Technology and Business Law Update -- Important Cases and Legal Developments

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Eayrs v. Absolute Roofing, 300 Ga. App. 825 (Ga. Ct. App. 2009)

- Facts - Eayrs obtained a proposal from Absolute Roofing to repair a roof, which was drafted and signed by Donn Harris. Eayres made the check for payment out to Absolute Roofing. The contract for the installation of the roof has the name "Absolute Roofing" across the top, but was signed by Harris without reference to Absolute Roofing. Eayrs sued Harris for breach claiming he thought he was contracting with Harris.

- Conclusion - Under O.C.G.A. § 10-6-23, if the principal is disclosed and the agent professes to act for him, the form in which the agent acts is immaterial and the act will be held to be the act of the principal. There were sufficient facts to indicate that the principal was disclosed in this transaction and that Harris was acting on behalf of Absolute Roofing.

- Practical Pointers - Avoid conflicting references in the contract as to the contracting party and specify with clarity the parties to be responsible to the contract. If seeking to have the agent or another person responsible, a guaranty should be obtained.

Ole Mexican Foods Inc. v. Hanson Staple Co., 676 SE 2d 169 (Ga. Sup. Ct. 2009)

- Facts - The parties to a contract that provided for the sale of goods, following a dispute, entered into a settlement agreement which provided, in relevant part, that Ole Mexican Foods would purchase certain products in certain amounts. Ole Mexican

Foods claimed that it had the right to reject Hanson Staple Co's product under the UCC if the product did not meet implied warranties.

- Conclusion – The Court held that those implied warranties are applicable to an agreement only if its predominant purpose is the sale of goods and not the settlement of litigation.

- Practical Pointers – In any settlement agreement that calls for a purchase of a product, the parties cannot rely upon protection under the UCC and must specifically set forth all desired warranties and obligations that are to apply to the settlement agreement.

RSN Properties, Inc. v. Engineering Consulting Services, 301 Ga. App. 52 (Ga. Ct. App. 2009)

- Facts - The parties entered into a professional engineering services contract for soil studies and the rendering of an opinion, which contract limited ECS's liability for engineering errors to the greater of $50,000 or the value of the engineering services. RSN sued ECS for damages that it incurred as a result of an inaccurate opinion.

- Conclusion – The limitation of liability provision did not violate public policy, because it did not create an obligation listed in O.C.G.A. § 13-8-2 (a) as contrary to public policy and no statute prohibited the limitation provision. O.C.G.A. § 13-8-2 (a) dealt with restraint of trade, evading laws and similar items. The Court did not find the limitation of liability provision contrary to any of those items as required for a finding to void the provision as a matter of public policy.

• Practical Pointers – In any contract, do not rely upon uncertain statutory provisions to avoid limitation of liability provisions contained in the contract. Limitation of liability provisions should be negotiated with the expectation that they will be enforced and should not be included where there is an expectation of recovery of actual damages, regardless of the amount of the damages.

Fernandez v. WebSingularity Inc., 299 Ga. App. 11 (Ga. Ct. App. 2009)

• Facts - Fernandez submitted a subscription agreement along with a check to WebSingularity for the purchase of stock on July 19, 2007. On August 6, 2007, upon finding out that the percentage of the company that the stock represented was less than the percentage that Fernandez had been believed was promised to him by WebSingularity, Fernandez attempted to rescind his stock purchase.

• Conclusion – Although the lower court ruled in favor of WebSingularity that the subscription agreement could not be rescinded as a result of evidence submitted that the subscription agreement had been accepted by the Company due to the Company submitting a subscription agreement as signed by the Company and with a completed date of July 25, 2007, the Georgia Court of Appeals ruled that WebSingularity had failed to authenticate the submitted exhibit as to the acceptance date.

• Practical Pointers – Where contracts are not being signed simultaneously with both parties walking away with executed copies, evidence of acceptance and execution on both sides needs to be clearly demonstrated with execution versions being exchanged along with completed dates and acknowledgments of acceptance.

Wachovia Insurance Services Inc. v. Fallon, 299 Ga. App. 440 (Ga. Ct. App. 2009)

- Facts - Three years after selling his insurance business to Wachovia, Fallon terminated his employment with Wachovia and immediately opened his own company and began to solicit Wachovia's customers in breach of a non-solicitation covenant.

- Conclusion – In response to Wachovia's claims that the non-solicitation agreement should be scrutinized as a covenant entered into in connection with a sale of Fallon's business, the Court found that the restrictive covenant agreement was entered into years after Fallon sold his business, and thus Wachovia was not entitled to a sale of business scrutiny review. The non-solicitation provision was found to be overly broad as it could be read to preclude Fallon from soliciting clients who had previously severed their relationship with Wachovia Insurance.

- Practical Pointers – Secure restrictive covenant protection at the time of a sale of a business to obtain broader protection under Georgia law. Restrictive covenants in the employment context must be narrowly drawn and continuously reviewed to determine compliance with ever changing Georgia law.

J. T. Turner Construction Co. Inc. v. Summerour, 301 Ga. App. 323 (Ga. Ct. App. 2009)

- Facts - J.T. Turner Construction Company, Inc. ("Turner") obtained a default judgment against SWI Partners ("SWI"), a general partnership, and Ernest Burns, one of SWI's partners, for breach of contract and negligent construction. Turner then filed a subsequent lawsuit against Orlando Summerour and Randy Hatcher, two other SWI partners, alleging that they were jointly and severally liable for the judgment against SWI. Summerour and Hatcher responded that they could not be held liable until they have "had their day in court."

- Conclusion – The Court concluded that Summerour and Hatcher had not cited any case, and the Court has not located any case, overruling the Court's prior decision addressing this issue, that all partners in a general partnership are jointly and severally liable for all obligations of the partnership. Despite not having their day in court, the Court found that a partner can be liable for a prior judgment where (1) the individual sued was a general partner of the partnership, (2) the indebtedness of the partnership was proved, and (3) the account sued upon was the identical account upon which the former suit against the partnership was based.

- Practical Pointers – Avoid general partnerships, and use limited liability entities to shield individuals from liabilities. Additionally, although not certain to provide protection, contractually require partnerships and other general partners to provide notice to all general partners of lawsuit to have your day in court.

<u>Professional Energy Management Inc. v. Necaise, 300 Ga. App. 223 (Ga. Ct. App. 2009)</u>

- Facts - Necaise, while employed by Professional Energy Management ("PEM") began to solicit customers of PEM to terminate their relationship with PEM for the purpose of becoming customers of a new company that Necaise had commenced.

- Conclusion – Among other things, the Court held that PEM could bring a breach of fiduciary duty claim against Necaise. The Court stated that while an employer relationship does not always create a fiduciary relationship, an employee who may bind his or her employer has a fiduciary duty to it. Here, the complaint alleged that Necaise served as an account executive and had the responsibility of securing new clients on behalf of PEM, which was sufficient to avoid dismissal and allow the case to go to trial.

- Practical Pointers – Avoid soliciting customers for a new company until you terminate your existing employment. Although the Court pointed out that an employee breaches no fiduciary duty to the employer simply by making plans to enter a competing business while he is still employed and is entitled to make arrangements to compete even while still employed, it is best to hold off as much as possible on new company arrangements until post-termination of existing employment.

<u>Enduracare Therapy Management Inc. v. Drake, 298 Ga. App. 809 (Ga. Ct. App. 2009)</u>

- Facts - Enduracare Therapy Management was a corporate entity that owned or controlled a nursing home that was operated by a limited liability company. Drake obtained a default judgment against Enduracare when Enduracare failed to respond to the Complaint.

- Conclusion – The judgment was reversed as no facts were alleged in the Complaint to support a piercing of the corporate veil. The Court held that while a default operates as an admission of the well-pled factual allegations in a complaint, it does not admit the legal conclusions contained therein. A default simply does not require blind acceptance of a plaintiff's erroneous conclusions of law.

- Practical Pointers – In order to seek recovery against a limited liability entity's owner, the plaintiff must allege facts sufficient to demonstrate (i) exceptional circumstances that address the legal distinction between a corporation and its owners or shareholders; (ii) that the owner was an alter ego or agent of the principal; (iii) a joint venture relationship or; (iv) that the entity's owner abused the corporate form through undercapitalization, domination, or any other means.

Koch Bus. Holdings, LLC v. Amoco Pipeline Holding Co., 554 F.3d 1334 (11th Cir. Ga. 2009)

- Facts - Amoco and Koch entered into a purchase agreement, pursuant to which Koch agreed to pay Amoco $295 million as a base payment for Amoco's shares in a corporation. Pursuant to the purchase agreement, Koch also agreed to pay, subject to certain post-closing conditions, a post-closing payment of $5 million. After closing, Koch took the position that the conditions had not been fulfilled and refused to pay the $5 million. Conversely, Amoco maintained that the conditions had been fulfilled and demanded payment. Koch sought to resolve the situation by instituting an action for declaratory judgment, and Amoco countered with a claim for breach of contract.

- Conclusion - The court held that Amoco was entitled to the post-closing payment of $5 million. The court reasoned that when interpreting a contract, the role of a court is to effectuate the parties' intent, and that under the objective theory of contract interpretation, a court must look at the words of the contract to ascertain the intent. The court noted that it was clear from the plain language of the purchase agreement that

Amoco was entitled to the payment and that a decision that Amoco was not entitled to a payment was not consistent with the express terms of the contract.

- Practical Pointer - When drafting a contract, the parties should keep in mind that a Georgia court will interpret a contract based upon an objective theory, and therefore, all provisions in a contract should be specifically tailored so that the parties' intent is clear from the plain language of the contract.

<u>Hilb, Rogal & Hamilton Co. of Atlanta, Inc. v. Holley, 284 Ga. App. 591 (Ga. Ct. App. 2007)</u>

- Facts - Holley, a business owner, sold his business to HRH and also signed an employment agreement with HRH, which provided for, among other things, that for a period of five (5) years, Holley could not "contact or solicit or accept an entreaty from, a Known Customer for the purpose of providing Prohibited Services to such Known Customer." Nearly five years after signing the agreement, Holley left HRH for a competitor, and announced his resignation to his customers using a publicly available list. HRH sued Holley for, among other things, breach of his employment agreement, including the non-solicitation and non-competition provisions.

- Conclusion - The court, applying strict scrutiny, held that the "accept an entreaty" language was overly broad and unenforceable. Thus, the court held that Holley did not breach the non-solicitation and non-employment provisions of his employment agreement, because under Georgia law, if one provision of an employment contract is unenforceable, all provisions are unenforceable.

• Practical Pointer - Carefully draft all provisions in an employment agreement in a manner so as to assure that none of the provisions are overly broad since under Georgia law, if one restrictive covenant in an employment contract is too broad and therefore, unenforceable, the entire agreement may be unenforceable.

Thompson v. State, 294 Ga. App. 363 (Ga. Ct. App. 2008)

• Facts - Defendant, a sole practitioner and the sole shareholder of Brett Thompson, Attorney at Law, a professional corporation, was charged with first degree forgery for allegedly forging the signature of a former employee on a non-competition agreement. The defendant refused to produce the document and the State subpoenaed the defendant. The defendant moved to quash the subpoena based upon the defendant's assertion that it violated her right against self-incrimination.

• Conclusion - The court held that even though the defendant was the sole shareholder and sole officer of the corporation, the defendant did not have a right against self-incrimination. The court reasoned that the State subpoenaed the defendant as an agent of the corporation, and not as an individual, and that corporations have no right against self-incrimination. The court further noted that it is well settled under Georgia law that no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be.

• Practical Pointer - Regardless of how small a corporation is, an officer's actions are considered actions of the corporation, and therefore, no officer has the right against self-incrimination when the officer is acting on behalf of the corporation.

Kilroy v. Alpharetta Fitness, Inc., 295 Ga. App. 274 (Ga. Ct. App. 2008)

- Facts - Buyer and its shareholders entered into an asset purchase agreement with seller, pursuant to which the Buyer purchased the assets comprising and relating to a franchise, Gold's Gym. A dispute arose between the parties regarding a covenant in the asset purchase agreement which stated that the seller and the shareholders covenant, represent and warrant that no assignment of rights in or relating to [the contracts] has been made by seller of shareholder. The seller did not disclose that it had sold or pledged all or some of the income streams of numerous membership contracts. The Buyer sued for, among other things, fraud, and the lower court granted a motion for summary judgment in favor of the seller and shareholder.

- Conclusion - The court ruled that granting summary judgment in favor of the seller and shareholder was inappropriate, because there was some evidence of each element of fraud. The court reasoned that since it was not apparent in the company's financial statement that the seller was factoring receivables and since there was no evidence in the documents that the buyer was aware of such practice, summary judgment in favor of the seller and shareholder was inappropriate.

- Practical Pointer - In order to avoid costly litigation, a company should properly disclose all relevant material facts in the disclosure schedules of the transaction agreement.

<u>Reindel v. Mobile Content Network Co., LLC, 652 F. Supp. 2d 1278 (N.D. Ga. 2009)</u>

- Facts - Plaintiff sued Mobile Content Network Company, LLC, an internet and wireless content business, and one of its founders, alleging, among other things breach of contract. The plaintiff had extensive media contacts, including with CNN, and alleged that the founder of the company, through a series of emails and oral conversations, approached the plaintiff about a possible affiliation in exchange for a large amount of stock. While the company used the plaintiff's contacts for its benefit, the company and the plaintiff never reached an agreement regarding the issuance of the stock.

- Conclusion - The court held there was no breach of contract. The court reasoned the founder did not have the authority to agree to the issuance of stock to the plaintiff given that there was no evidence that the founder had actual authority to make such agreement and because a reasonable person would not believe that the founder had the authority to enter into the transaction, a transaction which was not in the ordinary course of business. Additionally, the court reasoned that even if the founder had authority, there was no mutual assent because the plaintiff's response email to the founder included different terms, and therefore was a counter-offer, and not an acceptance.

- Practical Pointer - When contemplating whether to enter into a business transaction, the parties should memorialize the terms of the transaction in an written agreement which is signed by all parties and not rely on an oral agreement, so that it is clear that the parties intended to enter into a business transaction. Consider the use of a term sheet to memorialize certain pre-deal understandings. Additionally, when negotiating with another party, it is important to conduct due diligence in order to determine whether such party has the authority to act on behalf of the company.

White v. Shamrock Bldg. Sys., 294 Ga. App. 340 (Ga. Ct. App. 2008)

- Facts - Cooke, an employee of Shamrock, a commercial construction firm, started his own competing business, and was awarded a significant construction contract while still employed at Shamrock. Shamrock discovered that Cooke was awarded the construction contract and filed suit against Cooke for, among other things, breach of fiduciary duties. Cooke alleged that he did not breach his fiduciary duties as he claimed that he was a consultant, not an employee, of Shamrock at the time he was awarded the contract. The lower court denied Cooke's motion for summary judgment.

- Conclusion - The court ruled that there was enough evidence to deny Cooke's motion for summary judgment. The court noted that the relation of principal and agent is a fiduciary one, and the agent may not make a profit for himself out of the relationship, or out of other knowledge obtained from the relationship, to the injury of the principal. The relationship demands of the agent the utmost loyalty and good faith to his principal. Further, the court reasoned that an employee breaches no fiduciary duty to the employer simply by making plans to enter a competing business, however, an employee is not entitled to solicit customers for a rival business before the end of his employment; nor can the employee do other similar acts in direct competition with employer's business. The court noted that there were sufficient facts that indicated that Cooke was still an employee, particularly since he was still on the payroll.

• Practical Pointer - An individual working for a corporation should clearly define in an agreement whether such employee is an independent contractor or an employee, as an employee owes certain fiduciary duties to the company, while an independent contractor may not. Additionally, in order to avoid expensive and time consuming litigation, it is in an employee's best interests to avoid soliciting customers for a new company until the employee terminates his existing employment.

Am. Teleconferencing Servs. v. Network Billing Sys., LLC, 293 Ga. App. 772 (Ga. Ct. App. 2008)

• Facts - Network Billing Systems, a reseller of teleconferencing services, brought a breach of contract action against its client, American Teleconferencing Services. The contract was for a 12-month term with an automatic renewal clause in the case of no notice and the contract also contained a minimum monthly usage fee of $50,000. The contract automatically renewed, and in the middle of the new term, ATS desired to no longer use the reseller's services. NBS complied but stated that ATS was still responsible for the minimum usage fee. ATS refused to pay, and NBS sued ATS, for among other things, breach of contract. ATS countered stating that the minimum usage clause was unenforceable, and the lower court agreed with ATS.

• Conclusion - The court ruled that the minimum usage provision was not unenforceable as it was not a liquidated damages clause given that it was not triggered upon the termination of the contract, did not provide for a stipulated amount to be paid upon breach, and it actually provided ATS with the benefit of lower rates. As the only breach of contract alleged by the reseller was the ATS failure to pay the minimum monthly volume commitment, the trial court erred in not granting the client summary judgment.

- Practical Pointer - While a party can draft a contract with a provision that protects its economic interests, a party needs to be careful when drafting a provision that functions as a liquidated damages clause, as such provisions can be difficult to enforce under Georgia law.

<u>IP Co., LLC v. Cellnet Tech., Inc., 2660 F.Supp.2d 1351 (N.D.Ga., September 28, 2009)</u>

- Facts - SIPCO entered into an Intellectual Property License and Assignment Agreement with B&L, which licensed and assigned certain patents to SIPCO. In connection with the Licensing Agreement, the parties executed a Notification of Sale and Right of First Offer Agreement ("Notification Agreement"), which required B&L to give notice to SIPCO of B&L's intent to sell or transfer the licensed patents and which also gave SIPCO the right to purchase the patents on the same terms as the third-party offer, except for when B&L sold substantially all of its assets to L&G or its affiliate. The parties also signed a Release Agreement, which modified the terms of the Licensing and Notification Agreements to provide that B&L could transfer the patents without SIPCO's authorization to an entity that acquired substantially all of B&L's assets. Thereafter, B&L transferred substantially all of its assets to an affiliate of L&G and SIPCO filed suit.

- Conclusion - The court held that under O.C.G.A. § 13-2-2, which requires a court to consider the whole contract in arriving at the construction of any part, the transaction was expressly exempt from the notification and first offer requirement of the Notification Agreement because the acquirer was an affiliate of L&G and B&L transferred substantially all of its assets, including the patents, to an affiliate of L&G. The court rejected the lower court's decision that B&L could transfer substantially all of its assets without transferring the patents, as the patents constituted a significant amount of B&L's assets. Additionally, the court held that even if the transaction was not exempt from the Notification Agreement, such transaction would be exempt pursuant to the Release Agreement, which superseded the Notification Agreement.

- Practical Pointer: A holder of a right of first refusal should seek to limit the number of exceptions to the right to transfer the intellectual property in avoidance of any first refusal rights.

Intellectual Property Newsflash:

Supreme Court Decision in Bilski v. Kappos Likely to Affect Software and Medical Method Patents

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By: John Harris

On November 9, 2009, the U.S. Supreme Court heard oral arguments in the case of *Bilski v. Kappos*, which relates to the question of whether a business method directed to commodities risk management is patentable subject matter. (Case No. 08-964.) A decision by the Court is expected by June 2010. When the decision is handed down, it will likely affect not only the patentability of so-called "pure" business methods,* but also **any** process-oriented patents: computer software, computer-implemented inventions, medical and diagnostic methods, agricultural methods, financial services processes and systems, etc.

The *Bilski* case thus has potential to be disruptive to the notion of patent protection for more than just business methods. A poorly rendered decision by the Supreme Court could have significant negative effects to the information technology (IT) industry, especially technology startup ventures seeking funding.

The Supreme Court appeal involves the last stage of an effort by two inventors, Bernard A. Bilski and Rand A. Warsaw, to force the U.S. Patent and Trademark Office (USPTO) to issue them a patent for their risk hedging technique. The patent claims at issue relate to a method for managing consumption risk costs of a commodity. The claim recited a number of steps that were fairly broad and abstract, such as "initiating a series of transactions between [a] commodity provider and consumers," and "identifying market participants," and "initiating [another] series of transactions between said commodity provider and ... market participants." No computer or software was involved in the claim. The process could readily be carried out by a human being – without using any kind of machine. Nothing physical (not even data) appeared to be transformed by the process.

The "Machine-or-Transformation" Test Must Be Satisfied to Get a Patent

The USPTO denied a patent on the ground that the process was not patentable subject matter and the inventors appealed. In 2008 they wound up before the Court of Appeals for the Federal Circuit ("CAFC"). On October 30, 2008, the CAFC handed down an en banc decision in holding that a process, in order to be patentable subject matter under 35 U.S.C. § 101, must either be (1) tied to a particular machine or apparatus, or (2) physically transform a particular article into a different state or thing. This test for patentable subject matter is now called the "machine-or-transformation" test (MoT). The ruling is widely viewed as applying to *any* method or process invention.

The CAFC decision (affirming the denial of a patent and setting forth the MoT test) was appealed to the U.S. Supreme Court in 2009.

The most disturbing aspects of the MoT test are that (1) it seems narrow and relatively inflexible, (2) it applies to any method or process invention, and (3) it has no basis in the patent laws as passed by Congress – it is a test based purely on a number of older Supreme Court decisions.

Details about the CAFC decision, which also overruled the well-known and controversial 1998 business method case, *State Street Bank v. Signature Financial Corp.*, and other comments about the machine-or-transformation test are provided in our IP NewsFlash of October, 2008, which is available on the MMM web site.

In the views of many patent experts, the claims that Messrs. Bilski and Warsaw are trying to patent are too abstract and "human-implemented" to be patentable. Further, the claims are not particularly technical in nature, which is troublesome to those who expect patents to be directed to physical, tangible things like circuits, machines, and tools. However, there is no requirement in the U.S. patent laws (unlike in Europe) that there be any kind of "technical effect" in an invention to justify a patent. The notion of "technical effect" is itself semantically problematic – what exactly is "technical" anyway? The Bilski claims seem to be just a series of intangible, mental steps that people can take without the assistance of any machines or tools or devices. Furthermore, the claims have a high level of abstraction, which makes them seem all the more overbroad.

In addition to these issues, many patent experts have a hard time seeing how the Bilski claims would be patentable on grounds of novelty and nonobviousness. Some patent experts think that the USPTO should have avoided the patentable subject matter issue and appeals by finding a good prior art reference and rejecting the claims for lack of novelty or for being obvious.

However, the USPTO and the Federal Circuit apparently decided instead to make this a test case for patentable subject matter, rather than find another way to deny the patent. It almost seems that they were urging the Supreme Court to take on the case due to the controversial nature of business method patents. There is little doubt that many people want more certainty as to the patentability of business methods – and for that matter, more clarity on the patentability of computer software as well. The machine-or-transformation test provides that certainty – with the answer being "no patent allowed here" in many more cases than before the CAFC *Bilski* decision.

The "Machine-or-Transformation" Test Seems Easy to Apply But Is Inflexible

The machine-or-transformation test (MoT) in the Bilski Federal Circuit *en banc* decision is actually pretty easy to apply in this case. The Bilski claims on hedging risk with contracts did not involve any machines at all, and nothing was transformed. It is conceivable that the inventors could have presented claims involving transformations of money amounts in accounts, but no steps reciting account value transformations were included in the claims on appeal.

But problems surface when the test is applied in other circumstances. The MoT test has the real potential of being too rigidly applied by the USPTO examiners and the Board of

Patent Appeals and Interferences (BPAI), which initially hears appeals from USPTO patent denials. The USPTO has to implement court decisions through its internal regulations, and many examiners apply these regulations in a formulaic, rigid manner. For many systemic reasons, patent examiners have little incentive to be helpful and flexible. So, if the Supreme Court approves the MoT test and upholds the Federal Circuit's approach, it may prove almost impossible to get any kind of business method patented – even a computer-implemented method that is arguably novel and nonobvious.

Many patent experts expect that the Supreme Court will deny Messrs. Bilski and Rand a patent on their particular claims. Comments by the justices at the oral argument suggested as much. Although such an outcome may be the "right" answer *in this case*, there is a significant risk that the Supreme Court will create further uncertainty in the area. The Supreme Court in its *KSR v. Teleflex* case (2007) seemed to express the view that it did not like rigid, bright line tests in the patent area. If that view persists in the Bilski case, the MoT test will be viewed as too rigid, and a more flexible approach will be required.

The Court in the *KSR v. Teleflex* case considered whether the so-called "teaching-suggestion-motivation" (TSM) test was the only test for determining whether the prior art rendered an invention obvious and therefore unpatentable. Because almost all inventions are some combination of known elements, the TSM test requires a patent examiner (or accused infringer) to show that some suggestion or motivation exists in the prior art to combine known elements to form a claimed invention. The Court in that case did not completely disavow the TSM test – they said one could use this test, but other considerations could apply. This indicated that the Supreme Court favors a more flexible approach in determining obviousness.

The Potential For Disruption Is Real – Flexibility Results in Uncertainty

Perhaps the Supreme Court in the Bilski case will similarly adopt a more flexible approach in determining patentable subject matter and say that the MoT test may be used, but other considerations could apply. However, in ruling that flexibility is required, greater uncertainty will result.

Another disruptive effect would occur if the Supreme Court decides to make some new public policy about patentable subject matter. The Court has been known to make policy with their decisions from time to time, as legal scholars know. The current Court has been relatively conservative and generally tries to interpret the law and the Constitution rather than deliberately making policy – but the makeup of the Court recently changed with Justice Sotomayor, whose disposition in commercial cases is not yet clear. Determining the public policy of what constitutes patentable subject matter is arguably something that *Congress* should really address – but will probably not any time soon. There is no provision in the recent Patent Reform Acts introduced in Congress regarding determination of patentable subject matter. And it is doubtful that Congress can focus on patent issues in any meaningful fashion in this battered economy or in the foreseeable future due to bigger problems – like the healthcare reform bill and the possible threat to a Democratic majority.

Yet another disruptive effect could occur if the Supreme Court creates some entirely different test, or writes some dictum that is not limited to nontechnical business methods. Such dictum could readily be viewed as a providing a basis to deny patents for even arguably novel computer-implemented business methods – or more problematically for IT companies, many aspects of computer software itself. The possibility that the Supreme Court will go off in a strange direction is real: it was reported that at one point during the oral argument, the lawyers for the USPTO said that they did not see the case as a vehicle to decide whether software patents were allowable. Justice Samuel Alito reportedly said something to the effect of, "You're worried that we would screw it up." Some patent experts are worried about exactly that.

What About the Patentability of Computer Software?

As mentioned above, the *Bilski* case does not involve a computer or any computer programs or any automated operations. Nonetheless, the case is troubling to the computer industry because computer programs are, in essence, instructions for computer-implemented *processing of data*. The data handled in these processes often, but not always, represents physical entities and measurements. A test for patentability that limits the granting of patents to inventions that process data representing purely physical entities and quantities will negatively impact the patentability of computer software inventions. Furthermore, such a test has the potential to invalidate a huge number of existing patents. It is hard to rationally argue that a computer program does not transform input data into some kind of useful output, whether that output is used physically in a control application, or presented in a report, or merely displayed in a useful, aesthetic manner.

The patentability of computer software, either by itself or as an integral part of other technologies, has long been an area of controversy. This issue is closely tied to the patentability of business methods, because both involve processing of information. Many of the legal issues of patentability of business methods bleed over into a consideration of the patentability of software and IT and medical methods. The U.S. economy is heavily dependent on information-based technologies, and is still widely viewed as the world leader in information technologies (IT) and medical innovation. Any ruling by the Supreme Court that sends a message that innovators in the IT or medical procedures space cannot patent their innovations could deal a blow to U.S. competitiveness and further damage the economy.

The CAFC in its *Bilski* decision avoided deciding whether *data transformations* without some connection to something physical would satisfy the MoT. Some patent experts think that it left that question as part of the bait for the Supreme Court.

Given all the subtleties, the *Bilski* case has the potential to do much harm without the prospect of doing much long term good for the technology economy. The threat of disruption is significant to information technologies industries. Some think that the Supreme Court should find a way to deny Bilski's claims without creating any new tests or unduly chilling the patenting environment. Whether they can do this remains to be seen.

What Should Companies Do Now To Get Process Patents?

No matter what the Supreme Court does in the *Bilski* case, the patent system will trod ahead. Patents are an integral part of modern technology-based businesses – they provide tools for managing competition in a process-fair manner and serve as a capital-raising tool for emerging companies. They are not going away any time soon. Besides, the patent system emanates directly from the U.S. Constitution (Article 1, Section 8) and cannot be readily dismantled.

If you or your company are seeking to patent any kind of process, here are some steps to consider to improve your prospects for obtaining a patent:

- If possible, try to satisfy the "machine-or-transformation" test. There is little question that an invention that clearly satisfies the test will be deemed patentable subject matter.
- Develop a compelling case for novelty, nonobviousness, and a useful result. A compelling, societally-useful invention always fares better with the USPTO and in the courts.
- Make sure that your patent application defines a "particular" kind of machine, and ties the process to the machine. Go into detail about aspects of the machine. This will require working closely with your patent attorney to develop a quality patent application.
- Identify something that is transformed in the process – ideally from one physical state to another. If the transformation is purely that of data, try

to characterize the data as representing something physical, such as images or signals representing physical things.

- Closely study the guide for dealing with the machine-or-transformation test provided by the USPTO in the "Interim Examination Instructions for Evaluating Subject Matter Eligibility Under 35 U.S.C. § 101," published on its website in August 2009.
- Try to present the invention in other "statutory" categories in additional to a method. Other patentable subject matter categories include machines, articles, and compositions of matter. As to software, courts have approved patent claims in the so-called "Beauregard" format (a computer readable medium containing computer instructions that carry out a process) and the "Lowry" format (a data structure stored in a computer memory).

Client Alert: Georgia Restrictive Covenant Law News

Georgia Restrictive Covenants Legislation Moves Forward. On April 29, 2009, Georgia Governor Sonny Perdue signed legislation that may dramatically change the landscape in Georgia with regard to drafting and enforcing agreements containing restrictive covenants. The bill cannot take effect, however, without an amendment to the Georgia Constitution, which is being addressed during Georgia's current legislative session. The Georgia House passed the amendment by a vote of 158-12 on March 22, 2010. If the Senate adopts the required constitutional amendment during the current legislative session, the amendment will go to Georgia voters for ratification during the November 2010 election.

Currently, Georgia courts enforce restrictive covenants on a case-by-case basis, without statutory standards for determining enforceability. In the employment context, Georgia Courts strictly scrutinize such covenants, which must be narrowly crafted to be enforceable, and have refused to permit "blue penciling" (editing by the court). As a result, even a minor flaw in a restrictive covenant can render the entire covenant unenforceable.

Moreover, if one covenant is unenforceable, it can prevent enforcement of other covenants in the same agreement that might otherwise be enforceable. Current case law therefore makes drafting enforceable employment covenants agreements particularly challenging for Georgia businesses.

However, the new bill grants Georgia courts the power to blue pencil, "as long as the modification does not render the covenant more restrictive with regard to the employee than as originally drafted by the parties." The bill also defines common terms, which definitions appear to expand the permissible scope of certain covenants. For example, a customer nonsolicitation covenant limited to those customers with whom the employee had "material contact" would apply not only to those customers or potential customers with whom the employee dealt, but also to those "about whom the employee obtained confidential information in the ordinary course of business as a result of such employee's association with the employer." In addition, nonsolicitation covenants could permissibly restrict a former employee from merely accepting business from customers. Current case law prohibits such restrictions. Finally, the bill sets presumptively reasonable time limits, allowing for enforcement against former employees for up to two years; against a distributor, dealer, franchisee, lessee of property or licensee of a trademark for up to three years; and against the seller of a business for up to the longer of (a) five years, or (b) the time during which payments are being made to the seller. The bill's creators believe that establishing standards for restrictive covenants will make it easier for businesses to draft enforceable covenants that can survive a court challenge, resulting in fewer restrictive covenants lawsuits.

Jacobsen v. Katzer:

Open Source License Validation — How Far Does It Go?

By: Paul H. Arne[1,2]

On August 13, 2008, the U.S. Court of Appeals for the Federal Circuit issued its opinion in *Jacobsen v. Katzer and Kamind Associates, Inc. (d/b/a KAM Industries)*[3] ("*Jacobsen*"). By this decision, the Federal Circuit has validated the legal position intended by the creators of some of the most important open source licenses: covenants in an open source license may be enforced under copyright law rather than on contractual grounds. This article will examine the ruling and reasoning in this important case, ask some questions unanswered by this ruling, and discuss some additional implications of this case outside of the open source context.

Facts and Procedural History[4]

Jacobsen and Katzer/Kamind were the developers of competing software applications used to program the decoder chips that control model trains. Jacobsen and others, through an open source group known as JMRI, developed software called DecoderPro. DecoderPro was licensed under an open source license: the Artistic

[1] Paul is the co-chair of the Technology Group of Morris, Manning & Martin, L.L.P. He is also the founder of the firm's open source practice group. This article does not create an attorney/client relationship with you and does not provide specific legal advice to you or your company. Certain legal concepts have not been fully developed and certain legal issues have been stated as fact for which arguments can be made to the contrary, due to space constraints. It is provided for educational purposes only.

[3] 535 F.3d 1373 (Fed. Cir. 2008).

[4] Unless otherwise indicated, the facts are from the Federal Circuit opinion.

License.[5] Katzer/Kamind's software, Decoder Commander, was presumably developed and licensed under a proprietary license. Katzer obtained patents on certain inventions and then asserted that DecoderPro infringed. In response, Jacobsen filed suit, seeking a declaratory judgment that the patents are unenforceable or not applicable to DecoderPro.[6]

Earlier, a predecessor or employee of Katzer/Kamind had downloaded DecoderPro and incorporated portions of it into Decoder Commander. Despite using some of the DecoderPro code in its product, Katzer/Kamind did not follow the requirements of the Artistic License. Among other things, Jacobsen alleged that Katzer/Kamind did not include (a) the authors' names, (b) copyright notices for JMRI, (c) references to the file that contains the text of the Artistic License, (d) an identification of JMRI or SourceForge (a web site on which much open source software is managed and made available) as the source of the code, and (e) a description of how the files had been changed by the user.

As a result of these failures, Jacobsen also brought a claim for copyright infringement against Katzer/Kamind. Jacobsen sought an injunction against Katzer/Kamind, seeking to prevent Katzer/Kamind from using any part of DecoderPro. The propriety of granting an injunction was the issue presented on appeal.

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[5] The text of the Artistic License can be found at http://www.opensource.org/licenses/artistic-license-1.0.php.

[6] It is the patent aspects of this case that gave rise to the Federal Circuit's jurisdiction, even though the ruling did not address patent issues.

Irreparable harm may be presumed in a copyright infringement,[7] while no such presumption exists in a breach of contract context. The question presented was whether the unmet conditions of the Artistic License were (1) conditions of the license grant itself, i.e., if the conditions were violated Katzer/Kamind's use of DecoderPro would be unlicensed and therefore a copyright violation, or (2) contractual covenants for which normal breach of contract principles would apply.

Decision, Appeal, Decision

The District Court denied Jacobsen's motion for preliminary injunction, holding that the violated covenants of the Artistic License were not limitations on the grant of the license itself, but instead may be a breach of contract.[8] This decision was appealed to the Federal Circuit. The Federal Circuit reversed, holding that the violated provisions were conditions to the authorized use of DecoderPro, the violation of which resulting in a copyright infringement.

Why This Decision is Important

The Reach of Copyright Law

The U.S. Copyright Act gives a copyright holder certain exclusive rights, and often it is the license of these rights that allows the holder to make money from her work.

[7] On remand, the District Court noted that the standard for injunctive relief had recently changed in the 9th Circuit as a result of Winter. Natural Resources Defense Council, 129 S.Ct. 635 (2008). "In this recent case, the Supreme Court found that the Ninth Circuit's standard of the likelihood of irreparable injury was too lenient and held that a plaintiff must demonstrate that irreparable injury is '*likely* in the absence of an injunction.' [citation omitted] 'Issuing a preliminary injunction based only [sic] a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'" The District Court found that harm to Jacobsen was not "real, imminent and significant" and accordingly denied Jacobsen's request for a preliminary injunction. Jacobsen, 90 USPQ2d 1441, 1449.

[8] Jacobsen v. Katzer, No. C 06-01905; 2006 U.S. Dist. LEXIS 79030 (N.D. Cal.).

These rights are to make copies, create derivative works, distribute copies, and in some situations, publicly perform and display the copyrighted work.[9] These exclusive rights are just that: rights to exclude. At face value, the rights to limit copying, distribution, and derivative works do not seem to require someone to affirmatively do something — just not do something. Not surprisingly, in the business world proprietary license grants tend to be based on limiting copying, distribution, and the creation of derivative works.[10] They usually have an exclusionary tone — you can do this, but you can't do these other things, and the only rights you get are expressly set forth.

There may be other obligations of a party, but most of the time they are not framed as license limitations. For example, if there are non-disclosure provisions in a license agreement, a breach of them does not normally create a copyright infringement unless the license limits are also exceeded. If there is a limitation of damages clause, the remedy for "breach" is not usually perceived to be a copyright infringement action, but the enforcement of a contractual covenant.

Some of the most important open source licenses are different. Originally spurred by the actions of Richard Stalman and the Free Software Foundation, these licenses claim to be licenses only and not agreements.[11] Therefore, a user's violation of any of the conditions of the license means the user is not licensed and therefore a

[9] 17 U.S.C §106.

[10] Patent rights, which are frequently also licensed, address the exclusive right to make, use and sell the applicable invention. Most licenses for software (at least that this author has read) also has language related to "use." Rights in trade secrets and confidential information, which are also a part of many licenses, normally refer to "use" as well.

[11] Eben Moglen, the General Counsel of the Free Software Foundation (the developers of the General Public License or GPL) and a law professor at Columbia, states that "the GPL does not require any promises in return from licensees, it does not need contract enforcement in order to work." The GPL is a License, Not a Contract, Which is Why the Sky Isn't Falling, www.groklaw.net/article.php?story=20031214210634851, December 14, 2003.

copyright infringer. The concept of a license as opposed to an agreement is nicely set forth in Section 5 of the GNU General Public License (version 2) (or GPL):

> You are not required to accept this License, since you have not signed it. However, nothing else grants you permission to modify or distribute the Program or its derivative works. These actions are prohibited by law if you do not accept this License.

Using a traditional real property metaphor, rights in copyright can be treated as a bundle of sticks. The holder of a copyrighted work, for example, can grant the right to make copies of a work to a licensee only on vinyl records. All other sticks can be retained. If the licensee burns a copy on a CD, she exercises a right she never had. To enforce the restriction, the licensee isn't required to enter into an agreement; that is simply a right that was never licensed to her. No agreement is required, but nevertheless the prohibition is enforceable under copyright law.

This is a very important distinction for the open source movement, especially for the GPL and its companion, the GNU Lesser General Public License (or LGPL).[12] Relying on almost universal principles of copyright law, the Berne Convention,[13] arguably eliminates the difficulties in creating a single agreement that is enforceable everywhere in the world no matter the local requirements of contract law. Quoting Eben Moglen again:

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[12] As of this writing, a quick check of www.sourceforge.net, a popular Web site for open source projects, shows that of the over 134,000 open source projects listed, over 100,000 of them are licensed under the GPL or LGPL.

[13] The Berne Convention has been adopted by 164 countries. Berne Convention for the Protection of Literary and Artistic Works, http://en.wikipedia.org/wiki/Berne_Convention_for_the_Protection_of_Literary_and_Artistic_Works, September 10, 2008. It protects the exclusive rights of copyright holders to reproduce their works (Article 9) and to make alterations to their works (Article 12).

> [G]iven that we are all now existing in a Berne universe, the right way of internationalising is to come as close to Berne Convention mechanisms as possible. In order to do that the one step really needed is to get out of the licence dependence on any single legal system's vocabulary or unique conceptions.[14]

The legal distinction between a copyright infringement and a breach of contract is neither new nor remarkable. No agreement is necessary to prevent someone from making copies or creating derivative works of a book purchased at a bookstore; normally the person purchasing the book has neither met nor entered into any agreement with the book's author.

When an agreement is actually entered into, there are times when a violation of the agreement can be treated as exceeding the scope of the license — and therefore a copyright violation — and when the violation must be treated as a breach of contract.[15]

Jacobsen may be a little different from the vinyl and book examples above. The conditions of the Artistic License in question take us a little further than exclusionary concepts in copyright law. They require certain affirmative actions on the part of the user, as opposed to requiring the user not to do certain things. Among other things, as a condition of distribution, the user is required to describe how the files have been

[14] Transcript of Eben Moglen at the Third International GPLv3 Conference; June 22, 2006; transcript available at http://www.fsfeurope.org/projects/gplv3/barcelona-moglen-transcript.en.html.

[15] See generally 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 10.15[A].

changed and identify JMRI or SourceForge as the author of the code. Is the requiring of an affirmative action one of the sticks that is owned by a copyright holder?[16]

The Federal Circuit held that these requirements are conditions to the grant of the copyright license. Therefore, any use of DecoderPro while not complying with these affirmative conditions is a copyright infringement. Assuming that the other requirements for an injunction are met,[17] an injunction is an appropriate remedy in a copyright infringement case. This decision makes clear that some affirmative acts can be required as a condition of the right to use a copyrighted work. Whether this decision will allow more extensive affirmative acts to be license conditions will be discussed below.

Adoption of Open Source by the Court

This case is a major win for the open source movement. For the first time, a court has recognized and validated that affirmative covenants can be enforced in an open source license. One cannot read this case without realizing how deeply the Federal Circuit bought into open source as an important, valuable, strong model for the development of computer software. If this decision is any harbinger of court treatment of open source licenses in the future, the risks of a court refusing to enforce all or parts of open source licenses have just gotten much lower. If the lower court's decision had

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[16] The author recognizes that at times there is little difference between affirmative and exclusionary requirements. For example, there is little difference between a license to use software only when standing on one's left foot and a license requiring one to raise one's right leg. Nevertheless, the presence of a blurred edge to this dichotomy may not be helpful in more clear cut situations. For example, limiting one's liability as a condition of a license may not be a stick in the bundle of rights of a copyright holder.

[17] But see note 7.

been affirmed, the underlying premise behind the enforcement of the GPL and LGPL worldwide would have taken a serious hit.

Special Words

Jacobsen gives those of us who draft and interpret software licenses some important language lessons. If you want to have a provision of a license agreement interpreted as a condition of the license rather than a contractual covenant, *Jacobsen* provides a guide. The court placed heavy reliance on the use in the Artistic License of the word "condition" as opposed to "covenant". The court also found that the use of "provided that" as a part of the sentences that governed copying, distribution, and creating derivative works is evidence that the intent was to create a license limitation rather than a contractual covenant.

It may be useful to compare *Jacobsen* to another decision: *Fantastic Fakes, Inc. v. Pickwick Int'l, Inc.*[18] In *Fantastic Fakes*, the plaintiff argued that the defendant's failure to affix proper copyright notices on copies of the copyrighted works was unauthorized and therefore a copyright infringement rather than just a breach of contract. The license granted the right to use the works "*subject to and in accordance with* the following: ... 'LICENSEE' shall cause to appear on all sound recordings ... a copyright notice...." (emphasis supplied). The Fifth Circuit held that "subject to" and "in accordance with" was ambiguous. Applying three contract construction principles under Georgia law[19]— a bias towards construing provisions as covenants rather than

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[18] 661 F.2d 479 (5th Cir. 1981).

[19] *Jacobsen* and *Fantastic Fakes* are consistent in their application of state law to the interpretation of the language of the license. In that regard, open source licenses may still be limited to the vagaries of local law.

conditions, a bias towards avoiding a forfeiture, and a bias interpreting the agreement against the drafter — the court held that the provision was a contractual covenant rather than a condition of the license.

Jacobsen and *Fantastic Fakes*, both involving the failure to comply with a requirement to place copyright notices on copies, came to opposite results. In *Jacobsen*, the license used "provided that" and "condition" while in *Fantastic Fakes* the license used "subject to" and "in accordance with." If a lawyer wants to draft a provision that allows the force of copyright law to be available for its breach, the use of "covenant" and "provided that" is supported by *Jacobsen*.

Given the importance of the differences between contract and copyright causes of action and the lack of certainty related to which words will result in which judicial treatment, this would seem to be an area that will be explored by the courts in the future. As of this writing, however, this author could find no published opinion that uses *Jacobsen* in making such an analysis.

Importance of the "Little Provisions" of Open Source Licenses

There is another very important practice pointer coming out of *Jacobsen*. Many companies and their lawyers view the use of "academic licenses" as being fair game for use in their software development efforts. While the use of software licensed under the BSD license, for example, does not carry the potential risk of unintended consequences of software licensed under a strong "copyleft" license (like the GPL), there are still actions that you must take. For example, the BSD license provides as follows:

> Redistribution and use in source and binary forms, with or without modification, are permitted *provided that* the following conditions are met: ...
>
> Redistributions in binary form must reproduce the above copyright notice, this list of conditions and the following disclaimer in the documentation and/or other materials provided with the distribution. [emphasis supplied]

Other "academic licenses" have similar requirements. The absence of compliance with these kinds of provisions is just the kind of non-compliance that gave rise to a copyright infringement in *Jacobsen*. Counsel to developers of software should seriously consider stressing the need to comply with these provisions. This may also require some redrafting of existing corporate open source use policies.

Playing Out the String: Other Ramifications and Unanswered Questions

While the court in *Jacobsen* held that affirmative requirements could be conditions of a license, how far will courts take this in the future? The applicable covenants in *Jacobsen* were at least "copyright-like," in that they related to attribution, identifying derivative works, and preserving rights in copyright by using copyright symbols on copies. Would a court treat a clause the same way if the subject matter was further removed from the exclusive rights granted to copyright holders?

It is also important as a drafter of a license to ask yourself whether you want a provision to be enforced as a contractual covenant or as a copyright infringement. There are potential consequences of either approach.

For example, most open source licenses have broad limitation of liability clauses. Let's suppose that a developer licenses his software to third parties under an open source license containing a "condition" that purports to exonerate the licensor from all liability whatsoever. A user obtains the software and suffers a data loss as a result of a problem with the software. The user then sues the developer for damages related to the data loss, seeking to avoid the absolute limitation of liability in the open source license. What rights do the parties have in this situation? Here are a few options for how a court might treat this case.

- By seeking damages, the user has not lived up to the *conditions* of the license grant, so the user is an infringer and therefore liable for copyright damages associated with the unlicensed use of the software. However, because there is no *agreement* to limit liability, only a license, the limitation of liability clause is a condition of the license but not a limitation on the user's right to pursue a damages claim. In essence, this formulation gives the developer a counterclaim, but the user's claim is not blocked by the license.

- Same result as in the first option, except that the measure of damages for the copyright infringement includes the amount of damages that would be paid by the developer to the user as a result of the user's claim. This kind of ruling would enforce the limitation of liability clause indirectly through a copyright cause of action.[20]

[20] It would be interesting to see if a court would interpret 17 U.S.C. § 504(b) as extending to these kinds of damages. The statute provides that "[t]he copyright owner is entitled to recover the actual damages suffered by him

- The limitation of liability clause is interpreted as a contractual covenant and not a license condition.

- While the limitation of liability only gives a copyright remedy, principles of equity will cause it to be enforced as if it was agreed by the user.

- The limitation of liability clause is actually enforceable as a limitation under some theory that while the license terms were not contractually agreed, they were somehow "accepted" through the use of the software. This in essence enforces a license term as a contractual term even if it isn't agreed by contract. There are portions of the GNU General Public License that seem to contemplate the distinction between "acceptance," on the one hand, and "agreement," on the other.[21]

While the reader may prefer one option over others, or can think of other options, one can see that the ramifications of *Jacobsen* for other clauses that are common in open source licenses are not clear at this point. Only time will tell how far the reasoning in this case will be taken.

Web Site Terms of Use

If open source licenses can have affirmative conditions that are copyright-based limitations, what about terms of use set forth on web sites? Could the concepts in *Jacobsen* also be used to create additional remedies if terms of use are violated? There

or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages."

[21] A quick word search of the GPL v.3 shows that the word "agree" does not appear in the context of a licensee agreeing to anything; however "accept" does.

would seem to be no logical reason not to expand the court's reasoning to other forms of licenses.

In addition, there are a line of cases about when terms of use can be enforceable, based on what kind of notice is given on the web site.[22] These cases focus on the issue of reasonable notice to the user, such as font size, placement of the hypertext link to the terms, etc. Would this analysis be any different for a license instead of an agreement? After all, no assent is needed for a license. The licensor is just giving away sticks.

Even though the standards of notice under contract formation and license grant scenarios may be different, the drafter of web site terms and conditions may want to avoid using a covenant for those requirements that are not closely related to the exclusive rights in copyright. A drafter may decide to avoid the possibility of an unintended result by making those kinds of clauses covenants and not conditions.

Conclusion

Jacobsen clearly endorses the open source movement. However, important issues regarding the enforceability of other clauses in open source licenses, and how they are enforced, may not have been answered in this case. *Jacobsen* highlights the need to be sensitive to the differences between conditions and covenants in license drafting, as well as placing renewed attention on the requirements of academic and other open source licenses that do not contain strong copyleft attributes.

[22] See, e.g., Specht v. Netscape Communications Corp., 150 F.Supp.2d 585 (S.D.N.Y. 2001).