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A PROFESSIONAL CORPORATION

ADVISOR

Volume IV, Number III *Fall 1998*

Copyright Protections Extended to the Internet

The Digital Millennium Copyright Act ("Act") became effective in October 1998. The Act increases copyright protection on-line by implementing the World Intellectual Property Organization's (WIPO) Copyright Treaty and Performances and Phonograms Treaty. It also limits copyright infringement liability for Internet service providers ("ISP") who innocently transmit infringing material. Thus, the Act balances the needs and demands of both copyright owners and ISPs in an attempt to ensure that the variety and quality of on-line content will increase and the efficiency of the Internet will grow.

Title One specifically focuses on copyright holders. It increases on-line protection by prohibiting the circumvention of copy-protection measures and banning the manufacturing, importing, offering or providing of circumvention devices and services. This title also forbids removing or altering any copyright management information used to identify a work on-line. Copyright management information may consist of the names of the author and copyright owner as well as terms and conditions for using the work.

Title Two protects ISPs from monetary liability for infringing activity engaged in by subscribers. Under the Act, an ISP is exempt from copyright infringement liability when acting as a mere conduit for infringing material. Further, ISPs are granted broad protection if they disable access to allegedly infringing material. This section also authorizes copyright holders, if certain conditions are met, to subpoena an ISP for identification of an alleged infringer.

Title Three addresses the Ninth Circuit case, *Mai Sys. Corp. v. Peak Computer Inc.*, 991 F.2d 511 (9th Cir. 1993). *Mai* held that loading computer software into a computer's random access memory ("RAM") for the purpose of servicing the system's hardware constitutes copyright infringement. The court explained that the reproduction created in the RAM is an unauthorized "copy," as defined under the Copyright Act. The Act effectively overrules *Mai* by authorizing the owner or lessee of a computer to make a copy of a computer program if the copy is made during the maintenance or repair of the hardware.

Title Four contains a number of miscellaneous provisions, including a section that reflects a deal between Internet radio stations and the recording industry. Title Four creates a licensing and royalty distribution scheme for broadcasting copyrighted music over the Internet. It also exempts broadcasters from copyright infringement liability when they create a temporary copy of a sound recording on a server during a broadcast.

If you would like more information about the Digital Millennium Copyright Act or copyright law, please contact **Norm St. Landau** at (202) 429-3722 or via e-mail at nds@tuckerflyer.com. ■

TF&L Expands Practice to Include Affordable Housing

Affordable housing attorney **Craig Emden** recently joined the firm. His practice complements **TF&L**'s expertise in the tax, real estate, corporate and securities fields and enables the firm to provide expert advice to its clients involved in low-income housing tax credit transactions.

Craig represents both nonprofit and for-profit clients in structuring and closing low-income housing tax credit and historic rehabilitation tax credit transactions. This includes representation of developers, syndicators and investors. A significant portion of this practice includes the closing of investments in tax credit transactions and the issuance of tax opinions addressing all significant tax issues involved.

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In This Issue . . .

TF&L's Litigation Group Offers Businesses Partnership and Protection

Tucker, Flyer & Lewis recognizes that the best approach to successful business litigation is combining the talents of its litigators with the substantive knowledge of its transactional attorneys. **The Litigation Group** at **TF&L** offers a unique combination of trial experience and business expertise. A team approach to problem solving and dispute resolution enables the firm's litigators to take on the most difficult and contentious matters, backed up by the substantive expertise of their partners in such diverse areas as technology and licensing, corporate and securities law, intellectual property, real estate, government contracts, and employment and labor law. In this way, the firm is able to offer to its clients a seamless representation which is more cost-efficient than in larger firms and allows for strategic planning not generallv available in a litigation boutique.

TF&L's litigators are business lawyers first. Thus, clients are assured of creative and flexible responses to their problems and disputes that are sensitive to the particular needs and demands of their businesses. In this respect, the litigation group is fully-versed in all aspects of alternative dispute resolution. As trial attorneys, however, the firm's litigators are also aggressive and successful adversaries who will zealously represent their clients when they are faced with the daunting prospect of bringing or defending a lawsuit which may affect the survival of the business. Litigation, by its nature, can be expensive and unpleasant, even to clients who have the strongest or most compelling cases; however, **TF&L's** litigation group helps businesses and individuals use litigation as a tool to protect their financial interests and accomplish their business goals.

Alan Anderson is the senior litigator in the firm; he brings nearly twenty-five years of experience to bear on some of the most diverse cases that have confronted **TF&L's** clients. Some measure

of his activities in this region—and the high regard of his colleagues—is seen in **Alan's** being the immediate Past President of the Alexandria Bar Association. Although **Alan** has tried dozens of cases in state and federal courts throughout the region, he has recently taken a leadership role in the expanding field of alternative dispute resolution, both as counsel for parties in arbitration as well as serving as an arbitrator or mediator. As **Alan** notes, "with the cost and time commitment inherent in today's litigation, it pays to consider all options before one is forced into traditional litigation."

David Sellinger cut his teeth as a trial lawyer years ago, prosecuting criminal cases as an Assistant U.S. Attorney for the District of Columbia and he continues to bring that intensity to lawsuits and other disputes between parties to business relationships that have gone seriously awry. "Sometimes the dollars are too big or the position of one side is too entrenched to resolve it except in litigation," **David** says. In these and other matters in his practice, he points out, "litigation can sometimes level the playing field, forcing the other side to acknowledge weaknesses it was not considering in its position". Over more than twenty years in practice, **David** has handled a wide variety of cases involving "business divorces," partnership and shareholder disputes, business torts, contracts, executive terminations, real estate matters, and disputes over intellectual property and technology. **David** also represents clients in white-collar criminal matters such as government investigations and has successfully resolved matters through mediation. During the past year, he served as Chair of the Litigation Section of the D.C. Bar and he also serves as a member of the Executive Committee of the Council for Court Excellence.

Wayne G. Travell prides himself on a "lean and mean" approach to solving complex business litigation and counseling issues. Experienced in litigating such diverse subjects as covenants against competition, shareholder and corporate disputes, real estate and leasing matters, Wayne emphasizes building client relationships based upon trust and close client involvement. Over the past two years, **Wayne and Daniel M. Hawke** have conducted a very large and well-publicized law suit against HUD in the Federal Court in the District of Columbia and in the Federal Claims Court. Working in close cooperation with a long-time firm client, **Wayne and Dan** have been successful in making new law to allow this client to bring claims against the United States for, among other things, retaliation, corruption, breach of contract and violation of its First Amendment rights. "The client chose us for this representation because he knew we were smart, tough, and experienced litigators, and because he knew he could trust and work with us."

Roger Colaizzi is a seasoned litigator who brings significant courtroom experience to **TF&L** from his days as a former trial counsel with the Department of Justice prosecuting civil cases and a former Special Assistant U.S. Attorney for the District of Columbia prosecuting criminal cases. **Roger** has been involved in the arbitration of high stakes financial market disputes resulting from significant stock market fluctuations, as well as the litigation of market manipulation claims involving

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conspiracy, fraud and violations of federal securities laws and RICO. **Roger's** interest in the software, information technology and multimedia industries, and other burgeoning high-technology industries has directed the focus of his practice to disputes involving those issues as well as fraud, shareholder and partnership disputes and business torts.

"We always work toward obtaining a resolution of the dispute that makes commercial sense," **Roger** says, "however, when that fails, there is no better feeling than vindicating a client's rights in the courtroom."

Dan Hawke has been involved in some of the firm's most difficult and contentious complex litigation cases. "I learned early in my career at Tucker, **Flyer**, that our clients expect aggressiveness tempered by sound business judgment," Dan says. "We don't bet the business on litigation, but we won't hesitate to bang heads if we have to," he says. In addition, **Dan** handles a significant amount of the firm's trademark litigation, both in the Trademark Trial and Appeal Board and in the federal courts. **Dan** recently obtained a permanent injunction and attorneys' fees on behalf of Johnson & Johnson in a suit to enforce its Red Cross trademark against an infringer in California. "The trademark cases we handle," he says, "are extremely rewarding because they involve protecting our clients' investments in their valuable intellectual property rights."

The Litigation Group also includes four outstanding associates, **Kris Miller, Jill Prater, Monica Parchment,** and **Rebecca Nassab.** They add their varied backgrounds in intellectual property, employment law, government contracts, and high technology and business finance to the substantive knowledge the litigators can bring to matters. ■

Bankruptcy Termination Clauses, Don't Bet The Rent On It

Perhaps you are the landlord of a shopping center, an office building or some other commercial real estate. Your habitually late tenant is now two months behind in rent. You make demand for the rent and threaten to commence eviction proceedings. Just days before the grace period ends, you receive a notice in the mail that your tenant has filed a Chapter 11 bankruptcy case. No problem, you tell yourself, your lease provides for automatic termination of the tenant's leasehold interest if the tenant files for bankruptcy protection. Think again. Better yet, check with your bankruptcy counsel.

During lease negotiations, landlords typically insist that tenants accept lease provisions providing for the termination of the tenant's right to enjoy the premises upon certain events. These provisions usually state that the lease will automatically terminate if:

1. the tenant files a petition for federal bankruptcy relief or state insolvency proceedings;
2. the tenant is insolvent or its liabilities exceed its assets;
3. the tenant is unable to pay its debts as they become due;
4. the tenant applies for, or consents to, the appointment of a trustee, receiver or liquidation for itself or a substantial portion of its property;
5. the tenant ceases its business operations; or
6. the tenant takes any action for the purpose of effecting the foregoing.

These termination clauses, commonly called *ipso facto* clauses, are expressly invalidated by the Bankruptcy Code (the "Code"). Section 365(e)(1) of the Code provides, in part, that notwithstanding a provision in an unexpired lease of the debtor, the lease may not be terminated or modified, after the commencement of a bankruptcy case solely because of a provision which is conditioned on (1) the insolvency or financial condition of the debtor; (2) the commencement of a bankruptcy case; or (3) the appointment of or taking possession by a trustee in a bankruptcy case or a custodian before such commencement. The logic behind Section 365(e) is that no debtor should negotiate away its right to seek a "fresh start" through bankruptcy. Consequently, the landlord, despite its well-crafted lease, may have its property tied up in bankruptcy.

Fortunately, this does not mean that the landlord is entirely without protection. Section 365 of the Code requires the debtor to fulfill all of its obligations under the lease during the bankruptcy, including the payment of post-petition rent. If the debtor fails to pay the rent, the landlord can ask the bankruptcy court to lift the automatic stay so that it can pursue its state law eviction remedies. The debtor is also required to assume or reject any of its commercial leases within 60 days of the filing, unless the debtor gets an extension. If the lease is assumed, the debtor must cure all prepetition defaults and provide adequate assurance of future payments under the lease. If the lease is rejected or the debtor fails to make the election in a timely fashion, the tenant must immediately surrender the property to the landlord.

Thus, the best course of action for a landlord at the beginning of any bankruptcy case is to be aggressive, yet patient. Let the debtor's counsel know that you expect to be paid promptly according to the terms of the lease and that any non-monetary obligations must be met by the debtor. Ask whether and when the debtor will assume or reject the lease and provide debtor's counsel with accurate documentation of the prepetition rent due. By applying the appropriate amount of pressure, you can significantly improve the chances that your financial interest and your property will be safeguarded during the bankruptcy case.

If you have any questions concerning these issues, please contact **Jonathan W. Lipshie** at (202) 429-3252 or via e-mail at jwlipshie@tuckerflyer.com or **Lawrence A. Katz** at (202) 429-7115 or via e-mail at lakatz@tuckerflyer.com. ■

Government Contractors and the Freedom of Information Act: Is Your Competitive Advantage at Risk?

I. What Information May Be Released Under The Freedom Of Information Act ("FOIA")?

The Freedom of Information Act, 5 U.S.C. § 552, was enacted by Congress to give the public access to information in the possession of the federal government. FOIA gives any person or company (including your competitors) the right to request and receive any document, file or other record in the possession of any agency of the federal government. Consequently, competitive proposal information that a contractor submits to an agency in connection with a federal procurement may be subject to public release under FOIA.

The process for making a FOIA request to obtain certain documents is fairly simple. A letter is first submitted to the agency's FOIA Officer or to the head of the agency requesting certain agency records. After receiving the FOIA request, the agency is required to determine within 20 days (excluding Saturdays, Sundays, and legal holidays) whether to comply with the request. If the agency decides to comply with the request after 20 days, the documentation must then be released to the requester. FOIA permits an agency to extend this 20 day time limit for its FOIA responses as necessary in unusual circumstances such as when the agency must collect documents from remote locations, review large numbers of records, or consult with other agencies.

An agency may, but is not required to, refuse to disclose information requested through FOIA if it falls within any one of FOIA's nine statutory exemptions. These exemptions prohibit the government from disclosing certain agency documents such as those related to national defense or foreign policy, privacy of individuals, proprietary interests of a business, functioning of the government, and other important interests. Notwithstanding, even when an agency document contains some information that qualifies as exempt, the entire record is not necessarily exempt from disclosure since FOIA specifically provides that any reasonably segregable portions of a record must be provided to a requester after the deletion of the portions that are exempt. If a request is denied in whole or in part, the agency must tell the requester the reasons for the denial.

In many cases, the government will provide a contractor with an opportunity to object to the disclosure of certain information relating to the contractor's business which is requested under FOIA even before the agency issues an official response to the FOIA request.

II. Why Is FOIA's Exemption 4 Particularly Relevant For Government Contractors?

The most relevant exemption for government contractors is Exemption 4; it prohibits the disclosure of trade secret or confidential commercial or financial information in the government's possession. Nevertheless, recent court decisions have held that an agency's release of competitive price or technical information is not *per se* harmful to the competitive position of a government contractor.

III. What Type Of Information Is Proprietary Or Confidential Under Exemption 4?

Traditionally, courts have applied a "required/voluntary" submission test for purposes of determining whether information in the government's possession is protected from disclosure by FOIA's Exemption 4. Specifically, information **required** to be provided to an agency, such as competitive information submitted in response to a Solicitation (which is more frequently the type of contract information at issue in FOIA government contract cases), is only confidential under FOIA if its release would give competitors valuable business or technical insight into a contractor's competitive strategies **or** if disclosure of the information would impair the government's ability to obtain necessary information in the future. On the other hand, information which is **voluntarily** provided to the government, such as a contractor's responses to a government questionnaire, is considered confidential under Exemption 4 if it is the type of information that would not customarily be released to the public by the contractor.

Despite FOIA's additional provision for the exemption of proprietary or confidential information, in application, courts have increasingly held that the release of a contractor's competitive price or technical data will not result in competitive harm to the contractor. In *Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37 (D.D.C. 1997), several competitors requested copies of Martin Marietta's multiple contracts with the Department of the Navy for computer-assisted test equipment for various computer systems in Navy aircraft. *Id.* at 38. Although the contractor in *Martin Marietta* acceded to the release of certain contract information to its competitors, it specifically objected to the release of its proposed cost-and-fee and unit and contract line item information under FOIA on the grounds that it would lead to competitive harm. *Id.* According to the contractor, the release of this information would permit its competitors to predict its costs and profit margin in order to underbid Martin Marietta on future procurements. *Id.* at 40. In addition, Martin Marietta also argued that releasing certain technical and management information in its proposal would give its competitors valuable insight into its internal operations, subcontracting strategies and approach to overhead costs which would also cause competitive harm. *Id.* The *Martin Marietta* court

(continued next page)

ultimately held that FOIA must be construed broadly in favor of disclosure and that information in the government's possession is presumptively "producible" unless it is clearly exempt. *Id.* Thus, the court rejected Martin Marietta's allegations that the release of this contract information would lead to competitive harm since the court found that the contractor's general allegations did specifically support such a conclusion. *Id.* at 41; *see also McDonnell Douglas Corp. v. National Aeronautics & Space Administration*, 981 F. Supp. 12 (D.D.C. 1997) (court held that release of contractor's line item prices and other related pricing information under FOIA would not result in competitive harm); *CC Distributors, Inc. v. Kinzinger*, 1995 WL 405445 (D.D.C. 1995) (release of contractor's unit prices under FOIA would not result in competitive harm).

Similarly, the courts of appeals have also held that competitive information submitted to the government is not *per se* confidential under FOIA especially if that same information could possibly be obtained from alternate sources. In *Frazee v. U.S. Forest Service*, 97 F. 3d 367 (9th Cir. 1996), the contractor alleged that the disclosure of its contract operating plan under FOIA would lead to competitive harm. Amongst other things, the contractor's operating plan included a description of its equipment, supplies, personnel management, and fee collection. *Id.* at 369. Nonetheless, the court determined that this same information was freely or cheaply available from various sources other than the agency and, therefore, held that the contractor had failed to prove that it would suffer competitive harm if its proposed operating plan for the contract were released under FOIA. *Id.* at 371.

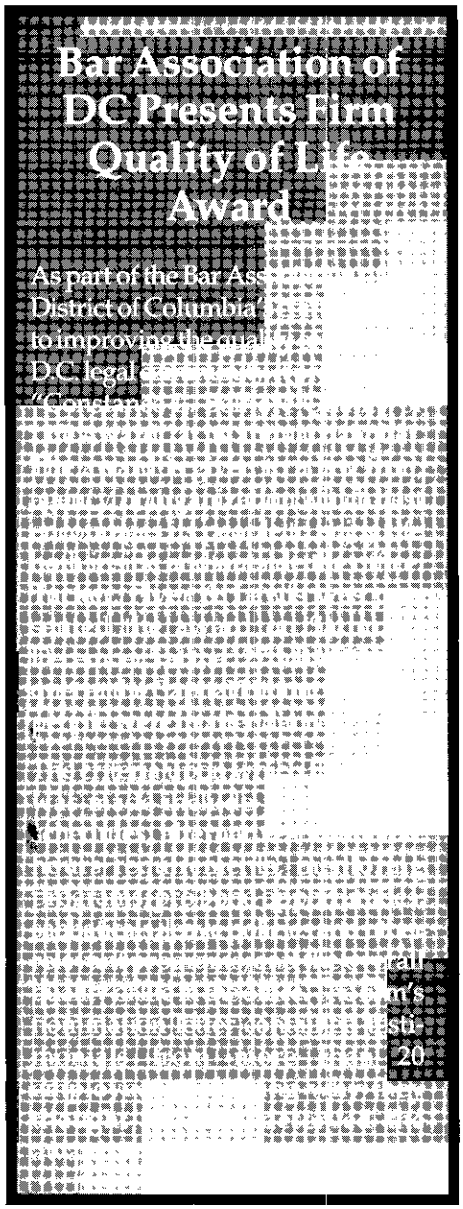
Contractors have tried to prevent release of their competitive information under FOIA by arguing that disclosure would impair the government's ability to obtain similar information in the future. However, this theory is rarely successful since the government (and not the contractor) is in the best position to determine what actions will affect its interests.

In short, the cases discussed above evidence that the protection afforded by Exemption 4 is somewhat limited in connection with prohibiting the disclosure of certain competitive bidding information. Hence, any government contractor could, at some point, find itself in the position of defending the proprietary or confidential nature of competitive information which it was required to submit to a federal agency in order to obtain a contract award.

IV. What Might Be Successful In Preventing The Disclosure Of Competitive Bidding Information Under FOIA?

If you are provided with an opportunity by the government, always respond to the proposed release of documents under FOIA if they somehow relate to your business.

- The FOIA case law indicates that you have a better chance of preventing disclosure of your proposal information by arguing that the release of this information to your competitors will cause you to suffer competitive harm.
- Always provide a **very detailed** explanation as to how the government's release of certain proposal information under FOIA will provide valuable insight into your company's business strategies (general allegations will not meet the burden of proof necessary to show competitive harm).
- Clearly establish that the competitive information in the government's possession is not available to the public from any other sources.
- Alternatively, suggest that the government redact certain portions of the proposal information as opposed to withholding an entire document.



Although the government's response to a FOIA request can never be predicted with absolute certainty, following these suggestions may, at the minimum, give an agency a strong foundation for the denial of a FOIA request submitted by your competitor, or any other party, in an effort to obtain your proposal information.

For more information about this topic, contact **William M. Weisberg** at (202) 429-3733 or via e-mail at wmweisberg@tuckerflyer.com or **Monica C. Parchment** at (202) 429-6331 or via e-mail at mcparchment@tuckerflyer.com.■

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It also includes the preparation of partnership agreements or operating agreements, ancillary agreements and various financing, corporate and securities documents for these transactions. Craig also submits private ruling requests to the Internal Revenue Service regarding unique issues that arise in connection with these transactions. Craig also represents clients both in the formation and closing of funds and other investment vehicles that will invest in low-income housing developments. He has extensive expertise in advising nonprofits that participate in low-income housing tax credit transactions and projects that serve special needs populations.

Craig is the co-author of "The Low-Income Housing Credit Provides Shelter from the Cold and Taxes," *Journal of Taxation of Investments*, Winter 1995. Craig received his B.A. from Miami University (Ohio) in 1977 and his J.D. from George Washington University in 1980. In 1984, he was awarded his LL.M. in taxation from Georgetown University.

Associate **Kimberly Crowder** (see biography next column) joined the firm with Craig. Craig and Kim, together with other members of the firm's tax, real estate, corporate and securities groups, are able to provide the sophisticated yet practical advice and solutions to our clients' affordable housing projects. ■

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TF&L Adds New Faces

Jennifer Baraban concentrates her practice on securing, maintaining and defending trademark and copyright registrations. She was awarded her J.D. in 1998 by George Washington University where she taught legal research and writing and served as a Notes Editor for the *American Intellectual Property Law Association's Quarterly Journal*. Jennifer received her B.A. from the University of California at Berkeley.

Kimberly Crowder concentrates her practice on the federal tax aspects of real estate transactions and partnerships. She specializes in low-income housing tax credit syndications, historic tax credit transactions, and tax-related matters involving tax-exempt entities. Ms. Crowder was awarded her LL.M. (Taxation) in 1996 by New York University, and both her J.D. (1995) and B.A. (1992) by University of Virginia.

Julie Davis' practice includes the representation of corporations, limited liability companies, and other entities with respect to commercial matters including entity formation, financing buy-sell arrangements, mergers and acquisitions, and succession and tax planning. She was awarded a LL.M. (Taxation) in 1998 from Georgetown University, a J.D. in 1996 from Southern Methodist University and a B.B.A. in 1992 from Sam Houston State University.

Tom FitzGerald represents clients in general corporate matters, technology licensing and mergers and acquisitions. Prior to joining the firm, Tom worked as a corporate counsel at a Maryland-based software company concentrating on corporate, securities and software licensing. He was awarded his J.D. by American University in 1995 and his B.A. in 1988 by Trinity College (CT).

Dave Hotes concentrates in the areas of federal and state taxation, tax planning, and all aspects of business transactions. Prior to entering legal practice, Dave practiced as a Certified Public Accountant for several years, most recently for a Big Six public accounting firm. Dave received his J.D. from the University of Maryland (*cum laude*) in 1995 and his B.A. from Lehigh University in 1988.

Rebecca Nassab, a member of the firm's litigation group, concentrates her practice on commercial and employment litigation. Prior to law school, she was in financial management for Raytheon Company. Rebecca received her J.D. from George Washington University and her B.A. (*cum laude*) from University of Pennsylvania's Wharton School of Business.

Jeanne Newlon's practice focuses on estate planning, business planning and charitable giving. George Washington University awarded Jeanne her J.D. with high honors in 1996 where she was a Notes Editor of the *Environmental Lawyer. She* received her B.S.B.A. from the University of Florida in 1992. Jeanne is currently pursuing a LL.M. in Taxation at Georgetown University.

Monica Parchment's practice involves government contract law. She counsels clients on issues related to all stages of federal and state procurements. In addition, Monica also represents clients in employment, business and IP-related matters. She received her J.D. from George Washington University in 1996 and her B.A. from Mount Saint Mary's College in 1993.