



# Attorney Web Sites: Ethical Issues Are Only the Beginning

**Non-Traditional Attorney Advertising on the Internet**

By Adam R. Bialek, Paris A. Gunther and Scott M. Smedresman

**ADAM R. BIALEK** (adam.bialek@wilsonelser.com) is a partner in Wilson Elser Moskowitz Edelman & Dicker, LLP, practicing out of the White Plains office. He earned his undergraduate degree from the University of Rochester and his J.D. from Washington University in St. Louis School of Law.

**PARIS A. GUNTHER** (paris.gunther@wilsonelser.com) is Director of Marketing at Wilson Elser. She received her B.A. from the University of Minnesota and her J.D. from William Mitchell College of Law.

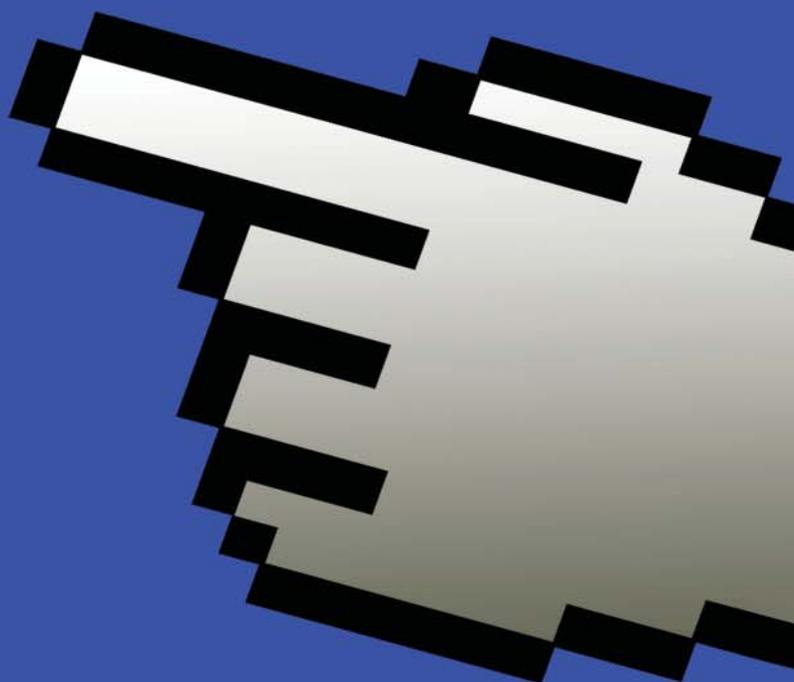
**SCOTT M. SMEDRESMAN** (scott.smedresman@wilsonelser.com) is an associate at Wilson Elser, practicing out of the White Plains office. He received his B.A. from New York University and his law degree from Fordham University School of Law.

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**W**eb sites have become essential elements of marketing for law firms of all sizes. They can be valuable tools to attract clients, recruit new attorneys and develop a recognizable name. Web sites have progressed significantly from the days when they were static, noninteractive destinations, having more similarities to advertisements in the yellow pages than to the complex mix of promotion and services they now represent. With their increasing interactivity, complexity, and functionality, it is more important than ever to understand and satisfy the myriad conditions imposed on Web sites by state, federal, and even foreign law.

Web sites now interact with their visitors, permitting users to leave materials behind and engage the Web site operators. Many law firms are using their Web sites in once-unconventional ways to advertise, to promote accomplishments or as educational vehicles, such as through videos, blogs and alumni Web sites. While the ethical issues regarding attorney advertising have been publicized and commented on, these newer interactive advertising campaigns raise issues that law firms may not have considered before. And there are laws and rules that all businesses operating Web sites should know – including law firms.

Law firms that operate Web sites must avoid copyright and trademark infringement, insulate themselves from copyright infringement caused by visitors, and comply with state, federal and perhaps foreign privacy laws. There are also the issues raised by the use of official and non-official law firm blogs, the use and implementation of a Web site Terms of Use, and the use of names and images of individuals. Although the benefits of non-traditional attorney Web sites can be great, they should be approached with the same care and consideration an attorney would devote to any other legal issue that arises during practice.



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## Ethical Issues

Many of the proposed and enacted rules regarding Internet advertising were overturned by the well-publicized case *Alexander v. Cahill*.<sup>1</sup> It is important, however, to remember that some of the regulations survived review, and these should be considered and followed by attorneys utilizing a Web site.

The surviving regulations relate to the selection of a domain name and the retention of electronic advertising. These rules are relatively simple to follow, but they create some questions as to the circumstances and material to which they apply. As a result, it may be advisable to err on the side of caution and comply with the regulations where there is uncertainty.

Section 1200.54 (Rule 7.5(e)) of title 22 of the N.Y. Comp. Codes, R. & Regs.<sup>2</sup> states that a domain name used by a lawyer must use that lawyer's name, unless a number of qualifications are met – *i.e.*, the domain name cannot be misleading, cannot imply the ability to obtain results and cannot violate any disciplinary rule. So, for example, New York lawyers could use the domain name *bigsettlementlawfirm.com* only if their name happens to be Bigsettlement. Similarly, a firm probably cannot use the domain name *LincolnBrandeisandMarshall.com*, unless that firm coincidentally has members whose names match these famous attorneys' names.<sup>3</sup>

The other surviving Internet-related regulations are found in 22 N.Y.C.R.R. § 1200.50(f) and (k). They require that electronic "advertisements" include the phrase "Attorney Advertising." This phrase can be placed on a Web site's homepage or in the subject line of an e-mail advertisement. These regulations also contain archiving requirements of at least one year for electronic advertisements and a minimum of 90 days for Web sites.

One point of contention regarding this marking and retention policy is what is an "advertisement"? The first version of the rules defined advertising extremely broadly, potentially applying to almost every e-mail an attorney sends.<sup>4</sup> After reconsideration, this definition was modified and limited to communications made for the "primary" purpose of obtaining retention.<sup>5</sup> Yet this too is unclear when it relates to multi-purpose attorney Web sites, particularly those containing nontraditional elements, such as blogs or alumni networking areas. These types of communications can arguably be interpreted as being made for the purposes of raising an attorney's profile or representing to the public the high quality of services the firm offers, which may fall under the definition of "advertisement" as laid out in Rule 1.0(a). Indeed, almost all public attorney activities can be interpreted as motivated, at least in part, by a desire to attract new clients, whether directly or indirectly.

Alternatively, it may be argued that many of these nontraditional elements, such as blogs, have primarily a scholarly purpose. Determining the "primary" purpose

of these statements and communications is critical. As such, although it is unclear if the rules require the marking and archiving of attorney blogs or alumni networking sites, a conservative approach would be to comply with the rules in uncertain situations.

## Nontraditional Web Site Design Concerns

Aside from well-publicized ethics rules, there are non-professional responsibility-related issues to be considered in the context of an attorney's or law firm's Web site. These concerns are particularly important where the Web site at issue allows users to interact with the Web site, collects any information regarding users of the Web site, contains a law firm blog or uses images or names of attorneys or clients in promotional testimonials.

## Interactivity

Many attorney Web sites now contain a variety of ways that Internet users can interact and leave content on a firm's computer system. If a law firm has a blog with comments enabled, whereby users can post text and, possibly, images and other media, a firm may not be able to tell if the user has the rights to post such material or if the posting of such material would otherwise be unlawful. Similarly, if a firm runs an alumni networking Web site, which may be used in similar ways to the popular Facebook® and LinkedIn® sites, users may upload a variety of materials, whether or not audited by the Web site operator. Additionally, users may have to register with a Web site before participating in such activities, thereby providing the Web site with personal information, such as a name or e-mail address. Web sites may also solicit employment prospects and receive resumes and related submissions that contain personally identifiable information.

Law firms whose Web sites enable user interaction may find themselves in the position of unknowingly violating copyright or trademark laws. Furthermore, attorney Web sites that collect information about visitors, whether solicited or not, may be required to follow strict regulations regarding the privacy and use of that information. Firms can take steps to limit their exposure to these risks.

## The Digital Millennium Copyright Act

The issue of copyright liability for Web sites based on the activities of its users was addressed over 10 years ago by the Digital Millennium Copyright Act (DMCA).<sup>6</sup> This act provides a system that can exempt certain online "Service Providers"<sup>7</sup> from the copyright infringement committed by its users. With the rise of online media, the DMCA has been well publicized and may be known even by lawyers and firms that do not focus on intellectual property issues. The DMCA, however, has requirements that a

service provider must affirmatively meet in order to take advantage of the act's protections.

The act requires a slightly more proactive approach to Web site management than simple reliance on statutory immunity. Procedures must be in place for copyright owners to notify the operator of the posting of infringing material. The immunity provided by the DMCA may be lost if a firm does not ensure that it terminates repeat copyright offenders.<sup>8</sup> Having a DMCA policy and reacting to notifications is not enough. Pursuant to the DMCA, a firm is required to register a designated agent with the U.S. Copyright Office to receive notifications regarding infringements.<sup>9</sup> Complying with the designated agent requirement is relatively simple: a firm need only submit a registration to the U.S. Copyright Office designating a name, address, fax number and e-mail address for notifications of infringement, and remit a nominal fee. This information must then be posted on a firm's Web site. The disclosure of the agent information and the repeat offender termination policy are generally noticed through a Terms of Use document that is available via a link from a Web site's homepage or template page.

Once it is established that a provider has complied with DMCA requirements, that provider should be protected from much of the copyright infringement committed by its users. However, a provider is still not permitted to post infringing content itself, and if the provider becomes aware of user-posted content that is infringing, it must remove the content immediately.<sup>10</sup>

Many law firms are not comfortable with simply allowing users to post un-screened content to their Web sites – for good reason. Firms do not want to be seen as possibly endorsing unreviewed material. If a provider screens content, it should be vigilant about not knowingly posting material that infringes a copyright. This is simple in cases where the content is obviously infringing. In the context of comments, testimonials and alumni Web sites, a firm is not likely to have sufficient knowledge of the ownership of material in order to determine if it is properly used or licensed. In the event that posted material reasonably appears to be innocuous but turns out to be infringing, the posting generally should not lead to liability, provided that the law firm has complied with the DMCA.

In addition to refraining from posting infringing content, a firm should remove material after it is notified that the material is unlawfully posted. The purpose of designating an agent with the Copyright Office is to facilitate a copyright owner's ability to contact and notify the appropriate party of an infringement. A law firm should designate a specific individual in the firm, either an attorney or an administrator, to monitor notices and ensure that they are properly responded to according to DMCA procedure.<sup>11</sup>

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### Privacy Policies and Terms of Use

Taking the steps to ensure that DMCA protection applies to a nontraditional law firm Web site is not the only measure a firm should take to protect itself from exposure. Firms with Web sites that have large interactive user bases or even occasionally collect information from Web site visitors should post and comply with a Privacy Policy regarding the use and collection of personal information of its users. A Terms of Use may be posted to help ensure that a Web site complies with various regulations and retains control over the more public areas of the site.

It is common for users of interactive Web sites to disclose large amounts of information when interacting online. Users generally disclose information when registering for a Web site service and during the course of use of such service. This may be particularly true for law firm alumni Web sites, which may be similar in structure to social networking Web sites. Additionally, law firm Web sites that accept employment applications collect protected information in the form of material disclosed in a resume. Even a simple "Contact Us" button may result in the collection of protected information in the form of a name and e-mail address.

**It is common for users of interactive Web sites to disclose large amounts of information.**

Various state and federal laws may apply to this type of data collection, whether or not the collecting law firm commercially uses the data it receives. Some of these laws require businesses to post a Privacy Policy on their Web sites which advise users of what types of information are collected and notify visitors of their rights. Online privacy laws can provide for fines or civil remedies for non-compliance and have been enforced by state attorneys general and by the Federal Trade Commission (FTC). The FTC has not been shy about enforcing some of these statutes; it has in the past levied significant penalties against noncompliant businesses.<sup>12</sup>

One such law is the California Online Privacy Protection Act of 2003 (CAOPPA).<sup>13</sup> Although it is a California state law, Web site operators who approach or interact with California residents may be subjected to the law's requirements. The act applies to any Web site which collects personal information from a California resident and requires the Web site to "conspicuously post [a] privacy policy on its Website."<sup>14</sup> Personal information is broadly defined to include any way that an individual can be contacted, including an e-mail address.<sup>15</sup> The Privacy Policy must include a description of the firm's treatment and use of personal information, and a link

to the policy must be posted on the firm's homepage, among other options and requirements.<sup>16</sup>

CAOPPA is a very broad statute that likely applies to a firm that allows users to register and make comments on a blog, and almost certainly applies to law firm alumni Web sites. The act applies only when California residents are involved, but it is likely more efficient to apply its requirements to all Web site users. Even if a firm does not practice in California, it may receive inquiries or Web site visits from users who live there. Without an effective way to limit where communications are coming from, compliance may be desirable out of an abundance of caution.

This is but one example of the many laws that address the treatment of Internet users' personal information. Additional state<sup>17</sup> and federal<sup>18</sup> laws address specific categories of information, such as personal health information<sup>19</sup> and financial information,<sup>20</sup> that also must be safeguarded. Furthermore, a number of foreign laws relating to individual privacy and personal information are often far stricter and more comprehensive than those of the United States, and some of them may apply if information is being collected or transferred from those jurisdictions to branch or home offices in the United States.<sup>21</sup>

In addition to a privacy policy, the other common Web site document is the "Terms of Use," "Terms of Service" or "Terms and Conditions" statement. While not yet mandated by any laws, this document can be an important tool for businesses concerned about limiting the risks associated with operating a Web site. For firm Web sites that include a large amount of user participation, it is desirable to have a document where the rules of Web site participation are established and the DMCA and other notices discussed above are published.

The Terms of Use can be helpful by addressing the user conduct that is acceptable and the conduct that will result in termination of an account. Such guidelines may be broad or detailed, depending on the Web site operator. This document also sets forth the specific areas of the Web site that users are authorized to access and/or those that are not public, thereby creating grounds for a Computer Fraud and Abuse Act<sup>22</sup> claim should a user exceed such authorized areas.<sup>23</sup> Furthermore, a Terms of Use document can ensure that a firm's Web site is granted a license to post the comments or other materials that a user uploads to the Web site. This license may be implied by the act of uploading, but it may be more desirable for a firm to lay out the conditions of its use of users' materials instead of relying on an implied right. In addition, a Terms of Use can be used to assert: (1) intellectual property rights in proprietary content appearing on a Web site; (2) intellectual property rights in material posted by others; (3) that no legal or financial advice is being provided by the Web site; (4) that prior results are not a guarantee of future performance; and (5) for other similar purposes.

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Web site Terms of Use are not only binding on a Web site's users, they can be similarly binding on the Web site operator. The FTC is charged with enforcing false and deceptive trade practices, and has interpreted this role as applying to Web site Terms of Use and privacy statements. As such, once a Web site Terms of Use or privacy policy is in place, it should be followed by the Web site operator. The FTC has generally focused its enforcement efforts against Web sites that have misrepresented the level of data security they provide; however, jurisdiction likely extends to any statement a Web site makes in its Terms of Use. A law firm should carefully draft its Terms of Use and be vigilant regarding compliance thereto.

The placement of the Terms of Use on the Web site can also affect enforceability. The best way to ensure that a visitor agrees to the Terms of Use is to have a popup box or landing page that requires a visitor to scroll through the terms before checking a box that confirms that the visitor has read the terms, understands the terms, and agrees to the terms. However, most law firm Web sites do not place the Terms of Use on a mandatory click-through page as this type of design would likely discourage many users from visiting a firm's Web site. Instead, a Terms of Use is generally implemented as an implied assent document, meaning that a user's conduct – using the Web site – symbolizes the user's assent to the Web site's Terms of Use.

The validity of implied assent Web site Terms of Use has been an open issue since the rise of Internet contracting and at this point remains largely unanswered.<sup>24</sup> The law in this area continues to be outpaced by technological developments. Courts that have addressed this issue have generally found that a user's awareness of the existence of proposed terms is central to their enforceability.<sup>25</sup> As such, it is still unclear whether the current practice of placing a Terms of Use notice in small letters at the bottom of a long scrolling homepage is sufficient to effectuate these agreements. As this practice becomes widely known as the norm, knowledge of the existence of a Terms of Use and its common placement at the bottom of a page may be viewed more favorably by courts. For now, a cautious Web site designer or operator may wish to place a Terms of Use notification at the top and bottom of a homepage. Ultimately, it is a firm's choice as to how best to balance Web site aesthetics with legal notices; however, as is clear from the otherwise unclear case law, the more prominent the placement of these policies, the more effective they might be.

### Practice of Law and Blogging

Another feature of attorney Web sites that has emerged in the last few years is the attorney or law firm blog. Blogs have been used as a means of publishing commentary or short articles on developments in the law. They are used to heighten awareness of the firm's profile in a field or

perhaps as a general way to attract clients. These blogs raise issues of practicing law and forming an attorney-client relationship that must be clearly addressed.

The subject matter and form of a law firm blog generally focuses on a particular practice area and involves the posting of articles of interest regarding that area. For example, a law firm may have a privacy law blog or an employment law blog. The comments section of the blog is often activated, thereby permitting users to leave questions or comments that may sometimes be responded to by the blog's author.

Attorney-bloggers must be careful in order to avoid dispensing legal advice or otherwise forming an attorney-client relationship. Most legal bloggers avoid the issue by posting a disclaimer noting that the blog is for informational purposes only. The disclaimer must be prominently noticed so that readers are reasonably aware of its existence and thus its disclaiming content. A disclaimer that users do not know about is likely of little value. The previous discussion about notice of Web site Terms of Use may offer some guidance as to how best to implement a disclaimer of this kind. Note also that if a blog enables an RRS feed,<sup>26</sup> a firm should be careful that its disclaimer is included with the syndicated text of the blog post.

Blogs are not the only elements of a Web site where this is a concern. Inadvertently offering legal advice and creating an attorney-client relationship is possible through any part of a Web site. This should be considered by a firm in ensuring that the risks of Web site use are minimized. Generally, this is accomplished through the posting of a disclaimer; by being careful as to how statements on the site are phrased; by ensuring it is clear that all materials deal with prior cases or hypothetical facts; and by making clear that no true opinion can be issued without a consideration of the facts of a particular case.

All materials posted to a blog, and indeed any part of a Web site, must comply with all laws. Employees may be considered to speak on behalf of a firm when posting to a blog, and as such, care should be taken that such employees do not post material which the firm does not condone.<sup>27</sup> Confidential material, of course, cannot be discussed. Defamation laws must be considered. Consideration must be given to statements made about others. Firms should be careful when touting victories or discussing the facts of cases that are pending. While certain statements made in the context of litigation may be protected, those same statements might not be privileged in the context of a blog or Web site.<sup>28</sup>

### Promotional Testimonials and Third-Party Materials

Many firms post testimonials on their Web sites, whether from clients or current or past employees, or third-party materials touting the accomplishments of a lawyer of

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## Firms should be careful not to cause confusion as to sponsorship when using trademarks of third parties.

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the firm. These testimonials often take the form of a laudatory statement about the firm's collegial workplace environment or its superior legal services. Occasionally, a testimonial will be accompanied by an image of the person giving it. The use of a person's image in this commercial environment raises the issue of personal rights of publicity. Additionally, the rights to post third-party materials, such as newspaper articles, must be secured prior to use in order to avoid copyright infringement. Trademark concerns are also raised when identifying the trademark of a client giving a testimonial. A firm should diligently clear these rights, even if a testimonial is being given by an employee of the firm or a client who has actually retained the firm, or the testimonial is from an article that discusses the firm.

Although New York law may lag behind other states' laws in recognizing certain privacy torts, New York law does provide that the unauthorized commercial use of a person's identity is a violation of that person's rights of publicity.<sup>29</sup> The use must be commercial, meaning it must be in the context of an advertisement or other trade usage, in order for the violation to occur.<sup>30</sup> New York law may allow recovery for the unauthorized use of a person's "name, portrait or picture" under such circumstances.

The use of an individual's photograph on a testimonial likely implicates this law. The purpose of a testimonial is to promote a law firm either to potential clients or prospective employees. As such, the unauthorized use of an individual's image for this purpose likely violates New York law. To avoid this outcome, a firm should obtain the written consent of any individual whose image is used on the Web site to promote the firm's services, even if the individual is a firm employee.

In addition, a firm should be diligent that all third-party materials that appear on a firm's Web site, such as images and articles, are properly licensed. An article from the *Wall Street Journal* that discusses your firm or a case your firm has handled may be excellent publicity, but you might not be permitted to post that entire article without permission from the content owner.

Similarly, a firm should be diligent in requiring that Web site design consultants have proper permission to use images and articles that they place on a firm's Web site. Even if a firm is given assurances that the material has been licensed, a firm can still be held liable under the Copyright Act if such assurances turn out to be false.<sup>31</sup> To avoid this, a firm may want its agreement with the Web site designer to contain an indemnity clause that includes

coverage for claims of copyright infringement for materials supplied by the designer.

Firms should be careful not to cause confusion as to sponsorship when using the trademarks of third parties, in order to avoid trademark infringement. Context is crucial when referring to the trademark of a client or any other company. If it is clear from the context that there is no sponsorship or other association between the company whose trademark is being used and the firm, there may not be an issue; but there is a fine line between permissible referential use and impermissible confusing use.

### Conclusion

Lawyer and law firm Web sites have long been the object of scrutiny from an ethics standpoint; however, Web sites present more than just ethical concerns for lawyers and law firms. Technology and the power of the Internet are having a significant impact on attorney promotion and marketing. Web sites now allow employers to keep in touch with past employees. New techniques allow firms to reach out to clients and attract new lawyers in ways that were not previously considered, or even possible. It is easier than ever to publish statements, often before serious scrutiny is given to them. These advances have been beneficial, but they bring with them a myriad of issues that law firms should be aware of before utilizing this powerful platform. As the law continues to develop in this area it is often unclear, and some of the issues can be highly technical. It may be advisable to retain counsel familiar with these issues to review a Web site and its functionality in order to ensure that the risks discussed herein are minimized, and the benefits to the lawyer or firm are maximized. ■

1. No. 5:07-CV-117 (FJS/GHL), 2007 WL 2120024 (N.D.N.Y. July 20, 2007).
2. 22 N.Y.C.R.R. § 1200.50 (Rule 7.1).
3. See 22 N.Y.C.R.R. § 1200.54(c) (Rule 7.5) (stating that a "lawyer shall not hold himself or herself out as having a partnership with one or more other lawyers unless they are in fact partners").
4. See Section 1200.1(k) of the Proposed Rules available at <http://web.archive.org/web/20060703045818/http://www.nycourts.gov/rules/1200-1.pdf> (defining "advertisement" as "any public communication made by or on behalf of a lawyer or law firm about a lawyer or law firm, or about a lawyer's or law firm's services").
5. See 22 N.Y.C.R.R. § 1200.0(a) (Rule 1.0) (defining advertisement as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.").
6. Digital Millennium Copyright Act, 17 U.S.C. § 101; P.L. 105-304; 112 Stat. 2860 (1998).
7. "Service Providers" is defined extremely broadly by the act as "a provider of online services or network access, or the operator of facilities therefore" (17 U.S.C. § 512(k)(1)(B)(a)). This definition would seem to encompass almost all attorney Web sites.
8. 17 U.S.C. § 512(i)(1)(A).
9. 17 U.S.C. § 512(c)(2).
10. 17 U.S.C. § 512(c)(1)(A).

11. See 7 U.S.C. § 512(g). The procedure requires the removal of the material, providing the user/poster of the allegedly infringing work with prompt notification of its removal and granting that user/poster the opportunity to respond. If the user responds, the copyright owner must file suit or the Provider must re-post the content within a specified period of time.

12. See *U.S. v. Xanga*, Civ. Act. No.1:2006cv06853 (S.D.N.Y. Sept. 7, 2006) (fining social networking site \$1 million for violation of the Children's Online Privacy Protection Act (COPPA)); see also *U.S. v. Mrs. Fields Famous Brands, Inc.*, Civ. Act. No. 2:2003cv205 JTG (D. Utah, filed Feb. 27, 2003) (\$100,000 in civil fines); and *U.S. v. UMG Recordings, Inc.*, Civ. Act. No. CV-01-1050 (C.D.C.A. filed Feb. 18, 2004) (\$400,000 in civil fines).

13. Cal. Bus. & Prof. Code §§ 22575-22579.

14. Cal. Bus. & Prof. Code § 22577(a). It is important that the Web site conspicuously publicize its privacy policy on the Web site and thus the Web site should have a separate link to the policy.

15. *Id.*

16. *Id.*

17. See "Shine the Light Law," Cal. Civ. Code § 1798.83.

18. See COPPA, 15 U.S.C. §§ 6501-6506; 112 Stat. 2581-728 (1998).

19. See Health Insurance Portability and Accountability Act (HIPAA), Pub. L. 104-191, 110 Stat. 1936 (1996).

20. See Gramm-Leach-Bliley Financial Services Modernization Act, Pub. L. 106-102, 113 Stat. 1338 (1999).

21. For Canada, see Personal Information Protection and Electronic Documents Act (PIPEDA), Statutes of Canada 2000, Chapter 5, Bill C-6 (assented to 13th April, 2000). For the European Union, see Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

22. Computer Fraud and Abuse Act, 18 U.S.C. § 1030; 99 Pub. L. 474; 100 Stat. 1213.

23. For example, if a Terms of Use limits user access to only those publicized areas of the Web site, and a user hacks into a private area of the server, the hacker could be more easily pursued for his or her unauthorized access.

24. For a larger discussion, see Christina L. Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 Bus. Law. 279 (2003).

25. See *American Airlines, Inc. v. Farechase, Inc.*, Cause No. 067-194022-02 (Texas, 67th Dist., Mar. 8, 2003); see also *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV99-7654-HLH(VBKX), 2003 WL 21397701 (C.D. Cal. Mar. 6, 2003).

26. RSS, or Really Simple Syndication, refers to a method of syndicating a blog to various types of aggregation programs. An RSS document (usually called a "feed") typically includes full or summarized text, plus metadata including publishing dates and origin. Thus, while a Web page on which the original article is posted may include a disclaimer, the RSS feed may not, unless included within the text of a particular blog posting.

27. Firms may wish to be careful that their attorneys do not advocate positions that are contrary to positions that other attorneys in the firm are currently advancing in a proceeding on behalf of a client. For a firm to advocate a position in a blog and take the opposite position in a paper submitted to a court could be embarrassing or damaging to the attorney's or the firm's credibility.

28. A defamatory statement made in the context of litigation is privileged only if "it may be considered pertinent to the litigation." See *Joseph v. Larry Dorman, P.C.*, 177 A.D.2d 618, 576 N.Y.S.2d 588 (2d Dep't 1991). This standard, however, is fairly lax, being characterized as applying "to any statement that may possibly or plausibly be relevant or pertinent, with the barest rationality." *Id.* However, it is unclear whether a marketing statement on an attorney or law firm Web site would qualify for this protection as being "pertinent" to the litigation.

29. See NY CLS Civ. R. § 50, 51.

30. See *Hampton v. Guare*, 195 A.D.2d 366, 600 N.Y.S.2d 57 (1st Dep't 1993); *Costanza v. Seinfeld*, 279 A.D.2d 255, 719 N.Y.S.2d 29 (1st Dep't 2001).

31. The Copyright Act does not provide an "intent" requirement with respect to infringement, and as such, the violation of an exclusive right granted by the Copyright Act will not be excused based on a good faith belief that the use was permissible. See *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 998 (2d Cir. N.Y. 1983) (finding that subconscious copying is infringement, even if the defendant did not know he was committing infringement).

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