



Monday, October 25
9:00am-10:30am

**110 - Software Licensing in the New Decade:
Ten Trends, Issues and Solutions to Consider
for Your Business**

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Faculty Biographies

David Brill

David H. Brill is head of legal for American Stock Transfer & Trust Company.

Prior to joining AST, Mr. Brill was with Thomson Reuters. He spent six years with Thomson Reuters and worked in several capacities, including vice president and principal legal counsel as well as serving as a member of the Corporate Services Executive Team. Prior to the acquisition of Reuters by the Thomson Corporation, Mr. Brill had corporate legal responsibilities at Thomson Financial, including mergers and acquisitions, and managed the contract negotiation process in North America while leading a staff of legal and non-legal personnel. Mr. Brill's career includes tenure at BlackRock Solutions as a director and Lehman Brothers as an equity research associate.

He is a member of the ACC IT, Privacy and eCommerce Committee and has spoken on legal and risk management issues.

Mr. Brill earned his BA from the University of Michigan and is a graduate of the American University, Washington College of Law where he was a member of the International Law Review.

Edward Rockwell

Edward F. Rockwell is vice president and associate general counsel for Hewlett-Packard Company (HP). He has worldwide responsibility for overseeing and coordinating legal matters affecting HP's Software and Solutions business unit. Since joining HP, Mr. Rockwell has served in a series of legal roles. Immediately prior to his current assignment, he was general counsel for HP's Americas region, with responsibility for providing legal support for HP's varied operations and hardware, software, and services offerings in the Americas. Prior to that assignment, he was managing counsel for HP Services worldwide. He also spent five years in Milan, Italy, where he served as lead attorney for HP's Outsourcing Services business in Europe, the Middle East, and Africa (EMEA) region and later managing counsel for Outsourcing Services worldwide.

Mr. Rockwell joined HP from Circuit City Stores, Inc. Prior to that he was a litigator in private practice in Virginia. He began his legal career as a law clerk serving the Supreme Court of Virginia.

Mr. Rockwell earned a BA from the University of Virginia and a JD from the University of Richmond.

James Steinberg

Partner

Kilpatrick Stockton LLP

Bruce Van Valkenburgh

Bruce G. Van Valkenburgh is currently in transition. While in transition, he is remaining current by serving as a consultant with International Computer Negotiations, Inc. (ICN), of Winter Park, Florida. Through ICN, Mr. Van Valkenburgh addresses the legal and business issues involved in the licensing and acquisition of information technology products and services.

Previously, Mr. Van Valkenburgh was corporate attorney with Eaton Corporation in Cleveland, Ohio. During his ten years at Eaton, he had primary responsibility for representing the interests of supply chain and the information technology functions throughout Eaton.

Mr. Van Valkenburgh received a BA from Cleveland State University and is a graduate of the Cleveland-Marshall College of Law.

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Social Media for Corporate Disclosure

David H. Brill
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1. What does it mean to lawyers, companies and investors?
2. How can companies use social media without running afoul of the federal securities laws?

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How lawyers use technology to make things easier.

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How are Public Companies Using Social Media?

- To post:
 - News and accomplishments
 - Information about upcoming events
 - Press releases
 - Discounts and promotions
 - Product announcements
 - Responses to complaints and opinions
 - Live streams of corporate events
 - Material, non-public information

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Companies Using Social Media for Business

- eBay
- General Motors
- Dell
- Starbucks
- Microsoft
- Dupont
- Chevron
- Johnson & Johnson
- Ford
- Wells Fargo
- Wachovia
- Samsung
- Coca-Cola
- Cisco
- General Electric
- United Airlines

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Examples of Real-Time Dissemination of Corporate Events

- **eBay:** Four-tweet disclaimer before reporting on a company event via Twitter:
 - *Tweet 1:* "Important information about the nature of this session. Forward-looking statements and non-GAAP financial measures. Click here: [Hyperlink to eBay's blog with traditional cautionary language.]"
 - Tweet 2:* "This session will contain non-GAAP financial measures"
 - Tweet 3:* "The presentation of this financial information is not intended to be considered in isolation or as a substitute for GAAP financial measures."
 - Tweet 4:* "A reconciliation of these measures to the nearest comparable GAAP measures can be found by clicking on the following link: [link to financial presentation]"
- **Chevron:** "Tweets" of official company news and links to earnings reports and press releases.

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Examples of Real-Time Dissemination of Corporate Events (cont.)

- **Walmart, Johnson & Johnson and United Airlines:** Live "Tweet" sessions from their respective annual shareholders' meetings.
- **Best Buy:** Advertised earnings calls and invited participation
- **Dell:** Earnings disclosure mistake
- **GM:** Customer responses to Chevy going formal (It's not Chevy; It's Chevrolet)
 - "Drove my Chevrolet to the levee' does not have the same ring. Dropping #Chevy is going to fall, like a rock"

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Benefit or Risk?



The illustration shows two characters. On the left, a man with glasses and a tie is sitting at a desk with a computer monitor, keyboard, and mouse. On the right, a woman with curly hair is standing and holding a pair of dice, with one die shown in motion falling towards the ground.

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Benefit

- Real-time communication
- More timely disclosure
- Transparency
- Cost savings
- Leveraging new technologies
- Fresh and innovative

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Risks

- Integrity of the markets
- Exposure to anti-fraud laws
- Unauthorized disclosure
- Reliance on inaccurate information
- Potential for selective disclosure

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Two Issues re: Selective Disclosure

1. If information was selectively disclosed, will posting it on Twitter constitute adequate public dissemination to remedy the violation?
2. Does information posted on Twitter risk becoming the subject of selective disclosure?

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Corporate Disclosure Obligations

- **Basic Disclosure Obligations**
 - Securities and Exchange Act of 1934
 - 10K/10Q/8K
 - Self-Regulatory Organization Rules
- **Other Disclosure Obligations**
 - Regulation FD (2000)
 - "Share with one, share with all" policy
 - 2008 "Commission Guidance on the Use of Websites"
 - Applies to blogs and social media

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Regulation Fair Disclosure (FD)

- Prohibits selective disclosure
- Relevant investment information must be simultaneously disclosed to institutional and individual investors
- Select individuals can no longer make profits or avoid losses at the expense of the uninformed
- Intentional selective disclosure → must disclose "simultaneously" to the public
- Unintentional selective disclosure → must disclose "promptly" to the public
- Companies commonly satisfy Regulation FD through a press release or an 8-K filing
- 2000: Company websites *will not* satisfy these disclosure obligations
- 2008: Company websites *may* satisfy these disclosure obligations

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2008 Commission Guidance on the Use of Websites

- Companies will be in compliance with disclosure requirements if the post is sufficiently "public"
 - What is public?
 - *Courts*: No bright light standard; analysis focuses on whether the information is available to the investing public generally
 - *Congress*: Tautologically stated that information is nonpublic when it is "not available to the general public"
 - *SEC*: Provides three-part test without any clarifying rules regarding how companies can meet this test

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Three-part test

1. The website must be a recognized channel of distribution
2. The information must be properly disseminated to the securities marketplace in general
3. The information must be posted long enough for investors and the market to react

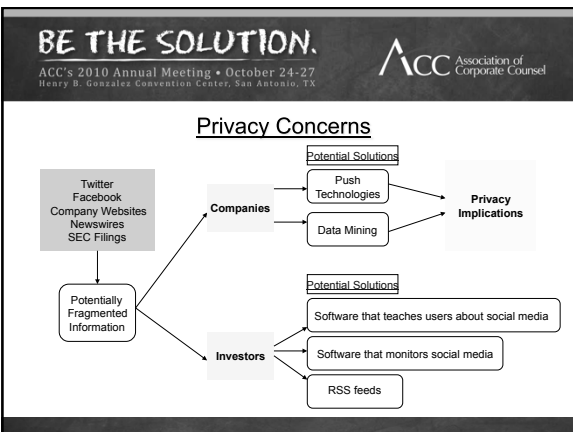
* Summary of caselaw and factors to consider in the Appendix

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Other Liability Considerations

- Previously posted materials
- Hyperlinks
- Unauthorized 3rd parties
- Representatives in their "individual" capacity
- Rule 10b-5 anti-fraud violations
- Proxy solicitations
- Intellectual Property
 - Potential disclosure of proprietary information
- Privacy concerns



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Recommendations

- Alert the market in general of the intent to use company websites or other unique disclosure practices
 - Use periodic reports or a hyperlink on the company website directing investors to the location of the disclosure
- Adopt or revise written policies to comply with the new rules
- Designate an authorized representative
- Monitor the information
- Take measures to correct false or misleading statements
- Adopt disclaimers similar to eBay
- Encourage investors to establish an RSS feed to receive immediate updates as information is published

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Facebook adds Shepardizing

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Questions?

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Appendix

1. Recognized Channel of Distribution + Securities Marketplace in General

- SEC v. Texas Gulf Sulphur (1968)
 - Information has to be "effectively disclosed in a manner sufficient to ensure its availability to the investing public."
 - "An announcement in "media of widest circulation."
 - Publication in local paper and not the broad tape was not sufficient.
 - Created long-standing rule that information is not public until published on the broad tape
- In re Faberge, Inc. (1973)
 - Press release through AutEx wire system was not made available to the general public because of the subscription nature of the wire system
 - Not public until published on broad tape
 - "The information must be disseminated in a manner calculated to reach the market in general by a recognized source of distribution."

Note: The definition of "Public" is analyzed through fraud and insider trading cases because there is little litigation involving Regulation FD.

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Appendix (cont.)

- **duPont Gloré Forgan (1978)**
 - Court views dissemination through a changed lens
 - Broad dissemination may occur through channels other than broad tape
 - Information on Reuters Financial Report was publicly disclosed:
 - even though the parties were not subscribers;
 - the parties were not aware of the report; and
 - a press release in the WSJ and other papers was not issued until 3-4 days later
- **SEC-Sponsored Conference (1998)**
 - Representatives of major stock exchanges stated that they consider information appearing on major newswires that provide push technologies, such as PR Newswire or Business Newswire, publicly disseminated.
- **Keyspan Corp. Securities Litigation (2003)**
 - Disclosure on EDGAR is sufficiently public
 - SEC's website is a recognized channel of distribution
 - "EDGAR system's broad and rapid dissemination benefits the public by allowing investors and others to obtain information rapidly and in electronic form."

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Appendix (cont.)

- **SEC unveils IDEA (2008)**
 - Successor to EDGAR
 - IDEA will make company and fund information interactive, giving investors faster and easier access to data
 - From document-based static financial reporting → financial information that is dynamic, usable and ready to go as investors make investment decisions
- **Twitter? Facebook? LinkedIn? (2010?)**
 - Speed, accuracy & reliability of the internet continues to grow
 - Broadtape/newsires/press releases:
 - perhaps no longer the best source of breaking news?
 - If communication/reliance on these sites becomes even more common place → sufficiently "public"?
 - Will requirement that investors must be followers, friends, or connected with the company cause a problem?
 - maybe not? (duPont Gloré)

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Appendix (cont.)

2. Reasonable Waiting Period to Absorb/Digest

- **SEC v. Texas Gulf Sulphur (1968)**
 - First articulated the need for a waiting period
 - Said insiders can't trade until information is disseminated and a period has passed to allow the market to absorb and react to the information
 - Purpose → to give investors a reasonably equal opportunity to make informed decisions before insiders jump the gun on a trade
- No bright-line standard
- Determined on a case-by-case basis
- Courts have come to varying conclusions. E.g.:
 - 6 hours after Reuters report was published (duPont Gloré)
 - 2 days for an efficient market to digest unexpected information (In re Crossroads Systems)

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Appendix (cont.)

- Factors to Consider
 - Form of dissemination (**Faberge**)
 - "How specific, definite and reliable the information is, how intelligible it is, and how easy it is to estimate its significance for the security in question."
 - Less of an issue of what's said → rather how it's said
 - Context and not just the use of individuals words (**Squith v. Middle S.**)
 - Information that is obscure, distorted or unclear should be given a longer waiting period
 - To be considered in the "total mix of information"
 - Nature and complexity of information (**Faberge**)
 - Less complex → shorter waiting period
 - If easily translatable into investment action → shorter waiting period
 - But "less spectacular" → longer waiting period (**SEC v. MacDonald**)
 - Frequency of activity
 - Actively traded securities → short absorption period
- Factors the SEC Highlighted for Website Disclosure
 - Market cap and number of shareholders of the company
 - Extent to which the information on the website is regularly accessed
 - Steps the company undertook to notify investors of key developments being posted on its website

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Changing Laws in a Mobile World

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Employment

- Privacy and data access
- Blurring the lines between business and personal
- Social networks

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Employment – Privacy and Access

- Computers
 - Employers are generally permitted to:
 - See what is on employees' screens as they work
 - Log keystrokes
 - Log busy/idle time

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Employment – Privacy and Access

- Email, Voicemail and SMS
 - Employers are generally permitted to:
 - Track and review work email
 - Track and review personal messages accessed using work devices
 - Retain copies of deleted emails, voicemails and texts

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Employment – Privacy and Access

- Other Smart Phone Data
 - GPS
 - Employers can track employees' position, but notice is required in some jurisdictions (e.g., Connecticut and Delaware)
 - Photos and Videos
 - Third party products that secretly monitor employee smartphone photos and videos exist
 - The law has yet to deal with the question

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Employment – Privacy and Access

- 4th Amendment: Government employees may have expectation of privacy when using employer-provided mobile device for personal purposes when on duty, but expectation may not be reasonable unless privacy is the employer's policy. *City of Ontario, California v. Quon*, 2010 WL 2400087
- Private Employers: Employees have a reasonable expectation of privacy in personal email through a personal account accessed on a Company device. *Stengart v. Loving Care Agency, Inc.*, 408 N.J. Super. 54 (App. Div. 2009)

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Employment – Privacy and Access

- **Ontario v. Quon**
 - Because Quon was a government employee, the case centered on 4th Amendment analysis
 - But: the Supreme Court said that the government's search would have been "reasonable and normal in the private-employer context"
 - "Even if [Quon] could assume some level of privacy would inhere in his messages, it would not have been reasonable for Quon to conclude that his messages were in all circumstances immune from scrutiny"

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Employment – Privacy and Access

- **Stengart v. Loving Care Agency**
 - Loving Care had a computer use policy:
 - Loving Care may review, access, and disclose "all matters on the company's media systems and services at any time"
 - E-mails, Internet communications and computer files are the company's business records and "are not to be considered private or personal" to employees
 - "Occasional personal use is permitted"

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Employment – Privacy and Access

- **Stengart v. Loving Care Agency**
 - Court's basis for finding Stengart's expectation of privacy reasonable under Loving Care's policy:
 - Policy did not expressly warn that personal, password-protected, web-based e-mail is subject to monitoring
 - Policy said Loving Care may review matters on "the company's media systems and services," but those terms are not defined

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Employment – Privacy and Access

- *Stengart v. Loving Care Agency*
 - Court's basis for finding Stengart's expectation of privacy reasonable under Loving Care's policy (cont.):
 - Policy does not expressly warn that personal, web-based e-mails are stored and can be forensically retrieved
 - Policy creates ambiguity by saying that e-mails "are not to be considered private or personal," while also permitting "occasional personal use" of e-mail

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Employment – Privacy and Access

- New North Carolina State Highway Patrol policy requires troopers who carry personal cell phones to hand over phone bills monthly.
 - Purpose: making sure troopers are working while on the clock
 - Unlike Quon and Stengart, NC troopers know in advance that the bills will be subject to review. Reasonable expectation of privacy?
 - What difference because the phones are personal?

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Employment – Privacy and Access

- Brandt Electrical Services, Inc. (BES) sued its former employee this month for violating his non-competition agreement
- In August, the employee was assigned to consult with a potential BES client
- The employee called in sick the next few days and never submitted a bid

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Employment – Privacy and Access

- BES reviewed the GPS feed from the employee's BES-issued mobile device
- The employee's supervisors went to his location and found him at the potential customer's property, working for his own company
- Unanswered questions:
 - Does it matter that BES was tracking the employee's whereabouts even when he was off-duty?
 - What is BES's policy on using GPS data?

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Employment – Work or Personal?

- Employer Liability for Employee Bad Acts
 - XYZ Corp. IT personnel notice logs indicating that Employee is accessing pornography
 - IT personnel tell Employee to stop, but take no other action.
 - After Employee is arrested on child pornography charges, Employee's wife sues XYZ Corp. on behalf of her daughter, a victim
 - Is XYZ Corp. liable to Employee's wife and daughter?

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Employment – Work or Personal?

- Yes; the court held:
 - XYZ had the **capability** to monitor Employee's internet use.
 - XYZ had the **right** to monitor Employee's internet use
 - XYZ was **on notice** that Employee was viewing child pornography on his computer
 - On public policy grounds, XYZ had a **duty** to "prevent the servant from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them"
 - XYZ's failure to act was a **proximate cause** of continuing harm to Employee's stepdaughter

Jane Doe v. XYZ Corporation, unpublished opinion of the New Jersey Appellate Division, December 27, 2005.

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Employment – Work or Personal?

- The XYZ case involved Employee's use of a desktop computer in 1999
- What outcome if Employee were browsing using his smartphone?
- What impact on "imputed knowledge" analysis if XYZ had:
 - HTTP access logs
 - GPS data
 - Ability to monitor uploads of camera phone images?

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Employment – Work or Personal?

- Employer Liability for Negligence
 - Employee driving a Company car, talking on a Company-issued cell phone, hits a woman who loses an arm as a result
 - Company policy at the time of the accident was for employees to use only hands-free phones while driving for Company business
 - The Company settled for \$5.2 million

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Employment – Work or Personal?

- Employer Liability for Negligence
 - Lawyer talking to a client on a cell phone while driving hits and kills a teen
 - The lawyer's employer, a large (500+ attorneys) international firm, was named as a defendant
 - The firm settled for an undisclosed amount. The teen's family was awarded a judgment of \$2,000,000 against the (now former-) attorney

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Employment – Work or Personal?

- Employer Liability for Overtime Pay
 - A non-exempt employee responds to a few emails on Saturday after a 40-hour work week on a company-issued smart phone
 - Does the company have to pay the employee for this time? If so, how much?

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Employment – Work or Personal?

- The employer is probably required to pay the employee time-and-a-half for the time spent responding to emails
- An activity is "work" if it is:
 - Controlled or required by an employer
 - Pursued necessarily and primarily for the employer's benefit
 - If performed outside scheduled work time, an integral and indispensable part of the employee's principal activities

Chao v. Gotham Registry, Inc., 514 F.3d 280, 285 (2d Cir.2008).

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Employment – Social Networks

- Social Media Policies
 - Policy should cover all employees
 - Revisit policies designed with only phones and email in mind
 - Consider whether to foster positive use of social media
 - Train human resources staff on risks of using social media to screen potential new hires

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Employment – Social Networks (Net Lore)

- Employee: "OMG I HATE MY JOB!! My boss is a total pervy wanker always making me do s#t!t stuff just to piss me off!! WANKER!"
- Boss: "Hi. I guess you forgot about adding me on here? Firstly, don't flatter yourself. Secondly, you've worked here 5 months and didn't work out that I'm gay? [...] and you can come in whenever you like to pick up any stuff you've left here. And yes, I'm serious."

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Employment – Social Networks (Net Lore)

- HR: "Please provide a medical certificate stating a valid reason for your sick leave on Thursday 21st 2008"
- Employee: "1 day leave absences do not require a medical certificate as stated in my contract, provided I have stated that I am on leave for medical reasons"

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Employment – Social Networks (Net Lore)

- HR: "Usually that is the case, as per your contract. However please note that leave during these occasions is only granted for genuine medical reasons. You line manager has determined that your leave was not due to medical reasons and as such we cannot grant leave on this occasion"
- Employee: "My leave was due to medical reasons, so you cannot deny leave based on a line manager's discretion, with no proof, please process leave as requested"

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Employment – Social Networks (Net Lore)

- HR: "I believe the proof that you are after is below"



Kyle Doyle
 is not going to work. ■ it's still trashed. SICKIE WOOL!
 Updated on Thursday

Networks:	Australia
Sex:	Male
Interested In:	Women
Birthday:	January 2, 1987
Hometown:	Sydney, Australia
Political Views:	Liberal Party Of Australia
Religious Views:	Agnostic

Mini-Feed

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Employment – Social Networks

- Social media makes it easy for employees to:
 - Embarrass themselves (possibly while identifying themselves as Company employees)
 - Disparage or harass coworker
 - Disparage the Company
 - Disclose trade secrets

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Employment – Social Networks

- Does your Company's internet use policy:
 - Specify that harassment and confidentiality policies apply equally to online speech?
 - Forbid employees from including the Company's name and trademarks in personal web communications?
 - Require employees to disclaim that they speak for the Company?
 - Forbid disparaging comments?

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Employment – Social Networks

- What about Company's own use of social sites?
 - Is it possible to 'facebook' a potential employee without gaining some information that can not be used in a hiring decision (information regarding the applicant's age, race, parental status, etc.)?
 - If the applicant is not hired and files a discrimination claim, it is possible that the applicant can defeat a summary judgment by showing that Company accessed her profile

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Enforceability of Mobile Agreements

Can a clickwrap agreement accepted via mobile device be enforced? What about browse wrap?

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Enforceability of Mobile Agreements

- Clickwrap, where a user must manifest assent to continue, is enforceable as in other contexts.
 - 30 pages of terms and conditions are harder to read on a Blackberry; but
 - The user is free to withhold assent and forego the application or website behind the click wrap

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Enforceability of Mobile Agreements

- Less clear for browse wrap, where a user is notified that use of a site or app is subject to agreement with terms and conditions, but no manifestation of assent (other than continued use) is required

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Enforceability of Mobile Agreements

- Outside the mobile context, browse wrap may not be enforceable where the license is not visible
 - E.g., where a user is able to access the licensed site or application without scrolling, but the terms and conditions notice is farther down the page

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Enforceability of Mobile Agreements

- Browse wrap may pose unique enforceability problems
 - Different browsers render pages differently
 - Each mobile platform uses its own proprietary browser
 - Third party mobile browsers are available
 - There is no uniform mobile device screen size or resolution

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Current Software Trends – Understanding the Software Cloud

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Context - dramatic market disruptions have repeatedly altered the use of technology by the Enterprise and corresponding legal considerations:

- Mainframes
- Minicomputers
- Client Server
- Internet
- Application Service Providers

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Some Factors Driving Current IT Trends ...

- Pursuit of business agility drives need for IT agility
- End-users have viable alternatives to enterprise IT and increasingly demand "consumer" experience
 - use of personal technology in the workplace, use of social media and web-based consumer applications
- Enterprises are data rich & information poor
 - Digital information doubling every 18 months

What does this mean for IT, the Business and You... accelerating complexity, risk and cost

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Enterprise IT is fundamentally changing again ...

- **Virtualization**
 - 28% of x86 workloads today
 - 48% by 2012
- **Cloud [public and private]**
 - 76% pursuing private cloud
 - By 2014 mainstream adoption of Cloud anticipated
- **Mobility**
 - 1 billion mobile devices accessing the internet in 2010
- **Social Media**

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What is Cloud Computing?

The cloud can be defined as a means by which highly scalable, technology-enabled services can be easily consumed over the internet on an as-needed basis.

Search the term and you will find a host of definitions: common thread is over-the-internet provision of dynamically scalable and often virtualized resources.

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Why do your clients care about Cloud? May include ...



Cost

- For Public Cloud, no Capex required; all costs are typically Opex based
- Generally lower cost to provision due to efficiency and economies of scale.
- No separate maintenance, management and high availability costs
- Pay for capacity only when needed – contrast SaaS with traditional ELA and a la carte licensing costs



Agility

- Ability to scale up/down capacity very quickly as needed
- No need to provision for peak performance
- Provides increased business agility – innovation, speed to market
- Enhance flexible access to features and functions - helps avoid over /under purchasing




Automation and Mobility

- Automated, no longer need to worry about hardware or software updates
- Mobility – often allows anytime, anywhere access for IT and end-users

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*Flavors of the Cloud
 "Everything as a Service"*



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- *Everything as a Service (EaaS) - the transformation of IT from a physical, well established environment into a capability that is available at people's fingertips without knowledge of where the assets are.*
- *Software as a Service (SaaS) - an environment where users can run predefined applications directly from their web browser.*
- *Platform as a Service (PaaS) - an environment in which the user is provided with a rich environment in which he or she can run applications as long as they are programmed in one of the languages supported by the platform (ex. Java, Python or .Net)*
- *Infrastructure as a Service (IaaS) - an environment that provides the user with processing power, networking, storage and the other necessary resources allowing the user to run software and applications*

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Key Considerations for SaaS Transactions

- Diligence on provider
- License → service
- Payment, warranty, support
- Liability, IP and indemnity
- Governing law, venue and related
- Term and Termination
- Business continuity planning
- Privacy, security and compliance considerations

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Diligence on Provider

- Provider background
- Financial stability
- Assess your regulatory needs and whether provider can meet them
- Reliance on third parties
 - IP owned by vendor or a 3rd party? Open source?
 - Use of subcontractors

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License → Service Agreement

- Standard offering or highly customized?
- Contracting model: paper, "click wrap"?
- Is it "full" SaaS or hybrid?
 - "SaaS" may range from a classic term or perpetual license together with hosted service delivery to a full service model where no license is provided.
- What are metrics defining use?
- Any geographic restrictions on access?

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Payment, Warranty, Support

- Payment
 - Up-front, subscription or metered?
 - If metered, is there a minimum?
- Warranty
 - Traditional software product warranty may not apply
 - Service level agreements (SLAs) with "up-time"
- Support
 - Support and related updates etc. may be included within fees.
 - Scheduled down-time

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Liability, IP, Indemnity

- Liability
- IP
- Indemnity
 - Consider responsibility for user content uploaded to SaaS data center

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Governing Law, Venue and Related Issues

- Governing Law
 - More than one set of laws may apply
- Venue
- Privilege
- "Guilt by Association"
 - Spam
 - data breach
- E-discovery
- Search warrants

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Term and Termination

- Who can terminate and when?
- Any stranded costs, wind-up or other fees due by customer?
- Consider Transition
 - Of actual operations or service
 - Of data
 - Cost and time to migrate to new solution
 - Option to license technology directly?

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Business Continuity Planning

- Is there data involved and where located?
- Back-ups
- Redundant data centers
- Access to technology or data in case of Force Majeure or other event
- Source Code Escrow

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Privacy, Security, Compliance

- Confirm nature of affected data
- who owns the data? Right to mine?
- Encryption
- Confirm regulatory obligations re: data
 - HIPAA
 - EU Data Protection Directive
 - Safe Harbor
 - Breach notification laws
- SAS 70 Type II reports
- ISO compliance
- Audits

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**Thunder from the Cloud -
 Common Negotiation Traps**

- Is Buyer seeking to transfer business risk?
- Is Buyer clear that they are buying a service not a license?
- Is Buyer seeking to transfer regulatory compliance?
- Has Seller "sold" a custom/standard solution but offering is actually standard/custom?

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QUESTIONS?



Extras from ACC

We are providing you with an index of all our InfoPAKs, Leading Practices Profiles, QuickCounsels and Top Tens, by substantive areas. We have also indexed for you those resources that are applicable to Canada and Europe.

Click on the link to index above or visit <http://www.acc.com/annualmeetingextras>.

The resources listed are just the tip of the iceberg! We have many more, including ACC Docket articles, sample forms and policies, and webcasts at <http://www.acc.com/LegalResources>.