Digital Law 2013: Hot Legal Trends in Internet, Cloud and Mobile Law and Liability

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E-Commerce & Internet Law

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Home | Publications | Experience | Contact

- About the Author
- Concentration
- About the Treatise
- Table of Contents
- Treatise Excerpts

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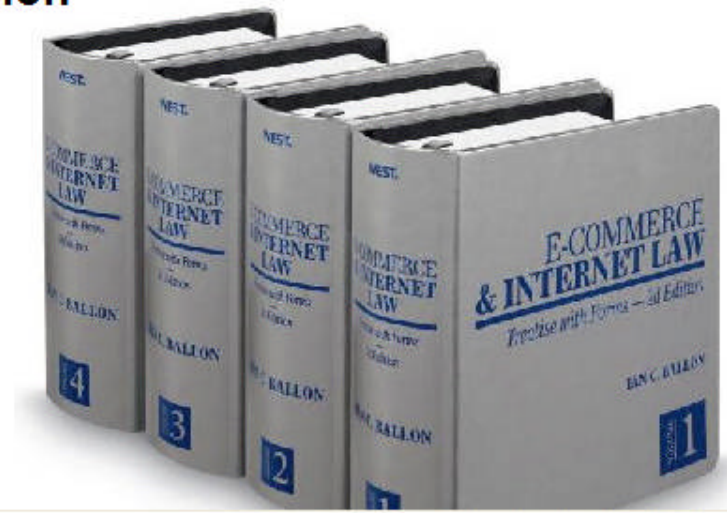
By Ian C. Ballon



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2013 Hot Legal Issues

- Exposure for Cloud, Mobile, Social Network and Other Service Providers
  - Liability and safe harbors
  - Copyright and the DMCA
  - Trademark/ Lanham Act issues
  - CDA preemption
  - Does the same legal regime apply to the cloud, social networks or when content is accessed on a mobile device?
- Strategies to win privacy, security and advertising class action suits
- Sponsored links
- Trends in litigation over Terms of Use and online contracts
- Enforcement of arbitration provisions
- Social media law


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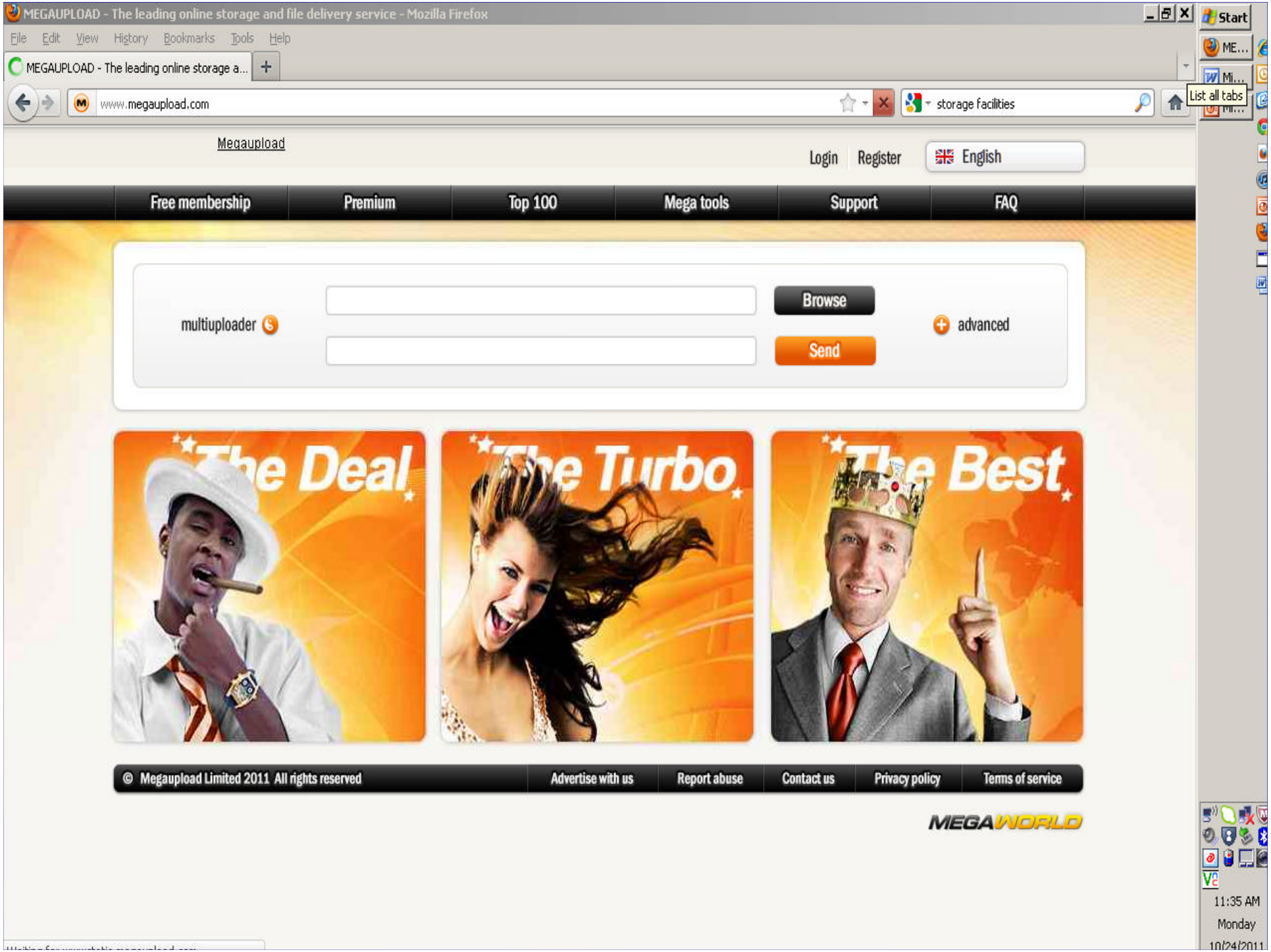
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Trends

- Internet contracting
  - Confusion over "clickwrap" and "browsewrap" agreements
  - Arbitration clauses broadly enforceable despite resistance in California
- Children and the use of mobile devices
  - COPPA regulations
  - I.B. v. Facebook, _ F. Supp. 2d _ (N.D. Cal. 2012) (allowing claims by minors for reimbursement of charges incurred to purchase virtual game property to proceed based on the California law that provides that contracts with minors are void)
  - But see A.V. v. iParadigms, LLC, 544 F. Supp. 2d 473, 481 (E.D. Va. 2008), *aff'd in part and rev'd in part on other grounds*, 562 F.3d 630, 639 (4th Cir. 2009) (minors equitably estopped from denying agreement to the terms of use of a plagiarism verification site)
  - Age of majority is higher in Alabama, Nebraska and Mississippi
- Liability for user conduct and content
  - DMCA, Trademark, CDA
  - Do the same rules apply for content or conduct in the cloud, on social media or on mobile devices?
- Copyrightability of APIs
  - Oracle America Corp. v. Google, Inc., 872 F. Supp. 2d 974 (N.D. Cal. 2012) (holding that Google's use of application programming interface (API) packages in connection with original code for the Android operating system did not infringe Oracle's copyrights in Java)
- Privacy
  - State AG enforcement of privacy relating to Apps
    - Letters and litigation
    - *Privacy on the Go* (January 2013)
  - New COPPA regulations
- Privacy class action suits
  - Standing (9th Circuit vs. other circuits)
  - Continued litigation (especially vs social networks and over mobile privacy)
- Security breach litigation
  - expanding definition of duty (esp. in the First Circuit)
- Social media regulation
  - State laws
  - NLRB guidelines
  - Enforceability of employer policies and website TOU as CFAA violations

Online Contract Formation

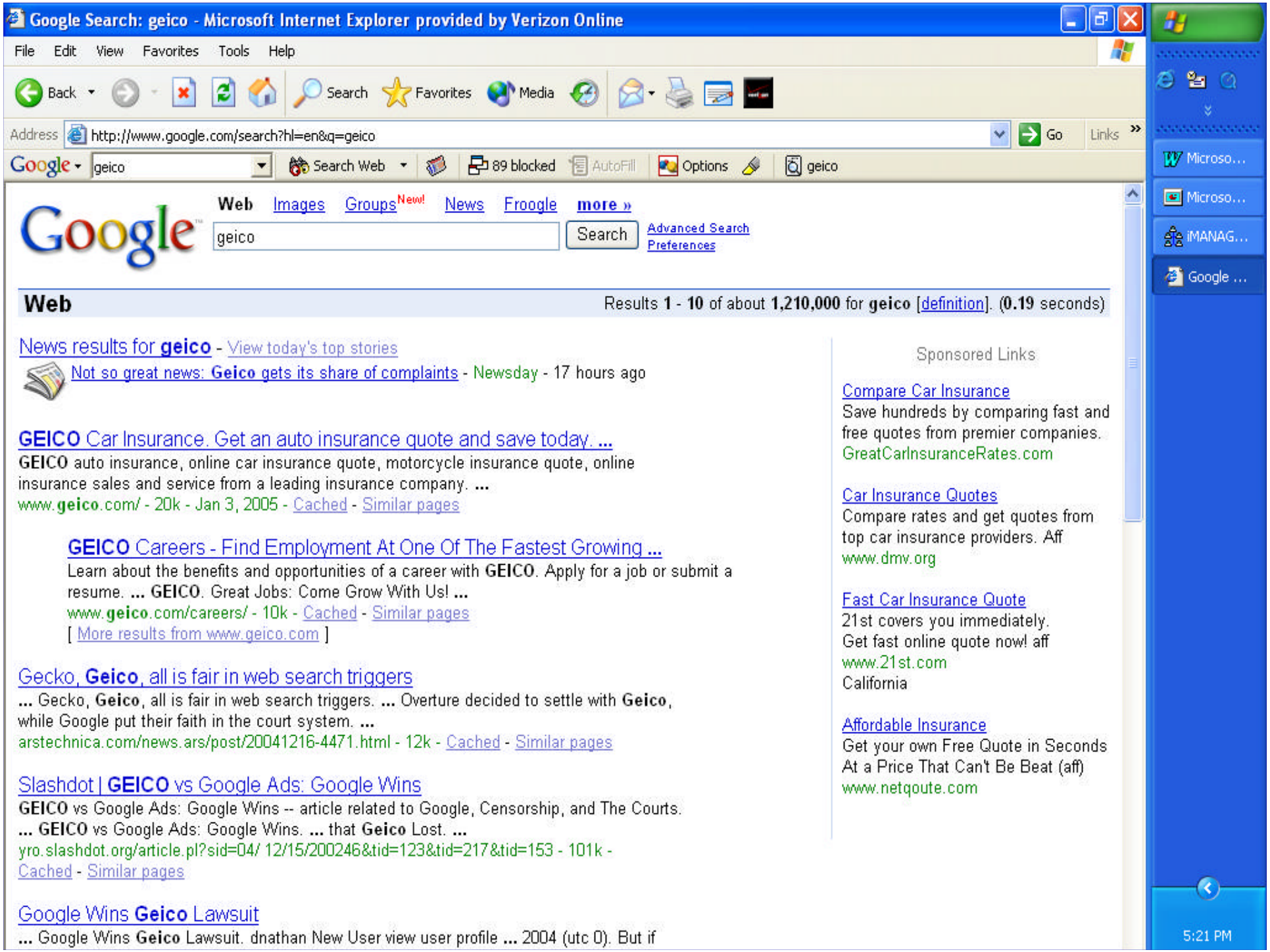
- Trend: Characterizing Click-Through + a link as browserwrap
  - Dawes v. Facebook, Inc., _ F. Supp. 2d _, 2012 WL 3242392 (S.D. Ill. 2012)
  - Fteja v. Facebook, Inc., 841 F. Supp. 2d 829 (S.D.N.Y. 2012)
- Continued Hostility to implied contracts
  - Cvent, Inc. v. Eventbrite, Inc., 739 F. Supp. 2d 927 (E.D. Va. 2010)
  - In re Zappos.com, Inc. Customer Data Securities Breach Litig., _ F. Supp. 2d _, 2012 WL 4466660 (D. Nev. 2012) (links to TOU on every page)
- Arbitration and Class Action Waivers
  - AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011)
  - Kilgore v. KeyBank, Nat'l Ass'n, 673 F.3d 947 (9th Cir. 2012) (FAA preempts Cal. rule prohibiting the arbitration of claims for broad, public injunctive relief)
  - Coneff v. AT & T, Corp., 673 F.3d 1155, 1160-62 (9th Cir. 2012) (invalidating Washington's unconscionability rule)
  - Schnabel v. Trilegiant Corp., 697 F.3d 110 (2d Cir. 2012) (email after agreement "failure to cancel = consent to arbitration" not a binding agreement to arbitrate disputes)
    - But see Hancock v. AT+T, _ F.3d _, 2012 WL 6132070 (10th Cir. 2012) (enforcing click through contract and arbitration provision contained in subsequent email that afforded the plaintiff the opportunity to cancel service within 30 days and obtain a partial refund if it did not agree with the provision)
  - In re American Express Merchants Litig., 667 F.3d 204 (2d Cir. 2012) (antitrust)
- Reservation of Unilateral Rights
  - Grosvenor v. Qwest Corp., 854 F. Supp. 2d 1021 (D. Colo. 2012) ("[b]ecause Qwest retained an unfettered ability to modify the existence, terms and scope of the arbitration clause, it is illusory and unenforceable.")
  - In re Zappos.com, Inc. Customer Data Securities Breach Litig., _ F. Supp. 2d _, 2012 WL 4466660 (D. Nev. 2012) (unilateral right to amend the TOU at any time rendered the agreement illusory)
- Drafting tips
  - Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010)
    - Challenge to the enforceability of an agreement (arbitrable) vs. challenge to the agreement to arbitrate
    - Clause: arbitrator, not a court, must resolve disputes over interpretation, applicability, enforceability or formation, including any claim that the agreement or any part of it is void or voidable

Computer Fraud and Abuse Act

- $5,000 threshold: loss to any one or more persons during a one year period aggregating $5,000 in value. 18 U.S.C. § 1030(c)(4)(A)(i)(I)
  - Bose v. Interclick, Inc., No. 10 Civ. 9183, 2011 WL 4343517 (S.D.N.Y. Aug. 17, 2011)
- Scaling back of the CFAA as a tool to challenge screen scraping or trade secret misappropriation in the Ninth and Fourth Circuits (disagreeing with the Fifth, Seventh and Eleventh Circuits)
  - United States v. Nosal, 676 F.3d 854 (9th Cir. 2012) (*en banc*) (the prohibition on exceeding authorized access under the CFAA applies to access restrictions, not use restrictions such as violating TOU or employment policies)
  - WEC Carolina Energy Solutions LLC v. Miller, 687 F.3d 199 (4th Cir. 2012) (CFAA fails to provide a remedy for misappropriation of trade secrets or violation of a use policy where authorization has not been rescinded)
  - But see U.S. v. John, 597 F.3d 263, 271 (5th Cir. 2010) (holding that an employee of Citigroup exceeded her authorized access when she accessed confidential customer information in violation of her employer's computer use restrictions and used that information to commit fraud, writing that a violation occurs "at least when the user knows or reasonably should know that he or she is not authorized to access a computer and information obtainable from that access in furtherance of or to perpetrate a crime . . . ."); U.S. v. Rodriguez, 628 F.3d 1258, 1263 (11th Cir. 2011) (holding that a Social Security Administration employee exceeded authorized access by obtaining information about former girlfriends and potential paramours to send flowers to their houses, where the Administration told the defendant that he was not authorized to obtain personal information for nonbusiness reasons); see also International Airport Centers, LLC v. Citrin, 440 F.3d 418, 420-21 (7th Cir. 2006) (reversing dismissal of a claim against an employee who accessed plaintiff's network and caused transmission of a program that caused damage to a protected computer where the court held that an employee who had decided to quit and violate his employment agreement by destroying data breached his duty of loyalty to his employer and therefore terminated the agency relationship, making his conduct unauthorized (or exceeding authorized access)); *see also* EF Cultural Travel BV v. Explorica, Inc., 274 F.3d 577 (1st Cir. 2001) (concluding that where a former employee of the plaintiff provided another company with proprietary information in violation of a confidentiality agreement, in order to "mine" his former employer's publically accessible website for certain information (using scraping software), he exceeded the authorization he had to navigate the website).

Sponsored Links

- Rosetta Stone Ltd. v. Google, Inc., 676 F.3d 144 (4th Cir. 2012)
  - Claims not barred by the functionality doctrine
  - Judge weighed facts, which is inappropriate when considering summary judgment
  - Case settled
- Continued Fallout of Network Automation, Inc. v. Advanced Systems Concepts, Inc., 638 F.3d 1137 (9th Cir. 2011)
- Trend
  - Likelihood of confusion or dilution
  - Damage
  - Fair use – comparative advertising
  - Suits vs. search engines vs. competitors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Social Network Communications

- Employer Restrictions on Access to Account Credentials
  - Cal. Labor Code § 980
  - Delaware
  - Illinois
  - Michigan
  - Md. Labor & Employment Code § 3-712
  - New Jersey
  - Bills pending in California (public employees), Missouri, Texas and Vermont as of 1/2013
- NLRB Guidelines on Employee Use of Social Media
- Evidence in Litigation (ECPA)
  - Suzlon Energy Ltd. v. Microsoft Corp., 671 F.3d 726 (9th Cir. 2011)
  - Bower v. Bower, 808 F. Supp. 2d 348, 349-50 (D. Mass. 2011) ("Faced with this statutory language, courts have repeatedly held that providers such as Yahoo! and Google may not produce emails in response to civil discovery subpoenas.")
  - Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965 (C.D. Cal. 2010)
  - Mintz v. Mark Bartelstein & Associates, Inc., __ F. Supp. 2d __, 2012 WL 3553351, at *5 (C.D. Cal. 2012) ("While the SCA prohibits AT & T from disclosing the content of any text messages to Defendants pursuant to a subpoena, the SCA does not prevent Defendants from obtaining this information through other means.")
  - Juror No. One v. Superior Court, 206 Cal. App. 4th 854 (2012)
  - The oxymoron of *compelled consent* in California

POTENTIAL SECONDARY LIABILITY FOR USER CONDUCT AND CONTENT

Liability for User Content & Conduct: Convergence and Divergence

- Copyright - Notice and Take Down (DMCA)
  - Direct, contributory, vicarious and inducing infringement
    - DMCA – applies to *service providers*; not off-Internet conduct or content
  - *Sony* safe harbor
- Trademark – *De Facto* Notice and Take Down
  - Direct, contributory and Inducing infringement and vicarious in some circuits
  - No DM*TA* or *Sony* safe harbor but increasing *de facto* recognition for notice and takedown
  - Publishers exemption - 15 U.S.C. 1114(2)(B)-(C),
- Patent law
  - Direct, contributory and inducing patent infringement
  - U.S. Supreme Court decision in *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011): willful blindness is inducement
- Evolving questions:
  - generalized knowledge v. knowledge of specific files (© and ™)
  - Notice vs. knowledge (™)
  - Willful blindness
  - Individual liability for investors, owners, officers and directors for secondary copyright infringement
- Potential Preemption of State IP claims under the Good Samaritan Exemption to the Telecommunications Act of 1996 (47 U.S.C. § 230) (the Communications Decency Act)
  - Defamation and other non-IP claims
  - State IP claims: Ninth Circuit law vs. district courts in other circuits
  - Gripe sites and what constitutes *development*

SECONDARY COPYRIGHT LIABILITY FOR USER CONTENT AND ROGUE WEBSITES

- Copyright Inducement
  - (1) intent to bring about infringement, (2) distribution of a device suitable for infringing use, and (3) evidence of actual infringement by recipients of the device. MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005); Columbia Pictures Industries, Inc. v. Fung., CV 06-5778 SVW (C.D. Cal. Dec. 21, 2009); Arista Records LLC v. Lime Group LLC, 784 F. Supp. 2d 398 (S.D.N.Y. 2011).
- Direct Liability
  - Volitional conduct (causation): Religious Technology Center v. Netcom On-Line Communication Services, Inc., 907 F. Supp. 1361 (N.D. Cal. 1995); CoStar Group, Inc. v. Loopnet, Inc., 373 F.3d 544 (4th Cir. 2004); Perfect10, Inc. v. Amazon.com, 487 F.3d 701 (9th Cir. 2007) (server test).
- Contributory Infringement
  - Imposed where a person or entity "induces, causes or materially contributes to the infringing conduct of another. . ." Sega Enterprises Ltd. v. MAPHIA, 857 F. Supp. 679, 686 (N.D. Cal. 1994); see also UMG Recordings, Inc. v. Bertelsmann, 222 F.R.D. 408 (N.D. Cal. 2004)(must show (1) direct infringement by a third party, (2) actual or constructive knowledge by the defendant, and (3) substantial participation by the defendant in the infringing activities); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (reasonable knowledge; knew/should have known on system; failed to act to prevent viral dist'n); Perfect10, Inc. v. Amazon.com, 487 F.3d 701 (9th Cir. 2007) (actual knowledge that specific infringing material is available where the service could have taken simple measures to prevent further damage but did not do so); Perfect 10, Inc. v. Visa Int'l, 494 F.3d 788 (9th Cir. 2007), cert. denied, 553 U.S. 1079 (2008).
- Vicarious liability
  - May be imposed where the defendant (1) has the right and ability to supervise the infringing activity, and (2) has a direct financial interest in such activities. E.g., A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); Perfect10, Inc. v. Amazon.com, 487 F.3d 701 (9th Cir. 2007) (no financial benefit or ability to control merely because of the AdSense program); Perfect 10, Inc. v. Visa Int'l, 494 F.3d 788 (9th Cir. 2007), cert. denied, 553 U.S. 1079 (2008).

Contributory Infringement (Links)

- Flava Works, Inc. v. Gunter, 689 F.3d 754 (7th Cir. 2012) (Posner, J.)
  - Vacated PI against social bookmarking site because MyVidster was not hosting infringing videos; it provided an index with in-line links
  - Applied a streamlined standard focused on "personal conduct that encourages or assists the infringement"
  - Criticized traditional contributory infringement test
  - *Cf.* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007) (holding that defendants potentially could be held liable for contributory infringement if the plaintiff could show knowledge and failure to take "simple measures to prevent further damage")
    - But see Perfect 10, Inc. v. VISA Int'l Service Ass'n, 494 F.3d 788 (9th Cir. 2007), cert. denied, 553 U.S. 1079 (2008).
  - Caveats –
    - DMCA inapplicable
    - No allegation of inducement

The Digital Millennium Copyright Act

Service Provider Liability Limitations Under the Digital Millennium Copyright Act

- Threshold requirements:
  - Adopt a policy providing for the termination of "repeat infringers" "in appropriate circumstances"
  - Inform subscribers and account holders of the policy
  - The policy must be "reasonably implemented"
  - The policy must accommodate and not interfere with "standard technical measures"
    - Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090 (W.D. Wash. 2004) (not necessarily a failure of implementation if an infringer sidesteps a service provider's policy and is able to sign back on under a new user ID)
- User Storage
  - Must respond expeditiously upon receipt of a notification to disable access to or remove allegedly infringing material
  - Service provider must not "receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity . . ." Divergent views:
    - Objective and subjective component – "something more" than the ability to block and remove content, without respect to knowledge (Viacom v. YouTube)
    - Right and ability to control requires specific knowledge (Shelter Partners)
  - May not have "actual knowledge" or be "aware of facts or circumstances from which infringing activity is apparent . . ." or, upon obtaining such knowledge, act expeditiously to remove or disable (Red Flag)
    - Knowledge of specific files or activity, not generalized knowledge (Viacom v. YouTube; Shelter Partners)
    - Perfect 10, Inc. v. ccBill, 488 F.3d 1102 (9th Cir.), cert. denied, 552 U.S. 1062 (2007)
    - Willful blindness – Viacom v. YouTube; Columbia Pictures Indus. v. Fung, CV 06-5578 SVW (C.D. Cal. plaintiffs' summary judgment motion granted Dec. 21, 2009) (turning a blind eye to infringement/ willful ignorance is inconsistent with the red flag requirement; no evid. of expeditious response)

Service Provider Liability Limitations Under the Digital Millennium Copyright Act

- UMG Recordings, Inc. v. Shelter Capital Partners LLC, 667 F.3d 1022 (9th Cir. 2011) (affirming summary judgment for the service provider and dismissal of claims against individual owners)
  - The "user storage" liability limitation applied even though Veoh transcoded and chunked files and allowed users to stream or download material
  - Generalized knowledge is insufficient to create either knowledge or red flag awareness
    - No evidence that Veoh in fact failed to act when acquired knowledge
    - Congress recognized that service providers could be held liable for user misconduct absent the safe harbors; therefore, Congress recognized that service providers eligible for the safe harbor nonetheless would have generalized knowledge that their sites or services could be used for infringement
    - Music category or use of tags or sponsored links not enough to establish specific knowledge
    - Defective DMCA notice cannot form the basis of knowledge under the statute
    - Suggests in *dicta* that notice from a third party (other than the copyright owner) could create red flag awareness
  - No right and ability to control
    - Ability to control requires knowledge of specific files (*Cf. Viacom v. YouTube)*
    - DMCA presupposes some level of control, but Congress cannot have intended that courts hold service providers lose immunity for having the type of control (to disable access to or remove material) that Congress assumed they had
    - Tougher standard for right and ability to control than for imposing common law vicarious liability (otherwise would exclude vicarious liability from DMCA protection, which was not Congress's intent)

DMCA Service Provider Liability Limitations

- Viacom v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012)
  - Reversed sj for YouTube as "premature" but largely upheld the lower court's analysis that the DMCA requires knowledge or awareness of *specific* infringing activity before there is an obligation to disable access to or remove material
    - Actual knowledge denotes subjective belief
    - Red flag awareness (of facts or circumstances from which infringing activity is apparent) imposes an objective reasonableness standard
    - Rejected plaintiffs' argument that the difference between actual and red flag knowledge was between specific and generalized knowledge
    - Potential fact issue on remand: pre-acquisitions surveys and internal emails potentially suggested red flag knowledge if they related to material that was not in fact taken down
  - Willful blindness is tantamount to knowledge.
    - 512(m) makes it clear that DMCA safe harbor protection is not conditioned on affirmative monitoring by a service provider.
    - But willful blindness is different from an affirmative duty to monitor and therefore, because the statute does not speak directly to the doctrine, it does not abrogate it.

DMCA Service Provider Liability Limitations

- Viacom v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012)
  - **Right and ability to control does not include a specific knowledge requirement**
    - Disagreed with the lower court and the Ninth Circuit's *Shelter Capital* decision and rejected defendants' argument that a service provider must know of the particular infringement before it can control it. "Any service provider that has item-specific knowledge of infringing activity and thereby obtains financial benefit would already be excluded from the safe harbor . . . for having specific knowledge of infringing material and failing to effect expeditious removal. No additional service provider would be excluded . . . "
    - Rejected plaintiff's argument that the DMCA codified the common law rule because it would render the statute internally inconsistent because section 512(c) presumes that service parties have the ability to block access to infringing material.
    - Right and ability to control requires something more than the ability to remove or block access to materials posted on a service provider's website
      - *Dicta:* suggests that "exerting substantial influence on the activities of users without necessarily acquiring knowledge. Inducement (*Grokster*) or instituting a monitoring program by which user websites received detailed instructions on use of layout, appearance and context (*Perfect 10 v Cyberventures*)
      - What does this mean? Does it penalize good behavior?

DMCA Service Provider Liability Limitations

- Viacom v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012)
  - Storage at the direction of a user
    - Affirmed that transcoding, playback on watch pages and "related videos" functions did not take YouTube outside the safe harbor
    - Remanded on the issue of whether third party syndication was outside the safe harbor (licensed for mobile delivery)
    - User storage limitation is not limited to merely storing material. It extends to software functions performed for the purpose of facilitating access to user-stored material
      - Important for digital media companies to understand
    - Plaintiffs argued that "by reason of" storage requires proximate causation between the act of storage and liability
- Capitol Records, Inc. v. MP3Tunes, LLC, 821 F.Supp.2d 627 (S.D.N.Y. 2011)
  - No DMCA protection for infringing music copied from unauthorized websites where provider had actual knowledge of infringing files stored by users
  - DMCA applies to state common law copyright claims for pre-1972 sound recordings
- UMG Recordings, Inc. v. Escape Media Group, Inc., 948 N.Y.S.2d 881 (N.Y. Sup. 2012)
- Wolk v. Kodak Imaging Network, Inc., 840 F. Supp. 2d 724 (S.D.N.Y. 2012) (DMCA protected photo sharing service provider)
- Obodai v. Demand Media, 2012 WL 2189740 (S.D.N.Y. June 13, 2012)

Secondary Trademark Liability

- No DM*TA*
- But the standards of liability are tougher: Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 439 n.19 (1984)
- Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 546 U.S. 844, 854 (1982)
  - Liability may be imposed where a manufacturer or distributor
    - Intentionally induces another to infringe a trademark or
    - Continues to supply a product to someone who the defendant knows or has reason to know is engaged in trademark infringement
  - Service: Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc., 658 F.3d 936 (9th Cir. 2011).
- Tiffany (NJ) Inc. v. eBay, Inc., 600 F.3d 93 (2d Cir.), cert. denied, 131 S. Ct. 647 (2010)
  - eBay does not take possession of goods; no allegation of inducement
  - District court (not challenged on appeal): Where liability is premised on the conduct of a user of a venue (as opposed to a manufacturer or distributor of a product) an initial threshold showing must be made that the defendant had *direct control and monitoring over the means of infringement.* Lockheed Martin Corp. v. NSI, 194 F.3d 980 (9th Cir. 1999)
  - A service provider must have more than general knowledge or reason to know that its service is being used to sell counterfeit goods (district court had explained that the standard is knowledge or reason to know, not *reasonable anticipation*). "Some contemporary knowledge of which particular listings are infringing or will infringe in the future is necessary."
  - eBay responded every time it received a notice of specific files and had a policy of terminating repeat infringers
- Sellify Inc. v. Amazon.com, Inc., No. 09 Civ. 10268, 2010 WL 4455830 (S.D.N.Y. Nov. 4, 2010) (granting summary judgment under *eBay* where there was no evidence that Amazon.com had particularized knowledge of, or direct control over, disparaging ads and terminated its contractual relationship with the provider after receiving notice but allegedly had failed to act in response to an earlier phone call)

Potential Federal Preemption of State IP Claims under

47 U.S.C. § 230

- 230(c)(1): No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider
- 230(c)(2)(A): No liability on account of "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not constitutionally protected..."
  - Scope: Defamation, privacy, most state civil and criminal claims, federal civil (but not criminal) claims.
  - Preempts inconsistent state laws.
  - Excludes: federal criminal claims, claims under the ECPA or "any similar state law" and "any law pertaining to intellectual property."
- Different approaches:
  - Fair Housing Council v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008)
    - Multiple choice questionnaire written by Roommates.com vs. white space
  - FTC v. Accusearch, Inc., 570 F.3d 1187 (10th Cir. 2009)
    - Solicitation + payment: interactive computer service → information content provider
    - Confidential phone records
  - Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250 (4th Cir. 2009) (commercial gripe site; 8 posts allegedly written by the defendant) (JOP)
    - "immunity is an *immunity from suit* rather than a mere defense to liability and is effectively lost if a case is erroneously permitted to go to trial"
- Conduct as content:
  - Doe v. MySpace, Inc., 528 F.3d 413 (5th Cir.), cert. denied, 555 U.S. 1031 (2008)
  - Doe II v. MySpace, Inc., 175 Cal. App. 4th 561, 96 Cal. Rptr. 3d 148 (Cal. App. 2009)
  - Inman v. Technicolor, S.A.., Case No. 2:11-cv-00666-GLL, 2011 WL 5829024 (W.D. Pa. Oct. 2011)
  - M.A. v. Village Voice Media Holdings LLC, 809 F. Supp. 2d 1041 (E.D. Mo. 2011)
  - Chicago v. StubHub, Inc., 624 F.3d 363 (7th Cir. 2010)

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- Gripe sites and user generated criticism cases:
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  - Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250 (4th Cir. 2009) (commercial gripe site; 8 posts allegedly written by the defendant) (JOP)
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  - Levitt v. Yelp! Inc., Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011)
  - Ascentive, LLC v. Opinion Corp., 842 F. Supp. 2d 450, 476 (E.D.N.Y. 2011)
  - DeVere Group GmbH v. Opinion Corp., _ F. Supp. 2d _, 2012 WL 2884986 (E.D.N.Y. 2012) (dismissing claims based on use of DeVere's trade name in text on PissedConsumer.com and in the *DeVere.PissedConsumer.com* subdomain; applying Second Circuit law in finding initial interest confusion inapplicable in this case)
- Are State IP Claims Preempted?
  - Perfect 10, Inc. v. Ccbill, 488 F.3d 1102 (9th Cir.), cert. denied, 552 U.S. 1062 (2007) (right of publicity claim). But see:
    - Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288 (D.N.H. 2008)
    - Atlantic Recording Corp. v. Project Playlist, Inc., 603 F. Supp. 2d 690 (S.D.N.Y. 2009) (Judge Denny Chen)
    - UMG Recordings, Inc. v. Escape Media Group, Inc., 948 N.Y.S. 881 (N.Y. Sup. 2012)
    - Parisi v. Sinclair, 774 F. Supp. 2d 310 (D.D.C. 2011) (declining to "extend the scope of the CDA immunity as far as the Ninth Circuit" but dismissing publicity claim under newsworthiness exception)
    - *Gauck v. Karamian*, 805 F. Supp. 2d 495 (W.D. Tenn. 2011) (assuming that right of publicity claim fell outside the CDA as a law pertaining to intellectual property)
    - Fraley v. Facebook, 830 F. Supp. 2d 735 (N.D. Cal. 2011)

DATA PRIVACY, SECURITY BREACH AND BEHAVIORAL ADVERTISING CLASS ACTION LITIGATION

Privacy Class Action Litigation

- August 2010: Flash cookie suits against Quantcast and Clearspring
  - June 2011: Final court approval of settlement class action $2.4M
- August 2011: Bose v. Interclick, Inc., No. 10 Civ. 9183, 2011 WL 4343517 (S.D.N.Y. Aug. 17, 2011): Advertisers (including CBS, Mazda and McDonald's) dismissed w/prejudice
- Common weakness: Standing? Injury?
  - In re iPhone Application Litig., Case No. 11-MD-02250-LHK, 2011 WL 4403963 (N.D. Cal. Sept. 20, 2011) (dismissing for lack of Article III standing, with leave to amend, a putative class action suit against Apple and various application providers alleging misuse of personal information without consent)
  - LaCourt v. Specific Media, Inc., No. SACV 10-1256-GW (JCGx), 2011 WL 1661532 (C.D. Cal. Apr. 28, 2011) (dismissing a putative class action suit brought over the alleged use of flash cookies to store a user's browsing history).
  - In re Google Privacy Policy Litig., 2012 WL 6738343 (N.D. Cal. Dec. 28, 2012)
  - Pirozzi v Apple Inc., 2012 WL 6652453 (N.D. Cal. Dec. 20, 2012)
  - *But see Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785(N.D. Cal. Dec. 16, 2011) (alleged failure to compensate for endorsements ("liking" products))
  - Edwards v. First American Corp., 610 F.3d 514 (9th Cir. 2010), *cert. dismissed,* 132 S. Ct. 2536 (2012)
- ECPA – 18 U.S.C. §§ 2500, 2700 *et seq.*
  - Only protects the *contents* of communications
    - In re iPhone Application Litig., 844 F. Supp. 2d 1040, 1062 (N.D. Cal. 2012) (dismissing plaintiff's claim because geolocation data was not the contents of a communication)
  - Also: no interception (Wiretap Act) and for advertisers no access (Stored Communications) (alleged communication is between widget provider and user's hard drive); for many websites and advertisers, consent (including from TOU or Privacy Policy)
  - Low v. LinkedIn Corp., No. 11–cv–01468–LHK, 2012 WL 2873847 (N.D. Cal. July 12, 2012)
- CFAA - 18 U.S.C. § 1030
  - $5,000 minimum injury
  - Nosal
- Video Privacy Protection Act – 18 U.S.C. § 2710
- State claims (CAFA)
  - Unfair competition, contract claims: Need injury and damage. In re Facebook Privacy Litig., 791 F. Supp. 2d 705 (N.D. Cal. 2011)
  - Breach of contract – must be more than nominal damages. Rudgayer v. Yahoo! Inc., 2012 WL 5471149 (N.D. Cal. Nov. 9, 2012)
  - Common law invasion of privacy: no claim if disclosed in Privacy Policy
- Targets?
  - App providers, mobile phone providers, social networks (unique IDs)
  - Any company that advertises on the Internet

Data Security Law

- Affirmative mandates under federal law
  - Financial (GLB)
  - Health care (HIPAA)
  - Children (COPPA)
- Patchwork of affirmative mandates and remedies under state law
  - Security breach notification laws
  - MA information security law
  - CA and other laws requiring *reasonable* security precautions (and similar restrictions imposed on third parties by contract)
  - Data destruction laws
- FTC enforcement actions
  - Specific statutes (GLB, HIPAA, COPPA, CAN-SPAM)
  - FTC Act § 5 – unfair or deceptive acts or practices
    - Deceptive: variation from a stated Privacy Policy or other representation
    - Increasingly focused on unfairness (*i.e.,* inadequate security precautions, even if no deceptive representation)
- Dept of Commerce Cybersecurity Report (2011)
  - Voluntary codes of conduct (enforced by the FTC)
- SEC Guidance – cybersecurity risk assessment (Oct 2011)
- Security breach notification laws
  - 46 states, DC, Puerto Rico, Virgin Islands
  - Laws impose conflicting obligations
  - Invitations to litigation and State AG investigations
- Litigation, including class action litigation
  - Suits against companies
    - Negligence, Contract, Implied Contract
  - Suits by companies against those responsible
    - Criminal and civil remedies (consider tradeoffs)
    - Federal anti-hacking statutes (ECPA, CFAA)
    - Trade secret law

Security Breach Litigation Against Companies

- Suits for breach of contract, negligence and potentially implied contract
  - Patco Construction Co. v. People's United Bank, 684 F.3d 197 (1st Cir. 2012) (holding defendant's security procedures to not be commercially reasonable)
  - Anderson v. Hannaford Brothers Co., 659 F.3d 151 (1st Cir. 2011)
    - Allowing negligence, breach of contract and breach of implied contract claims to go forward
    - Implied contract by grocery store to undertake some obligation to protect customers' data
- Standing in Putative Class Action Cases
  - Lambert v. Hartman, 517 F.3d 433 (6th Cir. 2008) (finding standing where plaintiff's information was posted on a municipal website and then taken by an identity thief, causing actual financial loss fairly traceable to d's conduct)
  - Resnick v. AvMed, Inc., 693 F.3d 1317 (11th Cir. 2012) (standing where plaintiffs had both been identity theft victims)
  - Pisciotta v. Old National Bancorp., 499 F.3d 629 (7th Cir. 2007) (finding standing in a security breach class action suit against a bank based on the threat of future harm)
  - Krottner v. Starbucks Corp., 628 F.3d 1139 (9th Cir. 2010) (finding standing in a suit where plaintiffs unencrypted information (names, addresses and social security numbers) was stored on a stolen laptop)
  - Reilly v. Ceridian Corp., 664 F.3d 38 (3d Cir. 2011) (finding no standing in a suit by law firm employees against a payroll processing firm alleging negligence and breach of contract relating to the risk of identity theft and costs to monitor credit activity)
    - Distinguished environmental and toxic tort cases

TCPA Suits

- Suits filed against social networks and advertisers over text messages allegedly sent confirming a party's opt-out request
- Plaintiffs allege that these messages constitute unauthorized use of "automated telephone dialing systems" under 47 U.S.C. § 227(b)(1)(A)(iii) (even though an ATDS in fact typically is not used)
- Lawyer-driven cases (opt in, opt out and lawsuit all in less than a month)
- Ibey v. Taco Bell Corp., Case No. 12-CV-0583-H, 2012 WL 2401972 (S.D. Cal. June 18, 2012)
  - TCPA does not impose liability for a single confirmatory text message
  - Insufficient allegation of use of an ATDS
  - Strategy
- In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act, Docket No. 02-278 (FCC Nov. 26, 2012)

Strategies to Minimize Exposure

- Review and audit your privacy policy and practices
- Review third party contracts with entities that collect or provide personal information to your company
- Assess your practices with respect to behavioral advertising, including ad agencies or other downstream providers
- Include indemnification provisions in agreements
  - Does a contracting party have adequate resources such that an offer of indemnification is meaningful?
- Consider insurance
- Use arbitration provisions in consumer contracts, including TOU, in light of *AT&T Mobility LLC v. Conception*, 131 S. Ct. 1740 (2011)
  - Consider making your privacy policy a binding contract or incorporate it by reference in your TOU
  - Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010)
    - Challenge to the enforceability of an agreement (arbitrable) vs. challenge to the agreement to arbitrate
    - Clause: arbitrator, not a court, must resolve disputes over interpretation, applicability, enforceability or formation, including any claim that the agreement or any part of it is void or voidable
- Evaluate credit card practices in light of California law
- Assess security practices
- Technology solutions (browser privacy settings)
- Self-regulatory and other best practices

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Digital Law 2013: Hot Legal Trends in Internet, Cloud and Mobile Law and Liability

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