Recent Cases of Interest Report–January, 2007;
MSBA Computer Law Section Case Law Committee
Jim Blomquist Chair

1. **Puckmaster, Inc. v. Metalbrik Equip't. LLC**
<http://www.nysd.uscourts.gov/courtweb/pdf/D08MNXC/06-04762.PDF>
Civ. No. 04-2599 ADM/JSM (D. Minn. 11/22/2006) ANN D. MONTGOMERY, U.S. DISTRICT JUDGE

Multiple parties and convoluted facts regarding sale of intellectual property. The case involved a trademark license/sale dispute. ("Plaintiff") asserts claims for violation of the Lanham Act, 15 U.S.C. § 1125 regarding alleged false representations of being authorized to manufacture and sell "Puckmaster" machines; tortious interference with contract; tortious interference with prospective contracts; civil conspiracy; conversion; and joint venture, joint adventure, and aiding and abetting. Defendants represented by Faegre Benson sought summary judgment.

Held that viewing the evidence in the light most favorable to Plaintiff,
1.) Plaintiff has supplied minimal but sufficient evidence to create a genuine issue of material fact on whether there was an implied contract of joint venture, but
2.) failed to create a genuine issue of fact with respect to its direct Lanham Act claim against SOS/TWA, and as a result, summary judgment on Plaintiff's direct Lanham Act claim against SOS/TWA is granted. The court also held that Plaintiff is not entitled to damages from SOS/TWA for the loss of the Turbocam sale, and Plaintiff's request for an injunction against SOS/TWA was denied.

2. **Gregerson v. Vilana Fin'l, Inc**.
<http://www.nysd.uscourts.gov/courtweb/pdf/D08MNXC/06-04518.PDF>
Civil. No. 06-1164 ADM/AJB (D. Minn. 11/7/2006) ANN D. MONTGOMERY, U.S. DISTRICT JUDGE

Trademark infringement;photo. This case began in Hennepin County Conciliation Court as a matter asserting the use, without paying a licensing fee, of a single photo taken from Gregerson's web site, but now after a bout of litigation fever, the case is in federal court with counterclaims for defamation and trademark infringement and requests for injunctive relief due to Plaintiff's website attacking the Defendants.

The Court refused an injunction since Gregerson's voluntary changes to his web site cure much of the harm described in the Motion, and comport with the guidelines found to be appropriate in Purdy. Specifically, Gregerson has removed all inappropriate comments about Vilenchik's secretary/girlfriend, has added a disclaimer noting the critical commentary nature of the web site, and has edited the metatags of his web site so that they are in a more descriptive format.

3. **Mid-State Aftermarket Body Parts, Inc. v. MQVP, Inc**.
<http://www.ca8.uscourts.gov/opndir/06/10/053057P.pdf>
U.S. Court of Appeals Case No: 05-3057; CA8; Eastern District of Arkansas

Trademarks; service mark not certification mark. This is a trademark infringement dispute between the owner of a registered service mark, MQVP, Inc., and an alleged infringer, Mid-State Aftermarket Body Parts, Inc.

MQVP appeals the district court's grant of summary judgment dismissing Lanham Act claims of infringement and false advertising. Concluding there are genuine issues of material fact as to whether Mid-State's unauthorized use of MQVP's service mark was "likely to cause confusion" as to the origin of products or services, or was false commercial advertising within the meaning of 15 U.S.C. § 1125(a)(1)(B), CA8 reversed.

4. **Wallace v. IBM et al**; 467 F.3d 1104, USCA 7—NOVEMBER 9, 2006; No. 1:05-cv-678 RLY-VSS
Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.—

Anti-Trust; open source.

In 2006, Daniel Wallace filed a lawsuit against IBM, Novell, and Red Hat, who profit from the distribution of open-source software, specifically the GNU/Linux operating system.[He claimed that these software companies were engaging in anticompetitive price fixing. On May 16, 2006, Judge Richard L. Young dismissed the case with prejudice. Wallace appealed and CA7 (Judge Easterbrook) affirmed.

5. **ABA SAYS LAWYERS MAY INSPECT METADATA**
"Ethics? Ethics? We don't need no stinkin' …."
On November 9th, the ABA Standing Committee on Ethics and Professional Responsibility issued a formal opinion that lawyers who receive electronic documents are free to look for and use information hidden in metadata even if the documents were provided by an opposing lawyer.

6. **United States v. Ganier** ; USCA 6; 11/15/06
http://www.ca6.uscourts.gov/opinions.pdf/06a0423p-06.pdf
No. 05-6350
Appeal from the United States District Court for the Middle District of Tennessee at Nashville.
No. 04-00193—Karl S. Forester, District Judge. Argued: September 20, 2006
Decided and Filed: November 15, 2006

Forensics Software Testimony Subject To Expert Rule

A government witness' proposed testimony (that he determined from reports generated by forensic software that a defendant had searched e-mail records using search terms relevant to a grand jury investigation) is expert testimony that must clear the hurdles set for such testimony by the federal rules of evidence.

The day before trial was set to begin, the government informed the court it wanted to introduce the reports and testimony of its witness. Ganier challenged the reports and related testimony on the basis that it is expert testimony and the government failed to provide a written summary as required by Fed. R. Crim. P. 16(a)(1)(G). The government asserted that the proposed testimony was not based on scientific, technical, or other specialized knowledge and, therefore, does not qualify as expert testimony. Instead, the government said that it is simply lay testimony available by running commercially available software, obtaining results, and reciting them. It further argued that the testimony involved facts that could be observed by anyone reasonably proficient in the use of commonly used software.

The court disagreed, saying that the "forensic tests [the witness] ran are more akin to specialized medical tests run by physicians." The court noted that a 2000 amendment to Federal Rule of Evidence 701 clarified that lay opinions or inferences cannot be based on "scientific, technical, or other specialized knowledge within the scope of Rule 702."

However, the court stopped short of excluding the proposed testimony. It observed that the rule provides remedies short of exclusion for failure to timely provide the required summary and said that the district court should examine those alternatives in light of the government's reasons for failing to comply with the rule and the degree of prejudice, if any, that the defendant suffered.