



## 110:Internet Hacking & IP Insurance

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## Faculty Biographies

### Reginald D. Davis

Reggie D. Davis is associate general counsel at Yahoo!, and is responsible for managing all litigation for the company. In addition, he chairs the company's virtual and physical security committee and is responsible for purchase of insurance policies for Yahoo.

Prior to joining Yahoo!, Mr. Davis was a partner at the firm of Hancock Rothert & Bunshoft in San Francisco.

He frequently speaks at various legal and technical conferences on topics related to internet and ecommerce litigation, security, and risk management.

Mr. Davis is a graduate of Harvard University and Tulane School of Law.

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# Internet & IP Risks

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Rick Seabolt – Hancock Rothert & Bunshoft

American Corporate Counsel Association  
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## Introductions

- Reggie Davis  
Yahoo! Associate General Counsel  
Co-Chair, ACCA eCommerce Committee
- Leib Dodell  
Vice President, Chubb Professional Insurance  
Media and Intellectual Property Specialist
- Rick Seabolt, Hancock Rothert & Bunshoft  
Officer, Cal. State Bar Litigation Section  
Board, Assoc. Business Trial Lawyers (ABTL)

## **Goals of Presentation**

- Evolving Internet Exposures Facing “Main Street” Companies
- Sound Risk Management Practices
- Evolution of Internet Liability Insurance
- Interesting Metrics
- Yahoo! Actual Claims Examples

## **OK, What Are The Exposures?**

- Copyright/Trademark Infringement
- Defamation/Disparagement
- “E-Commerce” Exposures
- Other Potential Exposures

## Copyright/Trademark Infringement

“Some of the evidence in this case strongly suggests that some companies operating in the area of the Internet may have a misconception that, because their technology is somewhat novel, they are somehow immune from the ordinary applications of laws of the United States, including copyright law.”

Judge Rakoff, *UMG v. MP3.com* (Sept. 6, 2000)

## Copyright/Trademark Infringement

- Domain names
  - Anticybersquatting Consumer Protection Act
  - ICANN dispute resolution process (icann.org)
- Website links (unauthorized links, use of “linking agreements”)
- Infringement in “metatags,” pop-up ads

## Copyright/Trademark, cont.

- Contributory infringement via links
  - (*Intellectual Reserve v. Utah Lighthouse Ministries*)
- Framing/“Deep-linking”
- Digital Millennium Copyright Act -- innocent infringement; “take-down procedures”
- Important U.S. Supreme Court decision –
  - *Tasini v. New York Times*

## Online Trademark Claims Examples

- Love Thy Neighbor v. lovethyneighbor.org
- Rock-n-Bowl v. Rocknbowl.com
- Estee Lauder v. The Fragrance Counter
- Teen Magazine v. teenmagazine.com
- Philip Morris v. phillipmorris.com
- Major League Baseball v. Morgan Lewis & Bockius
- MPAA v. ratednc-17.com.
- Delta Faucets v. Delta Airlines
- City of Barcelona v. barcelona.com



## Defamation

- False and defamatory statement of fact -- posting on Internet or in email IS “publication”
- Product disparagement -- online product comparisons
- Communications Decency Act -- safe harbor for *third party* content (note: U.S. law only)
- Claims examples:
  - *Blumenthal v. AOL and Matt Drudge*
  - *Carafano v. Metrosplash.com*
  - *Batzel v. Smith*

## “E-Commerce” Exposures

- Privacy Rights on the Internet
  - “You already have zero privacy. Get over it.”  
Scott McNealy, CEO, Sun Microsystems
  - Yahoo!
  - Real Networks
  - Amazon
  - Double Click
- **Major** focus of state/federal legislation
  - Children’s Online Privacy Protection Act
  - G-L-B, HIPPA, etc.
  - FTC/State AG enforcement
  - European Union Data Directive
  - Canadian national privacy law (1/1/2004) and provincial legislation (BC, Alberta, etc.)
- Free speech v. privacy
  - *Tucker Max v. Johnson*; justicefiles.org

## More “E-Commerce” Exposures

- Security Requirement
  - FTC enforcement – Eli Lilly, Microsoft and Guess
  - New California disclosure statute (SB 1386, now CCP 1798.82)
  - Identity theft
- Jurisdictional issues
  - *LICRA v. Yahoo!* (Nazi paraphernalia auction website)
  - *Gutnick v. Dow Jones* (Australian defamation case)
- Anti-spam legislation
  - Federal law (Burns-Wyden Act) “Can the Spam”
  - State Legislation – 26 states (including Utah and Virginia)
- Digital downloads/file sharing
  - MP3
  - Napster
  - Grokster

## Other Exposure Areas

- “Spyware” and “adware”
  - Gator, WhenU, Ezula cases
- Incitement (e.g., *Planned Parenthood v. American Coalition of Life Advocates*)
- Negligent advice or services
- Patent Infringement (particularly “business process” patents)



## One Solution – Cyberliability Insurance

- **Many Carriers Have Entered Marketplace:**
  - Chubb – Safety'Net Policy
  - AIG – NetAdvantage suite of products
  - CNA – Infotek
  - ACE USA – Digital Technology
  - London/Lloyd's syndicates
  - Media/Professional Insurance
- **Little standardization and major pricing variations**

## Coverage Variations

- ◆ Depend on biases of underwriting facility
- ◆ “First party”/”third party”/combined
- ◆ Security assessment prior to quote?
- ◆ Occurrence v. claims made triggers
- ◆ Insuring clause: “all risk” v. named perils
- ◆ Some include “E&O” -- separate coverage grant for “technology services”

## **Coverage Variations (continued)**

- ◆ Coverage territory (with respect to both acts and forums)
- ◆ Contingent bodily injury/property damage
- ◆ Duty to defend v. reimbursement
- ◆ Primary coverage or Excess D-I-C
- ◆ Punitive damages

## **Coverage Variations -- Exclusions**

- ◆ Failure to follow privacy policy
- ◆ Unauthorized access
- ◆ Virus/hacker
- ◆ Bulletin boards/chat rooms
- ◆ “Intellectual property”
- ◆ Dishonest/intentional acts



- Quick facts about Yahoo!
  - Growth
  - Revenue
  - Changing business model

## Claim is a Claim is a Claim

Despite interesting, cutting-edge cyber exposure of underlying disputes, the tendering of the claims and the coverage issues raised are very traditional in nature. Examples:

- *Yahoo! / LICRA*
  - International jurisdiction
- *broadcast.com/Chalkboard*
  - Implementation of Yahoo! privacy policy post-acquisition of broadcast.com
- *Launch*
  - Music DMCA – interactivity

## Yahoo! / LICRA

- Duty to Defend – insurer argued duty to defend does not include costs of prosecuting declaratory relief action
  - Yahoo! position – declaratory relief necessary to press Yahoo!'s defense under the First Amendment of the U.S. Constitution (a defense not available in France)
- Criminal acts exclusion – Gulf/Media Pro argued that because act was criminal in France the criminal acts exclusion applied
  - Yahoo! position – not criminal where servers located

## broadcast.com/Chalkboard

- Defense costs for Yahoo! Acquisition – broadcast.com
- Acquisition Endorsement “Automatic coverage” if
  - (a) greater than 50% ownership
  - (b) notice within 60 days
  - (c) payment of additional premium
- Yahoo! Positions:
  - Automatic coverage endorsement conditions satisfied
  - Dual purpose – *Buss* – must defend completely / entirely

## Launch Media / Yahoo!

### Launch Online Music Service

- Two successive policies – first policy exhausted
- Policy limit applicable to “each loss” is the policy limit of the policy in which matter is first uttered
- “Each Loss” – all damages and expense from utterance of matter during policy period relating to “same subject, person, or class of persons regardless of number of repetitions...”
- Undisputed that first utterance of any music occurred during first policy period. But also undisputed that “Liquid Dreams” owned by J Records first uttered in second period. J Records formed in second period (November 2000).

## Internet Law Resources

- BNA's Internet Law News  
(<http://ecommercecenter.bna.com>)
- Gigalaw.com
- ILPF.org
- ICANN.org
- Tech Law Journal ([techlawjournal.com](http://techlawjournal.com))
- SANS.org
- Mealey's Cybertech Litigation Reporter
- CERT.com (gov't/Carnegie Mellon site)
- Bank of America & Microsoft sites (security issues)

## Contact Information

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