

**West LegalEdcenter
September 7, 2011**



**Breakneck Speed: 10 Hot Topics on
Internet and Privacy Law**

**Nicole Haaning, Dorsey & Whitney
Melissa Krasnow, Dorsey & Whitney
Jamie Nafziger, Dorsey & Whitney
Sharon Scharf, Marsh**

Breaches

- **Breaches and incidents frequently occur, are reported and publicized by the media and on the internet**
- **Legal issues and business considerations**
- **Data crosses country borders**

State breach notification laws

- **Cover personal information, meaning name, plus any of:**
 - **social security number**
 - **driver's license number**
 - **financial account information (e.g., credit card, bank account, etc.)**
 - **in some cases, health information**

State breach notification laws

- **Notification an entity must make for breach of personal information to affected state residents and, in some cases:**
 - state attorney generals
 - state regulators
 - credit reporting agencies
- **Amendments to state breach notification laws**

Massachusetts privacy regulation

- **Covers any entity (regardless of whether in Massachusetts) with access to Massachusetts resident personal information**
- **Written information security program (WISP) is required**
- **Reporting a breach to the Massachusetts attorney general (which is required under the Massachusetts breach notification law) could trigger an investigation of a reporting entity, including that the entity submit its WISP for review**
- **2011 Massachusetts attorney general privacy enforcement actions**

Federal HIPAA / HITECH Act breach notification

- **Applies to covered entities and business associates**
- **Covered entity means (i) health plan, (ii) health care clearinghouse or (iii) health care provider**
- **Business associate that (i) on behalf of a covered entity, performs activity involving use or disclosure of individually identifiable health information or (ii) provides legal, actuarial, accounting, consulting, management, administrative, accreditation or financial services for the covered entity involving the disclosure of individually identifiable health information from the covered entity to the person**

Federal HIPAA / HITECH Act breach notification

- **Protected health information means individually identifiable health information relating to health care treatment, a health condition or payment for the provision of health care**
- **Covered entity notification to each individual, U.S. Department of Health and Human Services (if breach involves more than 500 individuals) and prominent media outlet (if breach involves more than 500 residents of state or jurisdiction)**
- **Business associate notification to covered entity**



Privacy, Computer, and Network Security

Sharon Scharf
sharon.k.scharf@marsh.com

What are the risks?

Privacy, computer, and network security are not just Internet issues.

- Any entity that transacts business using:
 - a computer network
 - confidential information is at risk

The question is no longer “if” you will experience a privacy or data breach, but “when.”

The risks all companies face:

- Legal liability to others for computer security breaches
- Legal liability to others for privacy breaches
- Regulatory actions and scrutiny
- Loss or damage to data/information
- Loss of revenue due to a computer attack
- Extra expense to recover/respond to a computer attack
- Loss or damage to reputation
- Cyber-extortion

Network Security aka Cyber Coverage: A Brief History

2000

Limited marketplace

Stand alone option only

Painful underwriting

No coverage for internal acts

Tied to a failure of your network security

Third party coverage trigger was a lawsuit

2011

Over 10 primary carriers

Ability to integrate with E&O

Streamlined

Contemplates all acts

Failure to safeguard information

Loss of information is trigger

Network Security aka Cyber Coverage: A Brief History

2000

No coverage for acts of vendors

No coverage for statutory and loss mitigation coverage

No coverage for regulatory fines and penalties

No loss control services

Business interruption coverage trigger is a failure of network security

2011

Coverage extends to information holders

Covered

Covered





Provided



Coverage can extend to system failure

Network Security and Privacy Insurance Overview



- **Network Security Liability**
- **Privacy Liability**
- **Crisis Management and Identity Theft Response Fund**
- **Cyber Extortion**
- **Network Business Interruption**
- **Data Asset Protection**



What is Network Security/Privacy Insurance?

-  **Network Security Liability:** Liability to a third party as a result of a failure of network security to prevent or mitigate a computer attack, whether that attack originated internally or externally.
-  **Privacy Liability:** Liability to a third party as a result of an unauthorized disclosure of confidential information in your care, custody or control and/or a violation of privacy regulations—includes vicarious liability for actions of vendors to whom you have entrusted confidential information.
Note: Coverage for Network Security and Privacy Liability requires no negligence on the part of the insured and provides coverage for the intentional acts of insured's employees.
-  **Crisis Management and Identity Theft Response Fund:** Expenses to comply with privacy regulations, such as communication to and privacy response services for affected individuals—this also includes expenses incurred in retaining a crisis management firm for the purpose of protecting/restoring reputation as a result of the actual or alleged violation of privacy regulations as well as forensic investigation expenses.
-  **Cyber Extortion:** Ransom and investigative expenses associated with a threatened computer attack or privacy breach.

 = Recommended coverage  = Generally considered optional coverage

What is Network Security/Privacy Insurance?

-  **Network Business Interruption:** Reimbursement of loss of income and/or extra expense resulting from an interruption or suspension of your computer system due to a failure of network security or system failure.
Note: New trigger: system outage/failure of technology.
-  **Data Asset Protection:** Costs to recollect, restore, or recreate electronic data, software or other applications that have been altered, corrupted, destroyed, deleted, or damaged by a computer attack.

 = Recommended coverage  = Generally considered optional coverage

Typical Insurance Policy Exclusions

- **Violations of certain types of intellectual property rights**
- **Products liability, false advertising**
- **Violation of anti-spam, blast-fax, collection practices, and similar laws**
- **Misappropriation of trade secrets by or with the active assistance of current or former senior employees**
- **Infrastructure failure, unless caused by the negligence of insured**
- **Inability to use, performance, development, expiration, or withdrawal of support of certain technology products or software**
- **Content created by third parties for posting and storage on the insured's websites**

Coverage Overview With Examples and Insurance Market Capacity

Coverage	Example	Limit of Liability	Retention
Network Security Liability	Hacking, virus transfer	Up to \$350,000,000	\$25,000 and up
Privacy Liability	Customer information breach	Up to \$350,000,000	\$25,000 and up
Privacy Breach Notification Costs	State privacy laws require notification	Up to \$70,000,000 or 10,000,000 records	Ranges from NIL and up
Crisis Management and Identity Theft Response Coverage	Credit monitoring and forensics	Up to \$10,000,000	Ranges from NIL and up
Data Asset Protection	Rebuild your damaged data from computer attack	Up to \$100,000,000	\$25,000 and up
Network Business Interruption	Loss of revenue due to computer attack	Up to \$100,000,000	A combination of the greater of \$25,000 + or 8 to 12 hours
Cyber Extortion	Ransom	Up to \$350,000,000	Ranges from NIL and up
Defense Costs/Fines and Penalties for Regulatory Actions	FTC or AG claims for privacy breach	Up to \$35,000,000	Ranges from NIL and up

Legal Disclaimer

This information is not intended to be taken as advice regarding any individual situation and should not be relied upon as such. Statements concerning tax, accounting and/or legal matters are general observations based solely on our experience as insurance brokers and risk consultants and should not be relied on as legal, tax or accounting advice. You should contact your legal, accounting, tax and other advisors regarding specific coverage and other issues. The information contained in this publication is based on sources we believe reliable but we make no representation or warranty as to its accuracy. All insurance coverage is subject to the terms, conditions, and exclusions of the applicable individual policies. Marsh cannot provide any assurance that insurance can be obtained for any particular client or for any particular risk. Marsh makes no representations or warranties, expressed or implied, concerning the application of policy wordings or the financial condition or solvency of insurers or re-insurers.

The hypothetical case studies contained herein are for illustrative purposes only and should not be relied upon as governing any specific facts or circumstances. All policy terms, conditions, limits, and exclusions are subject to individual underwriting review and are subject to change. Marsh cannot provide any assurance that insurance can be obtained for any particular client or for any particular risk. The hypothetical claims scenarios contained herein are for illustrative purposes only and should not be relied upon as governing any specific facts or circumstances. Actual claims are governed by the specific policy terms, conditions, limits, and exclusions and are subject to individual claims review by applicable insurer representatives.

This document or any portion of the information it contains may not be copied or reproduced in any form without the permission of Marsh Inc., except that clients of any of the companies of Marsh & McLennan Companies need not obtain such permission when using this report for their internal purposes so long as this page is included with all such copies or reproductions.

Marsh is part of the family of Marsh & McLennan Companies, including Guy Carpenter, Mercer, and the Oliver Wyman Group (including Lippincott and NERA Economic Consulting).

Copyright 2011 Marsh Inc. All rights reserved.

Privacy developments

- **Federal Trade Commission 2010 preliminary report on privacy is anticipated to be finalized by year-end 2011**
- **FTC is revisiting the Children's Online Privacy Protection Act and the Green Guides**
 - **FTC issued proposed revisions to the Green Guides in late 2010**

Privacy developments

- **Department of Commerce green papers in 2010 and 2011**
- **White House cybersecurity proposal in 2011**

Mobile Devices: New Uses in Retail

- Quick response codes
- Shelf-edge TVs (NFC in next generation)
- In-store wireless networks
- Shopping apps
- Increased consumer transparency



iPhone Screenshots



New Functionalities of Smartphones

- **Credit card reader**
 - Square



- **Mobile payments/digital wallet**
 - Near Field Communication (NFC)
 - Internet companies
 - Google Wallet
 - Zong (eBay/PayPal)
 - Banks
 - In2Pay pilot programs
 - Credit card companies



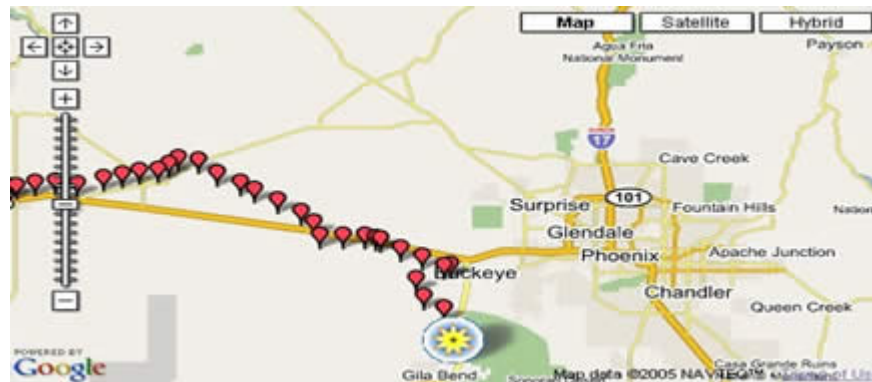
Mobile Devices: Apps and Privacy

- Your employees can be tracked
- *Wall Street Journal* article in Dec. 2010
- Recent study of 1,400 iPhone apps
 - **>50% transmitted device ID**
 - **Device ID can be linked to Facebook or Google and can determine user name**
 - **36 tracked device location**
 - **5 mined data from user address book**
 - **Source: *PiOS: Detecting Privacy Leaks in iOS Applications* (Feb. 2011)**
- **Only 19% of top 340 mobile apps contain link to privacy policy (*TRUSTe/Harris Interactive, April 2011*)**



Mobile Devices: Apps and Privacy

- ***In re iPhone Application Litigation Class Action***
- **Allegations include**
 - **Unique Device Identifier & browsing history**
 - **No way to block visibility to app developers**
 - **App developers sell dossiers of info about user searches tied to UDID to tracking companies**
 - **Combining info can lead to effective real-time tracking of user location and activity**
- **Motion to dismiss pending (filed June 2011)**
- **Similar cases pending against LinkedIn and Google**



Massachusetts privacy regulation

- **Requires written information security program mandating encryption of personal information transmitted wirelessly and stored on portable devices**
- **Revisit applicable entity policies (e.g., technology and electronic communications):**
 - **Entity access to and monitoring of employee-owned devices**
 - **Applicability to entity and employee-owned mobile devices**

Mobile Devices: What You Can do to Protect Your Entity

- **Before you offer an app or select a mobile payment system, work with legal to develop privacy policy and practices to minimize liability risk**
- **If you choose to participate in a third-party apps' service, conduct due diligence on its privacy practices**
- **Consider confidentiality concerns in connection with employee mobile device and app usage**
- **Make careful decisions about whether to connect employee-owned devices to your network**
- **Before launching text messaging capability, involve legal early in this heavily regulated and litigated area**
- **Be aware of potential pitfalls regarding commercial messages conveyed by email, text messaging, social media, etc.**

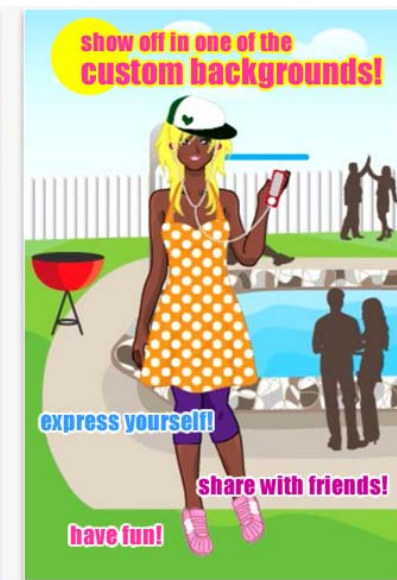
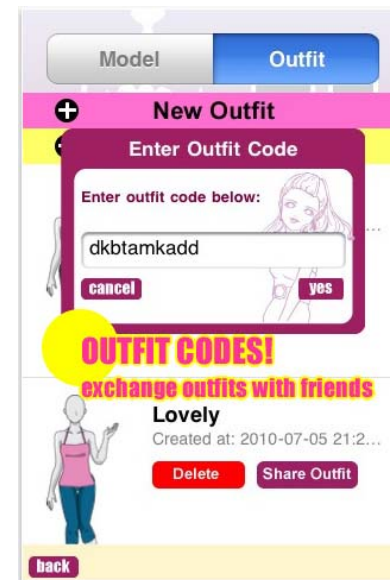


Online Advertising: Children's Online Privacy Protection Act

- **Websites designed for kids or**
- **General audience website that collects info from kids under 13**
- **Individually identifiable information about a child**
- **Verifiable parental consent before collection**

Children's Online Privacy Protection Act

- *W3 Innovations* (August 2011)
- First FTC case re mobile apps
- Apps and blog resulted in company collecting 30K email addresses and 600 full names from children without following COPPA
- \$50K penalty; delete info collected; comply with COPPA in future
- Warning to other app providers



Children's Online Privacy Protection Act

- *Playdom* (2011)
- Disney company offering multi-player games
- Policy – prohibit children under 13 from posting info online
- Violated own policy – allowed posting of PI by kids under 13
- Did not obtain parental consent before collecting
- Policy OK; practice not OK
- \$3M penalty to FTC



Children's Online Privacy Protection Act: What You Can do to Protect Your Entity

- **If collecting personal info from users online or allowing free-form posting by users online**
- **Make sure privacy policy and practices comply with COPPA**
- **Monitor revisions to COPPA underway**



Online Endorsement Issues

- **Federal Trade Commission endorsement guidelines**
- **People positively discussing a product or service online must disclose if paid or get a free product or service**
- **Advertisers are liable for a “paid” blogger’s false statements**
- **Advertisers have a duty to instruct “paid” blogger on appropriate notice he or she must give about payment and on the need for truthfulness and substantiation of claims**
- **Advertisers must monitor the “paid” blogger’s compliance with endorsement rules**
- **Bloggers are liable for false statements they make about advertiser’s products or services**
- **If employee posts anything positive online about employer’s products or services, fact of employment must be disclosed**
- **If members of the public receive something (e.g., points or free products) for passing along message to friends, they must disclose that fact to friends**

FTC Actions Based on Endorsement Guidelines



save the date

LOFT SUMMER 2010
EXCLUSIVE BLOGGER PREVIEW!

TUESDAY
JANUARY 26, 2010
4pm TO 5pm

INDUSTRIA SUPER STUDIO
356 WEST 12th STREET
AT WASHINGTON STREET

COME TAKE A SNEAK PEAK AT LOFT'S
SUMMER 2010 COLLECTION BEFORE
ANYONE ELSE! BLOGGERS WHO
ATTEND WILL RECEIVE A SPECIAL GIFT
AND THOSE WHO POST COVERAGE
FROM THE EVENT WILL BE ENTERED IN
A MYSTERY GIFT CARD DRAWING WHERE
YOU CAN WIN UP TO \$500 AT LOFT!!

RSVP
WWW.LOFTONLINE.COM

LOFT

PLEASE NOTE ALL BLOGGERS MUST POST COVERAGE FROM OUR EVENT
TO THEIR BLOGS WITHIN 24 HOURS IN ORDER TO BE ELIGIBLE. LINKS
TO POSTS MUST BE SENT TO EMMA.CASERNA@LOFTONLINE.COM
ALONG WITH THE CODE ON THE BACK OF YOUR GIFT CARD (DISTRIBUTED
TO YOU AT THE EVENT). YOU WILL BE NOTIFIED OF YOUR GIFT CARD
AMOUNT BY FEBRUARY 2ND, 2010. GIFT CARD AMOUNTS WILL VARY
FROM \$50 TO \$500.

FTC Actions Based on Endorsement Guidelines

- ***Legacy Learning Systems* (March 2011)**
 - Astroturfing by affiliates (which get commissions for referring users to website, if users buy)
 - “Putting it simply: Learn and Master Guitar emerged from our test as the King of ‘learn guitar at home’ courses.”
 - Legacy instructed affiliates to comply with FTC endorsement guidelines but failed to implement reasonable monitoring program
 - \$250K settlement with FTC
- ***Reverb Communications* (Aug. 2010)**
 - Astroturfing by public relations firm (which received % of app sales)
 - Gaming apps sold through iTunes store
 - PR firm posted reviews that endorsed client’s apps and appeared independent
 - “Amazing new game”
 - “GREAT, family-friendly board game app”
 - Delete comments still on internet; not do it again
 - No \$ penalty

Sustainability – it's not easy being green

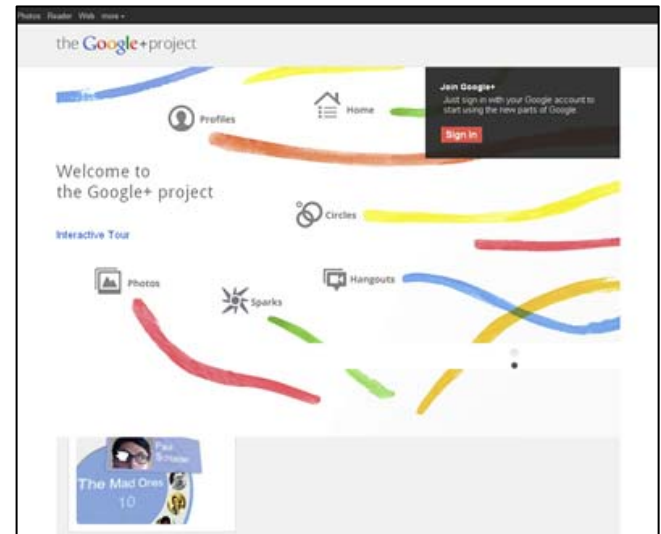
- **FTC's Green Guides cover general principles and specific types of environmental marketing claims (e.g., recyclable / recycled content)**
- **Environmental advertising and marketing practices that are inconsistent with the Green Guides could result in FTC enforcement action**

Recommendations

- **Set policies and train employees and any other endorsers on FTC endorsement guidelines**
- **Monitor compliance**
- **Be sensitive to information regarding children**
- **Evaluate websites and portions of websites or apps that children may be able to access**
- **Even general audience websites must comply with COPPA (e.g., privacy policies, practices, etc.)**
- **Coordinate marketing and legal regarding utilizing text messages and “green” initiatives**

Google Plus

- Launched June 2011 – testing phase
- Over 25M users by August 2011
- Business profiles coming later this year
- For preview of appearance, see <http://www.socialmediadialogue.com/google-plus-for-business-pages-to-launch-later-this-year/654/>
- Group messaging features
- Privacy protections designed in
- Will it overtake Facebook?



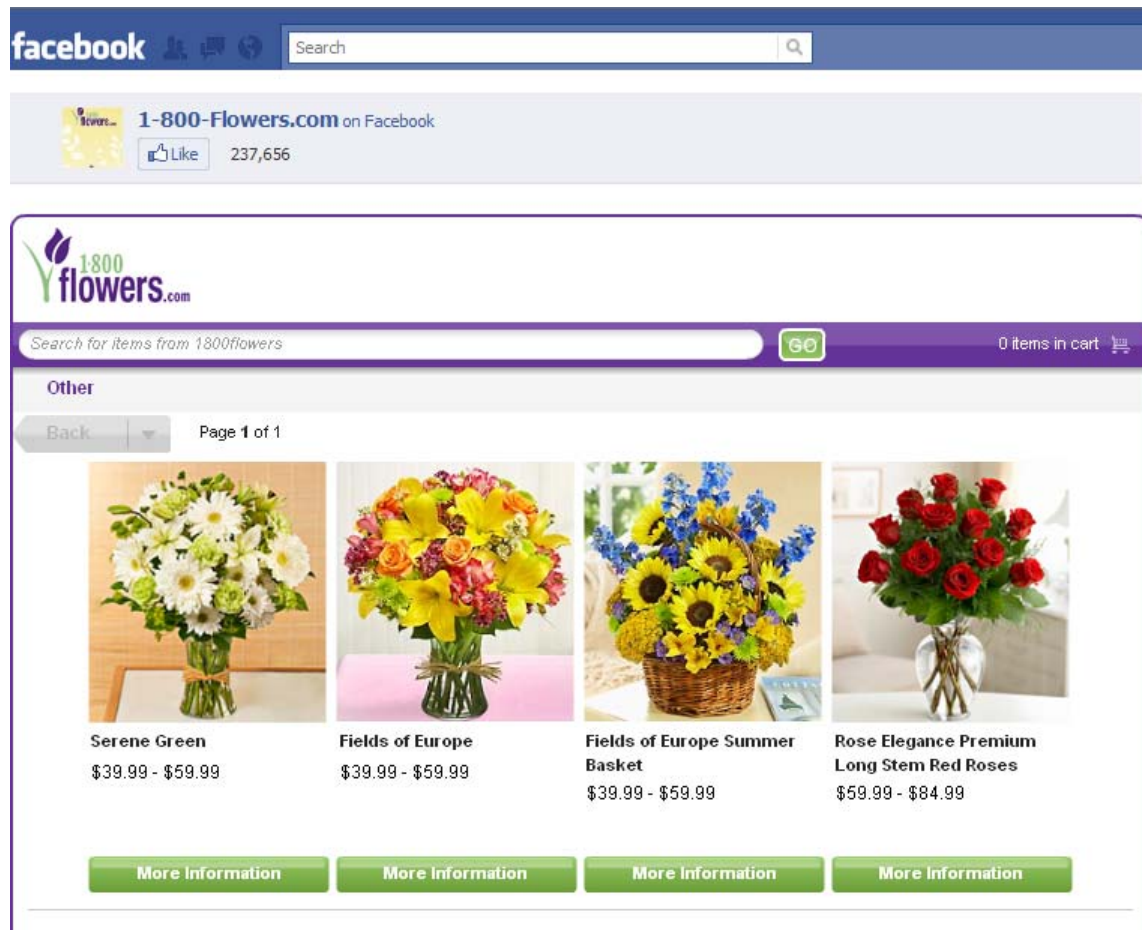
Social Networking: Key Intellectual Property Issues

- **Protecting trademarks on social networks**
 - **Defensive registrations – register key trademarks as Twitter usernames and Facebook vanity URLs**
 - **Monitor Facebook, Twitter, Google+ and other social networks for infringement and consider take-down requests, demand letters, or lawsuits**
- **Rights of publicity – obtain signed written consents for use of individual's picture on social networking site**
- **Confidential information and trade secret disclosure (customer lists)**
- **Agreement clauses regarding use of marks on social networks**

User-Generated Content: Legal Issues

- **Tension – increased interaction with users and transparency v. increased risk**
- **Comments, photos, videos**
- **Organization with Facebook Page not protected by Facebook’s terms of service**
- **Copyright – Digital Millennium Copyright Act**
- **Communications Decency Act**
 - **Defamation and other torts**
- **1-800-Flowers.com and Coca-Cola’s approach**

1-800-Flowers.com Facebook Page



The screenshot shows the Facebook interface for the 1-800-Flowers.com page. At the top, the Facebook logo and search bar are visible. Below that, the page name "1-800-Flowers.com on Facebook" is displayed with a "Like" button and a count of 237,656. The main content area features the 1800flowers.com logo and a search bar with the text "Search for items from 1800flowers". To the right of the search bar, it says "0 items in cart" with a shopping cart icon. Below the search bar, the word "Other" is displayed, followed by a "Back" button and "Page 1 of 1". The main display area contains four flower arrangements, each with a "More information" button below it:

Flower Arrangement	Price Range
Serene Green	\$39.99 - \$59.99
Fields of Europe	\$39.99 - \$59.99
Fields of Europe Summer Basket	\$39.99 - \$59.99
Rose Elegance Premium Long Stem Red Roses	\$59.99 - \$84.99

Social Media Policies

5 common provisions in social media policies:

- **Use common sense and do not be misleading**
- **Do not disclose confidential or proprietary information**
- **Do not disclose material nonpublic information**
- **Comply with company policies and applicable law**
- **Identify yourself and fully disclose your affiliation when you communicate about the entity**

Social Media Policies

- **Review policies and determine whether to amend existing policy for social media or establish a new social media policy**
- **Make sure policies are consistent and integrated**
- **Anticipate having to respond to a crisis - how would it look in the newspaper and other media?**
- **Train and educate employees and others with responsibility**
- **Social networking is multi-disciplinary – all areas that are implicated should work together**

Facebook: Bringing the NLRA to Your Non-Union Workplace

Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and *to engage in other protected concerted activities for the purpose of collective bargaining or other mutual aid or protection*

29 U.S.C. § 157

NLRA “Section 7” Rights

- **Protected concerned activities (“PCA”) include the right to discuss (*i.e.*, complain about) working conditions with coworkers**
- **Non-union employees have the same rights as union employees to engage in PCA**

Social Media Cases Before the NLRB

- **According to recent survey, the NLRB has reviewed at least 129 cases involving social media**
 - **U.S. Chamber of Commerce, *A Survey of Social Media Issues Before the NLRB*, August 5, 2011**
- **Two common complaints:**
 - **Overbroad policies restricting employees' use of social media**
 - **Unlawful discharge / discipline of employees for content posted via social media**

Policy “Red Flags”

- **Social media policies which prohibit**
 - **Disparaging the company, management, etc.**
 - **Discussing wages, corrective actions, investigations, etc.**
- **Critical question: will policy chill employees’ participation in PCA?**
- **The extent to which the Board will apply prior precedent regarding non-disparagement and employee loyalty remains unclear**

Is That Tweet PCA?

- **Does the post mention terms or conditions of employment?**
 - **Wages, staffing levels, quality of food served at sales event**
 - **Must be for “mutual aid or protection”; can’t be individual gripes**
- **Is there “group action” surrounding the post?**
 - **Coworker responses, water cooler talk about the post**

Interference Claims

- **When investigating or responding to employees' online activity, avoid actions that could be construed as interference with employees' right to engage in PCA**
 - **Threats**
 - **Unlawful surveillance**
 - **Selective enforcement of policies**

What You Don't Know Can't Hurt You?

- **Employee “complaints” via social media**
 - Are they “protected activity” under state and federal law?
 - Do they trigger an obligation to investigate?
- **Case Study: *Lilli Morse v. JP Morgan Chase & Co.*, Middle District of Florida**

Expansion of Domain Name System: Update on Launch of New gTLDs

- Currently 22 gTLDs such as .com, .net, .org
- Potential for indefinite number of new gTLDs (Limit of 1000 in first round)
- Application period January 12, 2012 – April 12, 2012
- Application fee \$185,000; additional costs
- Yearly registry fee \$25,000 plus additional fee for registries with >50,000 domain names
- Minimum ten year commitment
- Several lawsuits threatened



Examples of Expected Applications

• Generics

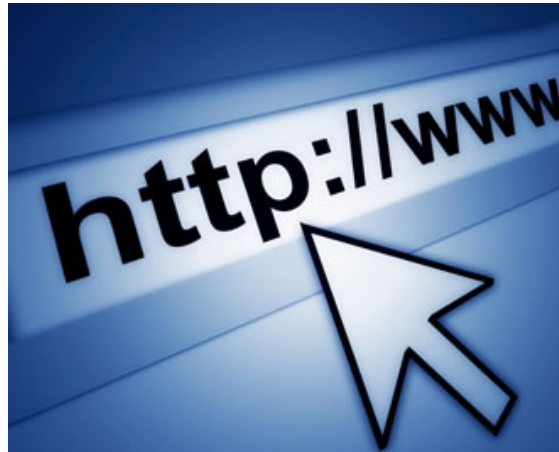
- .shop
- .site
- .news
- .bank
- .app
- .kids
- .homes
- .bank
- .money
- .horse
- .movie
- .music
- .web
- .phone
- .health
- .fam

• Cause

- .green
- .eco

• Brands

- .canon
- .hitachi
- .unicef



• Geographic

- .nyc
- .boston
- .chicago
- .dallas
- .miami
- .pdx (Portland)
- .seattle
- .sfo
- .paris
- .vegas
- .california
- .florida
- .arab
- .africa

For lists, see: <http://www.netgtdsite.com/new-gtld-list>
<http://www.register.en/uk/news/reu-new-gtld-newsflash.asp>

New Generic Domain Names: What You Can do to Protect Your Entity

- **Consider applying for own brand to establish private island on the internet**
- **Plan defensive registration strategy for second-level domain names**
- **Plan enforcement strategy**
- **Monitor impact on search engine rankings**



Spam Laws: Email

- **CAN-SPAM Act**
- **Commercial email message**
- **Definition: any email message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service**
- **Narrow exception for transactional/relationship messages**



Spam Laws: Email

- **Consequence of violation**
 - Enforcement action by FTC or other agency
 - Enforcement action by state attorney general
 - Statutory damages of up to \$250 per message (per recipient) up to \$2M
 - Action by internet access service
- **Facebook v. MaxBounty - CAN-SPAM Act applies to Facebook posts**
- **New Canadian anti-spam law**



Thinking of utilizing text messaging?

- **Involve legal sooner rather than later since text messaging is highly regulated**
- **In 2011, the FTC alleged violation of the FTC Act and the CAN-SPAM Act in its first enforcement action against a sender of unsolicited text messages**
- **Recent class action litigation on text messages**

Protecting Your Client From Online Copyright Trolls: Righthaven Lawsuits

- **Agreements with newspapers; registers copyrights**
- **Typically files suit without warning**
- **Seeking statutory damages and attorneys fees – settlements**
- **Ex. Democratic Underground posted five sentences from article and link to full article – Righthaven sued**
- **Facial/image recognition search tools improving (Google Search by Image, TinEye, PicScout) – cases based on photos**
- **Be extra mindful of securing rights to use content (text, photos, videos of others on your website)**



Online Copyright Trolls: What You Can do to Protect Your Entity

- **Gain protection under the DMCA for content posted by others**
 - Website terms of use need certain provisions
 - Register an agent with Copyright Office; agent handles take down requests
 - No actual knowledge of infringement
 - Act expeditiously to take down



Any Questions?

Dorsey & Whitney

Nicole Haaning

(612) 492-6635

haaning.nicole@dorsey.com

Melissa Krasnow

(612) 492-6106

krasnow.melissa@dorsey.com

Jamie Nafziger

(612) 343-7922

nafziger.jamie@dorsey.com

Marsh

Sharon Scharf

(612) 692-7888

sharon.k.scharf@marsh.com