



310 - Contractual Rights & the Internet: Ensuring Your Rights Are Protected

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Faculty Biographies

Karen Boudreau

Karen Boudreau is senior legal counsel at Websense, Inc. in San Diego.

She has been an in house counsel for a variety of companies including IBM, Oracle, GAP, Sony Electronics, Gateway, and Iomega and consulted to Marshalls, Reebok, and Hasbro.

She was previously chair of ACC's IT & eCommerce Committee and held a variety of positions on the board of ACC's San Diego Chapter. She has written several articles for the ACC Docket.

Karen Boudreau received her B.A. from the U. Maine with high honors and highest distinction and her J.D. from George Washington University with honors.

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Creating Enforceable Online Contracts

- What is an online contract?
- What constitutes agreement/assent?
- Key Elements:
 - Notice/Placement
 - Opportunity to review
 - Clear process of assent
 - Actual assent



Creating Enforceable Online Contracts

- Right to Change the Agreement
- Incorporating terms via hyperlinks
- Arbitration Clauses
- What about those “Bots?”
- E-Sign and UETA

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E-Sign

Stated Goal:

- Give legal legitimacy to e-signatures, e-contracting and e- records
- Pre-empt state and federal laws and other requirements for “written” documents or signatures, or mail or hand delivery of documents, with certain exceptions

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E-Sign

- Gives E-Signatures, e-contracts, and e-records the same effect as that accorded to paper and ink signatures, contracts, and records.
- Consumer protection measures require consumer notice and consent before e-records can bind consumers.
- Technology neutral - permits parties to choose the computer software or hardware through which to create or store e-records.

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E-Sign

- General rule - A signature, contract, or other record in electronic form used in interstate or foreign commerce will not be denied legal effect solely because it is in electronic form or an e-signature was used in forming the agreement.
§ 101(a).

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Privacy Policies and Online Contracts

- Is a privacy policy a contract?
- Should privacy policies be incorporated into online contracts?
- Consider:
 - limitations on liability
 - governing law/venue
 - standard of performance

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Privacy Policies and Online Contracts

- Security
 - What is the standard for securing the applicable information?
 - Don't let the marketing group create the standard
 - Consider the limitation on liability again and whether the privacy policy is really a contract or a statement of policy

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Privacy Policies Considerations

- Make sure you have accurate information about how you gather and handle information
- Make sure you have a method of tracking any changes to your use
- Do you want to be in the Safe Harbor
- Make sure that processes related to the policy actually work
 - Data removal
 - Data disclosure
 - Opt Out

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Developing a Privacy Policy

- What information do you gather?
 - Name, Address, ID, Password
 - Credit Card Info.
 - Website Browsing Info.
 - Purchase Info.
 - Third party info., i.e. gifts
 - Anything else
- What information do you keep?
 - Do you destroy information once used, i.e. CCNs?
 - How does one delete the information you have?
 - How does one find out what information you have?
- How do you secure data?
- How do you gather it?
 - Customer Input
 - Cookies
 - Tracer Tags

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Developing a Privacy Policy

- What do you use it for?
 - Tracking Customer Preferences
 - Reviewing the operation of your website
 - Enhancing Customer Experience
 - Convenient Reordering
 - Convenient Sign in
 - Revising your website
 - Identifying popular Products/Services
- With whom do you share it?
 - Your Affiliates
 - Your Vendors
 - Third Parties
 - Advertisers
 - Business partners
 - Information Gathering Services
 - Sale of your business
 - Governmental Agencies
 - Do you gather information from children under 13?

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Elements of a Privacy Policy

- Commitment to Privacy
- What Information You Collect
- How do you use the Information
- How do you gather the information
- How and with whom to do you share the information
- California Privacy Rights
- Who to contract re: questions/concerns
- Ability to revise date of last revision

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Use Agreements

- Do you want it just for site use or also for purchases?
- Do you want click through agreement or just posting?
- If for purchases include your usual sales terms
- Incorporate your trademark policy

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Elements of a Use Agreement

- Explanation that this is a contract and how they are accepting it
 - Use of the Site
 - Click Through
- Who are you and to whom does it apply
 - Your entity
 - Affiliates
- What does it cover
 - Use of Site
 - Purchase of Products/Services
- Reference to Privacy Policy/Incorporate Privacy Policy

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Elements of a Use Policy

- Prohibited Uses
 - Improper Access
 - Attempting to Breach Site Security
 - Attempt to Disrupt Service
 - Sending Unsolicited Communications
 - Forging Identification
- Termination of Access
- Comments/Suggestions/Feedback
- Who to contact

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Elements of a Use Agreement

- Updates/Revisions
- Customer Indemnity
- Warranty and other Disclaimers
 - Materials and Descriptions are Correct
 - Not responsible for Linked sites
 - Not endorsing any product
 - Descriptions may not be your opinion
- Limitation of Liability/No Consequentials
- Copyright/Trademarks

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Elements of a Use Agreement

- Digital Millennium Copyright Act
 - Must Respond to Copyright Claims
 - Identify Designated Agent
 - List of items notifications should include
 - How to file a counter-notification
 - Notice of penalties for false notifications
- Governing Law
- Arbitration/No Class Actions
- General Usual Legalese

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International e-Commerce



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A World Wide Opportunity

62.6% of
US retailers engaged
in international
e-commerce

- Foreign web traffic exceeds 10% of total traffic - 29.7%
- Foreign sales exceed 10% of total online sales - 26.4%
- Expecting foreign sales growth exceeding 10% - 38.1%

Source: Internet Retailer Survey 2006

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Global Risks

Employee data sans frontières...not in France, Tyco told

US multinational fined for laissez-faire approach

By [OUT-LAW.com](#) → [More by this author](#)

Published Tuesday 29th May 2007 00:00 GMT

Mobile computing: Opportunities and risk - Free whitepaper

The French data protection authority has fined a subsidiary of US firm Tyco Healthcare over the transfer of employee information across borders and inadequate data safeguards. Tyco Healthcare France was fined €30,000.

It is believed to be the first time that a US-based multinational has been fined for unauthorised overseas transfers of personal data.

German court convicts ex-online manager in child porn case

But suspended 2-year sentence means no jail time

By [IT](#)

Published 10:16 am EDT (GMT-04:00)

MUNICH, Germany (CNN) — A former head of the German division of the Compuserve online service was given a two-year suspended sentence after being convicted on Thursday of allowing customers to swap child pornography on the Internet.

Even prosecutors had conceded that Felix Sommer was not himself guilty of

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German crackdown raises the stakes for internet gambling

The Business

Published 04, 2006

By [C&A](#) in Frankfurt And Pierre Tran in Paris

773 words

SWITZER evaluation of online gambling companies could be arrested on criminal charges in Germany if they set foot in the country, officials from the interior ministries of the German states of Hesse and Bavaria told The Business that knowledge of foreign companies who let German residents place

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Can you sell it to Country X?

BUYING ON THE INTERNET
ATTENTION – BUYER BEWARE. MANY ITEMS AVAILABLE ON THE INTERNET ARE PROHIBITED OR RESTRICTED UNDER CUSTOMS LEGISLATION. CHECK WITH CUSTOMS BEFORE BUYING.

Customs x-rays, inspects and examines all goods received at international mail and air cargo centres. Australia has strict laws which control the import and export of goods including purchases made over the internet.

When buying goods over the internet, you should be aware that some items may be examined and seized. All goods entering Australia are subject to examination regardless of:

- if the goods were bought for someone else
- purpose of the goods including business, personal or private
- where they were bought
- whether or not the intention is to sell or distribute the goods.

If you are in doubt about goods you are planning to buy over the internet, check with Customs first.

CUSTOMS CLEARANCE
 Customs intercepts illegal drugs, including performance and image enhancing drugs, firearms and other weapons, such as

PROHIBITED GOODS
 Some goods bought over the internet are prohibited or could contain restricted substances. Items that may be detained or seized by Customs include:

- electronic dog collars
- electronic hand-held insect zappers
- medications, both traditional and alternative such as herbal preparations
- performance and image enhancing drugs, including steroids and health supplements containing restricted substances
- start funds
- videos, DVDs, CDs and books/publications with objectionable or offensive content
- wildlife souvenirs and products.

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Marketing & IP Compliance

- Cannot assume same rules apply
- Comparative Advertising
 - Prohibited in Germany
- Key Word Search Terms
 - Bidding on competitors trademark constitutes trademark infringement and unfair competition
- Email Marketing
 - EU, Australia have strict opt-in spam laws, while the US CAN-SPAM Act follows an opt-out approach
- Rights of Publicity
 - No similar right in UK (although celebrities may register their name as TM)

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Contract Terms

- EU Council Directive on Unfair Terms in Consumer Contracts
 - Contractual terms that were not individually negotiated “shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.”
- Specific Terms Identified as Unfair
 - **excluding or limiting the legal liability** of a seller or supplier in the event of the death or personal injury;
 - enabling the seller or supplier to **alter the terms of the contract unilaterally** without a valid reason which is specified in the contract;
 - **excluding or hindering the consumer's right to take legal action** or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract
- Rome Convention on the Law Applicable to Contractual Obligations
 - “a choice of law made by the parties shall not deprive the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence.”

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EU Data Protection & Safe Harbor

- European Union
 - Directive on Data Protection (1998) - prohibits the transfer of personal data to non-EU countries that do not provide “adequate” privacy protection
 - Approves US Safe Harbor principles in 2000
- Safe Harbor based on 7 privacy principles:
 - Notice
 - Choice
 - Onward Transfer
 - Security
 - Data integrity
 - Access
 - Enforcement

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Safe Harbor Principles

- **Notice**
Inform individuals about the purpose for which the information is being collected and types of third parties to which information is being disclosed, and the choices and means offered for limiting its use and disclosure
- **Choice**
Offer individuals the opportunity to choose (opt out) whether their personal information is (a) to be disclosed to a third party, or (b) to be used for a purpose that is incompatible with the purposes for which it was originally collected or subsequently authorized by the individual.
- **Sensitive Information**
For sensitive information (i.e. medical/ health conditions; racial/ethnic origin; political opinions; religious/ philosophical beliefs; trade union membership; sex life), individuals must be given affirmative or explicit (opt in) choice if the information is to be disclosed to a third party or used for a purpose other than those for which it was originally collected or subsequently authorized.
- **Onward Transfer**
To disclose information to a third party, organizations must apply the notice and choice principles.

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Safe Harbor Principles (con't)

- **Security**
Organizations creating, maintaining, using or disseminating personal information must take reasonable precautions to protect it from loss, misuse and unauthorized access, disclosure, alteration and destruction
- **Data Integrity**
Personal information must be relevant for the purposes for which it is to be used. An organization may not process personal information in a way that is incompatible with the purposes for which it has been collected or subsequently authorized by the individual.
- **Access**
Individuals must have access to personal information about them that an organization holds and be able to correct, amend, or delete that information where it is inaccurate, except where the burden or expense of providing access would be disproportionate to the risks to the individual's privacy in the case in question, or where the rights of persons other than the individual would be violated.
- **Enforcement**
Organizations must have the following enforcement mechanisms in place:
 - readily available and affordable independent recourse mechanisms to investigate and resolve complaints brought by individuals
 - Follow-up procedures for verifying that safe harbor policies and mechanisms have been implemented
 - Obligations to remedy problems arising out of a failure by the organization to comply with the principles

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Linking Nomenclature

Hyperlink -- an element in an electronic document that links to another place in the same document or to an entirely different document. Typically, you click on the hyperlink to follow the link. Hyperlinks are the most essential ingredient of all hypertext systems, including the World Wide Web.

Deep Link -- A hyperlink either on a Web page or in the results of a search engine query to a page on a Web site other than the site's home page. Typically, a Web site's home page is the top page in the site's hierarchy, and any page other than that is considered "deep."

Framing - on a web page, framing means that a website can be organized into frames. Each frame displays a different HTML document.

Thumbnail -- A miniature display of a page to be printed. Thumbnails enable you to see the layout of many pages on the screen at once. Generally, thumbnails are too small to show the actual text.

Sources: Webopedia, Wikipedia

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Framing

Washington Post Company v. Total News Inc., Case No. 97 Civ. 1190 (S.D. N.Y. 1997) – news portal framed Washington Post and other new sites replacing framed ads with portal ads. Case quickly settled requiring Total News to obtain license.



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Deep Linking

- ***Ticketmaster Corp. v. Tickets.com***,
2000 U.S. Dist. Lexis 4553 (C.D. Ca., March 27, 2000)
2003 U.S. Dist. Lexis 6483 (C.D. CA., March 7, 2003)
 - Rejects per se rule
 - "hyperlinking [without framing] does not itself involve a violation of the Copyright Act ... since no copying is involved."
 - "deep linking by itself (i.e. without confusion of source) does not necessarily involve unfair competition."
 - Refused to grant summary judgment for defendant on contract claim for violating website terms of use since binding agreement can be formed by mere use of a web site if the user has actual knowledge of such terms
- ***Live Nation Motor Sports Inc. v. Robert Davis***
Civ. Act. No. 3:06-CV-276-L (N.D. Texas, December 12, 2006)
Deep linking to permit users to access live webcasts "would likely qualify as a copied display or performance of SFX's copyrightable material".

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Contributory Infringement & Disparaging Links

● Contributory Infringement

- ***Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.***, 75 F. Supp. 2d 1290 (D. Utah, Dec. 6, 1999). Ordered defendants to remove listing of websites which posted materials infringing plaintiff's copyright.

● Disparaging Links

- ***Ford Motor Company v. 2600 Enterprises***, et al., 177 F. Supp. 2d 661 (E.D. Mich. 2001). Denies Ford Motor Company's motion for a preliminary injunction blocking www.f*ckgeneralmotors.com from redirecting users to Ford website.

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Thumbnails

- *Batesville Services, Inc., et al. v. Funeral Depot* (S. D. Ind., November 10, 2004) – fact issue of whether use of thumbnails of plaintiff's caskets constituted copyright infringement
- *Perfect 10, Inc. v. Amazon.com, Inc.* (9th Cir. May 16, 2007)
 - Use of thumbnail images in search engine for purpose of enabling public to locate the full size image constitutes fair use as it is transformative in nature and serves a different purpose.
 - "Google could be held contributorily liable if it had knowledge that infringing Perfect 10 images were available using its search engine, could take simple measures to prevent further damage to Perfect 10's copyrighted works, and failed to take such step."

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Other Considerations

- SEC Considerations
 - Potential liability for hyperlinked content depending on context, presentation and risk of confusion. *Use of Electronic Media*, SEC Interpretive Release Nos. 33-7856, 34-42728, IC-24426; File No. S7-11-00 (April 25, 2000).
- Disclaimers
 - You are now leaving the [blank] web site and linking to an independent web site. [Blank] is not responsible for the content of the linked site and does not endorse the services or products offered by the linked site. It is your responsibility to evaluate all offers, services, products, and information on the linked site. Do you wish to continue? Yes or No
- Who links to you?
 - <http://links2me.info/>

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