

Affiliate Summit 2004

Affiliate Marketing and the Law

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Managing Risk

- **Privacy & Security** – internal / external
- **Intellectual Property primer** –
patent / copyright / trademark / trade secrets
- **SEM & Trademarks; SEO**
- **Spam; Adware/Spyware; New Technologies**
- **Contracts with Business Partners (Merchants/Affiliates)**
- **Terms of Service with customers**
- **Steps to protect yourself**
- **Traditional Advertising/Marketing**
- **Online Advertising/Marketing Recap**

Privacy and Security

- **No *general* privacy law in the United States**
 - GLB (financial); COPPA (children); HIPAA (medical)
 - FTC regulates:
 - “*unfair or deceptive acts or practices in or affecting commerce*”
- **Formerly an internal concern**
- **Privacy breaches – FTC oversight**
- **FTC “Fair Information Practice” Principles**
 - Notice
 - Choice
 - Access
 - Security
 - Enforcement

Privacy and Security

■ California privacy law – effective July 1, 2004

“An operator of a commercial Web site or online service that collects personally identifiable information through the Internet about individual consumers residing in California shall conspicuously post its privacy policy on its Web site. The privacy policy shall:

- (1) Identify the categories of personally identifiable information it collects and the categories of third-parties with whom such information is shared;*
- (2) If the operator maintains a process to review and request changes to any personally identifiable information, provide a description of that process;*
- (3) Describe the process to notify consumers of material changes to the privacy policy; and*
- (4) Identify its effective date.”*

Privacy and Security

- **California disclosure law** – effective July 1, 2003

“Any person or business that conducts business in California, and that owns or licenses computerized data that includes personal information, shall disclose any breach of the security of the system following discovery or notification of the breach in the security of the data to any resident of California whose unencrypted personal information was, or is reasonably believed to have been acquired by an unauthorized person.”

Privacy and Security

Internal Security

- What information is collected
- Designated employees
- Privacy and security policies
- Privacy and security audits
- Vendor requirements
- Adequate electronic security
- Adequate physical security
- Disaster recovery plans
- Employee training
- Stay informed

Consumer Privacy

- N.C.A.S.E.
- Post a Privacy Policy
- Use of Data
- Customer Service
- Educate Consumers

Intellectual Property primer

Patent	Copyright	Trademark	Trade Secret
<p>Utility – inventions of products or processes</p> <p>Design – aesthetic, ornamental designs for industrial products</p>	Original works of authorship (literary works; photographs, art work, music; software; architecture)	Any word, name, symbol used in commerce to identify or distinguish one party's goods or services (logos; slogans; names)	Information (1) valuable to owner; (2) not generally known; and (3) reasonable attempts to keep confidential
Term = 20 years from application date	Term = Life of Author+70yrs Work for hire=95 yrs from publication (or 120 yrs. from creation, if shorter)	Term = 10 years (renewable)	Term = as long as confidentiality maintained

Intellectual Property primer

■ Reasons for registration

- Patent – Total Exclusivity (vs. Trade Secret)
- Copyright – Statutory Damages; Prima Facia evidence; Filing suit
- Trademark – Exclusive rights for the class of goods or services described in the registration

■ Those funny symbols

- Patent Pending
- Patent No. XXXXXXXX
- ©
- TM
- ®

SEM & Trademarks; SEO

- **Inherent conflict between trademarks and the Internet**
 - **American Blind and Wallpaper Factory v. Google**
 - **Louis Vuitton v. Google**
 - **Axa v. Google**
 - **Novak v. Google, et al**
 - *Hey, why is everybody v. Google?*
- **Liability in Search Engine Optimization**

Spam, Pop-ups and other Online fun

- **Cybersquatting**
 - UDRP and ACPA
- **Hacking**
 - Computer Fraud and Abuse Act
- **Spam**
 - Can-Spam Act of 2003
- **Adware/Spyware**
 - Litigation
 - Anti-spyware Legislation
- **Phishing**
 - FTC starting to wake up

Contracts with Business Partners (Merchants/Affiliates)

- **Click-wrap v. hard copy**
- **Contract Clauses**
 - Warranties & disclaimer of warranties
 - Limitations of liability
 - Permitted Use; Required Use; Impermissible Use
 - Indemnification
 - Force majeure
 - Payment and dispute terms; Audit
 - Length of term / evergreen clauses
 - Exclusivity limitations
 - Confidentiality; Intellectual Property
 - Consent to jurisdiction

Terms of Service with customers

- **Similar contractual issues**
- **Stronger, but reasonable, terms**
- **Acceptance**
- **POS**
- **State specific issues**
- **Jurisdiction**
- **Taxes**

How to Protect Yourself

- Register valuable IP
- NDAs
- TOS / Privacy Policies
- Effective Contracts
- The problem with bundling and distribution systems
- Quality Control
- Balance business v. legal

Traditional Advertising / Marketing

- **FTC Act §5 –**
 - “unfair or deceptive acts or practices in or affecting commerce”*
- **State baby-FTCs**
- **Pyramid Schemes v. Multi-level Marketing Programs**
- **Sweepstakes**

Traditional Advertising / Marketing

- **Your own advertising**
 - Substantiation of claims
 - Clear & conspicuous disclosures
 - Puffery
 - Comparative advertising
 - Endorsements
 - Rights of Publicity
 - Copyright / Trademark

- **FTC Remedies for False Advertising**
 - Cease & Desist; Financial; Corrective Advertising

Online Advertising / Marketing Recap

- **Online advertising services**
 - SEM; SEO; Email marketing; Pop-overs/unders/interstitials; Contextual marketing; Behavioral marketing; Wireless/SMS
 - When trying something new or untested, think about whether or not there is any exposure that could arise from contracts, IP, litigation, legislation or regulation.

Conclusion

Q & A

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RECAP

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