member of the faculty at the University of Baltimore School of Law, who teaches copyright and intellectual property law, to serve as a Master in the Malibu cases.<sup>27</sup> When a copyright lawsuit is filed by Malibu Media, procedures are followed to, inter alia, a) allow the Master to obtain information from the ISP, b) allow the Subscriber to provide the Master with information to enable the Master to make a preliminary recommendation whether a plausible claim for copyright infringement may be brought against the Subscriber, and c) for the Master to make a recommendation that a factual basis exists, or does not exist, for Malibu to assert a plausible claim for relief against a Subscriber for copyright infringement.

Even aside from the allegations that some unethical attorneys may actually be “seeding” their own copyrighted works online to induce others to download the work and then be sued later,<sup>28</sup> it is fundamentally unfair that innocent individuals and families are currently being subjected to the unnecessary worry and expense of being targeted by copyright trolls starting with the notice of subpoena from the ISPs, perhaps based on flimsy evidence. A court screening process, perhaps like the Maryland District Court’s Master, is a necessity to prevent the current troublesome number of innocent individuals and families from continuing to be subjected to claims of online copyright infringement.

### The need to amend the Copyright Act

Most people seem to agree that the average consumer who wrongfully obtains a copyrighted work should be subjected to the risk of being punished by a monetary fine. However, none of these BitTorrent copy-

right cases involve people attempting to redistribute the work for a profit. It seems incredibly unfair to subject consumers who are alleged to have downloaded a single movie or song on the internet for private viewing or listening purposes to be exposed to a potential \$150,000 statutory damages award, plus attorneys fees as provided in Section 504(c) (2). In order to present the potential for a proportional remedy for non-profitting copyright infringement by a consumer, the writer suggests amending the Copyright Act to a maximum of \$5,000 statutory damages where willfulness is demonstrated, and \$500 if willfulness is not demonstrated. (Change Section 504(c)(1)’s text from “an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, *in a sum of not less than \$750 or more than \$30,000 as the court considers just*” (italics added) to “an award of statutory damages for all infringements involved in the action, *when no monetary gain was intended by the infringement* with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, *in a sum of not less than \$750 or more than \$500 as the court considers just.*” Change Section 504(c)(2)’s text to “In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000. *However, if no monetary gain was intended by the infringement, the court may only increase the award of statutory damages to a sum of not more than \$5,000.*”

This cap on damages for non-profit-motivated copyright infringements may reduce the number of the more frivolous copyright trolling lawsuits and, at the very least, reduce the settlement amounts paid by those innocent defendants who just don’t want to deal with a lawsuit down from thousands of dollars, to just hundreds of dollars.

### Conclusion

The problems caused by the wave of BitTorrent copyright litigation flooding the federal courts is a classic case of the law needing to catch up to the current state of technology. In addition to the need to curb abuses and avoid burdening innocent people from becoming potential defendants to

federal litigation, the Copyright Act should be amended to reflect the reality that few people believe a consumer should be at risk of a \$150,000 statutory damage award for downloading a copyrighted movie, electronic book, or piece of software when there is no intent on distribution for profit. For all of these reasons, it is clearly time to modernize the “antiquated” copyright laws Judge Wright has so succinctly described.<sup>29</sup> ■

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1. In the BitTorrent file distribution system, a torrent file is a computer file that contains meta-data about files and folders to be distributed, and usually also a list of the network locations of trackers, which are computers that help participants in the system find each other and form efficient distribution groups called *swarms*. A torrent file does not contain the content to be distributed; it only contains information about those files, such as their names, sizes, folder structure, and cryptographic hash values for verifying file integrity. Depending on context, a torrent may be the torrent file or the referenced content. Torrent files are normally named with the extension *.torrent*, as in *MyFile.torrent*. <[http://en.wikipedia.org/wiki/BitTorrent\\_protocol](http://en.wikipedia.org/wiki/BitTorrent_protocol)>, accessed on August 6, 2013.

2. <[http://en.wikipedia.org/wiki/Copyright\\_troll](http://en.wikipedia.org/wiki/Copyright_troll)>

3. See, eg., bloggers at <[fightcopyrighttrolls.com](http://fightcopyrighttrolls.com)> and <[detroitdie.com](http://detroitdie.com)>

4. Jason R. LaFond, *Personal Jurisdiction and Joinder in Mass Copyright Troll Litigation* 71 Md. L. Rev. Endnotes 51 (2012) *citing Raw Films, Ltd. v. Does 1–32*, No. 3:11CV532-JAG, 2011 WL 6182025, at \*2–3 (E.D. Va. Oct. 5, 2011).

5. See, e.g., Tim Worstall, “Quite Amazing, Prenda Law Was Seeding The Torrent Sites It Then Sues People For Downloading From,” *Forbes*, Aug. 21, 2013, <<http://www.forbes.com/sites/timworstall/2013/08/21/quite-amazing-prenda-law-was-seeding-the-torrent-sites-it-then-sues-people-for-downloading-from/>>.

6. *Ingenuity 13, LLC v. John Doe*, 2012-cv-0833 CDCA, entered May 6, 2013.

7. 17 USC §504(c).

8. *Compare, e.g., Malibu Media, LLC v. Does 1–6*, --- F.R.D. ---, 2013 WL 2150679, \*11 (N.D. Ill. May 17, 2013) (allowing joinder); *Pacific Century Int’l v. Does 1–31*, No. 11 C 9064, 2012 WL 2129003, \*3 (N.D. Ill. June 12, 2012) (same); *First Time Videos, LLC v. Does 1–76*, 276 F.R.D. 254, 257 (N.D. Ill. 2011) (same); *with Malibu Media, LLC v. Reynolds*, No. 12 C 6672, 2013 WL 870618, \*14 (N.D. Ill. Mar. 7, 2013) (rejecting joinder); *Digital Sins, Inc. v. 1 A “MAC address”* is a unique number assigned to the hardware of a particular computer or other device. *United States v. Schuster*, 467 F.3d 614, 618 n. 1 (7th Cir. 2006). Case: 1:13-cv-04901 Document #: 10 Filed: 08/20/13 #:64 5 *Does 1–245*, No. 11 C 8170, 2012 WL 1744838, \*2 (S.D.N.Y. May 15, 2012) (same); *In re BitTorrent Adult Film Copyright Infringement Cases*, No. 11 C 3995, 2012 WL 1570765, \*11 (E.D.N.Y.

May 1, 2012) (same).

9. See, Fed. R. Civ. P. 20(a)(2)(A)

10. *Osiris Entertainment LLC v. Does 1-38*, 13-cv-04901 NDIL, August 20, 2013

11. 17 USC 101, et seq.

12. See, eg., *Malibu Media v. Does*, Case No. 12-cv-02088 (PAED), where the last remaining defendant was hit with a judgment exceeding \$100,000 in addition to plaintiff's attorney's fees.

13. "...[Plaintiffs then] offer to settle—for a sum calculated to be just below the cost of a bare-ones defense." *Ingenuity 13 LLC v. John Doe*, 2:12-cv-8333 CDCA, currently on appeal.

14. Gregory S. Mortenson, BitTorrent Copyright Trolling: A Pragmatic Proposal for a Systemic Problem, 43 SETON HALL L. REV. 1105, 1111 (May 30, 2013).

15. 17 USC §505

16. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994)

17. "Challenges and Directions for Monitoring P2P File Sharing Networks – or –Why My Printer Received a DMCA Takedown Notice" coauthored by professors Tadayoshi Kohno and Arvind Krishnamurthy of the University of Washington's De-

partment of Computer Science and Engineering

18. *SBO Pictures, Inc.*, *supra*, 2011 WL 6002620, at \*3

19. *In re Bittorrent Adult Film Copyright Infringement Cases*, 2012 WL 1570765, at \*3 13 (E.D.N.Y. May 1, 2012)

20. *Id.*

21. *Id.*

22. *VPR Internationale v. Does 1-1,017*, No. 11-02068 (ECF Doc. 15 at 2), 2011 WL 8179128 (C.D. Ill. Apr. 29, 2011).

23. *Id.*

24. See Carolyn Thompson, *Bizarre Pornography Raid Underscores Wi-Fi Privacy Risks* (April 25, 2011), <[http://www.msnbc.msn.com/id/42740201/ns/technology\\_and\\_science-wireless/](http://www.msnbc.msn.com/id/42740201/ns/technology_and_science-wireless/)>. *Id.*

25. *The Unbearable Lightness of Monitoring: Direct Monitoring in BitTorrent*, <[www.cs.bham.ac.uk/~tpc/Papers/P2PMonitor.pdf](http://www.cs.bham.ac.uk/~tpc/Papers/P2PMonitor.pdf)> accessed on March 11, 2013.

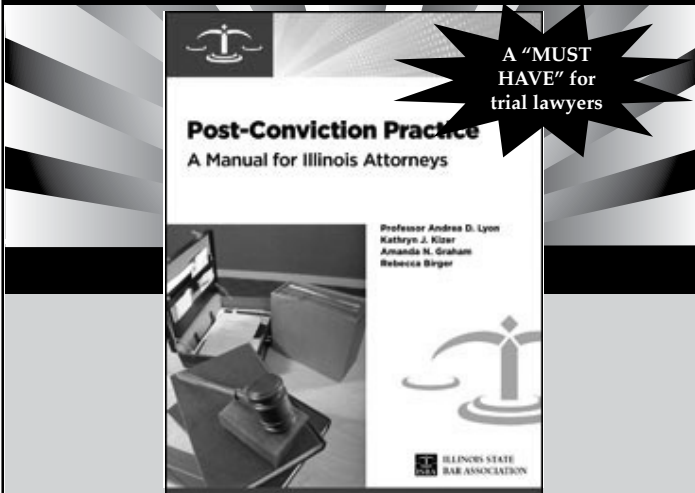
26. *In re Malibu Cases*, 12-cv-1195, entered May 16, 2013

27. *Id.*

28. Tim Worstall, "Quite Amazing, Prenda Law Was Seeding The Torrent Sites It Then Sues People For Downloading From," *Forbes*, Aug. 21, 2013, <<http://www.forbes.com/sites/tim-worstall/2013/08/21/quite-amazing-prenda-law-was-seeding-the-torrent-sites-it-then-sues-people-for-downloading-from/>>.

29. "They've discovered the nexus of antiquated copyright laws, paralyzing social stigma, and unaffordable defense costs. And they exploit this anomaly by accusing individuals of illegally downloading a single pornographic video. Then they offer to settle—for a sum calculated to be just below the cost of a bare-bones defense. For these individuals, resistance is futile; most reluctantly pay rather than have their names associated with illegally downloading porn. So now, copyright laws originally designed to compensate starving artists allow starving attorneys in this electronic-media era to plunder the citizenry." *Ingenuity 13 LLC v. John Doe*, 2:12-cv-8333 CDCA, currently on appeal.

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## Breaches of privacy and data—New risks, new insurance

By Daniel Kegan

The widespread adoption and intrusion of the Internet has made many professional, and consumer, tasks much easier. The ubiquitous Internet has also made breaches of privacy and data easier for tortfeasors. Some surveys conclude over half of small businesses have experienced data breaches. Responding to a data security breach is unpleasant, and often regulated by state and federal regulations. General commercial package insurance policies cannot be relied upon to adequately cover the exposure. Coverage for third-party liability—responding to rogue employee acts—may have even less coverage. Regulatory fines and penalties may not be covered, nor may the insurer have a duty to defend. Outsourcing data handling, litigation document review, and the like typically does not relieve the law firm from its duty to comply with the laws.

Exposure is not limited to Internet hackers. Lost, discarded, stolen laptops, PDAs, smartphones, and portable memory devices all create risks, as well as seemingly innocent procedural errors and disgruntled employees and agents.

For one insurer, the application qualification questions are few:

- Name, Address, Gross revenue for last full financial year or good-faith estimate for this full year if startup;
- Existing subsidiaries;
- Business activities (e.g., Legal services);
- Qualifying conditions: Not a depository (e.g., bank); payment card processor; insurer; social or professional networking site; franchise; pornographer; gambler; data warehouse; mobile application or video game developer or publisher; utility provider; family planning or substance abuse service, abortion clinic, adoption agency; all revenue-generating permanent physical operations within the USA; no more than one million payment card transactions annually; store under one million records with sensitive data; mobile devices storing sensitive data are encrypted; compliant with Payment Card Industry Data Security Standards (PCI/DSS) if covered; unaware of any likely loss; no action against applicant concerning sensitive data.

Here “sensitive data” is defined as “data including, but not limited to, Personally Identifiable Information (PII), Protected Health Information (PHI), Social Security Numbers (SSN), individual taxpayer identification number, drivers license number, passport number, other federal/state identification number, payment card data (credit or debit; PCI), and/or financial account information.”

Law firms are eligible to apply for insurance. For many firms, premiums range from \$800 to \$1,500. Firms processing payment

cards should be familiar with the annual PCI/DSS audit. Firms not processing payment cards will prudently audit their information practices and possible sensitive data breaches and leaks. Beyond the liabilities of any information holder’s leak, improper disclosure of sensitive data in litigation risks sanctions. ■

Daniel Kegan, <daniel@keganlaw.com>, Kegan & Kegan, Ltd., Chicago. Copyright © Daniel Kegan 2013, All Rights Reserved. Daniel thanks insurance professional Ken Teglia, <KTeglia@lhinc.com>, for his assistance with this article.

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# Intellectual Improbabilities™

By Daniel Kegan

**BUD, ORD?** Anheuser-Busch filed applications to register 42 airport codes as trademarks.

**Patent Litigation Improving Patent Quality.** As required by the Leahy-Smith America Invents Act, § 34, the General Accounting Office, 22Aug2013, reported on consequences of patent litigation by non-practicing entities (NPE). NPEs instituted about a fifth of patent lawsuits between 2007 and 2011. Patent litigation as a whole increased about a third from 2010 to 2011. The report recommended the PTO link patent litigation trends to internal patent examination data to improve patent quality. <[www.gao.gov/assets/660/657103.pdf](http://www.gao.gov/assets/660/657103.pdf)>.

**Gazette Gazing.** The PTO has released a more easily searchable electronic Official Gazette. To search TMOG:

- a) Locate the date that the mark was published for opposition by entering the serial number in <<http://tsdr.uspto.gov/>> and clicking "Status." The information will appear under the "Prosecution History" tab as the date that the mark "Published for Opposition."
- b) Click on "Trademark Official Gazette" for the date corresponding to the publication date.
- c) Wait for the TMOG to download.
- d) Locate the icon that is called either "Search" or "Find."
- e) In the "Search" box, enter any literal element of the mark, the name of the applicant (for individual: last name, first name), the serial number (using the hyphen and comma in this format: 77-545,528), or the registration number (using commas in this format: 4,181,096).
- f) View the retrieved result(s). If multiple results appear in the "Results" box, click directly on each "Search Term" shown in the box to access all separate listings in the TMOG.

**TMBP Bumps Up.** The Trademark Trial and Appeal Board issued the June 2013 update of its Board Manual of Procedure.

**Northfield Seek Branding.** The village of Northfield IL has budgeted funds for a branding and marketing initiative to differentiate the village from other suburban communities in the area, for marketing to prospective

businesses, residents, visitors, and village workers. Community Development Director Steve Gutierrez anticipates a 6-9 month process. However, some village trustees consider the project a needless expense. Village Manager Stacy Sigman thinks many don't understand Northfield, "a little gem." Bids and proposals for the branding project are expected by 25 October 2013.

**Who's On First, What's Second, I Don't Know Third?** APPLE is the *new* most valuable brand in the world, says Interbrand. Apple replaced Coca-Cola as first among most valuable brands, the first time since the survey began COKE has not been Number One [NYTimes, 29Sept2013]. This year's Interbrand ranking: 1 APPLE, 2 GOOGLE, 3 COCA-COLA, 4 IBM, 5 MICROSOFT, 6 GENERAL ELECTRIC, 7 MCDONALDS, 8 SAMSUNG, 9 INTEL, 10 TOYOTA; while the 2012 Interbrand rankings were 1 COCA-COLA, 2 APPLE, 3 IBM, 4 GOOGLE, 5 MICROSOFT, 6 GENERAL ELECTRIC, 7 MCDONALDS, 8 INTEL, 9 SAMSUNG, 10 TOYOTA. But don't tear up your horse-race betting tickets quite yet.

**Saving Face, Making Book.** However, COCA-COLA leads in Facebook Likes: 73 million for Coke, 15 million for Google, and 10 million for Apple.

**First Again.** BrandZ, in its 2012 listing of the Most Valuable Global Brands listed APPLE first, followed by 2 IBM, 3 GOOGLE, 4 MCDONALDS, 5 MICROSOFT, 6 COCA-COLA, 7 MARLBORO, 8 AT&T, 9 VERRIZON, 10 CHINA MOBILE. [BrandZ Top 100 Most Valuable Global Brands 2012, at 34].

**Echolalia Again.** The European Brand Institute in Vienna evaluated more than 3,000 companies in 24 countries, and concluded APPLE as the most valuable global brand. [Businessweek.com, 12Oct2011]. The silver and bronze went to 2 COCA-COLA, 3 MICROSOFT, 4 GOOGLE. The top ten brands were all USA-based.

**The Scoreboard.** In evaluation, it's prudent to attend to the evaluators, the methodology, and the details (fouly omitted from the above paragraphs). Why? Because Tomorrow may differ from Today, and your clients and judges likely Don't Care for unreliable, irrelevant asserted facts.

**Secrets Disclosed, TSDR Video.** A video

of the technical briefing on the inner workings of Trademark Status and Document Retrieval (TSDR) is now available: <[http://www.uspto.gov/trademarks/notices/TSDR\\_public\\_meeting.jsp](http://www.uspto.gov/trademarks/notices/TSDR_public_meeting.jsp)>. Topics include: the history of Trademark Application And Registration Retrieval (TARR), Trademark Document Retrieval (TDR), and TSDR; why we moved to TSDR; how TSDR differs from its predecessors, TARR and TDR; and the basics of the technology behind TSDR. The Discussion also describes some of the systems that are not normally visible to the public and how they differ from those the public views.

**Lawyer's Patently Fair Use.** The District of Minnesota rules that a law firm's use of copyrighted articles to prosecute patent applications for its clients is a fair use. *American Institute of Physics v. Schwegman, Lundberg & Woessner PA* (D MN, 12-civ-528, 30Aug2013).

**Copyright Royalty Judges Authority to Adopt Confidentiality Requirements upon Copyright Owners within a Voluntary Negotiated License Agreement, Scope of the, 78 Fed Reg 47421, #150, 5Aug2013.**

**Vet Your Defendants Before Filing Complaint.** Prominent IP and Internet attorney Lawrence Lessig, Harvard Law School professor, author of *Code: And Other Laws of Cyberspace*, uses examples in his lectures. One example is a series of remixes using the song "Lisztomania" by Phoenix, a French band. Someone remixed that song with clips from *The Breakfast Club* film (1980), the remix went viral and inspired other videos with pseudo-*Breakfast Club* actors dancing to the song. Lessig posted his lecture on YouTube. YouTube automatically scans its videos to find copyrighted songs. Liberation Music (Australia), owner of the "Lisztomania" song, wanted the song from Lessig's lecture taken down. Lessig sued Liberation Music claiming Liberation Music's bad faith demand. Lessig, reasonably considering his use fair, 17 USC §106, wants copyright owners to stop relying on automated systems to send out takedown notices, inserting humans who know the copyright law back into the enforcement process. [NPR.com, 27Sep2013].

**Personal Single Copyright Application.** The Copyright Office now offers, on an interim basis, a new electronic registration option for single copyright applications, not work



for hire.

**Iraq Trademark Registrations, Baghdad and Kurdish.** The Trademark Office of the Kurdish region of Iraq adopted the currently applicable fee schedule of the Trademark Office of Baghdad, effective 1 June 2013. The Trademark Office of Baghdad issues its registration for the whole Iraq nation. A Kurdish region registrant may also seek local protection in that territory.

**By Royal Decree,** 23 June 2013 (14 Sha'aban 14340 H), the official Saudia Arabia weekend is changed from Thursday-Friday to Friday-Saturday starting 29 Jun 2013, aligning local banking and business days with most of the region.

**Croatia joins the EU,** becoming the 28th member state. The Treaty of Accession was signed 9 Dec 2011. This was the seventh enlargement of the European Community since it was established in 1957.

**Identical or Fraternal Twins or.** The PTO has added an optional tool to its regular Trademark Electronic Application System (TEAS) application form (non-TEAS Plus). The system will compare of user-entered free-form goods/services description with the ID Manual and inform the user if there is an identical match, a possible match, or no match found.

**It's Not Easy Being Green (Kermit).** The US Department of Commerce published 31 July 2013 a green paper on Updating Copyright Policies for the Internet Age, deemed by DOC, the most thorough and comprehensive analysis of digital copyright policy issued by any administration since 1995. The report is a product of the Department of Commerce's Internet Policy Task Force (IPTF) with input from the U.S. Patent and Trademark Office (USPTO) and the National Telecommunications and Information Administration (NTIA). Through the IPTF, the USPTO and NTIA will solicit further public comments and convene roundtables and forums on a number of key policy issues. The Green Paper discusses the goals of maintaining an appropriate balance between rights and exceptions as the law continues to be updated; ensuring that copyright can be meaningfully enforced on the Internet; and furthering the development of an efficient online marketplace. <<http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf>>

**PTO Technology Evolution and Goods/ Services Description Amendments.** The

USPTO has received a number of requests for amendment under §7, as well as inquiries from registration owners, seeking to amend identifications of goods/services due to changes in the manner or medium by which products and services are offered for sale and provided to consumers, particularly because of evolving technology. In some cases, these requests have also sought a corresponding change in classification.

Examples of these requests include amending: Class 9 computer software programs to providing software as a service in Class 42; Class 9 items featuring music (e.g., audio cassettes, audio tapes, disks, diskettes, vinyl records, etc.) to musical sound recordings in Class 9; Class 16 printed magazines to providing on-line magazines in Class 41; and Class 41 entertainment services such as providing cable television entertainment programs to providing television entertainment via the Internet in Class 41.

The USPTO previously has taken the position that such amendments impermissibly expand the scope of a registration. However, registration owners seeking to amend their identifications in this matter have countered that public notice would not be adversely impacted because the core goods/services remain the same. They further assert that merely changing the medium for the goods/services would not alter or expand the scope of protection granted under a registration. In response to these requests, the USPTO is seeking feedback from U.S. trademark owners, practitioners, and other interested parties regarding their views about these proposed amendments and USPTO policy on this subject. **Please submit it no later than December 1, 2013 to** [TMFeedback@uspto.gov](mailto:TMFeedback@uspto.gov), with the subject line "Technology Evolution."

1. Please identify your relevant background on this issue, including whether you are a trademark owner or practitioner, and the general size and nature of your business or trademark practice, including the number of trademark applications and registrations your business has, or your practice handles.
2. Do you think the USPTO should allow amendments to identifications of goods/services in registrations based on changes in the manner or medium by which products and services are offered for sale and provided to consumers?
3. If such amendments are permitted, should they only be allowed post registration to account for changes in tech-

nology following registration, or should similar amendments be permitted in applications prior to registration (see 37 C.F.R. §2.71(a), stating that prior to registration, an applicant may clarify or limit, but not broaden, the identification)?

4. What type of showing should be required for such amendments? Should a special process be required to file such amendments, apart from a request for amendment under §7?
5. Should such amendments be limited to certain goods, services or fields (such as computer software, music, etc.), and if so, how should the determination be made as to which goods, services or fields?
6. Should a distinction be made between products that have been phased out (such as eight-track tapes), as opposed to products for which the technology is evolving (such as on-line magazines), or should amendments be permitted for both categories of products?
7. Do you believe the scope of protection in an identification of goods/services is expanded if an amendment is allowed to alter the medium of the goods/services?
8. Would the original dates of use remain accurate if such amendments are permitted?
9. What would the impact of such amendments be on the public policy objective of ensuring notice of the coverage afforded under a registration?
10. Please provide any additional comments you may have.

**Essential Government Operations.** As of 1 October 2013, the first day of the federal government shutdown, user-fee-supported US Patent and Trademark Office had funds to operate for about four weeks; the Copyright Office, a branch of the Library of Congress, closed most operations, including its <[www.copyright.gov](http://www.copyright.gov)> Web site offering remote searching of its databases. Electronic filing of new applications via the <<https://eco.copyright.gov>> system remains operating. The Northern District of Illinois anticipated it could remain open for approximately ten business days, and would then reassess its situation. Proceedings and deadlines remain in effect as scheduled unless otherwise advised. ■

Daniel Kegan, <[daniel@keganlaw.com](mailto:daniel@keganlaw.com)>, Kegan & Kegan, Ltd, Chicago. Copyright © Daniel Kegan 2013, All Rights Reserved.

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**Tuesday, 11/5/13 – Webinar**—Intro to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 1:30 – 2:30 p.m. CST.

**Tuesday, 11/5/13- Live Webcast, ISBA Studio**—Children and Trauma; A Guide for Attorneys. Presented by the ISBA Child Law Section. 11-12.

**Tuesday, 11/5/13- Live Webcast, ISBA Studio**—2013 Immigration Law Update—Changes which Affect Your Practice & Clients. Presented by the ISBA International & Immigration Law Section, ISBA Young Lawyers Division and the ISBA General Practice, Solo and Small Firm Section. 1:00-2:00.

**Thursday, 11/7/13 – Webinar**—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 1:30 – 2:30 p.m. CST.

**Friday, 11/8/13- Chicago, ISBA Regional Office**—Successfully Navigating Civil Litigation Evidence and Theory Involving Topics of Expert Testimony. Presented by the ISBA Civil Practice & Procedure Section. 8:50-4:00.

**Thursday, 11/14/13- Chicago, ISBA Regional Office**—SETTLE IT!- Resolving Financial Family Law Conundrums. Presented by the ISBA Family Law Section and the ISBA Alternative Dispute Resolution Committee. 8-5.

**Thursday, 11/14/13- Springfield, INB Conference Center**—Drug Case Issues and Specialty Courts. Presented by the ISBA Criminal Justice Section. 9-4.

**Friday, 11/15/13- Chicago, ISBA Regional Office**—Collection Issues You Don't Know About...But Should. Presented by the ISBA Commercial Banking, Collections and Bankruptcy Section. 9-4:30.

**Wednesday, 11/20/13 – Webinar**—Introduction to Boolean (Keyword) Search. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 1:30 – 2:30 p.m. CST.

**Friday, 11/22/13- Chicago, ISBA Regional Office**—Drug Case Issues and Specialty Courts. Presented by the ISBA Criminal Justice Section. 9-4.

### December

**Thursday, 12/5/13- Chicago, ISBA Regional Office**—Civility in the Courtroom. Presented by the ISBA Bench and Bar Section. 1-5.

**Thursday, 12/12/13- Chicago, Sheraton Hotel (Midyear)**—Speaking to Win: Building Effective Communication Skills. Master Series presented by the ISBA. 8:30-11:45.

**Thursday, 12/12/13- Chicago, Sheraton Hotel (Midyear)**—Legal Writing in the Smartphone Age. Master Series presented by the ISBA. 1:00-4:15.

### January

**Tuesday, 1/7/14- Webinar**—Introduction to Fastcase Legal Research. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 4:00 Eastern.

**Thursday, 1/9/14- Webinar**—Advanced Tips to Fastcase Legal Research. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 4:00 Eastern.

**Wednesday, 1/15/14- Webinar**—Boolean (Keyword) Searches on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 4:00 Eastern.

### February

**Wednesday 2/5/14- Webinar**—Introduction to Fastcase Legal Research. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00 Eastern.

**Friday, 2/7/14- Webinar**—Advanced Tips to Fastcase Legal Research. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00 Eastern.

**Friday, 2/7/14- Bloomington-Normal, Marriott Hotel and Conference Center**—Hot Topics in Agricultural Law- 2014. Presented by the ISBA Agricultural Law Section.

All Day.

**Wednesday, 2/12/14- Webinar**—Boolean (Keyword) Searches on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00 Eastern.

**Wednesday, 2/12/14- Chicago, ISBA Regional Office**—Tort Law Back to Basics. Presented by the ISBA Tort Law Section. All Day.

**Thursday, 2/27/14- East Peoria, Holiday Inn and Suites**—SETTLE IT!- Resolving Financial Family Law Conundrums. Presented by the ISBA Family Law Section and the ISBA Alternative Dispute Resolution Committee. 8:00-5:00.

### March

**Tuesday, 3/4/14- Webinar**—Introduction to Fastcase Legal Research. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 2:00 Eastern.

**Thursday, 3/6/14- Webinar**—Advanced Tips to Fastcase Legal Research. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 2:00 Eastern.

**Thursday, 3/6- Friday, 3/7/14- Chicago, ITT Chicago-Kent School of Law**—13th Annual Environmental Law Conference. Presented by the ISBA Environmental Law Section. 8:30-4:45 with reception from 4:45-6; 8:30-1:30.

**Tuesday, 3/11/14- Webinar**—Boolean (Keyword) Searches on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 2:00 Eastern.

**Tuesday, 3/25/14- Chicago, ISBA Chicago Regional Office**—Master Series: The Cybersleuth's Guide to the Internet: Super Search Engine Strategies and Investigative Research. Presented by the Illinois State Bar Association. All day.

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