

IN BRIEF

The newsletter of
**Feldman, Franden,
Woodard, Farris & Boudreaux**
September 15, 2005



U.S. Supreme Court Holds Software Company Liable for End-Users' Copyright Infringement

Companies can no longer facilitate others' infringements of the copyright laws. In *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, decided June 27, the defendant companies distributed free software that allows computer users to share electronic files through peer-to-peer networks. Users of the software used it primarily to share copyrighted music and video files without authorization. A group of movie studios and other copyright holders sued the software companies for their users' copyright infringements, alleging that respondents knowingly and intentionally distributed their software to enable users to infringe copyrighted works.

The companies were aware that users employ their software primarily to download copyrighted files, although the decentralized networks do not reveal which files are copied or when. The companies sometimes learned about the infringement directly when users sent email questions regarding copyrighted works. When the defendant companies first began to distribute their free software,

each of them clearly voiced the objective that recipients use the software to download copyrighted works, and took active steps to encourage infringement. After Napster, was sued by copyright holders for facilitating copyright infringement, the defendants promoted and marketed themselves as Napster alternatives. The defendants received no revenue from users, but obtained revenue by streaming advertising to their users. As the number of users increases, advertising opportunities are worth more. There is no evidence that defendants made any effort to filter copyrighted material from users' downloads or otherwise to impede the sharing of copyrighted files.

The Court held that one who distributes software with the object of promoting its use to infringe copyright, as shown by a clear expression or other affirmative steps taken to foster infringement (evidencing conduct beyond mere distribution with knowledge of third-party action) is liable for the resulting acts of infringement by third parties using the device, regardless of the device's lawful uses.

We are proud of ...

... our lawyers for their recent accomplishments ...

Joe Farris and Paula Quillin won summary judgment in a legal malpractice case.

Belinda Aguilar won an appeal of a products liability case.

Victor Wandres won a motion to dismiss a premises liability case.

Joe Farris and Belinda Aguilar filed a motion to dismiss in a commercial dispute. Rather than respond, the opposing party dismissed the case.

Joe Farris and Paula Quillin won summary judgment for a defendant in a negligence and breach of fiduciary duty case.

Paul Boudreaux successfully negotiated an favorable solution to a series of toxic tort cases.

Victor Wandres won a motion for sanctions in a legal malpractice suit, excluding all expert testimony as to liability and all testimony relating to alleged damages.

Joe Farris and Paula Quillin won dismissal of a Fair Debt Collection Practices Act claim in federal court.

Jasen Corns won an oral argument and prevailed against a motion to dismiss for lack of personal jurisdiction.

Ray Feldman and Victor Wandres closed deals on 5 downtown office buildings.

Jason Goodnight and Belinda Aguilar won a motion to dismiss in a property damage case.

SHORT JOKE

The warden, addressing the three instigators of a failed prison riot, said, "I would like to know two things. First: Why did you revolt Second: How did you get out of your cell?"

One of the three stepped

forward, "Warden, we rebelled because the food is awful."

"I see. And what did you use to break the bars?" the warden asked.

Replied the spokesman, "French Toast..."

Across

- 1. Trudge
- 5. Dreary
- 9. Retail outlet
- 13. Wander
- 14. Warble
- 16. Remuneration
- 17. Part of the Roman calendar
- 18. Play or represent

- 19. Nimbus
- 20. Virtue
- 22. Introduction
- 24. Type of tree
- 26. Additional
- 27. French film festival
- 30. Temper or season
- 35. Place
- 36. Book of maps
- 39. Currency of Nigeria
- 40. Woodwind instrument
- 42. Bird of prey
- 44. Heat up
- 45. Ocean vessel
- 47. Exuviate
- 49. Fish eggs
- 50. Nocturnal wildcat
- 52. One who suffers for the sake of principle
- 54. Sagolike starch
- 57. Novel
- 58. Part of a grandfather clock
- 62. Meat cooked on a skewer
- 66. Promise
- 67. Narrow length of leather
- 69. Solitary
- 70. Song for solo voice
- 71. Path
- 72. Ballot

- 73. Religious order
- 74. Friend
- 75. Ruler or chieftain
- 68. Travel a route regularly

Down

- 1. Dainty
- 2. Valuable ore deposit
- 3. Finished
- 4. Blueprint
- 5. Coloring substance
- 6. Frolic
- 7. Worship
- 8. Asian pepper plant
- 9. Mop
- 10. Drag
- 11. Fiend
- 12. Leguminous plant
- 15. Tether
- 21. Large food and game fish
- 23. Miserly
- 25. Administer or ___ out
- 27. Having three dimensions
- 28. Expiate
- 29. Close violently
- 31. Uncooked
- 32. Personal journal
- 33. Mistake
- 34. Epithet
- 35. Game played on horseback

1	2	3	4		5	6	7	8		9	10	11	12	
13					14			15		16				
17					18					19				
20				21		22				23				
			24		25		26							
	27	28				29		30		31	32	33	34	
35				36			37	38		39				
40			41		42			43		44				
45				46		47				48		49		
50					51			52			53			
				54		55	56		57					
	58	59	60					61		62		63	64	65
66					67			68		69				
70					71					72				
73						74					75			

- 41. Long fish
 - 43. Panache
 - 46. Route
 - 48. Journey
 - 51. Reliance
 - 53. Roman XII
 - 55. Radical
 - 56. Wall painting
 - 58. Small opening in the skin
 - 59. Long narrative poem
 - 60. Orderly
 - 61. Post
 - 63. Economic prosperity
 - 64. Opposing
 - 65. Alcoholic beverage
 - 66. Possesses
- (Answers on page 5)

YOU THINK GASOLINE IS EXPENSIVE?



- Diet Snapple 16 oz. for \$1.29 = \$10.32 per gallon
- Lipton Ice Tea 16oz for \$1.19 = \$9.52 per gallon
- Gatorade 20oz for \$1.59 = \$10.17 per gallon
- Ocean Spray 16oz for \$1.25 = \$10.00 per gallon
- Pint of milk 16oz for \$1.59 = \$12.72 per gallon
- STP Brake Fluid 12oz \$3.15 = \$33.60 per gallon
- Vick's Nyquil 6oz for \$8.35 = \$178.13 per gallon
- Pepto Bismol 4oz for \$3.85 = \$123.20 per gallon
- Whiteout .7oz for \$1.39 = \$25.42 per gallon
- Scope 1.5oz for \$0.99 = \$84.48 per gallon

And this is the REAL KICKER.....

Evian water 9oz for \$1.49 = \$21.19 per gallon
\$21.19 FOR WATER!!!

So next time you're at the pump, be glad your car doesn't run on Nyquil, or Scope, or Whiteout!!!!

Quotable

The penalty for laughing in a courtroom is six months in jail; if it were not for this penalty, the jury would never hear the evidence. ~ H. L. Mencken

No man goes before his time -- unless the boss leaves early. ~ Groucho Marx

Although golf was originally restricted to wealthy Protestants, today its open to anybody who owns hideous clothing. ~ Dave Barry

MORE THAN NEGLIGENCE REQUIRED TO PROVE INSURANCE BAD FAITH IN OKLAHOMA

The Oklahoma Supreme Court, in response to much debate within the legal profession and insurance community, replaced an earlier decision, *Badillo v. Mid Century Ins. Co.*, 2004 OK 42, with *Badillo v. Mid Century Ins. Co.*, 2005 OK 48 (June 21, 2005).

The *Badillo* suit involved a third-party claim against a liability policy. The insurer could have settled the case for policy limits, had they convinced the injured party's lawyers that no other source of payment was available. To settle, it was necessary to allow the third party to take the insured's statement. The insurer refused to permit the insured's statement to be taken and did not inform the insured that a statement had been requested. Consequently, the insured risked a judgment exceeding policy limits. The insured sued the insurer for bad faith and obtained a judgment in his favor. Both appealed.

Because the judgment was supported by competent evidence and there was no reversible error, the appellate court was required to affirm the judgment rather than second-guess it. Concerning the trial court's failure to direct a verdict for the insurer on the issue of bad faith, the Court noted that the essence of an action for breach of the duty of good faith and fair dealing was the insurer's unreasonable, bad-faith conduct, and if there is conflicting evidence regarding the reasonableness of the insurer's conduct, then what is reasonable is a jury question.

Significantly, the Court stated that to the extent a prior decision "may have implied that a simple negligence standard was approved or adopted as to the level of culpability necessary to be shown for liability to attach to an insurer for breach of the duty of good faith and fair dealing in relation to the handling of a third-party claim made

against the insured, *i.e.*, the situation involved here, that case is expressly overruled." Interpreting prior decisions, the Court said that more than simple negligence is required for a bad faith claim, stating that "In our view, under *Christian* and later cases, the minimum level of culpability necessary for liability against an insurer to attach is more than simple negligence, but less than the reckless conduct necessary to sanction a punitive damage award against said insurer. . . ." The Court rejected the insurer's contention that a tender of policy limits to a third party was a complete defense to a claim for breach of the duty of good faith and relieved the insurer of the obligation to safeguard the interests of its insured. The insurer tendered policy limits but when a statement from the insured was demanded, refused and told the third-party claimant to send back the \$10,000 policy limits if she no longer wished to settle the case. There

had never been a settlement agreement. The duty of good faith required the insurers to reasonably respond to reasonable requests from the injured party's lawyers in an effort to settle the case for the protection of the insured. Whether they did so was a jury question.

The Supreme Court in *Badillo* affirmed the duty of an insurer to conduct an investigation reasonably appropriate under the circumstances. The Supreme Court upheld a directed verdict in favor of the insurer on the issue of punitive damages. The trial court record did not contain competent evidence from which a reasonable jury could find reckless disregard, sufficient to support an inference of evil intent and malice.

In sum, it requires more than simple negligence to submit to the jury the issue of bad faith but does not require the same level of intent required to submit the issue of punitive damages to the jury.



A FEW SHORT JOKES

A man and his wife were driving their Recreational Vehicle across the country and were nearing a town spelled Kissimee. They noted the strange spelling and tried to figure how to pronounce it - KISS-a-me; kis-A-me; kis-a-ME. They grew more perplexed as they drove into the town.

Since they were hungry, they pulled into a place to get something to eat. At the counter, the man said to the waitress:

"My wife and I can't seem to be able to figure out how to pronounce this place. Will you tell me where we are and say it very slowly so that I can understand."

The waitress looked at him and said: "Buuurrngerrr Kiiiiinnng."

With HIPAA regulations in full force, a hospital IT technician reminds users that when they print reports containing patient information, those reports can't be left in the printer tray. "They must be either secured under lock and key or shredded," he says. But one user had a problem: "I don't always have time to pick up my reports from the printer. Is there any way I can set up my PC so I can send my documents directly to the shredder?"

A man walked into the office of an eminent psychiatrist and sat down to explain his problem.

"Doctor, doctor! I've got this problem," the man said. "I keep hallucinating that I'm a dog. It's crazy. I don't know what to do!"

"A common canine complex," said the doctor soothingly. "Relax. Come here and lie down on the couch."

"Oh no, Doctor," the man said nervously, "I'm not allowed up on the furniture."

Associatology 101: The Buzz from the Water Cooler

Belinda Aguilar, newly admitted to the Oklahoma Bar, recently made her first oral argument in court, defending a motion to dismiss. Ms. Aguilar made the most of her courtroom debut, stretching her argument into a theatrical 96-minute speech that would have made William Jennings Bryan proud. After artfully weaving the U.S. Constitution, state statutes, old English common law, Plato, natural law, Red Skelton, a 1921 Harvard Law Review article, and her grandmother's famous peanut butter cookies into her stunning presentation, Ms. Aguilar tearfully finished with a quote from Che Guevara that inspired onlookers to break into an impromptu standing ovation and demand an encore. No one is sure who actually won the motion.

Thayla Painter Bohn recently settled a complex lawsuit involving quarterhorses. For months, Painter Bohn had immersed herself in the case, learning every fact and nuance about the world of quarterhorses. Since the case ended, Painter Bohn has exhibited some troubling signs of withdrawal pains. One Monday, she wore cowboy boots with her Ann Taylor suit. Then on jeans day, she wore chaps – that is, until John Woodard sent her home for the day. And there are rumors, thus far unconfirmed, that she has begun chewing tobacco.

Jasen Corns amazed fellow downtown workers and parking garage attendants alike recently when he lodged his mother's Lincoln Navigator in the parking garage. Oblivious to all height warnings, Corns pulled the gargantuan SUV, which also had an add-on luggage compartment on top, into the garage. Half a floor up the ramp, he heard a screeching sound and could not

move the vehicle. An hour-and-a-half later, a team of workers had freed the SUV, which now needs a new luggage rack. After the incident, managing partner Joe Farris made Corns show him his juris doctorate degree to confirm he had actually made it through law school.



Jason Goodnight staged a brief walkout after going six consecutive days without a road trip. Goodnight, accustomed to traveling the country for depositions, hearings, and other tedious lawyering events, started showing signs of grumpiness by the third day. He was overheard asking firm receptionist Sharon Helm, "Where's my continental breakfast?" He reportedly also called her demanding toothbrushes, room service, and wake-up calls. Day six was the tipping point, as Goodnight sat cross-legged on the Main Street sidewalk, arms folded across his chest, refusing to go in. Mercifully, John Woodard sent Goodnight to hand deliver some interrogatories to a law firm in Chicago, where Goodnight stayed two nights in the downtown Four Seasons.

Paul Prather was spotted at the recent local concert by 1980's hair bands Cinderella and Ratt. Prather attempted to blend in by wearing a sleeveless t-shirt, sunglasses, and baseball hat, but his disguise could not fool the firm's private investigator, who happened to also be in attendance. The investigator discreetly snapped photos of Prather playing a wicked air guitar, body surfing, and ultimately being escorted out of the arena after trying to rush the stage.

Curtis Roberts recently paid a high-priced salon beautician \$49 to make him "look more sexy, like Brad Pitt." After handing Roberts the business cards of a well-known plastic surgeon and a local faith healer, the beautician spent approximately ninety seconds buzzing Roberts' head with clippers.

"There ya go, Brad," said the beautician, while promptly escorting Roberts to the cash register. "Oh my," marveled Roberts, as he gazed in the mirror. "You are a flippin' magician!" The proud Roberts arrived at work at 6 a.m. the next morning, eager for compliments, only to find himself the subject of whispers, finger-pointing, and full-blown ridicule when co-workers began arriving a couple hours later.

Victor Wandres found himself in an unusual position last week, losing an oral argument for the first time in his career. He did not take it well. "What do you mean, 'overruled?'" Wandres angrily demanded, after hearing the judge's ruling. Wandres immediately made an oral Motion To Reconsider, followed by an oral Motion For Rehearing, followed by an oral Motion To Vacate. After the judge denied all three, Wandres asked the judge for attorney's fees and sanctions. He was denied. The next day, the Judge read Victor's 182-page brief with 1,743 pages of attachments, and granted the motion. Victor was relieved. "It took me half the morning to write that brief!" he exclaimed.

Coupla Jokes

A lady came to the hospital to visit a friend. She had not been in a hospital for several years and felt uneasy, not knowing about all the new technology. A technician followed her onto the elevator, wheeling a large, intimidating looking machine with tubes and wires and dials.

"Boy, would I hate to be hooked up to that thing," she said.

"So would I," replied the technician. "It's a floor-cleaning machine."

Bidding at a local auction was proceeding furiously when the auctioneer suddenly announced, "A gentleman in this room has lost a wallet containing \$10,000. If it is returned, he will pay a reward of \$2,000."

There was a moment's silence, and then from the back of the room came the cry, "Two thousand five hundred!"

SAFETY ADVICE FOR OWNERS OF MP3 PLAYERS

Recently, an IN BRIEF staffer bought an MP3 player to replace one that had died a slow and painful death during the middle of a tune that the staffer refuses to identify.

A crisp new 50-page booklet came with the MP3 player. While there were no instructions on how to operate the basic controls, the purchaser was repeatedly congratulated in English, French, Spanish, and Portuguese for purchasing the MP3 player.

The purchaser was also given "Safety Advice," and which we feel compelled to pass along for those of you who regard MP3 players as innocuous little devices.

Although the "Safety Advice" TITLE appeared in all four languages, the universal symbols depicting danger were IDENTICAL in all four languages.

Unfortunately for those who do not speak Universal, no written descriptions accompany the universal symbols. Here's where we can help with a translation.



1. Do not cry onto your MP3 player. This may cause the MP3 player to default to Brittany Spears, causing you further depression.



2. Do not try to mow crabgrass with your MP3 player. It just springs back up and might poke your eye out.



3. No charbroiling of the MP3 player. It causes carcinogens. If you must cook it, boil it.



4. Do not play horse shoes with your MP3 player. Horseshoes is a dangerous game. Better to use lawn darts.



5. Do not give a screwdriver to your MP3 player. It could turn on you, just like that.



6. Do not attempt to use a rectal thermometer on anyone or anything.

Unfortunately, we lack the skill to translate this column into French, Spanish, or Portuguese. If you'd like a Pig-Latin translation, though, write to the editor.

Igpay-Atinlay: Unfortunatelyway, eway acklay ethay illskay otay anslatetray isthay olumncay intoway Enchfray, Anishspay, orway Ortugueseplay. Ifway ouyay'day ikelay away Igpay-Atinlay anslationtray, oughthay, itewray otay ethay editorway .



the Grapevine

Sandy Farris (Joe's wife) is now a member of the Board of Directors of the American Law Auxiliary.

Jeremy Ward, our summer law clerk, is now Articles Editor for the TU law school's Energy Law Journal, having published an article recently.

Paul Boudreaux is now a Diplomat of The American Board of Trial Advocates.

Paula Quillin is back from a tour of Ireland but still disturbed that the McQuillin castle was wrested from her family a few centuries ago. Paula has vowed to regain control as soon as she finds her river dance shoes.

Right: the answer to the crossword puzzle on page 2. Peeked, didn't you?

Don't feel bad, but the Staff of IN BRIEF worked the entire crossword puzzle in less than 45 seconds, using indelible ink.

This doesn't mean you are a slacker. No, there were many other indications of THAT, without taking the puzzle into account.

P	L	O	D		D	R	A	B		S	H	O	P		
R	O	V	E		Y	O	D	E	L		W	A	G	E	
I	D	E	S		E	M	O	T	E		A	U	R	A	
M	E	R	I	T		P	R	E	A	M	B	L	E		
			G	U	M			E	L	S	E				
	C	A	N	N	E	S			H	A	R	D	E	N	
P	U	T		A	T	L	A	S		N	A	I	R	A	
O	B	O	E		E	A	G	L	E		W	A	R	M	
L	I	N	E	R		M	O	U	L	T		R	O	E	
O	C	E	L	O	T			M	A	R	T	Y	R		
				A	R	U	M			N	E	W			
	P	E	N	D	U	L	U	M		K	E	B	A	B	
H	O	P	E			S	T	R	A	P		L	O	N	E
A	R	I	A			T	R	A	I	L		V	O	T	E
S	E	C	T			A	L	L	Y			E	M	I	R



September 15, 2005

Feldman, Franden,
Woodard, Farris &
Boudreaux
525 S. Main
Suite 1000
Tulsa OK 74103

In Brief

LEAF BLOWER EDITION

On the web at www.tulsalawyer.com

Use
IN
BRIEF
For A
Clean,
High Gloss
Finish

