October 2011: Internet Litigation Update

Cloud-Based Music Storage Services Win DMCA Protection: On August 22, 2011, Judge William H. Pauley III of the Southern District of New York ruled that cloud-based music storage services are entitled to substantial protection under the Digital Millennium Copyright Act ("DMCA"). (Cloud computing offers computation, storage and other services that do not require end-user knowledge of how the system works, much like the use of electricity in one's home does not require that a homeowner understand the electrical grid that supplies the electricity.)

Defendant MP3tunes created a system that allowed its users to search and download free MP3s from third-party sites. Its service allowed users to store downloaded music in private accounts and stream it on any device. At the same time, MP3tunes.com enforced policies prohibiting the use of its services by persons who had repeatedly downloaded music unlawfully and uploaded it to their accounts.

Notwithstanding that policy, the EMI Group brought suit because users of MP3tunes.com's services were, predictably, downloading its music, which was not being offered for free. EMI sent "takedown notices" to MP3tunes.com under OCILLA (the "Online Copyright Infringement Liability Limitation Act") and alleged that MP3tunes.com was liable for infringing the 472 songs that it failed to remove after receiving the notices. Under OCILLA, that was a given. Notably, though, EMI also sought to impose liability based on the unlawful downloading of files as to which it had never sent takedown notices. EMI alleged that 3,189 sound recordings, 562 musical compositions, and 328 images of album cover art had been infringed and that MP3tunes.com was liable because it was well aware that its services were being used for unlawful purposes.

Rejecting that argument, the court held that MP3tunes.com had no duty to search for instances of copyright infringement: "While a reasonable person might conclude after some investigation that the websites used by MP3tunes executives were not authorized to distribute EMI's copyrighted works, the DMCA does not place the burden of investigation on the internet service provider." The court further observed that "[i]f enabling a party to download infringing material was sufficient to create liability, then even search engines like Google or Yahoo! would be without DMCA protection." Accordingly, MP3tunes.com was liable only for the pirated works it failed to remove after receiving takedown letters. *See Capitol Records, Inc. v. MP3tunes, LLC*, No. 07 Civ. 9931 (WHP), 2011 WL 366735, 2011 LEXIS 93351 (S.D.N.Y. Aug. 22, 2011).

Your Company's Name (Not) Here?: When the Internet Corporation for Assigned Names and Numbers ("ICANN") announced on June 19 that it would allow virtually any word or name to be registered as a top-level domain ("TLD"), many pundits predicted a digital gold rush. After all, why would a business want a www.ourproduct@xyzcorp.com Web site when it could instead have www.ourproducts.xyz? Moreover, wouldn't it want to register ".xyz" as a TLD to prevent competitors or cyber squatters from doing so?

Many business are increasingly answering "no" to the above questions. Each applicant for a generic TLD must submit an application likely to take several hundred hours to complete, must pay a $185,000 evaluation fee, and can be required to pay a Registry Services Review Fee anticipated to cost an additional $50,000. If there are other applicants for the same or a substantially similar domain name, an applicant could become entangled in an expensive dispute resolution proceeding that could cost it both the TLD and most or all of the fees paid to ICANN. Moreover, winning the right to a new TLD has its own cost: successful applicants for the new TLDs will incur a minimum $25,000 annual fee to "operate" a registry for their TLDs, even if they do not use them. As a consequence, many well-known companies, including PepsiCo, Ikea, Wells Fargo, and Morgan Stanley, have chosen not to apply to register their names as TLDs.