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Cloud Computing Is a Hot Topic... in Business and the Courtroom

Cloud computing sales are poised to triple by 2017, according to IHS Technology. With growth comes competition and the potential for disputes, both intellectual property-related and otherwise. This article surveys some of the legal issues raised by this burgeoning area of technology.

Not everyone agrees on what "cloud computing" means. This article defines cloud computing as the delivery of services over the internet via three well known models: (1) Infrastructure as a Service (IaaS) (e.g., data storage in the cloud); (2) Platform as a Service (PaaS) (e.g., application development/deployment in the cloud); and (3) Software as a Service (SaaS) (e.g., software hosting in the cloud). In a nutshell, IaaS provides servers and related hardware; PaaS provides operating systems, libraries, and tools for customers to create their own software; and SaaS provides software applications.

These cloud computing services can supplement or obviate the need for certain in-house information technology. A typical use scenario is when a company wants to quickly test a new idea or respond to a new market demand, but does not possess (or wish to use) internal resources to handle the additional data storage and analysis required. This scenario is especially pertinent for start-ups or any other company in a fast-paced market environment. Traditionally, such companies would have to buy hardware, install the hardware in a physical location, install platforms, install applications, and then hope that all the tools function smoothly together. Cloud computing avoids this time-consuming, expensive, and uncertain process.

One of the key benefits of cloud computing is that it allows companies to choose from a panoply of off-the-shelf computing services. The cloud delivery model eliminates the need for installation, updates, or maintenance. Users of cloud services only pay for the service; gone are the days when companies were required to pay for and maintain a whole server while using only 10% of its capacity. Cloud services users can quickly scale capacity up or down, or switch platforms or applications without delay. The

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Quinn Emanuel Named *Legal Business*' 2014 "U.S. Law Firm of the Year"

London publication *Legal Business* named Quinn Emanuel "2014 U.S. Law Firm of the Year" at the 17th annual Legal Business awards ceremony. The award recognizes the U.S. firm that has made the greatest progress over the past year in advancing strategy, improving financial performance, and winning cases for clients. Quinn Emanuel's London office, which launched six years ago, has now won this award twice (in 2012 and 2014). Q

Faith Gay and Dominic Surprenant Named BTI Client Service All-Stars

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Sheila Birnbaum Named 2014 Product Liability Defense Lawyer of the Year at the Annual *Who's Who Legal* Awards

For the second year in a row, Quinn Emanuel partner Sheila Birnbaum was named *Who's Who Legal*'s Product Liability Defense Lawyer of the Year. Ms. Birnbaum was selected for her successful year working in significant products liability, toxic torts, and insurance coverage litigation matters. During her career, Ms. Birnbaum has argued two landmark cases before the U.S. Supreme Court that have changed the course of product liability law. She has also served as Special Master of the September 11th Victims Compensation Fund program since her appointment in 2011 by U.S. Attorney General Eric Holder. Q accessibility of platforms and applications provided by the cloud to users everywhere also offers compatibility and standardization, thus enhancing collaboration. The benefits afforded by the cloud can increase the efficiency of doing business.

Limelight Networks Inc. v. Akamai Technologies, Inc. – *A Supreme Court Case That Could Have Significant Repercussions for Cloud Computing*

On April 30, 2014, the U.S. Supreme Court heard oral argument in *Limelight Networks Inc. v. Akamai Technologies, Inc.*, No. 12-786 (U.S.), a decision that could have profound implications for cloud computing technologies. Before the Federal Circuit issued its *en banc* decision in *Akamai Technologies, Inc. v. Limelight Networks, Inc.*, 692 F.3d 1301 (Fed. Cir. 2012) (*en banc*), a defendant who induced another to perform *fewer* than all of the steps of a method patent claim could not be held liable for induced infringement (even where the remaining steps were performed by others, including the defendant itself). Because direct infringement of a method claim (a prerequisite for inducement) also required a single actor to perform all of the steps of the claim, such induced parties would not be direct infringers, and thus no inducement of infringement could be found.

However, in *Akamai* the *en banc* Federal Circuit held that a defendant can be held liable for induced infringement even when no individual actor is liable for direct infringement. In doing so, the court distinguished the question of whether a patent has been infringed from the question of whether anyone can be held legally liable for that infringement, noting that: "Requiring proof that there *has been* direct infringement as a predicate for induced infringement is not the same as requiring proof that a single party would be *liable* as a direct infringer. If a party has knowingly induced others to commit the acts necessary to infringe the plaintiff's patent and those others commit those acts, there is no reason to immunize the inducer from liability for indirect infringement simply because the parties have structured their conduct so that no single defendant has committed all the acts necessary to give rise to liability for direct infringement." *Id.* at 1308-09 (emphasis in original).

In connection with the Supreme Court's review of *Akamai*, Quinn Emanuel filed an *amicus* brief on behalf of Google, Cisco, Oracle, Red Hat, and SAP in support of the Petitioner, Limelight. Among other things, *amici* note that given today's information technology markets, the Federal Circuit's *Akamai* decision will increase the cost and complexity of investigating allegations of patent infringement. The Federal Circuit's holding in *Akamai* forces companies to consider numerous possible configurations and combinations of hardware and software to determine whether any permutation permitted or facilitated by their platforms could be interpreted to perform all the steps of any asserted claim—a costly, and often impossible, proposition.

For example, several *amici* who provide software for mobile applications have been accused under the *Akamai* rule of inducing infringement of claims that contain elements that may be practiced by the hardware components, software, and end user (none of which are commonly controlled). *See, e.g., CIVX-DDI LLC v. Hotels.com LP*, No. 05 C 6869, 2012 WL 5383268 (N.D. Ill. Nov. 1, 2012) (finding that the claimed steps may be performed by defendant Hotels.com with one or more third parties, such as Expedia, DoubleClick, and/or iFrame).

Amici who provide hardware components that may be used in a network face a similar conundrum. These networks, by their nature, include multiple disaggregated users and terminal devices. *Amici* design and build their hardware so that it can be used in a highly adaptable fashion and a large number of configurations. Users connect to and configure such networks using this hardware in a variety of ways, many of which are outside of *amici's* scope of knowledge or control. Cloud computing enhances both flexibility in configuration and user independence. Under the *Akamai* rule, the very configurability that is beneficial to consumers—allowing them to use multiple types of devices and applications over the internet and other networks—now subjects *amici* to unknowable potential liability for these uses.

The Supreme Court's ruling in *Akamai* is expected by the end of June 2014.

NPEs Are Targeting Cloud Computing

Today it seems that no patent litigation discussion is complete without a mention of non-practicing entities. Obviously, cloud computing is not immune, and NPEs are increasingly targeting cloud computing technologies. NPEs targeting the cloud computing space include Parallel Iron, IP Nav, PersonalWeb, Clouding IP, and Unwired Planet. These NPEs are targeting various aspects of cloud computing, including frontend and backend functionalities. For example, Clouding IP recently sued a host of technology companies, including Apple, Amazon, Google, HP, Microsoft, and Oracle, asserting patents related to synchronization of copies of files across a server and client.

Critics point out that NPEs tend to assert software patents against emerging technologies, like cloud computing, to exploit broad and sometimes ambiguous "functional claiming" found in software patents. Functional claiming refers to the practice of crafting patent claims in functional terms to cover a result (e.g., a method of using a software application *to build a website*). The Supreme Court, cognizant of these concerns, has taken under review two additional patent cases, the first involving software patents and the second involving the statutory requirement of particular and distinct patent claiming. In *Alice Corp. Pty. Ltd. v. CLS Bank International*, No. 13-298 (U.S.), the Supreme Court will consider whether claims to computer-implemented inventions—including claims to systems and machines, processes, and items of manufacture—are directed to patent-eligible subject matter within the meaning of 35 U.S.C. § 101. In *Nautilus, Inc. v. Biosig Instruments, Inc.*, No. 13-369 (U.S.), the Supreme Court will consider (1) whether the Federal Circuit's acceptance of ambiguous patent claims with multiple reasonable interpretations—so long as the ambiguity is not "insoluble" by a court—defeats the statutory requirement of particular and distinct patent claiming; and (2) whether the presumption of validity dilutes the requirement of particular and distinct patent claiming.

As with *Akamai*, the Supreme Court's rulings are expected by the end of June 2014.

ITC Investigations Involving Cloud Computing?

Those anticipating NPEs and other patent holders using the International Trade Commission ("ITC") to target cloud computing technologies may need to reset their expectations. On December 13, 2013, a divided Federal Circuit panel issued an opinion that could make it difficult to pursue exclusion remedies against certain cloud computing services. In *Suprema, Inc. v. International Trade Commission*, 742 F.3d 1350 (Fed. Cir. 2013), a split Federal Circuit panel held that an exclusion order issued by the ITC under Section 337 "may not be predicated on a theory of induced infringement . . . where direct infringement does not occur until *after* importation of the articles the exclusion order would bar." *Id.* at 1351. Rather, an exclusion order can "bar only those articles that infringe . . . at the time of importation." *Id.* It remains to be seen how and to what extent the *Suprema* decision will impact the viability and effectiveness of the ITC as a forum for litigating claims involving cloud computing.

On February 21, 2014, the ITC filed a petition for panel rehearing and rehearing *en banc*. At the Federal Circuit's request, Suprema filed a response to the ITC's petition on March 25, 2014.

E-Discovery in the Cloud

The cloud is not just subject to patent litigation – it is also becoming important to discovery in both patent and non-patent litigation. While clients have begun offloading data storage into the cloud, some regard the cloud to be generally less stable than on-site data storage. For example, files in cloud repositories are often updated, backed-up, or moved to different repositories. As a result, records of data changes may not be preserved adequately. Further, cloud services and storage may be "offshored" to foreign countries, such that the documents maintained in the cloud may be subject to extraterritorial laws and restrictions. *See* Stephanie Koons, "Cloud Computing Offers New Challenges" (Oct. 24, 2013), *available at* http://news.psu.edu/story/292841/2013/10/24/academics/cloud-computing-offers-new-challenges-traditional-law-enforcement. As a result, the storage, search, and retrieval of data in the cloud for electronic discovery raises unique challenges for litigants, including:

- Data Preservation – Users of cloud data storage should consider both the stability of the data storage and preservation of metadata associated with frequently updated or moved repositories. In particular, in-house counsel should revisit record retention policies and disposal procedures. Likewise, litigants may need to take special steps to ensure that data in the cloud (including metadata) is preserved in a manner compliant with a party's obligations under applicable federal and state rules of discovery.
- "Possession, Custody and Control" – Control has been construed broadly in the ESI context: so long as the party has the "practical ability" or contractual legal right to obtain the data, the fact that data is not in the party's actual possession does not constrain the duty to produce the information. *See, e.g., In re NTL Inc. Sec. Litig.*, 244 F.R.D. 179, 195-96 (S.D.N.Y. 2007). Thus, litigants may be required to approach cloud service providers directly for collection of metadata in connection with their discovery obligations. Similarly, to the extent a party's employees store potentially relevant documents in the cloud, such a party may be required to collect documents from its employees' personal cloud accounts.
- Burden and Cost – Storage of data in the cloud raises unique considerations as to the costs and burdens involved in accessing such data. Thus, litigants should take into account the proportionality standards imposed by Rules 26(b)(2)(B) and 45(d)(2)(B) of the Federal Rules of Civil Procedure when determining appropriate strategies for review

and production of data stored in the cloud.

- Confidentiality and Privilege – Cloud-stored data raises potential questions as to whether confidentiality has been appropriately maintained. Thus, in-house counsel should be diligent in establishing appropriate policies regarding cloud storage of confidential and/or privileged documentation.
- Admissibility of Data Stored in the Cloud – Cloud-derived evidence, like any other evidence, still needs to meet the standard tests for admissibility. *See Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 537-39 (D. Md. 2007). In particular, the storage of data *only* in the cloud raises potential issues of authenticity and hearsay, which may require appropriate declarations or testimony from authors, recipients, or the cloud providers themselves.

A key step in addressing these discovery-related issues is the party's contract with the cloud provider. These contracts can be used to address whether and how cloud stored data can be moved or manipulated, whether metadata is stored and maintained, and what actions the provider can take to preserve and produce data in case of a lawsuit, as well as the cost associated with retention and production of that data.

A Plethora of Other Legal Issues

While the appeal of the cloud appears to be winning over competing concerns about privacy and security, the legal (and ethical) issues facing practitioners are many, varied, and growing. Just a few issues, which are outside the scope of the instant article, include:

- What jurisdiction's laws govern data stored on servers located overseas or across multiple jurisdictions?
- What are a cloud service provider's obligations to respond to subpoenas for their customers' data?
- Who owns the data and software created in the cloud or using cloud software?
- What are the copyright issues associated with using PaaS (Platform as a Service)? Are cloud companies that store infringing works liable for copyright infringement?
- What is the extent of liability for data loss and corruption in the cloud?
- What happens to customer data when a cloud service provider goes bankrupt?
- Are lawyers ethically obligated to ensure that their cloud storage provider is adequately protecting their client's confidential information?
- Do the answers to these questions depend on the location of the servers?

Conclusion

While cloud computing is changing the landscape in enterprise information technology, the laws impacting and governing cloud computing leave both businesses and litigants with a measure of uncertainty. Q

Faith Gay and Dominic Surprenant Named BTI Client Service All-Stars

Quinn Emanuel partners Faith Gay and Dominic Surprenant were named 2014 BTI Client Service All-Stars. Each individual was chosen based on feedback from a panel of corporate counsel. The award recognizes attorneys who have delivered exceptional client service during the year.

Ms. Gay is Co-Chair of the firm's National Trial Practice Group. Clients she has recently represented include Coca-Cola, Colgate, ETrade, Home Depot, Morgan Stanley, Motorola, Novartis, Nuance, Pfizer, Sandoz, Schwab, Travelport, and Wyeth.

Mr. Surprenant specializes in complex commercial litigation and trial practice, with emphasis on antitrust, class action, trade secret, and civil RICO cases. His notable clients include Sprint, Nextel, ADT, Avery Dennison, General Motors, the Academy of Motion Picture Arts and Sciences, Miramax Films, and American Airlines. Q

Garlock: Lifting the Veil on Asbestos Trust Claims

Over the past four decades the landscape of asbestos litigation has been changing, influenced in large part by many asbestos defendants filing for bankruptcy. In search of solvent defendants, plaintiffs' attorneys expanded their roster of potential targets from the traditional "big dusties" to manufacturers of products that were never formulated to contain or be used with asbestos.

Although most "real" asbestos exposures undoubtedly came from the "big dusties," compensation from these companies is severely curtailed because claims against those entities must be made to litigation trusts created in bankruptcy. That creates a significant incentive for plaintiffs' attorneys to sue solvent "asbestos" defendants even if the real causative agent was the product of a bankrupt entity. A recent bankruptcy court decision, *In re Garlock Sealing Tech., LLC*, 504 B.R. 71 (Bankr. W.D.N.C. 2014), reveals that the trust system has created the risk of asbestos plaintiffs' "double dipping"—bringing both tort claims against solvent defendants and trust claims against bankrupt entities without any offset.

Garlock was a gasket manufacturer that became a major target of asbestos litigation after the more traditional asbestos defendants filed for bankruptcy. Faced with thousands of pending personal injury claims arising from alleged exposure to asbestos from Garlock's products, Garlock sought bankruptcy protection to establish a trust to resolve current and future claims. As part of that process, the United States Bankruptcy Court for the Western District of North Carolina scheduled a hearing on Garlock's estimated asbestos liability.

In preparation, the company sought access to information submitted in asbestos-related bankruptcy claims filed in Delaware by plaintiffs who had previously settled tort cases against Garlock. *In re Motions for Access of Garlock Sealing Technologies LLC*, 488 B.R. 281 (D. Del. 2013). Trust claims provide powerful evidence of the true cause of many plaintiffs' asbestos-related disease because many require sworn affidavits that the claimant was exposed to an asbestos-containing product of the bankrupt entity. Despite this materiality to pending asbestos lawsuits, this evidence is not easily obtained by asbestos defendants. Many of the more than 30 asbestos-related litigation trusts require subpoenas before they will even confirm whether an individual has filed a claim. It was thus significant when Garlock gained access to details on 15 plaintiffs who filed trust claims following settlements with Garlock.

At the estimation hearing, the trust claims-related discovery obtained in Delaware affirmed Garlock's suspicions: After disclaiming exposures to traditional asbestos defendants' products (like insulation) in their tort cases against Garlock, each of the 15 plaintiffs investigated went on to file trust claims alleging exposure to one or more of those insulation products after extracting large settlements from Garlock. In some instances, the plaintiffs had actively opposed listing the bankrupt asbestos defendants on the verdict forms, moved to preclude references to potential exposures to the bankrupt asbestos defendants' products at trial, and/or purported to have no personal knowledge of exposure while they were litigating against Garlock. The court found that, on average, the 15 plaintiffs disclosed two exposures to bankrupt companies' products, but after settling with Garlock, made claims against about 19 such companies' trusts.

The full disclosure of potential exposure sources had a significant impact on Garlock's trials. In a survey of cases where exposure evidence was suppressed, Garlock either paid settlements or lost verdicts ranging from $250,000 to $9 million. By contrast, in the four trials where trust claim forms were admitted into evidence, Garlock won three defense verdicts and was assigned only 2% of the liability in the fourth.

After a 17-day hearing that included 29 witnesses, the court set Garlock's asbestos liability at $125 million—drastically lower than the plaintiffs' requested $1.3 *billion*. The court found that the aggregate settlements and verdicts typically relied on to value asbestos liabilities were "infected with the impropriety of some law firms" where "certain Plaintiffs' law firms used [their] control over the evidence to drive up the settlements demanded of Garlock."

In an interesting twist, Garlock has since filed fraud and federal RICO claims against the four plaintiffs firms involved in the confirmed double dipping. The initial pleadings were filed under seal, and the case remains in its earliest stage.

State and federal legislators are also taking steps to address the potential for fraud. The U.S. House of Representatives passed the Furthering Asbestos Claim Transparency (FACT) Act of 2012, a bill mandating quarterly disclosure of trust claim demands and payment information from the trusts as a way to shed light on the process and permit the type of analysis that occurred in *Garlock* to be possible in every litigation. Ohio, Oklahoma, and Wisconsin have all recently passed similar transparency laws. Q

Trial Practice Update

Courts, Lawmakers, and Other Groups Grapple with Juror Misuse of Social Media and the Internet. Jurors are expected to decide cases based on evidence they see and hear in the courtroom, after deliberating while sequestered from outside influences. For decades, courts have enforced rules and practices designed to make these expectations reality. At the outset of their service, jurors are admonished not to discuss the case with anybody. Courtroom officers whisk jurors out of the jury box when there is extended argument about potentially inadmissible evidence. Lawyers know that anything more than a polite greeting to a juror in a courtroom elevator is off-limits. And judges instruct jurors to avoid media accounts regarding high-profile cases.

Despite best efforts, the proliferation of internet and smartphone use has made it more difficult to prevent improper information flow to and from jurors. The internet and smartphones provide easily-accessible, tempting launchpads for jurors to quickly (1) get unauthorized information about cases on which they are serving; and (2) voice views and opinions about cases and case participants on social media sites. Both practices create problems for the trial system.

The juror who collects information on the internet about a case or its participants (parties, witnesses, or lawyers) jeopardizes her ability to decide the case based solely on the evidence in the record, and risks infecting the rest of the jury pool with that information. Even if the juror keeps the information to herself, she has denied litigants the opportunity to confront, in open court, information that may drive a verdict. And even if the misconduct comes to light before deliberations, remedies such as a mistrial drain financial and temporal resources from an already-overburdened legal system.

The juror who tweets or uses other social media tools to discuss a litigant or case risks causing a multitude of problems. Tweets may disclose confidential information subject to a protective order. The juror may become enmeshed in discussion that will impact her views of the merits. And social media statements from jurors in the middle of a case risk giving litigants a midstream "read"—correct or not—about how the juror views the case. Remedies once the violation has occurred again create inefficiencies and potential unfairness.

Examples of cases in which these issues have arisen abound. In one recent case, a juror went online during a trial and researched the law firm website for counsel of one of the parties. *See Zhou v. Mazda Motor Corp. of Am.*, No. A133031, 2013 WL 204695, at *13 (Cal. App. Jan. 18, 2013) (affirming grant of new trial). The website included statements that the court found were prejudicial to the opposing party. *Id*. In another case, a juror researched the judge online and read an article regarding alleged facts in the case, and another juror researched the phasing of the trial itself. *See In re MTBE Prods. Liability Litig.*, 739 F. Supp. 2d 576, 592 (S.D.N.Y. 2010) (denying new trial).

Different participants in the legal system have taken different steps to address these issues. Revised jury instructions are a principal tool. A committee of the Federal Judicial Conference—a group made up of federal judges, lawyers, and academics that serves as the principal policy-making body for the federal courts—recently released a new set of model jury instructions. Along with broader, traditional admonitions about juror conduct, the instructions specifically prohibit communicating "with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube." *See* http://www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf.

The American College of Trial Lawyers—a professional organization of trial lawyers from the United States and Canada—also recently prepared a set of model jury instructions targeting these issues. The instructions warn against communicating "via emails, text messages, tweets, blogs, chat rooms, comments or other postings, Facebook, MySpace, LinkedIn, or any other websites." *See* American College of Trial Lawyers, *Jury Instructions Cautioning Against Use of the Internet and Social Networking* (Sept. 2010), *available at* http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=5213. They also provide model language for summonses to prospective jurors, warning against "research on sites such as Google, Bing, Yahoo, Wikipedia, Facebook or blogs."

The Judicial Council of California—the policymaking body of the California courts—recently changed its preliminary admonition to prohibit communications using "any electronic device or media, such as a cell phone or smartphone, PDA, computer, the Internet, any Internet service, any text or instant-messaging service, any Internet chat room, blog, or Web site, including social networking websites or online diaries, to send or receive any information to or from anyone about this case or your experience as a juror until after you have been discharged from your jury duty." *See* Judicial Council of California, Civil Jury Instruction 100 (Preliminary Admonitions).

New York's Civil Pattern Jury Instructions advise jurors that "[i]t is important to remember that you may not use any internet services, such as Google, Facebook, Twitter or any others to individually or collectively research topics concerning the trial, which includes the law, information about any of the issues in contention, the parties, the lawyers or the court. After you have rendered your verdict and have been discharged, you will be free to do any research you choose, or to share your experiences, either directly, or through your favorite electronic means." *See* http://www.courts.state.ny.us/judges/cpji/PJI%201-10%20and%2011%20final3.pdf .

Other legal system participants have taken other measures. The California legislature recently amended the California Code of Civil Procedure to statutorily prohibit "all forms of electronic and wireless communication" by the jury during trial or deliberations. Cal. Civ. Proc. Code § 611. Under this rule, a juror may not "conduct research, disseminate information, or converse with, or permit themselves to be addressed by, any other person on any subject of the trial, and [may not] form or express an opinion thereon until the case is finally submitted to them." *Id.* The law permits jurors guilty of a willful violation to be charged with contempt of court. Cal. Civ. Proc. Code § 1209(a)(6).

Some jurisdictions have banned jurors from using electronic devices for any purpose during trial and deliberations. For example, Michigan state courts recently revised their rules to require an instruction that jurors may not "use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation," although they may be used on breaks or recesses. *See* MCR Rule 2.511(h)(2). Further, jurors may not "use a computer, cellular phone, or other electronic device with communication capabilities, or any other method, to obtain or disclose information about the case when they are not in court." *Id.*

As technology increases opportunities for jurors to give and get information related to the cases they are charged with deciding, legal system participants continue to formulate mechanisms—through laws, court rules, and jury instructions—to prevent improper information flow. Although none of these methods is foolproof, litigants seeking to prevent inappropriate electronic information flow to and from jurors should raise the issue with the court at an early stage, and present the court with recommendations for how to address the issue proactively.

Energy Litigation Update

Measure of Damages for Breach of a Contract to Drill Exploratory Oil or Gas Well: U.S. and English Law.

With recent increasing frontier exploration activity, greater attention has fallen on the value of work obligations received for the grant or assignment of exploration and development rights. In many parts of the world, it is common for rights to be granted in return for, *inter alia*, an undertaking to drill exploration wells. Companies that obtain these rights often farm them out in return for an undertaking to carry their costs of performing such drilling. What if the promisor decides that the exploration prospect has become too risky or not worth the investment? Can it walk away from the obligation, knowing that the promisee cannot prove any loss because, on a balance of probabilities, the work would not have led to a commercial discovery? This article reviews this issue under English and U.S. law.

English Law. No direct authority exists on this issue under English law. The general rule at common law is that contractual damages exist to position the plaintiff as he would have been had the contract been performed (to protect the plaintiff's "expectation interest"). Given that damages awards are based on the reasonable balance of probabilities (namely, greater than a 50% chance that the loss in question was suffered), aiming to protect the promisee's expectation interest when the usual likelihood of discovering a commercially viable reservoir will be less than 50% makes little sense in this context. Three alternative approaches to this issue are potentially available under English law, though none is particularly satisfactory.

The first approach would be to award "reliance interest," covering the promisee's wasted expenditure incurred in reliance on the contract being observed (restoring him to his pre-contractual position). Persuasive support for this approach is discussed in the Canadian Supreme Court's decision in *Sunshine Exploration Ltd. et al v Dolly Varden Mines Ltd. (N.P.L.)* [1970] S.C.R.2. There, the Supreme Court awarded the license holder damages equaling the cost of performing the exploratory work that should have been carried out, reasoning that the contractor, by entering the agreement, had acknowledged that its own suggested works program was worth the cost of performing the contract and the license holder had given valuable consideration for that performance.

The second approach would be to award damages based on loss of chance or opportunity. Loss of chance damages are generally dependent on a hypothetical future event occurring (and the chance in question must be more than speculative). But in the scenario in question, irrespective of whether or not drilling occurs, there is either oil underground or there is not. Therefore, loss of chance considerations should not apply. Indeed, English courts have employed this rationale in medical negligence cases concerning failures to diagnose or treat conditions in sufficient time, where courts have confirmed that they will not award a patient damages for loss of a chance where his pre-existing injury or condition is such that the damage has already been done even if future treatment would have had a chance of success. In these cases, the actual existing state of affairs at the time of the negligence is determinative of the hypothetical question of what the plaintiff's position would have been but for the breach of duty. *See, e.g., Hotson v East Berkshire Area Health Authority* [1987] A.C. 750 HL; *see also Gregg v Scott* [2005] UKHL 2.

The third approach would be to award so-called *"Wrotham Park"* or "negotiating" damages, named after the decision in *Wrotham Park Estate Co v Parkside Homes* [1974] 1 WLR 798, where damages are measured by reference to the benefit gained by the wrongdoer from the breach of contract. In that case, the defendant developed houses on land in breach of a restrictive covenant but both parties accepted that there had not been any reduction in land value as a result of the development. The Court awarded damages to reflect "such a sum of money as might reasonably have been demanded…as a *quid pro quo* for relaxing the covenant." Recently, *Giedo van der Garde BV and another v Force India Formula One Team Ltd.* [2010] EWHC 2373 (QB) has confirmed that such damages awards are available for breach of contract claims generally. In the drilling context, this would likely arise towards the end of the license period, when the license holder will have lost the ability to enforce the contractual obligation to drill (considering the long lead times to arrange drilling equipment). The loss would be quantified as the value that would have been agreed between the promisor and the promisee in a hypothetical negotiation to release the contractor from drilling obligations.

U.S. Law. U.S. law is more developed on the issue and courts have followed one of two approaches: the "cost of drilling" approach, and the "value of performance" approach.

Under the "cost of drilling" approach, damages for breach of contract to drill a well are calculated by the "cost of sinking the well contracted for, or of completing one partially sunk if the defendant has partially performed." *Fisher v. Tomlinson Oil Co.*, 215 Kan. 616, 619 (Kan. 1974). For example, in *Fite v. Miller*, 196 La. 876, 886 (1940), the defendant failed to drill a well that he agreed to drill in exchange for a half interest in an oil, gas, and mineral lease. Despite defendant's evidence the well would have been a dry hole, the Louisiana Supreme Court awarded damages by measuring the cost of drilling because the plaintiff lost the right to have the well drilled and was entitled to the value of such drilling. *Id.; see also Apache Bohai Corp. LDC v. Texaco China B.V.,* No. H-01-2019, 2005 WL 6112664 (S.D. Tex. Feb. 28, 2005).

Texas and California courts have rejected the "cost of drilling" approach to damages in this context in favor of the "value of performance." *See, e.g., Fisher v. Hampton*, 44 Cal. App. 3d 741 (1975); *Riddle*, 136 Tex. at 134. Under this approach, courts measure damages based on anticipated and non-speculative benefits under a contract so that the non-breaching party is "in the same position as that in which [it] would have been put by performance." *Riddle*, 136 Tex. at 134. Under this rule, a plaintiff may recover the value of royalty or the loss of profits on the retained lease. *See Guardian Trust Co. v. Brothers*, 59 S.W.2d 343, 345 (Tex. Civ. App. 1933); *Hardwick v. Jackson*, 315 S.W.2d 440, 441 (Tex. Civ. App. 1958). In contrast to the Canadian decision in the *Dolly Varden* case *supra*, a plaintiff may also claim damages arising out of lost profits on retained leases, provided that profits from an increased market value of the lease were contemplated by the parties when the contract was made, and the plaintiff would have sold all or part of its interest. *See Whiteside v. Trentman*, 141 Tex. 46 (1943); *Sanchez-O'Brien Oil & Gas Corp. v. Austin Resources Corp.*, No. 14-96-96-00240, 1998 WL 322686 (Tex. Ct. App. June 18, 1998).

Practical Tip. Damages laws in England and the U.S. are tested by the particular circumstances of a contract to carry out exploration activity because of the inherently speculative nature of the work. In drafting an agreement under which one party agrees to carry out such work, there will always be doubt regarding the monetary consequences of a breach. While liquidated damages clauses (as distinguished from license clauses which allow for relinquishment) are rare in such contracts, they are the best route to avoiding an inevitably protracted legal debate on this issue.

White Collar Litigation Update

Jumping the Gun: Public Statements by U.S. Attorneys That Inappropriately Opine on the Guilt of Charged but Untried Defendants. When United States Attorney's Offices file criminal charges in significant cases, U.S. Attorneys generally seek to publicize their offices' work. That publicity usually takes the form of press releases. U.S. Attorneys are supposed to refrain from publicly opining on the guilt of people who have been charged but not convicted. In reality, some U.S. Attorneys play by that rule, and others don't. But in the absence of a defendant making the extremely difficult showing of prejudicial pretrial publicity, even when U.S. Attorneys ignore federal guidelines and

Department of Justice ("DOJ") policy and opine on an untried defendant's guilt, the call is "no harm-no foul" and the violation goes unaddressed.

Law and Policy Governing Public Statements by Prosecutors. 28 C.F.R. § 50.2 sets forth guidelines that are supposed to govern public disclosure of information by DOJ personnel. The regulation is premised on the principle that any release of information by prosecutors should balance the rights of accused persons with the public's interest in the transparency of criminal proceedings.

To that end, section 50.2(b)(3) lists types of information that DOJ officials may publicly disclose—such as basic biographical information, the substance of the allegations contained in the complaint or indictment or other public document, and the circumstances immediately surrounding an arrest. Section 50.2(b)(6) lists categories of statements that prosecutors "should refrain from making" in public statements, including "[a]ny opinion as to the defendant's guilt." Likewise, the U.S. Attorney's Manual ("USAM"), which governs the conduct of U.S. Attorneys and their staff, explicitly directs prosecutors to "refrain from" publicly opining on a defendant's guilt. USAM § 1-7.550.

While 28 C.F.R. § 50.2 and USAM § 1-7.550 both explicitly tell U.S. Attorneys that they should not publicly offer opinions on an untried defendant's guilt, neither provides for any penalty if that directive is ignored.

Disparate Compliance with the C.F.R. and USAM's Guidelines. Comparing various offices' press releases illustrates the disparity in the degree to which U.S. Attorneys perceive themselves to be constrained in opining publicly on the guilt of untried defendants. The nation's highest-profile U.S. Attorney's Office, the Southern District of New York ("S.D.N.Y."), is the office that most often opines on the guilt of people who have been charged but not convicted. Sometimes, the U.S. Attorney does it without any subtlety at all; other times, the opinion is stated only implicitly. For example, in October, the S.D.N.Y. U.S. Attorney issued a press release in connection with the arrest of a man for allegedly operating Silk Road, a website that purportedly offered drugs and other illegal services. The press release stated: "With his arrest and our subsequent seizures of millions of dollars worth of Silk Road's [virtual currency], we have sent a clear message to him and everyone else running criminal enterprises of the dark web: we are determined and equipped to hold you to account." Yet, all that had happened at that point was that a magistrate judge had found probable cause to sign an arrest warrant on a criminal complaint; the government certainly had not obtained any judicial finding that in fact the defendant ran any criminal enterprise, including one of "the dark web," at all.

On the same day, the same U.S. Attorney issued another press release, which announced recent arrests and charges related to armed robberies. That press release stated: "The perpetrators of violence cannot hide from the law, as the arrests of these defendants show." In fact, the arrests of the defendants showed merely that they had been charged with being perpetrators of violence, not that they were such villains. The following week, the same U.S. Attorney stated in a press release announcing fraud charges against a provider of services for special needs preschool students: "As today's arrest makes clear, we will not tolerate individuals who cheat local, state, and federal government under the guise of helping children, and will do everything in our power to hold them accountable." If one credited the U.S. Attorney's implicitly stated opinion, then the defendant, who had been not convicted of anything, had already been determined to be one of the referenced despicable individuals who cheated the government under the guise of helping children.

Other U.S. Attorneys are not so prolific but still occasionally ignore the C.F.R. and the USAM. In a recent press release from the Eastern District of New York announcing the arrest of a defendant on fraud charges, the U.S. Attorney stated: "Fredrick Douglas Scott wanted a place in history, but tried to secure that spot with stolen money rather than honest work." This is the sort of statement that one expects to see after the return of a guilty verdict, not a mere arrest. Similarly, in a press release from the Central District of California announcing arrests of numerous defendants alleged to be participants in a drug conspiracy, the U.S. Attorney said: "The arrests we announce today dismantle that conspiracy and disrupt this threat to public safety."

Some offices (at least currently) do not editorialize at all, instead simply summarizing charges. Recent press releases from the Northern District of Illinois and the Southern District of Florida reflect such an approach.

Conclusion. The direction in the C.F.R. and USAM could not be more clear: do not publicly opine on a charged defendant's guilt. But some U.S. Attorneys will continue to ignore the guidelines and attempt to color the public's view of a charged defendant from the moment he or she is arrested. Unless and until the rules change to provide for some enforcement mechanism short of having to prove a due process violation resulting from prejudicial pretrial publicity, then nothing will change and some U.S. Attorneys will continue to break these rules without suffering any consequences.

First Amendment Victory for Chinese Internet Search Engine

Quinn Emanuel has secured a major First Amendment victory for its client Baidu, Inc. In a case of significant importance for internet search engines and media companies worldwide, Quinn Emanuel persuaded the United States District Court for the Southern District of New York that the First Amendment bars an action seeking to hold its client Baidu—the most popular internet search service in China—liable for the order and content of results returned on its search engine. Plaintiffs—eight Chinese individuals living in the United States—claimed that Baidu violated various U.S. civil rights laws by allegedly preventing its search engine from returning results linking to plaintiffs' works advocating political change in China.

Plaintiffs' complaint asserted eight causes of action against Baidu including alleged violations of 42 U.S.C. §§ 1981, 1983, and 1985, asserting that Baidu's purported failure to return search results linking to plaintiffs' works infringed upon plaintiffs' freedom of speech. The other five causes of action asserted violations of New York state and local laws—alleging that the Baidu.com website is a "place of public accommodation" that discriminates against plaintiffs on the basis of their purported political beliefs. Plaintiffs sought $16 million in damages.

Baidu moved for judgment on the pleadings. The court granted Baidu's motion in a carefully reasoned and scholarly opinion holding that the First Amendment barred plaintiffs' action because it sought in effect to have a U.S. court sanction a private party for allegedly declining to publish the political advocacy of another party.

As a threshold matter, the court recognized that plaintiffs' suit raised the question of "whether the First Amendment protects as speech the results produced by an Internet search engine." Although the court declined to decide that question categorically, it held that "at least in the circumstances presented here, it does" since "allowing Plaintiffs to sue Baidu for what are in essence editorial judgments about which political ideas to promote would run afoul of the First Amendment."

Citing U.S. Supreme Court authority on compelled speech, the court recognized the right of internet search engine services to "exercise editorial control" over the order and content of the search results they return—declaring that there "is a strong argument to be made that the First Amendment fully immunizes search-engine results from most, if not all, kinds of civil liability and government regulation." Indeed, to the extent that search engines exercise editorial control over their search results, the court determined that the First Amendment "plainly shields" those determinations. The Court therefore rejected plaintiffs' attempt to "enlist the government—through the exercise of this Court's powers—to impose 'a penalty on the basis of the content' of Baidu's speech," since allowing them to do so "would 'inescapably dampen the vigor and limit the variety of public debate.'"

The court further held that sanctioning Baidu, as plaintiffs sought, for allegedly "design[ing] its search-engine algorithms to favor certain expression on core political subjects over other expression on those same political subjects" would "'violate the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message,'" and that punishing Baidu for editorial judgments "would contravene the principle upon which 'our political system and cultural life rest': 'that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.'"

Whether Baidu chooses "to disfavor speech concerning democracy"—as plaintiffs alleged—was immaterial, the court declared, since "the First Amendment protects Baidu's right to advocate for systems of government other than democracy (in China or elsewhere) just as surely as it protects Plaintiffs' rights to advocate for democracy." Indeed, the court recognized that its dismissal of the case "is itself 'a reaffirmation of the principles of freedom and inclusiveness that [democracy] best reflects, and of the conviction that our toleration of criticism . . . is a sign and source of our strength.'"

Energy Industry Victory

In November 2013, Quinn Emanuel obtained a substantial victory for Entergy Corporation, resulting in the Missouri Public Service Commission withdrawing an order that would have prevented the successful reorganization of energy transmission facilities serving retail customers in several states.

For years, Entergy had sought approvals from various state public utility commissions and the Federal Energy Regulatory Commission to join a Regional Transmission Organization ("RTO") known as the Midcontinent Independent System Operator, Inc. ("MISO"). RTOs manage large multi-state electrical grids so that maximum efficiency can be achieved; for example, the lowest-cost generating plant can ramp up first to meet demand, followed by higher-cost plants. RTO participation by owners of generating and transmission assets has been a federal policy priority for more than a decade. The benefits to ratepayers are substantial. Here, for example, Entergy projected that its transfer of transmission assets in five States (Arkansas, Louisiana, Mississippi, Missouri, and Texas) into MISO would yield $1.4 billion in benefits to its ratepaying customers over the next decade.

Although Entergy successfully obtained approvals for the transaction from FERC and the state regulatory bodies in the four states where Entergy has retail customers, the Missouri Commission issued an order on October 9, 2013, that imposed two onerous conditions on Entergy's ability to transfer its Missouri transmission lines (which are used solely for interstate wholesale service because Entergy has no retail ratepaying customers in Missouri). Specifically, the order required that (1) Entergy compensate those Missouri ratepayers who purchase power from sources not in MISO and thus may face higher rates after the transaction; and (2) MISO and its neighboring RTOs enter into a new agreement governing electricity transfers between them. The former condition was unacceptable because it could trigger similar financial obligations in the other states in which Entergy operates, and the latter was unacceptable because MISO and its principal neighboring RTO are outside the control of Entergy.

The Missouri Commission's order created an urgent situation because integration of Entergy's transmission lines into MISO, which requires substantial planning and coordination, was scheduled to occur in December 2014. Quinn Emanuel rapidly prepared a federal complaint that asserted causes of action that the order is preempted under the Federal Power Act (because it interferes with interstate grid operations regulated by FERC under the Federal Power Act) and unconstitutional under the Dormant Commerce Clause (because it imposes undue burdens on interstate commerce). Quinn Emanuel also prepared a motion for a preliminary injunction against enforcement of the order, so that integration of the transmission lines into MISO could proceed as scheduled. Quinn Emanuel filed the complaint and motion on November 13, 2013 in the U.S. District Court for the Eastern District of Missouri. Several weeks later, on November 26, the Missouri Commission decided to withdraw its order along with the conditions it imposed. The withdrawal allowed Entergy to dismiss its complaint voluntarily, and to proceed to transfer its transmission lines into MISO in December.

Another Victory for Google and Motorola Against Apple in a Patent Case Aimed at the Android OS

On behalf of Google and Motorola, Quinn Emanuel's German offices continued their winning streak in defending the Android ecosystem. On February 4, 2014, after an intense two day oral hearing, an Opposition Division of the European Patent Office (EPO) revoked Apple's European Patent EP 2 098 948 B1 on a touch event model which claimed a core functionality of the iOS devices in its entirety.

This patent had been asserted against Motorola as well as Samsung and HTC in Germany as well as in other European jurisdictions. Quinn Emanuel had already convinced the District Court in Mannheim, Germany (the venue in which Apple sued Motorola) to dismiss the infringement suit by showing that the claimed flags based on which touch events are being processed were not implemented in the Android OS.

As the patent-in-suit was asserted by Apple immediately after grant, an opposition proceeding, rather than a nullity action, had to be initiated at European Patent Office. The advantage of such an opposition proceeding is that the patent can be revoked with effect for all designated member states of the European Patent Convention. Motorola joined the already pending opposition proceeding, which had originally been filed by Samsung, after it was sued by Apple in the Mannheim court.

Quinn Emanuel identified the decisive piece of prior art based on which the EPO revoked the patent as granted due to lack of novelty. Apple relentlessly tried to defend its patent by filing several auxiliary requests. These attempts culminated in Apple filing a further auxiliary request with an amended set of claims at the beginning of the second day of the hearing. None of these survived oral argument.

With only very limited time to react to Apple's most recent auxiliary request, Quinn Emanuel succeeded in convincing the court that neither of the auxiliary requests Apple finally chose to maintain could differentiate the claimed teaching over the prior art and that these should not be allowed. Q

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