

Getting Stimulus Funds for Electronic Medical Record Systems

The Economic Stimulus And Recovery Act Can Help Physician Groups Pay for e-Systems that Could Reduce Medical Errors And Improve Health Care

By Jonathan Bick

Technology has afforded increased productivity and improved accuracy in the medical industry. The single greatest inhibitor to taking advantage of technology in health care, however, is the requirement for an initial investment and, in the medical-records technology area, this investment can be significant.

However, the federal government has recently offered a solution to this difficulty, in the form of public funding. Software vendors and hospitals may be able to help physician groups get access to stimulus funds, thus facilitating access to and boosting velocity of e-commerce activity on a range of routes.

e-Commerce counsel would do well by their clients in medicine and allied health care who would benefit from e-medical record systems to look into them, and to seek further counsel on how to structure contracts with record-system providers, and on other legal issues.

continued on page 9

Virgin Advantage from a New, Near-Shore Corporate Frontier

A U.S. Caribbean Harbor Could Be the Berth Your e-Commerce Ship Is Seeking

By David Zumwalt

When viewed from the perspective of their first discovery, the world's great harbors have a certain obviousness about them.

The evolution and history of global commerce, and the trade routes that serve as its backbone, have followed such a scenario. Questions quickly follow the establishment of, and planning for, commercial transactions. For instance:

- Which routes provide the quickest, easiest means of travel?
- Which routes enjoy the best legal protections?
- Which routes provide the most efficient access to markets and trading partners?

These timeless questions guided 1st century Mediterranean traders, 16th century New World navigators, 19th century American railway barons, and 21st century network carriers, service providers and e-commerce companies.

LOCATION, LOCATION, LOCATION: ANOTHER LOOK

A quick study of American commerce immediately reveals the long-standing strategic role of the Caribbean. From the provisioning of the earliest American colonies, to the trans-shipment of goods and raw materials between the Americas and Europe, the United States has benefited greatly from the region. At first, favorable trade winds dictated the strategic value of the region, but the Caribbean's geographic realities are even more compelling today.

How can this be true?

First, recall the inherent efficiencies of hubs, in virtually any industry or enterprise:

- Railway systems radiate from switching yards;
- Telephone networks are built around central offices; and
- Hub airports determine competitive advantage for airlines (FedEx pioneered

continued on page 2

In This Issue

Virgin Advantage from A New, Near-Shore Corporate Frontier . . .	1
Getting Stimulus Funds For Electronic Medical Records Systems. . . .	1
Using Content on e-Commerce Sites. . .	3
CAN-SPAM Pre-empt California Spam Law .	5
e-Commerce Notes	10

PRSR STD
AUTO
US POSTAGE PAID
PHILADELPHIA, PA
PERMIT #1437

Corporate Frontier

continued from page 1

an entire industry by leveraging a good hub location — Memphis).

Consider this, too: Where do you find the epicenter of your company's intellectual property? The answer: most likely on a central server, the "nerve center" of your business. The right hub sites are similarly crucial, of course, to the Internet.

Second, while it is clear that the general public retains only an abstract interest in the global backbone and how the world's networks actually interconnect, network operators care deeply about such matters, and focus on network efficiencies and optimization with the same fervor that led European states to fight vigorously over the harbors of the Caribbean. And so it might come as a surprise to the general public, but not to network operators, that the best way to interconnect the Americas to Europe — and beyond — for the massive pipes the growing global network requires, rests on the geographic obviousness of the Caribbean in general, and the specific legal protections afforded by U.S. federal law in the United States Virgin Islands.

David Zumwalt is executive director of the University of the Virgin Islands Research & Technology Park ("RTPark"), St. Croix, the U.S. Virgin Islands. Prior to taking this position, in 2005, Zumwalt founded and served as chair and CEO of CNet Inc., a provider of operational support-system software and technology solutions to the wireless-telecommunications industry. e-Commerce is among his areas of expertise. For more information about RTPark, please visit www.uvirtpark.com, or its affiliated site, www.ecommerceisland.com. *IRS Circular 230 Notice: In compliance with U.S. Treasury regulations, please be advised that this article does not provide tax advice to any persons or entities and is not intended or written to be used, and cannot be used, for the purpose of: 1) avoiding tax penalties; or 2) promoting, marketing or recommending to another person any transaction or matter addressed herein.*

That is how the island of St. Croix, USVI, laid claim to the second-largest concentration of bandwidth in the Western Hemisphere, anchored by major submarine fiber landings and light-wave switching facilities of Global Crossing and AT&T. Global e-commerce relies on these facilities. Yet in the same way that you may not have realized the role Memphis plays in the delivery of your overnight letters, you may not have known of the role St. Croix plays in the digital commerce that engages you at home, in the car and in the office. (Incidentally, your last fill-up at the gas station might have relied on St. Croix, too: The second-largest refinery in the Western Hemisphere is located on the island.)

A LEGITIMATE ALTERNATIVE

With bona fides now suitably established, is it possible to actively leverage the USVI's fiber and bandwidth assets to deliver greater competitive and stakeholder advantage to the enterprise? Yes it is; an economic development program chartered in law by the USVI government, sanctioned under U.S. Treasury regulations and managed by the University of the Virgin Islands Research and Technology Park ("RTPark"), may be of particular interest to e-commerce and other knowledge-based businesses.

The RTPark offers an excellent example of how knowledge of the law — and creative and persistent efforts to use the law effectively — can generate opportunities and suggest creative business strategies. Working with law firm DLA Piper and others, the RTPark recently helped to achieve the recent implementation of permanent U.S. Treasury Department regulations clarifying source-income treatment for certain USVI-based knowledge-based businesses, facilitating e-commerce and software intellectual-property models — and up to 90% federal tax savings for income sourced in the USVI.

The USVI's economic-development programs have been established under law to improve economic diversity and provide opportunities for a better quality of life for residents,

continued on page 5

e-commerce LAW & STRATEGY®

EDITOR-IN-CHIEF Michael Lear-Olimpi
EDITORIAL DIRECTOR Wendy Kaplan Ampolsk
MANAGING EDITOR Steven Salkin, Esq.
MARKETING DIRECTOR Jeannine Kennedy
GRAPHIC DESIGNER Louis F. Bartella

BOARD OF EDITORS

JOHN BEARDWOOD Fasken Martineau
Toronto
JEFFREY P. CUNARD Debevoise & Plimpton
Washington, DC
WALTER A. EFFROSS American University
Washington, DC
D. REED FREEMAN JR. Claria Corp.
Washington, DC
ALAN L. FRIEL Kaye Scholer LLP
Los Angeles
ELIZABETH A. GAUDIO Nat'l Federation of Ind. Bus.
Legal Foundation
Washington, DC
PAUL R. GUPTA Mayer, Brown, Rowe & Maw
New York
THOMAS HEYMANN Heymann & Partner
Frankfurt, Germany
STANLEY P. JASKIEWICZ Spector Gadon & Rosen, P.C.
Philadelphia
PHILIPPA LAWSON Canadian Internet Policy and
Public Interest Clinic
Ottawa
EMILE LOZA Technology Law Group
Boise, ID
RONALD J. MANN Mitts Milavec
Philadelphia
OLIVERA MEDENICA Wahab & Medenica
New York
JULIAN S. MILLSTEIN Morrison & Foerster
New York
JEFFREY D. NEUBURGER Proskauer Rose
New York
EDWARD A. PISACRETA Holland & Knight
New York
LUIS SALAZAR Greenberg Traurig LLP
Miami
DR. KATHARINA SCHEJA Heymann & Partner
Frankfurt, Germany
J.T. WESTERMEIER, JR. Finnegan, Henderson, Farabow,
Garrett & Dunner LLP
Reston, VA
JOSEPH P. ZAMMIT Fulbright & Jaworski
New York

e-Commerce Law & Strategy® (ISSN 0747-8933) is published by Law Journal Newsletters, a division of Incisive Media. © 2009, Incisive US Properties, LLC. All rights reserved. No reproduction of any portion of this issue is allowed without written permission from the publisher. Phone: 877-256-2472
Editorial e-mail: steve.salkin@incisivemedia.com
Circulation e-mail: customercare@incisivemedia.com
Reprints e-mail: reprintscustomerservice@incisivemedia.com

The publisher of this newsletter is not engaged in rendering legal, accounting, financial, investment advisory or other professional services, and this publication is not meant to constitute legal, accounting, financial, investment advisory or other professional advice. If legal, financial, investment advisory or other professional assistance is required, the services of a competent professional person should be sought.

POSTMASTER: Send address changes to:
Incisive Media
120 Broadway, New York, NY 10271

Published Monthly by:
Law Journal Newsletters
1617 JFK Boulevard, Suite 1750, Philadelphia, PA 19103
www.ljnonline.com



A Touch of Gray

Romper Room Meets Web Design

By Stanley P. Jaskiewicz

No one enjoys clearing rights. Checking that you may use content (whether on your Web site, in a publication, or for a performance) and won't be sued over it takes time and effort. And, for e-commerce counsel clients, that means more money.

THERE ARE RULES

The rules governing content use have always been complex, long before the Internet. For instance, different types of intangible rights must be obtained, even for the same song or image — not only familiar rights such as:

- Text;
- Images;
- Photographs;
- Music; and
- Trademarks.

There are also hybrids when one type of right is embedded in another type, such as a photograph that includes a trademark. And additional rights must be obtained when images of individuals are included.

Even worse, owners of multiple rights often must be identified — and located, if they even can be found. For example, even if you want only to loop a few seconds of a single song, you need separate rights for:

- The lyrics;
- The score;
- A particular performance; and, today,

Stanley P. Jaskiewicz, a business lawyer, helps clients solve e-commerce, corporate, contract and technology-law problems, and is a member of *e-Commerce Law & Strategy's* Board of Editors. Reach him at the Philadelphia law firm of Spector Gaddon & Rosen P.C., at sjaskiewicz@lawsgr.com, or 215-241-8866. Mr. Jaskiewicz thanks his colleagues, **Timothy Szuhaj, Esq.**, and **Cheryl Kreiner** for their assistance in assembling links to the Web sites listed in "Links to Help e-Commerce Players Identify Rights Owners and Clear Rights," on page 8.

- Different types of recordings of that performance, as well as master rights of any music publishers.

E-COMMERCE COMPLICATES THE REGULAR RULES

Yet, applying those rules to using content on an e-commerce Web site is even more difficult because "commercial speech" remains an evolving area of the law. The legal rules for online content constantly evolve as copyright and other intellectual-property laws struggle to adjust "rights" to the stresses caused since digital technology redefined the many ways to "copy" content. For example, something as simple as cutting and pasting a desirable image found online may run afoul not only of the owner of the image, but also of the Web site operator who did obtain the content-usage rights properly and paid for a license to use the content, and of the artist who created it. In e-commerce, too, the particular look of content is critically important to brand image and market impression, and some vendors spend heavily to create extremely high-quality images so that their content can be properly displayed online — and therefore are prepared to spend heavily again to stop others from copying that image to sell similar or knockoff products.

But in trying to cut through all of this complexity, perhaps the legal rules of Web site design (at least in practice) become as simple as the schoolyard games that teach toddlers the importance of asking permission before acting, such as Mother May I? and Simon Says. In this changing technological and retailing landscape, Web designers must almost always be sure they have permission before using content, whether that content be:

- Software;
- Images;
- Artwork;
- Graphics;
- Music;
- Good old-fashioned text; or
- That which can safely be relied upon to include an exception to the permission requirement.

(**Editor's note:** For a list of Web sites where one can request permission for a variety of content, see, "Links to Help e-Commerce Players Identify Rights Owners and Clear Rights," on page 8. The list is not comprehensive, because there are too many possible rights owners from whom permission must be sought to cover all entities or people for every instance. A good basic resource on the mechanical process of clearing rights is *Getting Permission: How to License & Clear Copyrighted Materials Online and Off*, by Richard Stim, Esquire (Nolo Press, 2007).)

Of course, the same rules apply when publishing content offline, whether that content is to be published in a magazine, a book or video. But the convenience of right-clicking to copy and use electronic content seems to cause designers to forget that basic rule — and to forget to check the terms and conditions of the Web site from which the content was obtained, to be certain that use is permitted. For example, see the restrictions of Corbis.com, a well-known stock photo site, at http://pro.corbisimages.com/creative/terms/content/EULAs/Certified_EULA_US.pdf, which clarify that it licenses images solely for a specific "End Use," rather than for general publication or distribution. (Corbis.com, in contrast, also offers a "royalty free" license, but that applies only after payment of a flat fee, and then only for distribution to 10 or fewer users.) Obviously, these restrictions would not apply to content that the designer's firm already owns, either because it created it, employed the person who created it under a contract that assigned the rights to the content, or acquired or licensed it from a third party.

IT'S NOT ALWAYS

JUST BLACK AND WHITE

This "black and white" kindergarten rule to "ask first" has the advantage of simplicity — either you have the rights, or you don't. If you don't have the rights, you can't use the content — maybe. As with anything involving the law, there are gray areas, exceptions to complicate matters,

continued on page 4

Using Content

continued from page 3

when advance permission from the rights owner is not required. How else would attorneys remain fully employed?

For example, asking for permission isn't needed for content that the designer's firm already owns, either because it created it or because the firm employed the person who created it as mentioned earlier, such as under a contract that assigned the firm the rights to the content as a "work made for hire." Similarly, no additional permission is needed for content properly acquired or licensed from a third party. Other content may be used freely — and "for free" — such as content that has gone into the public domain. That situation occurs when prior rights have lapsed, or the creator chooses to make them available for others' use. But be careful — just as the law in general doesn't have a list of what you are permitted to do, there is no encyclopedia of public-domain works.

OTHER MEANS TO AN END

"Fair use" of another's content is also permitted, for "copying of copyrighted material done for a limited and 'transformative' purpose such as to comment upon, criticize or parody a copyrighted work." (**Editor's note:** For an overview of fair use and for particulars of the doctrine and application of fair use pertaining to copyright and to fair use in U.S. trademark law, see, http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-a.html; http://en.wikipedia.org/wiki/Fair_use; and [http://en.wikipedia.org/wiki/Fair_use_\(U.S._trademark_law\)](http://en.wikipedia.org/wiki/Fair_use_(U.S._trademark_law))).

In the absence of black and white rules, often what is "fair" differs depending on whether one is the rights owner or the person trying to use them without paying for that privilege. Finally, if you can't find anyone from whom to seek permission to use a work, even if you know the identity of that person, you have (and may use) a so-called "orphan work" (see, http://en.wikipedia.org/wiki/Orphan_works), which is an-

other common exception to the permission requirement (see, <http://copyright.columbia.edu/orphan-works>). Of course, unlike real children without parents, a work is an orphan only until its creator shows up, demanding royalties and damages. And it can be particularly frustrating when a particular work is desired, and you know the author, but can't locate the proper licensor — as recently occurred to me when I tried to assist a small nonprofit with locating the owner of an image widely available online at print sales sites, but could not find the owner of the licensing rights.

There are many reasons one might rationally prefer a "gray" solution, even if such an option is riskier than a clear black and white one.

In all those cases, unfortunately, the black and white permission requirement takes on a "touch of gray" (or "grey," the alternative spelling that those alternatives, The Grateful Dead, used in their song "A Touch of Grey"; see, <http://arts.ucsc.edu/Gdead/AGDL/touc.html>). Instead of asking for permission in advance, the designer must try to "get by" by using the content without permission, but also without the certainty (and legal defense) that publishers prefer to have when using content. The clarity of prior permission provides the defense against claims of infringement from the rights owner, and all the costs that inevitably come with such a lawsuit.

Still, there are many reasons one might rationally prefer a "gray" solution, even if such an option is riskier than a clear black and white one. The first is easy to understand: Free usage, with acceptable risk, costs less than paying for permission. Even before the current recession, avoiding a cost has always been a step to profitability, and this is the case especially now as publishers strive to develop an economic model for survival against the widespread availability of free content online.

Moreover, the risk of using rights without permission when the law concerning them is ambiguous, such as under the fair-use and public-domain exceptions, may be preferable to risking rejection from the rights owner by asking for permission — especially if the rights owner restricts use of its creations to avoid undesired association, whether to avoid damaging one's commercial value, or on the basis of political or ideological preference (see, www.cbsnews.com/stories/2006/02/26/sunday/main1346174.shtm). It may be a cliché, but there is tremendous folk wisdom (and canny legal advice) in the expression, "Never ask the rabbi if it's kosher."

DUE DILIGENCE

IN CLEARING RIGHTS

In addition, even if someone is willing to pay for proper content-use rights, it is not always easy to secure them. Cheryl Kreiner, the expert legal assistant in my office responsible for the often mechanical tasks of clearing rights, warns that it can frequently take a long time just to find the right person to ask, much less pose the correct question.

"Make sure you have enough time to get the license; you can't make this happen overnight, in a week or a month," Kreiner says. "Too many people are involved, *i.e.*, the songwriter(s), the artist, the record label, etc. Someone could be on vacation, on tour, or the responsibility for issuing the license could be delegated to someone new who doesn't know about you or your request. Keep in constant contact with everyone from whom you requested a license. And last, but not least, always keep your clients continuously informed regarding your progress" (or the lack of it, because of the very real possibility that when so many parties are involved, something will inevitably go askew).

Also, a party seeking rights permission must know precisely what use to request — simply stating a request to use content in "e-commerce" leaves open many technical questions that will affect the type

continued on page 7

CAN-SPAM Pre-empts California Spam Law

By Amanda Bronstad

A Los Angeles judge, ruling on a case of first impression, recently found that the federal CAN-SPAM Act pre-empts a California law designed to curb false and misleading commercial e-mails.

The May 4 ruling, which throws out a case claiming \$45 million in damages, is the first to address the preemption issue in California's state courts and could stymie future suits filed under the statute. *See, Hypertouch Inc. v. ValueClick, et al*, No. LC081000 (Cal. Sup. Ct., County of L.A.).

"This opinion has closed the door on lawsuits asserting contrived violations of the California statute where the plaintiff can't show actual intent to deceive or that any deception occurred," says Ashlie Beringer,

Amanda Bronstad is a reporter for *The Recorder*, an Incisive Media affiliate of *e-Commerce Law & Strategy*.

Corporate Frontier

continued from page 2

who are U.S. citizens. Certain tax incentives — such as those available through the RTPark — can be extended only if rigorous due diligence and compliance standards are met, and when these incentives are tied to investments that improve these residents' abilities to achieve and compete for opportunities that otherwise might truly move offshore. Operations in the USVI, including those in partnership with RTPark, are offshore only geographically, and then, not that far, really.

EXPLORING THE POSSIBILITIES

The USVI is an insular territory of the United States, and its residents are U.S. citizens. Economic development activities in the U.S. territories and possessions have been matters of particular governmental interest at the local and federal levels for decades. Over the past century, in fact, mechanisms have been established for living and conducting business in U.S. territories that are harmonized to federal law and provide for the

a partner in the Palo Alto, CA, office of Los Angeles-based Gibson, Dunn & Crutcher, who represents the defendant, ValueClick Inc.

The case was filed in Los Angeles Superior Court against ValueClick Inc., which manages online and e-mail advertising for clients including Wells Fargo & Co. and The Walt Disney Co. The plaintiff, Hypertouch Inc., an Internet service provider in Menlo Park, CA, alleged that its end users received 45,000 misleading e-mails from ValueClick in violation of a California Business & Professions Code section that provides \$1,000 in damages per e-mail — the most aggressive statute of its kind in the nation.

The 2004 CAN-SPAM Act ("Controlling the Assault of Non-Solicited Pornography and Marketing Act") imposes penalties against companies that send e-mails with false and misleading information on subject lines and headers. The CAN-SPAM Act pre-empts all state laws except those that prohibit false and deceptive information in the e-mails.

unique circumstances of territorial governance. Notably, territories enjoy certain flexibilities with respect to the assessment of certain taxes, vis-à-vis other states, especially where the territory's economic-development priorities are concerned.

For example, territorial taxpayers do not remit federal taxes to the U.S. Treasury, per se. Instead, those taxes are typically assessed under a "mirror code" system aligned to IRS procedures and forms, but remittances are made to the territorial revenue bureau instead of to the IRS. For the USVI, for instance, an individual taxpayer completes his or her annual tax return on Form 1040VI, which is essentially identical to Form 1040. Similarly, a corporate taxpayer completes Form 1120VI, instead of Form 1120.

This unique wrinkle in the assessment and collection of "federal" taxes at a territorial level has given rise to tax-incentive structures that can be extended to qualifying businesses that are instrumental in furthering a territory's specific economic-development objectives. In the case of

Federal judges have split over whether that pre-emption includes California's statute. Two federal district court decisions — one in 2007 and one in 2008 — found that the California statute was pre-empted by the CAN-SPAM Act. A third ruling, issued in April, found that the CAN-SPAM Act did not pre-empt the California statute.

"This judge held correctly that they must include a showing of the elements of fraud or deception in order to avoid the effect of CAN-SPAM," Beringer says.

Lawrence Riff, a partner in the Los Angeles office of Washington's Stepoe & Johnson, who represents Hypertouch, insists that the California statute falls under the CAN-SPAM Act's exception.

"Whereas the statute by its terms simply prohibits falsity or deception, the defendants say to survive the pre-emption what a spam plaintiff needs to plead and prove is all of the elements of common law fraud," he says.

Congress, Riff says, did not intend to require that.

—♦—

the USVI, the high concentration of backbone bandwidth (which arose, again, from the geographic obviousness of the region as well as the specific protections under federal law) led leaders from government, academia, and the private sector to create RTPark in 2002 and codify into law specific incentives directed at fostering the development of a robust technology sector in the USVI. In so doing, RTPark would help diversify the economy and alleviate the territory's historical dependency on tourism-related activities, create more globally competitive career options for residents and help to arrest a so-called brain drain that has been a growing area of concern for Caribbean territories and nations.

The RTPark's mission and mandate can be found at Chapters 34 and 43 of Title 17 of the Virgin Islands Code. For e-commerce companies and other knowledge-based businesses qualifying under the terms set forth in those chapters, a reduction in corporate income taxes of up to 90%, as well as other benefits and

continued on page 6

concessions, may be obtained for an initial 15-year term that is renewable under certain circumstances to a total of 30 years. Because the USVI is part of the United States, these incentives should not be confused with offshore reduced tax regimes, including those provided elsewhere in the Caribbean.

FEDERAL LAW HARMONIZATION

How are territorial incentives harmonized to federal law? To start with, these incentive structures are not new. Insular territories have for many years used tax incentives to achieve economic-development objectives, and this approach has been endorsed and supported at the federal level. Generally stated, income that is properly sourced in a territory is thus properly subject to assessment of tax by the territory.

However, the last 10 to 15 years have witnessed tremendous changes in personal and corporate mobility, and the emergence of less capital-intensive companies and industries. Businesses have become much more adaptive, agile and less tethered to a specific physical location or plant. Corporate structures have evolved, as well, and many businesses are now organized as flow-through entities that pass tax liability directly to stakeholders (*e.g.*, subchapter S corporations, partnerships, LLCs, LLPs and the like). As a result, where a business generates its income, maintains its operations or develops its products, have become questions of increasing concern for tax authorities. Refineries are easy to nail down; e-commerce companies are highly virtualized by the nature of the Internet.

Congress initially acted, through language added to the American Jobs Creation Act of 2004, to get its arms around the questions brought forward by this increasing virtualization of enterprise. At first, these actions effectively placed a stranglehold on economic-development initiatives in the territories, because of the uncertainties they created among existing and prospective participant beneficiaries. But clarifications issued by the U.S. Treasury Department in 2006 and 2008 did much to disperse the fog: Strict requirements for proving residency (generally, over 183 days per

year in a territory) came in 2006, followed by permanent income-sourcing guidance relevant to e-commerce and knowledge-based businesses in 2008.

Because the aforementioned tax incentives are fundamentally corporate incentives, individuals may participate only to the extent that: a) their claim is directly related to their stake in a qualifying business that happens to be structured as a flow-through entity; and b) they are bona fide residents of the territory.

PRIVATE PARTNERSHIP AND SUCCESS SCENARIOS

RTPark was instrumental in obtaining the key income-sourcing clarification from Treasury by commissioning attorney Eric Ryan, a partner at DLA Piper in Palo Alto, CA, to build a case based on existing federal tax law. Working with territorial government leaders, a case was successfully brought to the U.S. Treasury Department in 2006, and the resulting permanent Treasury guidance was published, effective April 9, 2008, in *Internal Revenue Bulletin 2008-20, T.D. 9391* (Section 937).

The Treasury income-sourcing guidance provides relevant examples, including for an application-service provider (*e.g.*, software as a service), and for software licensing where title is transferred in the territory. These examples demonstrate the harmonization of the territorial tax incentives to federal tax law, and facilitate e-commerce and software intellectual-property models — for qualifying businesses — in the USVI. This harmonization makes it possible for investors to proceed with greater confidence, retain and deploy capital to grow and enhance their businesses, and effectively co-invest in the development of a diversified economy in the USVI.

What business models might be attracted or suited to the USVI's tax-incentive structure, as vested in RTPark? Practically speaking, the answer is virtually any knowledge-based business seeking tier-1 global connectivity, e-commerce payment/transaction processing capabilities, and a location under the U.S. flag subject to U.S. law. Examples include:

- Software as a service (“SaaS”) for customer-relationship management, conferencing, human resources, Web analytics, accounting and related activities;

- Online gaming (however, Internet gambling and pornography are specifically proscribed);
- Digital media, including movies, photos, music and ringtones;
- Distance learning, telemedicine, online continuing education, curricula and tutorials;
- Subscription services (online research reports and newsletters);
- Online advertising and marketing;
- Online dating and matchmaking services; and
- Other activities requiring collaboration with university research and educational resources.

CONCLUSION

Founding Father Alexander Hamilton spent his formative years in St. Croix. Local business leaders recognized his potential and paid his way to New York so that he could complete his education. Hamilton is considered the architect of the U.S. financial system and his portrait is on the U.S. \$10 bill. There is, historically speaking, a certain obviousness about the role St. Croix has played as a hub of American commerce and finance.

Today, the marriage of a compelling tax-incentive structure — appropriate to e-commerce and harmonized to U.S. law — to significant backbone connectivity joining North, South and Central America to Europe, creates unique opportunities for competitive advantage. In these trying economic times, shouldn't corporations seek to preserve capital for redeployment in business? Shouldn't they seek to expand and increase shareholder value? Shouldn't they seek to mitigate risks by operating in jurisdictions under the U.S. flag — on U.S. soil — subject to U.S. federal law, with all of its incumbent protections for intellectual property and investment?

Perhaps the question boils down to something more basic; after all, knowledge-based businesses, and e-commerce companies, already rely on network transport via the USVI. So a better question for the CEO and for e-commerce counsel might be: Is more value to be gained from the USVI serving a passive, or an active, role in my business? The answer, in all likelihood, will be obvious.



Using Content

continued from page 4

of rights that must be obtained, and the cost of obtaining those particular rights, not to mention the legal questions about the desired scope of use for the rights being sought. For example:

- Will music on a marketing Web site also be used in companion campaigns in traditional media or in other marketing channels?
- Will the site be available for a limited time only, or will it remain online indefinitely?
- Will it be promoted domestically, or to a broader, even worldwide, audience?
- Focusing on just the Web site, how long will it operate?
- Will it be linked to other sites where the content may be displayed?

A specific, fully explained request will generate a response much more quickly than a broad, general one.

RIGHTS: A DEEP WELL

The multiplicity of rights for the same content also creates particular problems for designers creating content intended for use in multiple formats, as often occurs when creating a Web site that is part of a broader marketing campaign, and which is something in which e-commerce enterprises typically engage. As Kreiner notes, getting rights to music can involve the songwriter, the publisher, the performer, the record label and the owner of master rights to it all. Conceptual changes are easy to make for a single designer or marketer, but not if changing the Web site will require getting new or different rights; indeed, that will take more time than is available for the task. In fact, some previously obtained rights may no longer be accurate. Sometimes changes in the design will require people tasked with acquiring rights to seek entirely different rights, at potentially much different — and greater — cost. In the world of e-commerce, where changes can be published to the world seconds after they have been created, accommodating the timetables of the traditional licensing world will quickly clash with the work habits of those accustomed to

immediate implementation — especially, as Kreiner warns, if the people involved in scheduling steps in the e-commerce development process did not build in any time to hunt for rights owners.

Of course, not having time to clear rights is a better problem to have than the consequences of not paying attention to rights in the first place. A colleague once told me about a Web site that was created and used the music of a well-known performer. Senior executives loved the demo version, and asked how the rights had been obtained within the project's budget — which of course the designers had never realized they had to secure. At that point, well into the time and expense allotted for the project, the developer had little alternative to trying to secure those rights, regardless of the cost, or other limits on use, because the rest of the development had proceeded past the point where it could be redone.

Another rights-clearing challenge created by e-commerce is a modern variation on the “round peg into a square hole” problem. Frequently, those involved in clearing rights are not e-commerce attorneys, or even e-commerce site developers; instead, the personnel at the rights-owner or clearinghouse agency may be lower-level clerks seeking to pigeonhole each rights request into an established slot. While some aspects of e-commerce may well employ traditional methods, others taking advantage of the possibility for innovation made possible by Internet technologies may truly be creating “new slots.” In that case, the request may be priced too high, or just delayed while the clearinghouse tries to set the correct rate, and by doing so, holding back the whole project.

BETTER SAFE THAN OUT OF BUSINESS

However, despite all of these ways around getting rights, most e-commerce firms will still pursue them, whenever possible, and not just because the lawyers want such work. (In fact, the high-level, time-sensitive, value-added work derived from defending an infringement injunction will almost always be far

more profitable than the commodity work of routine advance licensing handled by legal assistants or clerical employees.) The upshot is that for a firm looking ahead to the long term, the risk of not getting rights, or relying on an aggressive interpretation of one of the doctrines described above, goes far beyond the relatively small cost of taking the content off the site upon receipt of a cease-and-desist letter. If the copyrighted content is tied into a broader campaign, and has been used in collateral materials, the idea of “relatively small cost” can take on a very real, very different, meaning and magnitude.

First, any lender or investor who looks at the site will certainly ask for a typical warranty that the owner has all rights to the content, and will inquire about for how long the rights have been secured. After all, why would a lender or investor risk a loan to a firm that does not have its marketing rights locked up indefinitely? Note, too, that this question would apply not just to content licensed from third parties, but also to “home-grown” content. As described above, content created by an independent contractor whose agreement did not properly assign rights to the work to the user will not satisfy the lender's attorney, who must evaluate the Web site as collateral (see, “Dressing Your e-Business Up For Success” in the June 2008 edition of *e-Commerce Law & Strategy*; subscribers can find it at www.ljnonline.com/issues/ljn_e-commerce/25_2/news/150577-1.html).

A potential investor will ask the same questions, because losing rights to use content could affect future earnings. However, a failure to obtain the correct rights the first time around not only calls into question the likelihood of getting the loan, but also the lender's evaluation of the prospective borrower's business skills for having made such a basic mistake. And the possibly doubt-fueled scrutiny may not end there. The same questions will be asked by most potential deal partners. Who wants to buy into a site that has a latent lawsuit lurking in the background — at least not without discounting the deal price

continued on page 8

Using Content

continued from page 7

by a multiple of the potential cost of the claim?

In all of these cases, therefore, the moral is clear: No matter how burdensome (or expensive or time-consuming) asking for rights may be, it will most likely be less than the cost of defending a rights-infringement action. Even worse, the entrepreneurs or established e-commerce venture may have to take down its site for repairs, with the attendant loss of business and costs of redesign, and the potentially devastating loss of goodwill (if any remains after the site must be changed under these circumstances).

DO IT RIGHT THE FIRST TIME

So what can a Web site developer do to avoid all this aggravation? Certainly, as Kreiner's advice makes clear, most of the clearance process can't be avoided. Just as in the schoolyard games referred to earlier in this article, advancing without asking permission will get you sent back, but with far worse consequences for your business or career than being last in the lunch line or being called "out" in a no-venture no-gain child's game. Therefore, leave plenty of time for the research process, and exhaustively consider all of the rights needed. Fortunately, because rights clearing is often done by legal assistants or clerks, it may simply be cheaper to hire someone who does it every day. I could read a book on how to replace my brakes, but I wouldn't want to bet my life on my ability to follow the instructions — nor should the principles and others in an e-commerce enterprise bet their professional life on how well they can handle what some people spend all their work time doing.

If you are designing a site from scratch, however, you can "pick your battles," and choose only content for which you don't need rights, or rights you can obtain cheaply. There are many sites online promising royalty-free material. You can also plan to rely solely on creation of your own content (as long as you obtain full rights from the artist or

continued on page 9

LINKS TO HELP E-COMMERCE PLAYERS IDENTIFY RIGHTS OWNERS AND CLEAR RIGHTS

1. U.S. Government Resources

Library of Congress Catalog Search: <http://catalog.loc.gov>
Copyright Office

The following three links connect to different pages at the U.S. Copyright Office (note difference between www.copyright.gov and www.copyright.com, the latter a reference in item number 3).

www.copyright.gov
www.copyright.gov/circs/circ1.pdf
www.copyright.gov/circs

2. Artist Help Publications

www.artisthelpnetwork.com/index.asp

3. Copyright Clearance Center. The following four links connect to different pages at the company Copyright.com.

www.copyright.com/readyimages
www.copyright.com/media/pdfs/prod-images.pdf
www.copyright.com/cc/viewPage.do?pageCode=bu12
www.copyright.com/cc/viewPage.do?pageCode=bu13

4. Illustrators

<http://portfolios.gag.org/pages/disciplines/associates.html>
www.graphicartistsguild.org/faq

5. National Writers Union

www.nwu.org/nwu/?cmd=showPage&page_id=1.2.13.5

6. Photos

www.photographersindex.com
www.arsny.com
www.apanational.com/index.cfm?
www.asmp.org

7. Music

ASCAP (www.ascap.com)
BMI (www.bmi.com)
SESAC (www.sesac.com)

8. Master Rights Owners

EMI Music North America (www.emimusicpub.com/worldwide/index.html)
Sony/BMG Music Entertainment (www.sonybmg.com/licensing/contact)
Universal Music Enterprises (www.universalfilmmandtvmusic.com/default.asp)
Warner Music Group (<https://www.wmgmusiclicensing.com/WMGML/LogIn.aspx?ReturnUrl=/WMGML/home.aspx>)

Note: There are also many independent labels that may hold rights to a particular song.

9. Research on Music Ownership

www.billboard.com
www.allmusic.com

10. Rights Clearinghouses

www.arsny.com
<http://info.icopyright.com>

11. Royalty-Free Content (including public domain)

http://commons.wikimedia.org/wiki/ Commons: Reusing_content_outside_Wikimedia
www.public-domain-photos.com
www.mrssmoke.onsugar.com/3152550

12. "Locating Public Domain Images," by Lorrie Knight, from the *C & RL News of the Association of College & Research Libraries*. www.ala.org/ala/mgrps/divs/acrl/publications/crlnews/1998/jan/locatingpublic.cfm

— Stanley P. Jaskiewicz, with assistance from Timothy Szubaj, Esq., and Cheryl Kreiner, of Spector Gadon & Rosen, Philadelphia.

Using Content

continued from page 8

creator). Again, be sure to read the licensing terms for clip art, whether on a disk or online; something that is free for personal use may bear a charge for commercial or mass use.

If you want to be more daring, orphan works are also available — but be prepared to demonstrate the reasonableness of your search for the owner if its lawyer sends you a cease-and-desist letter. The lenders and investors mentioned earlier in this article won't be interested in your cost-benefit analysis if it proves to be

wrong. The same balancing applies to what you believe to be in the public domain: in some fields, everything reasonably needed has gone into the public domain. And be even more careful when using images of persons, especially famous ones — not only do they likely control contractual rights to use of their likeness, but common law also gives them rights to the exploitation of their persona.

The crux of it is that when planning an e-commerce Web site, you should apply to the current situation the lessons learned that you may have used with adaptation for the march of time, even if inherently, through

your life since you were five years old (your kindergarten rules): Ask permission first, if you can get it; if you can't, then you must become familiar with the rules for living with “a touch of gray” that apply to instances in which you can use the content of another person without express prior permission. Because the Internet is not kindergarten (notwithstanding the kindergarten-like online behavior of many people), and, more often than not, with the help of those rules, “you will get by,” as the aforementioned song says.



Stimulus Funds

continued from page 1

AN E-ASY WAY TO PREVENT ERRORS

For decades, hospitals and other medical service providers have been enticed by the prospect of establishing electronic health-record systems to improve the efficiency of their medical care and to reduce medical errors. Automating the health-record process has the potential to provide a host of benefits, most notably by reducing medical errors. For example, as many as 98,000 Americans each year are prescribed medications to which they are allergic. Electronic medical record (“EMR”) systems could significantly reduce this number. A much-cited 2005 Rand Corp. study of the use of medical-record automation found that a savings of \$77 billion annually could be realized. However, it is widely believed that the cost of implementing electronic health-record systems is responsible for low adoption rates.

Such systems are, ideally, capable of creating, maintaining, transmitting, receiving and allowing health

care providers access to information about patients via electronic records. From the beginning, besides reluctance among many older physicians to adopt technology, the medical and health care industries have stated that some sort of financial assistance or incentive to purchase and implement the software would allow them to tie together all medical records into an electronic health-record system. The economic-recovery bill seems to be the beginning of an answer to their requests.

GETTING FUNDS TO GET AN EMR

The American Recovery and Reinvestment Act of 2009 (the “Act”) contains a measure that includes approximately \$20 billion to modernize medical-records programs and specifically authorizes expenditures to improve electronic medical records. The health measures are part of the sweeping \$825 billion bill that Congress hoped would help lift the nation out of the economic recession. The Act allocates \$44,000 in payments to medical practices that adopt a certified EMR system. (EMR systems are also known as electronic health records (“EHRs”).)

The Act also allows hospitals that have qualifying systems to receive base payments of \$2 million each, with payments adjusted up or down, based on the number of the facilities' patient discharges, and how many Medicare and Medicaid patients they treat. The Act calls for the Department of Health and

Human Services (“HHS”) to promulgate payment rules, certification standards or definitions of key terms such as “meaningful use,” by the end of the year. Thus, the terms of precisely how hospitals and other providers will qualify under the Act will provide guidance.

To qualify for the \$44,000 payment, physicians must implement and use a certified EMR in a meaningful way before Jan. 1, 2011. Assuming the physicians qualify, payments will arrive over five years. The first-year payment is \$18,000, followed by \$12,000, \$8,000, \$4,000, and finally, \$2,000.

The \$44,000 payment is actually worth more than the nominally stated disbursement because physicians who do not adopt certified EMR systems will be penalized through a reduction in Medicare payments by 1% for the first year, followed by 2% and 3% reductions in subsequent years. In particular, the Act also calls for health care organizations that have not adopted EMR systems by 2015 to be penalized. They will lose 1% of the Medicare/Medicaid reimbursements they would otherwise receive. That penalty increases to 2% deducted in 2016, and to 3% in 2017 and afterward.

continued on page 12

The publisher of this newsletter is not engaged in rendering legal, accounting, financial, investment advisory or other professional services, and this publication is not meant to constitute legal, accounting, financial, investment advisory or other professional advice. If legal, financial, investment advisory or other professional assistance is required, the services of a competent professional person should be sought.

Jonathan Bick is of counsel to Brach Eichler of Roseland, NJ, and is an adjunct professor of Internet law at Pace Law School and Rutgers Law School. He is also the author of *101 Things You Need To Know About Internet Law* (Random House 2000). He can be reached at bickj@bicklaw.com.

e-COMMERCE NOTES

FTC ISSUES OVER \$12 MILLION IN REDRESS CHECKS TO VICTIMS OF '90 CREDIT FRAUD

The Federal Trade Commission ("FTC") announced last month that it had, through its claims administrator, mailed more than 400,000 checks totaling more than \$12 million to consumers identified as victims of an illegal credit-card billing scam operated by J.K. Publications and other defendants.

The payments follow a 2000 ruling that the defendants allegedly made millions of dollars worth of illegal charges to credit and debit cards for subscriptions to Web sites, in part by accessing consumers' personal financial information through a database to which the companies subscribed.

The federal court for the Northern District of California found in 2000 that the defendants had racked up \$37,566,577 — minus legitimate or unaccounted-for alleged charges exceeding \$43 million — and ordered the FTC to provide restitution to the injured consumers in the most feasible manner.

The FTC says the redress checks are the result of a lawsuit the FTC filed in 1999. The defendants' records obtained during litigation contained only credit and debit card numbers. Under instructions from the court, credit reporting agencies and banks provided the FTC with the names and addresses associated with the card numbers as of the date of the charges. The FTC's claims administrator mailed checks to those consumers.

Most of the illegal billing dates back to 1998, the government says in a posting on the FTC's Web site (www.ftc.gov). Substantial time passed between the court's judgment and the issuance of these checks because the defendants moved millions of dollars of their ill-gotten funds offshore, and it took significant time and effort to locate and repatriate the fraudulently obtained money, the FTC says.

As part of its ongoing effort to educate the public on consumer-pro-

tection matters, the FTC states in its press release on the payments that recipients of the consumer-redress checks can cash them directly. The FTC emphasizes that it never requires payment of money up front, or the provision of additional information, before consumers cash redress checks issued to them.

FTC TELLS THE HOUSE ABOUT ID-THEFT EFFORTS

The Federal Trade Commission ("FTC") last month described its comprehensive efforts to combat identity theft before the U.S. House Subcommittee on Information Policy, Census, and National Archives of the Committee on Oversight and Government Reform.

The FTC also recommended legislative remedies to enhance the effectiveness of these efforts, according to a news release on the agency's Web site (www.ftc.gov).

The testimony, presented by Betsy Broder, assistant director of the FTC's Division of Privacy and Identity Protection, highlighted the agency's leadership role in developing a national strategy to combat identity theft as part of the President's Identity Theft Task Force.

The Task Force issued 31 recommendations that promoted an enhanced data-security culture in the public and private sectors, launched victim assistance initiatives, and improved law enforcement's ability to pursue and punish identity thieves.

The FTC's testimony recommended that to help prevent identity theft, Congress should establish data-security standards across the private sector requiring all organizations that hold sensitive consumer data to take reasonable measures to safeguard it, and to notify consumers when the security of their information has been breached. In addition, the Commission has asked Congress for authority to seek civil penalties in data-security cases and for legislation that would help reduce the unnecessary use and display of Social Security numbers.

The FTC testimony described the agency's efforts to keep sensitive information out of the hands of identity thieves by working to ensure that those who maintain such information adequately protect it.

The agency told the Subcommittee that since 2001, the FTC has brought 26 law-enforcement actions against businesses that failed to implement reasonable security measures to protect sensitive consumer data.

The Commission says its enforcers believe that these aggressive law-enforcement efforts have helped make the business sector sensitive to the importance of data security and motivated business owners to devote more attention and resources to protecting consumers' data.

The agency notes, too, that it shares consumer complaints with more than 1,700 law-enforcement agencies through the Consumer Sentinel Network to facilitate criminal prosecution of identity thieves.

The testimony also discussed the Commission's direct assistance to ID-theft victims, such as online resources at www.ftc.gov/idtheft, and a toll-free hotline for victims, 1-877-IDTHEFT, which assisted more than 300,000 victims in 2008 alone.

The testimony outlined how these resources guide victims to limit the damage and restore their identities.

According to the FTC testimony, the agency's efforts to educate consumers also include:

- Disseminating English- and Spanish-language materials directly to consumers;
- Working with organizations to help inform their members, constituencies, and employees; and
- Creating a multimedia Web site, OnGuard Online, with tips on safe online computing. For businesses — especially small businesses — the Commission has created a brochure and online tutorial on information security and has hosted regional data-security workshops.

continued on page 11

e-Commerce Notes

continued from page 10

The Commission also has worked to implement the identity-theft provisions of the Fair and Accurate Credit Transactions Act ("FACT Act"). For example, the FACT Act gives consumers the right to receive free annual credit reports so that they can spot signs of identity theft. The FTC has enforced this right by bringing two actions against companies offering so-called "free" credit reports that were tied to the purchase of a credit-monitoring service.

The Commission vote authorizing presentation of the testimony was 4-0.

FTC MISSION STATUTES INVOLVING ONLINE COMMERCE

As part of its mission to keep subscribing counsel informed about laws that have bearing on e-commerce or consumer access to business via the Internet, *e-Commerce Law & Strategy* offers the information below on legal resources critically important to the Federal Trade Commission's primary missions of regulating business competition and protecting consumers from fraud.

Federal Trade Commission Act (15 U.S.C. §§41-58, as amended). Under this Act, the Commission is empowered, among other things, to: 1) prevent unfair methods of competition, and unfair or deceptive acts or practices in or affecting commerce; 2) seek monetary redress and other relief for conduct injurious to consumers; 3) prescribe trade regulation rules defining with specificity acts or practices that are unfair or deceptive, and establishing requirements designed to prevent such acts or practices; 4) conduct investigations relating to the organization, business, practices, and management of entities engaged in commerce; and 5) make reports and legislative recommendations to Congress.

Lanham Trademark Act (15 U.S.C. §§1051-1127, as amended). Section 14 of this Act (15 U.S.C. §1064) authorizes the Commission, under certain specified conditions, to apply to the Patent and Trademark Office for

the cancellation of registered trademarks.

Fairness to Contact Lens Consumers Act (15 U.S.C. §§7601-7610). This Act provides for the availability of contact lens prescriptions to patients and authorizes the FTC to prescribe rules to implement the Act (codified at 16 C.F.R. Part 315). The Act also requires the FTC to study the strength of competition in the sale of prescription contact lenses and to report its findings to Congress.

U.S. Safe Web Act (Pub. L. No. 109-455, codified to the FTC Act, 15 U.S.C. §§41 *et seq.*). This Act provides the FTC with a number of tools to improve enforcement regarding fraudulent spam, spyware, misleading advertising, privacy and security breaches, and other consumer protection matters, particularly those with an international dimension. Among other things, the Act allows increased cooperation with foreign law-enforcement authorities through confidential information sharing, provision of investigative assistance, and enhanced staff exchanges. In certain limited circumstances it enables the FTC to obtain information in domestic or foreign consumer protection matters from third parties without tipping off investigative targets.

Energy Independence and Security Act of 2007 (Pub. L. No. 110-140; 121 Stat. 1492). Section 811 of this Act prohibits any manipulative or deceptive device or contrivance in connection with the wholesale purchase or sale of crude oil, gasoline, or other petroleum distillate in contravention of rules or regulations the Commission may prescribe. Section 205 of the Act requires the Commission to issue rules for the labeling of biodiesel or biodiesel blend fuel sold at retail. Title III of the Act amends the Energy Policy and Conservation Act, providing for Commission rule-making in specified circumstances regarding energy efficiency labeling for certain heating and cooling equipment, lamps and lighting, consumer electronic products, and other consumer products as appropriate.

For more information, go to the Commission's Web site, www.ftc.gov.

FIRM WEB SITE RECEIVES ABA BRANDING ACCOLADE

Baker Hostetler's Web site was recognized this spring for its branding presence in the article, "Law Firm Websites That Work," which was published in the April 2009 edition of the *ABA Journal*, the firm reports in a news release on its Web site.

Several experts in "Internet presence" were asked to recommend Web sites they feel work well, and Burkey Belser, president of Greenfield/Belser, a professional-services marketing firm based in Washington, DC, selected Baker Hostetler's Web site for its branding effort.

Firms that focus on "traditional" law through "traditional" methods can benefit from a strong, identifiable Internet presence with easy-to-use, and useful, services, online-branding experts say. e-Commerce counsel likely can bring in more e-focused clients with a strong brand on the Web.

"It's almost impossible to find law firm Web sites that effectively succeed in the all-important job of branding the firm — creating a distinct identity based on a promise of value that is different from any other," Belser says. "My job was to discover an exemplar of effective branding. I'm giving the nod to Baker & Hostetler."

Belser offered the following observations about the Baker Hostetler site, pinning those observations to what he called his firm's "three rules of an effective site":

1. Have a purpose. What do you want the reader to do?
2. Create a dialogue with the reader.
3. Position yourself as important, confident and a leader.

Belser explains in a statement on Baker Hostetler's Web site that this goal is accomplished, in part, with a distinct market position on a law firm's home page: "Counsel to market leaders."

DISCOVERY ORGANIZATION LAUNCHES JOB PROJECT

In May, the Electronic Discovery Reference Model ("EDRM," www.edrm.net), begun in 2005 to establish standards in electronic discovery,

continued on page 12

e-Commerce Notes

continued from page 11

launched another intra-Model effort, the The Jobs Project.

e-Discovery is a matter of increasing importance to all enterprises, including — and, in many ways, especially for — e-commerce businesses because of the way they operate, and collect, store and move data: electronically.

Principles George Socha and Tom Gelbmann say, in a column for Incisive Media's *Law Technology News*,

Stimulus Funds

continued from page 9

CERTIFICATION, COMPLIANCE AND MORE

The Act, however, does not explicitly state what constitutes a "certified" EMR system. The Act also does not have language that links EMR-system use with success measurements, goals or outcomes to improve quality or reduce costs, or both. The Act does, however, require Medicare and Medicaid physicians to use "qualified" EMR systems and to employ them in "meaningful ways" to qualify for the incentives. Traditionally, *certification* simply means *substantial compliance*. For the purposes of EMRs, substantial compliance means implementing one of a variety of widely advertised EMR-software systems, such as that sold by General Electric; such software systems typically have a startup cost of \$7,500, but some cost as much as \$100,000.

In addition to the startup cost, there are other ongoing costs associated with any software system, such as maintenance fees. These are usually about 15% of the purchase price and are due annually. Training and implementation may also cost money.

In short, failure to apply for the \$44,000 incentive fee may be tantamount to leaving money on the table. This is particularly true when some EMR-system vendors are willing to assist their customers collect the incentive payment.

that they hope to address three problems in the area of e-discovery positions. These are:

- Companies aren't sure how to create e-discovery jobs that meet anticipated goals, or how to describe these jobs.
- Candidates don't fit the job bill. Also, people hiring don't always understand how to appropriately assess candidates, and candidates don't comprehend what the positions involve.
- Turnover is high.

Medical practices that adopt an EMR system should contractually require their EMR-system vendors to assist the practice in collecting the incentive payments. Medical practices that adopt an EMR system should also have the EMR-system vendor warrant that the EMR system will qualify the practice for the incentive payment.

Because time is of the essence for the avoidance of penalties through a reduction in Medicare payments, the contract for the EMR system should address the implementation of the EMR system in a meaningful way. Since a quantifiable amount of money may be forfeited if implementation of an EMR system is delayed, vendor indemnification or penalty clauses should be considered.

Alternatively, the medical practice might consider securing an insurance policy to compensate it in the event of the assessment of penalties through a reduction in Medicare payments. Because the penalty is easily quantified, insurance firms offering business-interruption insurance are normally willing to offer a policy to address the adverse effects of a delayed software implementation.

CONSIDER WORKING WITH HOSPITALS

Since federal anti-kickback rules that had prohibited hospitals from providing any direct financial support to physicians' offices to buy EMR systems have been eased, medical

The model seeks to address these problems with a frame for assessing and addressing personnel issues relevant to pre-discovery and discovery by using real scenarios.

They want to create a guide like the EDRM Search Guide.

The Jobs Project is neither a jobs clearinghouse nor a substitute for job-creators' expertise and judgment, Socha and Gelbmann write.

Find more about the EDRM and its projects at www.edrm.net/index.php.



practices should also consider asking hospitals for help in providing funding for electronic medical records. Many hospitals work collaboratively with physician practices and typically have more advanced EMR resources than most physician groups, and so they are likely to be willing, and able, to help their physicians get EMRs.

Hospitals may help physician groups in other ways, too; in particular, hospitals may help physician groups by reducing the uncertainty about which system the physicians should select to avoid wasting the stimulus payment. Horror stories abound from the implementation of an incompatible EMR system, and the practices that received the ill-fated selection or faulty implementation having to start over again.

Also, hospitals associated with physician groups may help overcome another barrier to the proper use of the stimulus money — by helping them understand how to take advantage of an EMR system. Hospitals typically lead physician groups in the successful implementation of EMR systems, so hospitals can show physician groups how EMRs can make their practices more efficient.



Follow Us on
TWITTER!
<http://twitter.com/stevesalkin>

To order this newsletter, call:
1-877-256-2472

On the Web at:
www.ljnonline.com