

Richard H. Stern

*Ablondi, Foster,
Sobin & Davidow,
p.c.*

*1130 Connecticut
Ave., NW, Suite 500*

*Washington, DC
20036*

*rstern@ablondifost
er.com*

It's not enough to be right

Last issue's Micro Law column (May/June 1997) addressed a massive lawsuit by six prominent content providers against a Web entrepreneur whom they accused of pirating their content by "framing" it. The *Washington Post*, *Los Angeles Times*, *Wall Street Journal* (Dow Jones), CNN, Reuters, and Time Warner all joined to sue Total News for copyright infringement and sundry other alleged wrongs.

As reported by wire June 16, the plaintiffs announced that Total News capitulated to them and signed a settlement agreement. (Its text is now posted at www.ljx.com/internet/totalse.html.) The settlement is not a legal precedent against any third parties, and thus the underlying legal issues are left unresolved.

Under the agreement, Total News must not ever frame Web sites of the *Washington Post* and the other plaintiffs, with framing broadly defined as directly or indirectly causing any further material to appear on the same screen. This further information includes any link back to Total News. While the agreement does not say this, apparently included is any manipulation of the Netsite/Location box near the top of the screen. As www.totalnews.com now operates, when you link to the *Washington Post* Web site, the URL that appears in the Netsite/Location box is www.washingtonpost.com, and the Back button is grayed out. (However, if you close the screen—for example, by clicking on the X box at upper right in Netscape—you jump back to www.totalnews.com.)

The agreement further provides that Total News may link its users (without framing) to Web sites of the *Washington Post* and the other plaintiffs, but subject to various conditions. First, the link must be plain text consisting of the name of the linked site—that is, no screen buttons with logos or other symbols. Second, the plaintiffs' agreements to permit linking may be

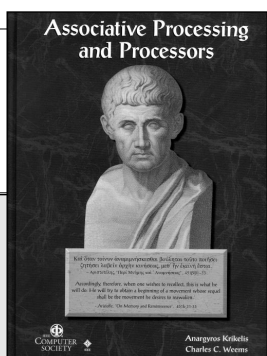
suspended on two weeks' notice. If Total News does not stop linking at that point, the plaintiffs may once again sue "and it shall be an affirmative defense that defendants' conduct does not infringe or violate plaintiffs' rights."

The first of these provisions prevents trademark infringement, and appears reasonable and ordinary. The second is interesting because it is a lawyer's stratagem, probably unremarked on Total News's side, but surely well thought out on the plaintiffs' side.

The ordinary rule in intellectual property law is that the plaintiff (copyright or patent owner) must prove infringement. Unless and until the plaintiff does so, the defendant has no need to show anything; absent such proof at the outset, the defendant is entitled to have the case dismissed.

On the other hand, an affirmative defense is something that a defendant must prove. Fair use, for example, is an affirmative defense. Unless the defendant in a copyright infringement case convinces the court that its use of the copyrighted work was fair, the defendant is liable for any infringement that occurred. Turning non-infringement into an affirmative defense turns upside down the ordinary rule of proof in an intellectual property case. Instead of the plaintiff having to prove the defendant guilty, the defendant must prove its innocence. That could be overly determinative of the outcome, particularly in as uncertain and unsettled a legal area as Internet copyright law. For one thing, it almost certainly means that the defendant, in a subsequent infringement suit, could not get the case summarily (and thus cheaply) dismissed on the ground that there is no infringement as a matter of law.

Two lessons emerge from this incident. First, it's not enough to be right. Second, it's risky to rely on any lawyers not well-educated in the school of hard knocks (by past copyright dis-



Associative Processing and Processors

edited by Anargyros Krikelidz and Charles C. Weems

Covers recent research on associative processing and processors and details the unique features they offer for cost-effective system solutions. The book explores the distinct advantages that associative processing systems have over other parallel processors.

The text illustrates associative processing techniques for both traditional architectures and architectures that support multiassociative processing. It details several general purpose associative processing architectures, as well as a dataflow architecture that uses associative processing elements. In addition, the book examines five applications that employ associative processing: database mining, logic programming with Prolog, natural language translation, image rendering, and ray tracing. The book concludes with an exploration of associativity in neural network processing

360 pages. 8 1/2" x 11" Softcover.
July 1997. ISBN 0-8186-7661-2.
Catalog # BP07661
\$40.00 Members / \$50.00 List

Order Today!

In the U.S. & Canada call:
+1.800.CS.BOOKS
Online Bookstore:
<http://computer.org>



Micro Law

continued from p. 77

pute misfortunes).

Consider Total News as defendant in its copyright infringement suit brought by the *Washington Post*, Dow Jones, and other media giants, and Borland as defendant in its copyright infringement suit brought by Lotus over the 1-2-3 interface. Total News, faced with perhaps a million or half a million dollars in legal fees plus uncertain damages liability, chose to capitulate to a meritless claim of infringement rather than go broke. Total News chose not to emulate Queequeg, his hand nailing the flag to the mast of the Pequod while the rest of him was already under water.

Borland, somewhat better funded at the outset, chose to fight rather than switch when faced with a meritless claim of copyright infringement. Years later, and millions of dollars later as well, Borland won. In the meantime, a weakened Borland Quattro Pro succumbed to Microsoft's Excel, while at the same time Microsoft "vaporware" Borland's compilers to death (Micro Law, Apr. 1995). Phillippe Kahn was forced to resign and slink off to the Riviera with a scant few hundreds of millions left as consolation. The price of vindication is excessive for many or most accused infringers.

If you, Micro Law reader, are an underfunded garage start-up entrepreneur, and someone threatens to shut you down with an infringement suit, consider seriously the possibility of taking up a different line of endeavor. In any case, watch out for legal artifices. The chances are that the plaintiff will be able to afford a much slicker lawyer than you can. Intellectual property infringement cases are risky learning exercises for your business lawyer—risky for you, that is. This is an abstract, abstruse, counterintuitive, and just plain tricky area of law.

Reader Interest Survey

Indicate your interest in this column by circling the appropriate number on the Reader Service Card.

Low 177 Medium 178 High 179