

# 038 A Year in Review: eCommerce Checklist for Managing Counsel

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## Faculty Biographies

### **Blake T. Bilstad, Esq..**

Blake T. Bilstad is the corporate counsel and secretary for MP3.com, Inc. in San Diego. His responsibilities include providing legal counsel in the areas of corporate governance, securities, internet law, content licensing and regulation, mergers and acquisitions, employment, intellectual property, contests and sweepstakes, and international law. Mr. Bilstad counseled MP3.com on its initial preferred stock financings and executive team hires prior to joining the company before its initial public offering in July 1999.

Prior to joining MP3.com, Mr. Bilstad worked for three years as a business associate with the law firm of Cooley Godward LLP in San Diego, providing general corporate representation for emerging technology companies ranging from start-ups to publicly-traded corporations in the software, internet, entertainment, and biotech industries.

Mr. Bilstad received a BA *magna cum laude* from Duke University and a JD *cum laude* from Harvard Law School.

### **Christopher Kim**

Chris J. Kim is senior corporate counsel for Yahoo! Inc., in Sunnyvale, California. His responsibilities include the oversight of new product development as well as the negotiation of IP licensing, advertising, and strategic alliance relationships on behalf of Yahoo!

Prior to joining Yahoo!, Mr. Kim was an associate at the law firm of Howard, Rice, Nemerovski, Canady, Falk and Rabin in San Francisco. During his three years at Howard Rice, Mr. Kim provided counsel in a variety of areas including IP licensing and securities law.

Mr. Kim received his bachelors from the University of Toronto and is a graduate of the University of British Columbia Faculty of Law.

### **Randy S. Segal**

Randy S. Segal is senior vice president and general counsel of Hughes Network Systems, an international telecommunications systems provider in Germantown, Maryland. Hughes Network Systems is a leader in global satellite and cellular systems, including broadband communications.

Prior to May 2001, Ms. Segal was senior vice president and general counsel of Motient Corporation, a mobile internet and satellite communications company. Ms. Segal played a central role in the formulation and implementation of Motient's business strategy as well as strategic oversight of its merger and acquisition activity. Ms. Segal led Motient and XM Satellite Radio through many significant financing activities, including both Motient and XM's initial public offerings. Ms. Segal serves on the board of directors of XM Satellite

Radio Corporation, which will offer direct satellite-to-receiver broadcast technology to provide listeners car and home broadcasting of 100 channels of digital quality music, news, sports, talk, and children's programming, coast to coast.

Prior to Motient, Ms. Segal was in the New York office of Debevoise & Plimpton. Prior to joining Debevoise & Plimpton, Ms. Segal served as a law clerk to the Honorable Jerre S. Williams of the United States Court of Appeals, Fifth Circuit, and the Honorable Edmund L. Palmieri of the United States District Court for the Southern District of New York.

Ms. Segal is a member of the North Virginia Technology Council, National Association of Corporate Directors, and President's Council of Cornell Women. She received her bachelor's and master's degrees from Cornell University and her law degree from Columbia Law School.



## A YEAR IN REVIEW: E-COMMERCE CHECKLIST FOR MANAGING COUNSEL

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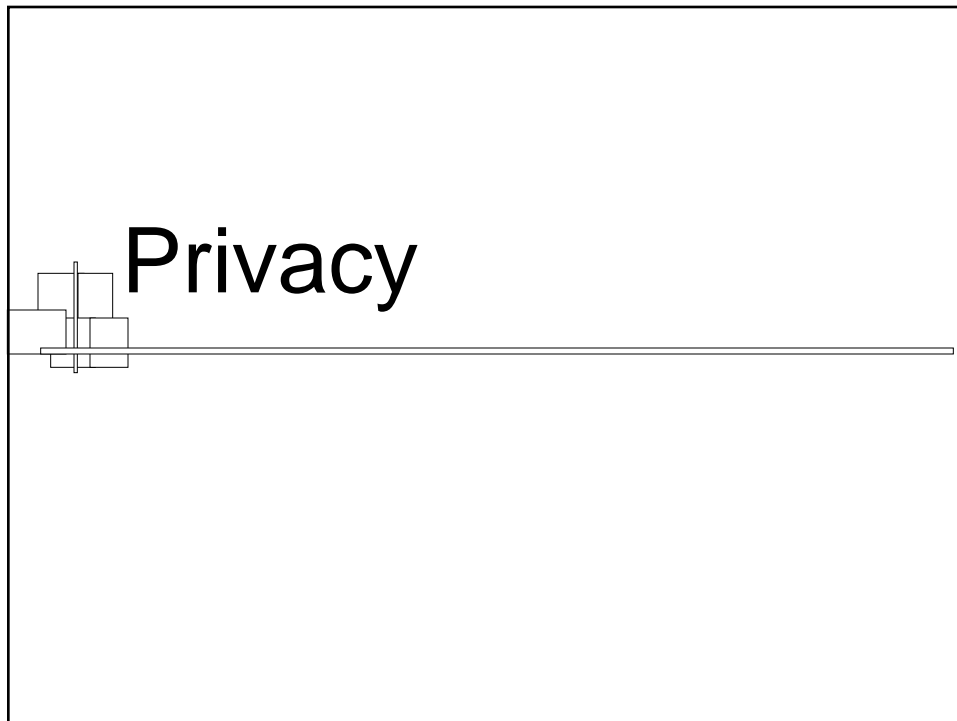
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## Advising the e-Company: A Checklist for Managing Counsel

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Privacy  
e-commerce Contracts  
Securities Law  
Human Resources  
Linking, Framing and Cybertrespassing  
Cross-Border Issues  
Regulation of Online Content  
Chatrooms  
New Frontiers



- n Lack of Uniform Law in the U.S.
- n Industry Self-Regulation
- n Federal Privacy Legislation
- n International Privacy



## Federal Privacy Legislation

- n Federal Trade Commission Act
  - n "unfair or deceptive acts or practices in or affecting commerce."
    - n Geocities
    - n Toysmart
    - n Other cases



## Federal Privacy Legislation

- n COPPA (Children's Online Protection Act of 1998)
  - n Scope (Service providers and Web sties directed towards children under 13 years of age)
  - n Notice
  - n Verifiable Parental Consent
  - n Parental Review
  - n Conditions on Activities
  - n Reasonable Security and Confidential Procedures



## Federal Privacy Legislation

- n Gramm-Leach-Bliley Act of 1999 (financial institutions)
  - n Disclosure, "Opt-out", Prohibitions
- n Health Insurance Portability and Accountability Act (HIPAA)
  - n Healthcare organizations



## International Privacy

- n EU e-commerce Directive
  - n [http://europa.eu.int/comm/internal\\_market/en/media/](http://europa.eu.int/comm/internal_market/en/media/)
- n Nomenclature
  - n "data protection"
  - n personal vs. sensitive data
- n Key principles: disclosure and consent
  - n note: opt-in consent required in Germany (dialog window)



## International Privacy

- n EU – proper handling of personal data
  - n fairly and lawfully processed
  - n processed for limited purposes
  - n adequate, relevant and not excessive
  - n accurate
  - n not kept longer than necessary
  - n processed in accordance with the data subject's rights
  - n secure; and
  - n not transferred to countries without adequate protection (not US!)



## International Privacy

- n EU – seven "safe harbor" principles (in process of adoption)
  - n notice of purpose and use
  - n choice/opt-out
  - n compliant transfer of data
  - n reasonable security
  - n integrity of data and process
  - n access to personal data (problematic)
  - n compliance/enforcement mechanisms





## International Privacy

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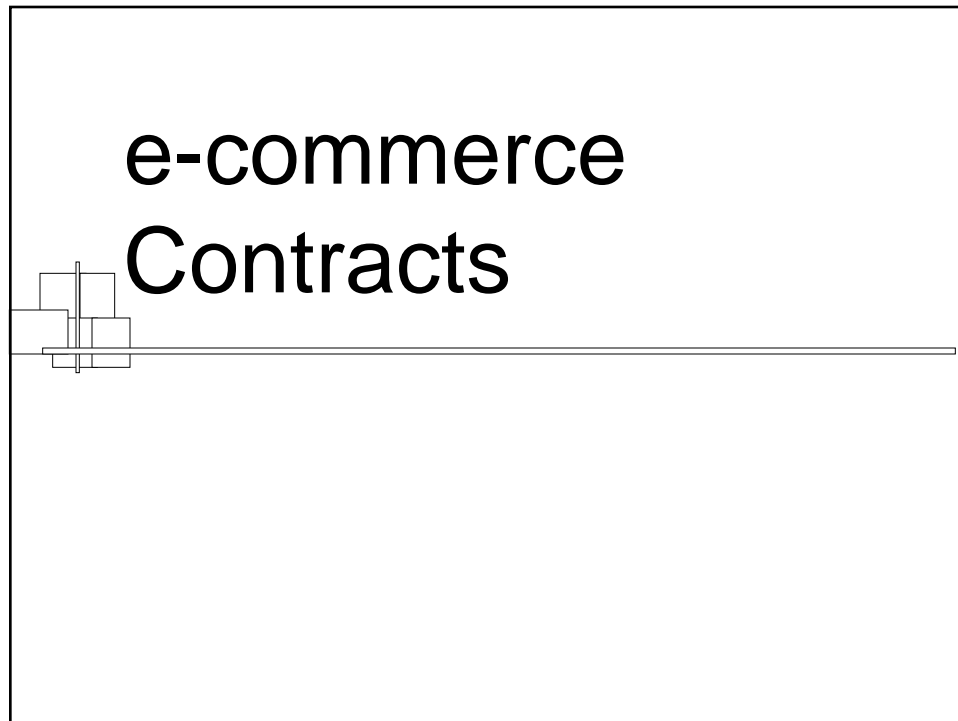
- n Anti-spam/email regulations
  - n multiple EU directives (telecom, distance selling, e-commerce)
- n Opt-out registries
  - n e.g., Spain – AEMD "Robinson List"
- n Registration requirements
  - n e.g., France – CNIL



## Privacy on the Internet: Takeaways for Inhouse Counsel

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- n Tips on drafting a privacy policy
  - n Consider the relevant law specific to your industry
  - n Consider cookies, beacons, third party ad servers, etc.
  - n Consider privacy programs such as TRUSTe
- n Ensure careful compliance with your policy
- n Carefully review e-commerce contract user data provisions
- n Consult international counsel as appropriate



e-commerce Contracts

Generally, the rules are the same, but consider . . .

- n Internet specific provisions
  - n Website look and feel
    - n Logos, banners, navigation bars and tools, graphics, typeface, page layout, object placement (critical to user familiarity and recognition)
    - n Linking agreements and co-branded sites (whose look and feel; who can modify)
  - n Site development, hosting and co-branding agreements (to allocate web site delivery, management and performance responsibilities)
  - n Site traffic calculations



## e-commerce Contracts

- n e-commerce issues ("spin") for traditional contract provisions and new terms for contract concerns/focus
  - n Force majeure
    - n consider: man made events: hacking, internet transmission failures
  - n Intellectual property
    - n consider: source code access/escrow; background and foreground ownership; non-competes
  - n Privacy
    - n covered earlier
  - n Security
    - n consider: encryption; firewalls; related to privacy issues



## e-commerce Contracts

- n Payment
  - n consider: special internet terms especially re: linking and co-branding agreements, including impressions, unique user fees, fees for referrals that lead to actual purchasers.
- n Warranties/Indemnification
  - n consider: warranty as to own technology/content/software esp. important in internet/linking/cobranding; IP, Information, obscenity, privacy, publicity
- n Choice of law and forum
  - n consider: select forum that has a forward view of e-commerce issues; limit risk and exposure in distant courts; arbitration choice to head off class action; UCITA and/or UETA adopter



## e-commerce Contracts

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- n Export controls
  - n consider: warranty of compliance with US export laws; erect measures designed to prevent unauthorized exports
- n Signatures/password identification
  - n consider: method to establish enforceability validity of transaction both domestic and international; require "affirmative act"/click by user to assent or reject transaction
- n Insurance policies
  - n consider: 1) cyberspace and multimedia risks for third party liability for liable, slander and defamation, as well as infringement of IP rights; 2) internet security, crime, kidnap and ransom policies (net secure coverage) covering lost web and advertising revenues due to unauthorized entry, viruses, employee error, theft of credit data; and 3) intellectual property loss risks



## e-commerce Contracts

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- n Internet advertising
  - n consider: federal regulation of advertising, disclosures and warranties to consumers, as well as international restrictions; SPAM; unsolicited e-mail
- n Standard Contractual Terms
  - n consider: simple and reasonable terms consistent with off-line sales to further enforceability; carefully drawn contract with material terms prominently disclosed and displayed



## e-commerce Contracts: Takeaways for Inhouse Counsel

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- n Consider new terms/ considerations for e-commerce
- n Review standard terms with e-commerce slant in mind
- n Consider what's necessary to meet legal and enforceability requirements, and protect economic interests/ risks



## Securities Law: New Challenges and Opportunities

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## Securities Law

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### Overview

- n Internet significantly changes securities law and insider trading review and you must exercise caution in applying existing principles to website content, postings (in general and during an offering), hyperlinks, chatrooms, etc.



## Securities Law

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### n Regulation FD

- n effective October 2000

- n in a nutshell:

- n *Whenever a public company, or any person acting on its behalf, discloses material nonpublic information to certain enumerated persons, the company must simultaneously, in the case of intentional disclosures, or promptly, in the case of unintentional disclosures, make public disclosure of that same information.*



## Securities Law

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### n Regulation FD (cont.)

#### n definitions

- n persons acting on its behalf: directors, executive officers, employees/agents who regularly communicate to certain enumerated persons
- n certain enumerated persons: securities market professionals, shareholders
- n intentional: disclosing person knows, or is reckless in not knowing, info is material/nonpublic
- n promptly: within the later of 24 hours or commencement of next trading day on NYSE
- n public disclosure: '34 Act filing or combo of other accepted methods (press release, email to shareholders, news conference, webcast, web posting)



## Securities Law

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### n Regulation FD (cont.)

- n does not create Rule 10b-5 liability
- n knowing/reckless conduct required for SEC enforcement
- n traditional selective disclosure liabilities remain in effect



## Securities Law

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- n Regulation FD (cont.)
  - n selective disclosure issues: When is information "public"? Is it sufficiently disseminated so investors have access/opportunity to absorb?
  - n SEC confirmed views that--
    - n much of investing public not online yet (selective disclosure)
    - n passive publication on websites (requires browsing at right time to "pull" information; compare with "push" of news service)



## Securities Law

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*Stock option "disincentives" got your e-commerce company down? Some new alternatives (and some old ones rearing their heads again) should be navigated carefully...*

- n Rule 10b5-1 trading plans
- n Stock option repricings





## Securities Law

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- n Rule 10b5-1 trading plans
  - n effective October 2000
  - n affirmative defense under Rule 10b-5 for persons that trade securities while in possession of material nonpublic information
  - n must have "[e]ntered into a binding contract to purchase or sell the security" with a qualified third party



## Securities Law

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- n Rule 10b5-1 Trading Plans (cont.)
  - n requirements:
    - n plan must specify date, amount and price of securities sold (or includes written formula or algorithm for determining same) or is set up as a qualified "blind" trust
    - n cannot be modified by person (only terminated)
    - n other restrictions, good faith requirement
  - n consider modifying company insider trading policy to accommodate



## Securities Law

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### n Stock Option Repricings

- n recent market conditions --> havoc among option plans
- n simple repricing creates unfavorable "variable accounting" treatment
- n other options: new grants, cancel and replace after 6 mos., restricted stock exchange, cash/bonus make-goods, accelerating future awards
- n some serious issues: proxy disclosure, issuer tender offer, corporate waste
- n consulting accounting and legal experts a MUST



## Securities Law

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### Your Website

- n Controlling the content of your site
  - n Companies are responsible for accuracy of statements if they "reasonably can be expected to reach investors or the securities markets regardless of the medium through which the statements are made, including the internet"



## Securities Law

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### Your Website (cont.)

- n All aspects of website postings can give rise to liability
  - n Examples:
    - n overly optimistic descriptions of products, capabilities; outdated materials; hyperlinks to other company sites
  - n Hyperlinks
    - n Beware/review hyperlinks as extending and incorporating liability (consider further links to cautionary statements safe harbor)
    - n New SEC/Internet release includes detailed discussion of responsibility for hyperlinked information, and that there is no "bright line" test.



## Securities Law

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### Your Website (cont.)

- n Three factors to consider as to whether there has been adoption:
  - n 1. Content of hyperlink (what does company say: "for best description of company, see..." versus "the following is a list of all analyst reports")
  - n 2. Whether investor is likely to be confused about source (click-through does/does not announce leaving company website, company does not monitor link); greater risk of liability if company "frames" third party website as own
  - n 3. Presentation of material: more likely adopted if hyperlink limits information accessed in a manner unrepresentative to general information (scope, favorable/unfavorable limits, presentation designed to enhance what can be viewed).

## Securities Law

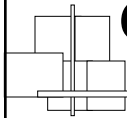
### Webpostings: Protections (cont.)

- n Consider separate investor relations section to focus relevant audience and reduce risk of (actionable) reliance on other areas of site
- n Current versus archived information on website (e.g., press releases and forward-looking information)
- n Time-tagging ("This information is as of x date and the company has no duty to update.")
- n Watch for further SEC guidance/clarification
  - n Cautionary Statements/Disclaimers (in addition to forward looking statement, craft links to risk factors from periodic reports to make disclaimer meaningful and subject to safe harbor).
  - n Exercise care in placing transcripts of analyst calls/conferences on website

## Securities Law: Takeaways for Inhouse Counsel

- n Review your website for unintended securities law exposure, and modify to reflect separate investor sites, time-tagging/archiving, hyperlinking adoption risks, safeharbor, risk-factor links, etc.
- n Establish policy, procedures and guidelines for use of electronic postings, distributions, and emails consistent with SEC guidance on general public v. employee use.
- n In your company's attempts to mitigate stock option plan "disincentives" in today's economic climate, consider:
  - n modifying your insider trading policy to accommodate new Rule 10b5-1 trading plans (for individuals with material nonpublic information)
  - n the serious accounting risks inherent to any attempted stock option repricings (consult your auditors!)

# Human Resources: Employee Issues in the e-Age



## Human Resources: Employee Issues in the e-Age

- n As employee use of e-mail and internet increases, so does potential for employer liability for employee misconduct
- n Although these increase employee productivity, companies need to take steps to minimize risks and liability
- n Need policies in place



## e-Mail Policies

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- n Policy:
  - n Overcoming notion that e-mail is informal, private and impermanent: Importance of employee training
  - n Points to consider for inclusion in e-mail policy:
    - n Make employees aware that e-mail will be monitored (no expectation of privacy)
    - n Compliance with Electronic Communication Privacy Act of 1986 (18 USC 2501 et seq., 2701 et seq.) (prohibiting intentional interception, use and disclosure of electronic communications)



## e-Mail Policies

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- Exceptions to ECPA (allowing employers to monitor employee use without liability under ECPA): if company owns system it can monitor employee use ("system provider" exception): Bohach v. City of Reno, 932 F.Supp 1232 (D.Nev.1996)); can be monitored with consent; can be monitored if business-related reason for monitoring ("business use" exception)); see 18 U.S.C. § 2511(4)(a).
- n Obtain employee's written consent to monitoring policy or publicize written e-mail policy internally
- n Need to coordinate policy with applicable state laws



## e-Mail Policies

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- n Specify amount of personal/non-business use that will be tolerated
- n Make employees aware that e-mail is the property of the corporation (including telecommuter employees)
- n Prohibition of offensive, obscene, defamatory and derogatory material



## e-Mail Policies

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- n Prohibition of copying and transmission of copyrighted material (e.g. artwork, clips from TV shows), if not, your company can be liable for direct, contributory and vicarious copyright infringement
- n Prohibition of transmission of large files and "chain" e-mail (system performance issue)
- n Prohibition of transmission of company secrets (including trade secrets and other confidential/privileged information)



## e-Mail Policies

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- n Forbidding e-mail solicitations and proselytizing
  - n Other issues with electronic posting board/access policy
- n Retention policy
  - n E-mail will be routinely deleted
  - n Employee must discard e-mail regularly
  - n Suspension of regular retention policy in cases of forthcoming or potential litigation



## Internet

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- n Appropriate use policy in place, tailored to corporate culture
- n Allowing only for "gainful company business": how to monitor and define; possible morale effects
- n Avoiding "cyberloafing": how much personal use will you tolerate
- n Importance of communicating policy: eliminate expectations of privacy
- n Coordinate with e-mail policy
- n Prohibiting access to sites with inappropriate or offensive content





## Internet

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- n Software or other methods to determine inappropriate usage (i.e., NetWatch, NetNanny)
- n Sexual harassment, hostile work environment issues: cases
  - n Inappropriate e-mail as evidence in sexual discrimination case (Strauss v. Microsoft Corp., 814 F.Supp. 1186, 1194 (S.D.N.Y. 1993))
  - n Harassment via e-mail Knox v. State of Indiana, 93 F.3d 1327 (7th Cir. 1996))
  - n Racial discrimination claim supported by supervisor's use of racially derogatory e-mail (Curtis v. Citibank, 1998 WL 3354 (S.D.N.Y. 1998))
  - n Single offensive e-mail does not create hostile work environment (Curtis v. DiMaio, 46 F. Supp. 2d 206 (E. D. N. Y. 1999))
  - n Company may be liable if it knew or should have known hostile work environment created by on-line bulletin board hosted on Compuserve (but no duty to monitor) (Blakey v. Continental Airlines, 751 A.2d 538 (N.J. 2000))



## Internet

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- n Hostile work environment claim due to supervisor's use of the Internet in employee's plain sight to access pornographic sites (Coniglio v. City of Berwyn, 1999 WL 1212190 (N.D. Ill. 1999))
- n Employer's investigation defused employee hostile work environment/harassment/retaliation claim based on e-mail messages (Schwenn v. Anheuser-Busch, Inc., 1998 WL 166845 (N.D.N.Y. 1998))
- n Third party-sponsored on-line bulletin board may be deemed work-related forum and may give rise to sexual harassment claim, with employer duty to prevent defamatory statements. Blakey v. Continental Airlines, 751 A.2d 538 (NJ Sup. Ct. 2000).
- n Plaintiff's own pornography, internet, and e-mail usage on office computer's relevant to defense against hostile work environment lawsuit. (Dufresne v. J. D. Fields and Co., Inc. 2001 WL 30671 (E.D. LA 2001))



## Employee e-mails and Internet: Takeaways for Inhouse Counsel

- n Establish a comprehensive e-mail and internet policy, publish widely and clearly, make available on corporate intranet, handbooks, and training sessions
- n Policy should detail care to be taken, express that e-mail/usage may be monitored, prohibit offensive, offensive, defamatory, and derogatory material/usage



## Linking, Framing and Cybertrespassing

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## Linking, Framing and Cybertrespassing

- n Some definitions:
  - n Deep Linking
  - n Framing
  - n Scraping
- n What are the issues?
- n Unsettled law

## Linking or Deep Linking

- n Lanham Act violations
- n Copyright infringement
- n Site terms and conditions
- n Case law:
  - n *Ticketmaster, Inc. v. Tickets.com, Inc.*
  - n *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*
  - n *Universal City Studios v. Reimerdes*
- n International case law



## Framing

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- n Trademark infringement and dilution
- n Unauthorized derivative work
- n Case law:
  - n *Washington Post Co. v. Total News, Inc.*
  - n *Futuredonics v. Applied Anagranics Inc.*
  - n *Hard Rock Cafe Int'l (USA) Inc. v. Morton*



## Cybertrespassing

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- n Violation of site terms and conditions
- n Computer Fraud and Abuse Act (CFAA)
- n Probability of irreparable harm
- n Case law:
  - n *Register.com, Inc. v. Verio, Inc.*
  - n *eBay, Inc. v. Bidder's Edge, Inc.*



## Linking, Framing and Cybertrespassing: Takeaways for Inhouse Counsel

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- n Take care in reviewing your company's linking and framing practices
- n Monitor and consider practices of others with your company's sites



## Cross-Border Issues

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## Cross-Border Issues

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- n Hiring local counsel
  - n global firm vs. local practitioner networks
  - n coordination with US counsel
  - n representative jurisdictions
    - n e.g., Spain/Latin America
  - n competing providers



## Cross-Border Issues

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- n International Contracts
  - n formation/enforceability
    - n local laws, translation issues
    - n issues can range from age of majority considerations (e.g., 20 in Japan) to license duration problems (e.g., 5-year default in Spain if not specified)



## Cross-Border Issues

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### n International Contracts (cont.)

- n EU Directive on Distance Selling Contracts (May 1997)
  - n must provide consumers pre-order details, pre-delivery writing
  - n 7-day cancellation period
  - n exceptions for personalized goods, opened software or recordings
- n EU e-commerce Directive (June 2000)
  - n info requirements to consumer, technical disclosures
- n Japan – Door-to-Door Sales Law; Installment Sales Law
- n applicable law – Rome Convention



## Cross-Border Issues

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### n Intellectual Property

- n trademarks
- n patents, copyrights
- n moral rights

### n Tax Issues

- n taxable presence
- n corporation taxes
- n Value Added Tax (VAT) on consumer sales



## Cross-Border Issues

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- n Advertising/Marketing Abroad
  - n local rules and regs
    - n France – translation requirement (Toubon Law-1984)
    - n Japan – info requirements (Door-to-Door Sales Law)
  - n truthfulness in advertising
  - n contests & sweepstakes issues



## Cross-Border Issues

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- n International Content Regulation
  - n obscenity/indecency
  - n controversial content
    - n nazi content (Germany, France)
    - n political content
    - n blasphemy!
  - n defamation
    - n message boards/chat rooms






## Cross-Border Issues

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- n Online Liability/Jurisdiction
  - n general jurisdiction principles control
    - n 1968 Brussels Convention on Jurisdiction and Enforcement of Judgements (Europe generally)
    - n local laws
  - n Yahoo! France case
  - n German Bundesgerichtshof ruling (12/13/00)



## Cross-Border Issues: Takeaways for Inhouse Counsel

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- n Do not underestimate the utility or need to hire competent overseas counsel
- n Consider the impact or applicability of local laws on any international e-commerce transaction or company initiative from a variety of perspectives:
  - n contract formation/enforceability, IP treatment, tax exposure, advertising regulations, content restrictions, etc.

# Regulation of Online Content



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## Regulation of Online Content



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### n Obscenity/Indecency

- n obscene materials always illegal
  - n three-part Miller test (Miller v. California, 413 U.S. 15, 24 (1973))
- n indecent content – protected speech under fire
- n Communications Decency Act (CDA)
  - n content restrictions ruled unconstitutional (Reno v. ACLU, 521 U.S. 844 (1997))
- n Children's Online Protection Act (COPA)
  - n ruled unconstitutional; being reviewed by Supreme Court (ACLU v. Reno, 217 F.3d 162 (3<sup>rd</sup> Cir. 2000), *cert. granted*, 2001 U.S. App. LEXIS 3820 (U.S. May 21, 2001))



## Regulation of Online Content

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### n Other Content Liability Issues

- n controversial content – U.S. standards uniquely liberal
- n hate speech
  - n must advocate "imminent lawless action" (Brandenburg v. Ohio, 395 U.S. 444, 447 (1969))
- n defamation



## Regulation of Online Content

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### n ISP Liability

- n *Cubby v. CompuServe* (S.D.N.Y.) – ignorance as bliss
- n *Stratton Oakmont, Inc. v. Prodigy Services Co.* (N.Y. Sup.Ct.) – publisher liability
- n CDA – "good samaritan" defense still survives, overrides *Stratton*
- n Digital Millennium Copyright Act (DMCA)
  - n knowledge, notice, removal requirements



## Regulation of Online Content: Takeaways for Inhouse Counsel

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- n Consider online content for obscenity, child protection concerns, defamation, etc.
- n Assess applicability of ISP defenses/liability to your company's online efforts and whether/when "ignorance" or "vigilance" should prevail



## Chatrooms

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## Chatrooms

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### Monitoring chat rooms for postings about company:

- n Possible ways to review:
  - n Assign employees.
  - n Use automated web surveillance software
  - n Outside monitoring services exist (i.e., "Ewatch," "Cybercheck," "Cyveillance" (similar to clipping services))
  - n Should you monitor?
  - n On balance, the benefits of monitoring your chatroom outweigh any downside
  - n Pros: ability to discover investor/consumer concerns; avoid liability
  - n Cons: cost/temptation to respond/possible required disclosure, possible assumed liability if don't take action
- n Employers must be liable for employees' postings under Rule 10b-5 respondent superior theory (if they knew or should have known)



## Chatrooms

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When you are a public company, chatroom rumors take on additional level of risk/concern

### Responding to rumors:

- n Securities law implications
  - n Two well-known posting boards are Motley Fool and Yahoo! Finance.
  - n Disclosure of stock information within restricted confines of a chat room may be considered a "selective disclosure" with insider trading implications
  - n No general duty to respond to rumors (exception: if information leak tied to Company) In which case you need to decide if correcting press release needed (under Reg. FD, posting alone does not "cure" selection disclosure)
  - n If respond: duty to update/correct response
  - n "No comment" policy is preferable: if consistently applied, eliminates duty to update (do not respond unless specifically requested to do so by NASDAQ or stock exchange)
  - n What if significant impact although no Company fault



## Chatrooms

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### Other implications (NYSE/NASDAQ/AMEX):

- n NYSE and other self regulatory organizations (SROs): may have duty to respond to rumors-either affirm correct rumors or deny incorrect ones
- n May be able to get around for legitimate business reasons

**Company policies:** Make sure your company has a policy to ensure employees don't post and if a violation occurs to minimize attribution to company.

- n Employees should not "chat" on company time
- n Employees should be informed not to post, even to defend company
- n Perhaps most important point to emphasize to employees trying to help
- n Employees use may be monitored
- n Prohibit any employee discussion about company's stock, business affairs, inside/confidential information (this includes third party sites)



## Chatrooms


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### Liability for hyperlinking to chat room site:

- n May be seen as entanglement with content of site

Acting against false/misleading information posted in chat room. This may be easier said than done, but there are ways if postings are that troublesome:

- n Use of private investigator to determine poster identity (if outside company), who use data-mining techniques and/or lure person to a site to trace identity
- n Use of in-house IT department to determine poster identity (if inside company)
- n Contact SEC or other law enforcement authorities
- n "John Doe" lawsuits: formal discovery used to determine identity of those posting comments



## Chatrooms: Takeaways for Inhouse Counsel

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- n Establish clear policy that employees should never post
- n Have responsible person monitor chatrooms, but do not respond
- n Scrub website for hyperlinks to chatroom sites
- n Carefully evaluate action plan if false/misleading information posted



## New Frontiers

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## New Frontiers

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- n As e-commerce evolves, matures and encounters new challenges:
  - n Focus of lawyers' substantive law efforts change
    - n Barter "out"; collections "in"
    - n Online advertising revisited
    - n Changes in partnering/M+A challenges
  - n Rethinking of what e-commerce success requires