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THE HOWE & HUTTON REPORT

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TRENDING NOW

U.S. PROSECUTORS CAN'T SEIZE EMAIL STORED OVERSEAS — The U.S. Court of Appeals for the Second Circuit in New York has held that prosecutors can't force Microsoft to turn over email and other customer data stored on servers overseas. Federal prosecutors wanted Microsoft to turn over email stored on servers in Ireland for use in a drug trafficking investigation. However, the Court of Appeals unanimously overturned a lower court's contempt citation against Microsoft for refusing to relinquish the data sought by the prosecutors, finding that the federal Stored Communications Act gave U.S. prosecutors no right to enforce a warrant for information stored overseas and that "centuries of law" prohibited that practice. *The ruling has been considered a major victory for "cloud computing" in which data is kept on giant, often distant, servers. The Court of Appeals noted that Microsoft stores data on servers in more than 40 countries.*

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PERSONAL INFORMATION PROTECTION ACT AMENDED — Illinois has amended its Personal Information Protection Act to expand data breach notification requirements. Organizations are required to notify consumers if there has been a data breach involving their "personal information," and the amendments to the Act expand the definition of that term. It now includes (1) a username or email address in combination with a password or security question and answer that would permit access to an individual's online account or (2) an individual's first name or first initial and last name in combination with a Social Security number, a driver's license number or state identification card number, an account number or credit or debit card number, medical information, health insurance information, unique biometric data (such as a fingerprint, retina or iris image), or information that would permit access to an individual's financial account. The amended Act also now requires that notifications take place even if data involved in a breach was encrypted, provided a decryption key was obtained during the breach, and the Act now clarifies that notifications can be in electronic form. *Data breaches are on the rise, according to the Identity Theft Resource Center in San Diego, which keeps track of such things. The Center reports that 473 data breaches occurred nationwide in the first half of 2016, exposing more than 12.6 million records containing personal information. As a result of such breaches, only a couple of states do not have data breach notification laws.*

NOT FOR PROFIT LAW DEVELOPMENTS

NON-PROFIT PUBLIC SERVICE ADS IN BUS UPHELD — The U.S. Court of Appeals for the Seventh Circuit in Chicago has rejected efforts to prevent a nonprofit from placing public service ads on city buses. A municipal corporation that provides bus service in Fort Wayne, Indiana had refused to allow the nonprofit Women's Health Link Inc. to place an ad for its free women's health care services in city buses because the nonprofit is pro-life, advocating alternatives to abortion, and the bus company considered abortion to be a "moral issue." After the nonprofit sued over that decision and a trial court granted summary judgment in favor of the bus company, the Court of Appeals reversed the trial court, ruling that the company's prohibition of the ad was an unjustifiable and arbitrary discriminatory restriction of free speech. *Key to the Court of Appeals decision was the court's finding that the ad in question was an "innocuous" public service ad that expressed no opinion or position on abortion. The ad did refer people to the nonprofit's website, which contained opinions about abortion. But the bus company's restrictions on bus advertising didn't extend to the contents of websites referred to in bus ads.*

MUSEUM ANTIQUITIES SHIELDED FROM VICTIMS OF TERRORISM — The U.S. Court of Appeals for the Seventh Circuit in Chicago has held that victims of terrorism cannot satisfy a judgment against Iran by attaching ancient Persian artifacts that Iran loaned to several local museums. The victims were among 200 people injured when three Hamas suicide bombers blew themselves up in Jerusalem 19 years ago. The victims had secured a $71.5 million judgment against Iran from U.S. courts, along with a judgment for more than $400 million in punitive damages against individual defendants. But the Seventh Circuit, finding that the antiquities in this case were the property of a foreign state that had not been used for any commercial purpose, held that they were shielded from attachment under the federal Foreign Sovereign Immunities Act and Terrorism Risk Insurance Act of 2002. *This case may not be over. The Seventh Circuit's decision arguably conflicts with a ruling in a similar case by the U.S. Court of Appeals for the Ninth Circuit in San Francisco, as well as two earlier decisions by the Seventh Circuit. When conflicting Court of Appeals decisions are handed down, the conflicts are often resolved by the Supreme Court of the U.S. This case does illustrate, though, how difficult it can sometimes be to collect on a judgment, especially when it's against someone overseas.*

GOVERNMENT CONTROL OF INTERNET TO END — The Obama Administration has announced that it will be ceding all control of the Internet to a nonprofit, multi-stakeholder entity on October 1. The nonprofit Internet Corporation for Assigned Names and Numbers (ICANN) has long controlled many aspects of Internet operations, though the Internet originated with the U.S. military. *The Administration regards the transfer as necessary to maintain international support for the Internet. Opponents of the move in Congress say it will endanger U.S. national security.*

INTELLECTUAL PROPERTY AND LAW DEVELOPMENTS

ROAD TO RIO® PAVED WITH CEASE AND DESIST LETTERS — The United States Olympic Committee ("USOC") benefits from a statute that grants it exclusive rights to all Olympic-related words, phrases, and logos. Use of "any trademark, trade name, sign, symbol, or insignia falsely representing association with, or authorization by" the USOC is likewise prohibited by federal law. Within this framework, the USOC has adopted a policy "against any entity using USOC trademarks, imagery or terminology for commercial purposes." Where should the line be drawn, however, as to what is permissible in the social media era? Women's apparel company Oiselle recently received a cease and desist letter from the USOC for using the phrase "She's going to Rio!" and the hashtag #RoadtoRio in an Instagram post. Could a personal social media post support an infringement claim? What about the title of this newsletter article? *Given the USOC's position rests on legislation drafted for its unique benefit, its aggressive approach may not prove to be effective for those relying on the general protection afforded by trademark laws. However, there would seem to be little downside for deep-pocketed trademark owners to test the boundaries of enforcement in social media settings.*

REGULATORY LAW DEVELOPMENTS

SUPREME COURT REJECTS CHALLENGES TO STATE AND LOCAL GUN BANS — Though they may have prevented enactment of new federal gun regulations this year, gun enthusiasts have had less luck challenging existing state and local laws banning assault weapons of the sort used in the Orlando, Florida shootings. Gun rights supporters have argued that such laws conflict with the Second Amendment to the U.S. Constitution, which says, "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." But the Supreme Court of the U.S. recently rejected efforts by gun law proponents to overturn Connecticut and New York laws banning assault weapons, finding that the Second Amendment doesn't prohibit such laws. Those laws were passed in the aftermath of an earlier shooting rampage, the 2012 elementary school attack in Newtown, Connecticut that left 20 children and six educators dead. In December, less than a month after the mass shooting in San Bernardino, California, the Supreme Court also refused to overturn an assault weapons prohibition in Highland Park, Illinois. *Seven states and the District of Columbia, as well as numerous other local governments, now ban assault weapons, while other state and local governments regulate them. New laws are passed every time there is another horrific shooting. But the killings continue, even in localities that have the toughest anti-gun laws, such as Chicago.*

BATHROOM RIGHTS RULING FLUSHED PENDING APPEAL — The U.S. Supreme Court has temporarily blocked enforcement of a lower court order recognizing transgender bathroom rights. The U.S. Court of Appeals for the Fourth Circuit had previously held that school officials in Gloucester County, Virginia committed sex discrimination in violation of the federal Civil Rights Act by refusing to allow students the use of bathrooms corresponding to their gender identity, as opposed to their gender at birth. But the Supreme Court ruling prevents enforcement of the Court of Appeals decision while school officials prepare a petition requesting that the Supreme Court overturn it. *The lower court decision was based on a letter from the U.S. Department of Education advising the country's schools on transgender policy. At issue is whether the letter had any force of law to which the Court of Appeals should have deferred, there being no properly promulgated Department regulations on the subject. Eleven states have sued the Department over the letter, while the Obama Administration is separately suing North Carolina over its law denying transgender students the right to a bathroom to their gender identity.*

REGULATORY LAW DEVELOPMENTS (cont.)

HOUSE REJECTS BILL TO CURB GOVERNMENT SURVEILLANCE — In a victory for government anti-terrorism efforts, the U.S. House of Representatives recently voted down a bill to restrict government surveillance of Americans. The bill would have blocked the federal government from forcing companies to build bypasses into their encrypted devices so that government agents could more easily search those belonging to suspected terrorists. The same proposed legislation would have required federal authorities to obtain a warrant before searching through emails and phone calls from Americans as part of any investigation targeting foreigners. *This vote occurred after the Orlando, Florida shootings and likely reflected a consequent increase in fears about terrorism in the U.S. The government surveillance activities targeted by the bill will now presumably continue without restriction.*

FINAL TRUCK MILEAGE AND EMISSIONS RULES RELEASED — The federal government has released final rules requiring large commercial trucks to have lower carbon emissions and fuel consumption. The rules were jointly announced by the Environmental Protection Agency and the Department of Transportation. They cover big vehicles from garbage trucks to 18-wheelers. Reductions of up to 25% are mandated over the next ten years. *Truck manufacturers and operators of large commercial trucking fleets have generally embraced the new standards. But representatives of smaller trucking companies have been more critical, saying that the rules place an unfair burden on them because, unlike the larger truck operators, they can't afford to buy trucks with new and more expensive technology needed to reduce emissions and boost mileage.*

FEDERAL JUDGE BLOCKS FRACKING RULES — A federal district court judge in Wyoming has blocked enforcement of new U.S. Interior Department rules regulating oil and gas production by hydraulic fracturing or "fracking," a process that involves injecting water and/or chemical solutions into the ground in order to force oil and gas out of it. The rules, among other things, would require oil and gas developers to disclose to federal regulators the chemical ingredients they use for fracking. But the states of Colorado, North Dakota, Utah and Wyoming, sued to prevent enforcement of the rules, claiming that federal involvement would undermine their own efforts to regulate fracking, and Judge Scott Skavdahl has now sided with the states. *Judge Skavdahl said he was not deciding whether fracking was a good thing or an environmental hazard, as some have argued. Rather, he said that Congress was required to give the Interior Department authority to promulgate rules overriding state regulation in this area and had not done so.*

TAX LAW DEVELOPMENTS

NEW PHISHING SCHEME TARGETS TAX RETURN PREPARERS — The Internal Revenue Service has warned of a new phishing scheme targeting tax return preparers, and particularly those who have purchased tax software to help them with the process. A phishing scheme tricks people into providing sensitive information, which is then used by cyber thieves. This new scheme involves an email that purports to come from tax software companies. The email requests the recipient to download and install an important software update by way of a link included in the email. Upon clicking the link, recipients are directed to a website prompting them to download what appears to be a software update, but which is, in fact, a program designed to track the user's key strokes, a common means by which cyber thieves steal information. The file has a naming convention that uses the actual name of legitimate software followed by an ".exe extension." *New phishing scams seem to arise almost daily. Be on the lookout for this one.*

EMPLOYMENT LAW DEVELOPMENTS

CASE EXAMINES WHAT IS "ESSENTIAL FUNCTION" OF JOB — The Americans with Disabilities Act does not require that a disabled worker be given a job if they cannot perform its "essential functions" even with a reasonable accommodation for all disabilities. But what is an essential function? As a recent district court case in Chicago shows, it isn't determined only by what an employer considers an "essential function." In that case, a worker with epilepsy was demoted from his job as a truck driver because federal law prohibits anyone with epilepsy from driving a truck weighing more than 10,000 pounds. But the district court noted that the worker was required to spend only 5% of his time driving a truck of that size, and the rest of his time was spent driving a lighter truck. Based on that fact, and the court's conclusion that such a small part of the worker's duties could have been reassigned to other employees at a negligible cost to the employer, the court ruled that driving larger trucks was not an "essential function" of the worker's job. *Employers need to consider this decision in determining whether a small part of a worker's job really is an "essential function" of that job for ADA purposes. If a small portion of someone's work can be easily reassigned to someone else, that "function" may not be legally "essential."*

"REPLACEMENT" EMPLOYEE AVOIDS NONCOMPETE CLAUSE — The Illinois Appellate Court, First District, has held that a non-compete clause in an employment contract for a temporary replacement worker could not be enforced. In this case, Hineline, a summer "variety performer" at an amusement park, found a temporary replacement for himself, with his employer's approval, while he took 10 days off work. The park continued to pay Hineline, and he paid his replacement under an employment contract that prohibited the replacement from working directly for the amusement park for two years after Hineline returned from his 10 days off. When the replacement signed an employment contract with the park the following summer, Hineline sued for breach of the non-compete clause. But the Appellate Court held that, to be enforceable under Illinois law, a non-compete requires "adequate consideration," which can be (1) a separate payment for the non-compete apart from pay received for doing a job or (2) continued employment for at least two years. Then, finding that Hineline made no separate payment to his replacement worker specifically for the non-compete, the court held that employment for 10 days was also too short a time period to be considered "adequate consideration" for it. *Other courts in Illinois have held that there is no hard and fast two-year rule as a test of adequate consideration. But the Court of Appeals applied one here.*

COURT OKAYS FIRING FOR PLAGIARISM — The U.S. Court of Appeals for the Seventh Circuit in Chicago has upheld the firing of a tenured professor at a private college for plagiarizing a substantial portion of a textbook he had written for use in his classes, having concluded that no other adequate textbook was available. The professor had argued that any plagiarism was unintentional, and, in any event, a less severe sanction was warranted under a college statement of policy. But the Court of Appeals concluded that "intent" isn't a necessary requirement for plagiarism and that, "in academia, plagiarism is considered an egregious and serious offense," which justified termination, even if less severe sanctions were permitted, though not required, under the college's statement of policy. *It isn't clear whether the court's decision would also apply to an employer that was not a college. Would plagiarism be considered an "egregious and serious offense" in other workplaces?*

MEETING AND TRAVEL DEVELOPMENTS

EPA PROCEEDS WITH REGULATION OF AIRCRAFT EMISSIONS — The Federal Environmental Protection Agency has advanced its plans to regulate carbon emissions from aircraft, the latest of numerous actions by the Obama Administration promoting the President's environmental agenda. The EPA issued a final scientific assessment concluding that carbon emissions from aircraft endanger public health and welfare, a legal prerequisite to the agency's issuing regulations for such emissions. This despite the fact that the EPA estimates only 2% of total global carbon emissions come from aircraft. *The EPA originally indicated that it would implement regulations in coordination with the International Civil Aviation Organization, an arm of the United Nations, which is still drafting global standards for aircraft emissions. But, as the ICAO hasn't completed its work, and President Obama's last term in office is winding down, the EPA is probably anxious to get its regulations finished. Additionally, the EPA recently said that its standards may be tougher than those adopted by the ICAO, though the EPA doesn't yet know what the ICAO standards will be. Will airlines raise fares as a result of this rulemaking? We'll have to wait and see.*

OTHER ISSUES TRENDS AND DEVELOPMENTS

"**STATE ACTION" LIMITATION DOOMS CIVIL RIGHTS SUIT —** The U.S. Court of Appeals for the Tenth Circuit has affirmed a lower court's dismissal of a suit filed against a ski resort and the U.S. Forest Service by a group of snowboarders who claimed that the defendants violated their constitutional right to equal protection of the laws by implementing a "skiers only" policy at the resort. The Court of Appeals noted that only governmental action, not private conduct, receives equal protection scrutiny under the U.S. Constitution, and the Court of Appeals found no such "state action" was involved in this case. The resort is operated on federal land, pays the federal government around $400,000 per year for an annual usage permit, and obtained approval from the Forest Service for a site operation plan that authorized the resort to exclude certain skiing devices. But the Court of Appeals concluded that, even if the Forest Service knew about the resort's ban on snowboarding, that general awareness and the Service's continued approval of an annual permit for the resort did not amount to "state action" of the sort required for maintenance of an equal protection suit under the Constitution. *We are not sure if there really was an absence of "state action" in the case or the Court of Appeals just thought that refereeing a fight between skiers and snowboarders over access to one resort was a waste of the court's time.*

HOWE & HUTTON NEWS AND EVENTS

Naomi Angel served as a panelist at an event focused on risk assessment and mitigation hosted by the Society for Incentive Travel Excellence in Chicago.

Naomi will also be reporting on Legal Trends and Developments at trade association meetings in Cleveland and Indianapolis.

This month Jonathan T. Howe presented "Market Negotiations and Contracts" for meeting professionals in Nassau. Attendees of this session received CMP Credit.

In October, he presents "Don't Overlook The Small Stuff – Contract Clauses To Which You Pay No Attention, But Should" at the Small Meetings Market conference in Huntsville, Alabama. Jon will also participate in a "Legal Session Brainstorming" call for Financial & Insurance Conference Planners (FICP) Annual Conference.

Gerald P. Panaro will be presenting a webinar for ASAE in November on the U.S. Department of Labor's new overtime regulations.

On Thursday, November 17, Mike Deese will be presenting on Current Association Legal Issues at a Leadership Forum held by Association Headquarters, Inc. in Mt. Laurel, NJ for the volunteer leaders of its association clients.

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