

ADVERTISING, IP, AND SOCIAL MEDIA
Advising clients who use social media outlets to
advertise and sell products and services

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Road Map

- Federal Trade Commission Guidelines
- Intellectual property update
 - Patent infringement 2011
- Privacy / Information collection and sharing
- Promotions and sweepstakes

- Q&A

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Federal Trade Commission Act

Section 5 – prohibits unfair or deceptive acts or
practices in trade

FTC Guides Concerning the Use of
Endorsements and Testimonials in Advertising

- Effective 12/2/09

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FTC Guides Concerning the Use of Endorsements and Testimonials

Consumer-generated content in new media can be an endorsement

- e.g., a blogger who is paid to speak about a product
- e.g., a reviewer who is paid to post a positive review

An advertiser who initiates the endorsement process can be liable for statements of the endorser

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FTC Guides Concerning the Use of Endorsements and Testimonials

Endorsements must reflect honest opinions of the endorser

- Endorser must be a *bona fide* user of the product
- Advertiser must be able to substantiate endorser's statements about key attributes of the product
- If an apparent "actual consumer" is not in fact one, say so

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FTC Guides Concerning the Use of Endorsements and Testimonials

Must disclose material connections between the seller and the endorser

- Example 7: College student blogs about video games. Blogger receives game for free from manufacturer and posts positive review.
 - Manufacturer should advise blogger to disclose the connection
- Example 8: Software discussion forum. An employee of a software company posts a comment that promotes the company's product.
 - Commenter should disclose that she is an employee.

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FTC Enforcement Actions

- *Reverb Communications Inc.* – PR firm for video game maker
- *Ann Taylor Loft*
- *Legacy Learning Systems*

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Questions?

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Intellectual Property Update

- Trademarks
- Copyrights
- Patents
- Trade Secrets



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Intellectual property

Trademark: Any word, design or device which identifies and distinguishes products and services of one company from another



Google™



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Right of Publicity

The right of an individual in the public eye to control the commercial use of his/her name, likeness, voice, and persona

- Includes right to control endorsements
- Does not include right to control news reporting
- Limits rights for politicians, newsworthy individuals



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Protecting Your Trademarks

Lanham Act – infringement (15 USC 1114):

- Use in commerce,
- without consent of the registrant,
- in connection with sale/offer/distribution or advertising of goods or services,
- likely to cause confusion or deceive.

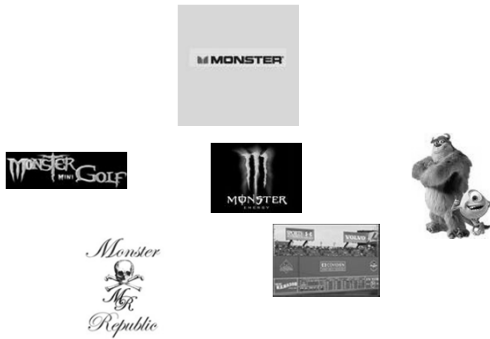
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Protecting Your Trademarks

- Must police use of your marks in social media
 - Don't expect the social media site to do it for you
 - Social media site policies / automated forms for reporting IP infringement
- Be careful before taking anything down
 - Consider adverse PR risks of overly aggressive enforcement
 - Consider alternate approaches

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Policing your marks



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Intellectual property - Copyrights

Original work of authorship

- Software code
- Manuals, publications, blueprints
- Website content
- Graphics
- Music and video



Fixed in a tangible medium

- E.g., text on paper, photo on a display,
- Software or audio/video file in memory



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Digital Millennium Copyright Act

Protects Internet service providers from infringing activity by their users

- Must have no actual prior knowledge of infringement
- Must comply with notice and takedown upon receipt of knowledge
- Must have no financial benefit
- Must register with Copyright Office and designate an agent for receipt of notice

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Copyright Service Provider Agents - A

Directory of Service Provider Agents for Notification of Claims of Infringement

The following service providers have filed designations of agents for notification of claims of infringement pursuant to Section 512(c) of the Copyright Act. The Copyright Office's current directory of agents consists of this list, with links to copies, in PDF format, of the designations filed on behalf of service providers. You must have the Adobe Acrobat Reader installed on your computer to view and print the forms. The Adobe Acrobat Reader is available for free from Adobe Systems Incorporated.

Go To: A B C D E F G H I J K L M N O P Q R S T U V W X Y Z Numerals/Symbols

Service Provider Agents List

-A-

S

A10 Capital, LLC
A10 Capital.com
a-human-right.com
A2Hosting, Inc.
A2 Web Hosting
A.1 Vacations.com

facebook

How to Report Claims of Intellectual Property Infringement

Facebook is committed to protecting the intellectual property of third parties. On this page, rights holders will find information regarding how to report copyright and other intellectual property infringements by users posting content on our website, and answers to some frequently asked questions regarding our policies.

If you are a user concerned about the removal of your content, you may file a counter-notice. You can do so through the email notification you received, or in the warning at the top of your home page.

If you are a user concerned about the security of your account, please visit our Security Help Page.

How to report claims of copyright infringement by users

To report a copyright infringement by a Facebook user, all you need to do is fill out our automated DMCA form. This form is the fastest way to report a copyright infringement, although we will review reports in all languages, it will speed our review if you can submit your report in English.

If you prefer, you can also send a DMCA notice to our designated agent (information below).

How to report other claims of intellectual property infringement by users

If you wish to report other claims of intellectual property infringement (i.e. non-copyright) by a Facebook user, all you need to do is fill out our automated IP infringement form. We appreciate your cooperation in providing an English translation of your report, when possible.

Frequently Asked Questions

What happens after I send the report?
What should I do if a third-party application infringes my rights?
What is the contact information for your DMCA designated agent?
Can I report the infringement of someone else's intellectual property rights?
What should I do if someone is pretending to be me?

Facebook © 2011 - English (US) About · Advertising · Create a Page · Developers · Con...

Digital Millennium Copyright Act

Be sure that the material is actually infringing

- Does the client own it?
 - Work for hire
 - Assignment of copyright
- Risk penalties / attorney fees if you are wrong

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Digital Millennium Copyright Act

If you want your material taken down, be sure that the notice complies with all requirements

- *Wolk v. Kodak Imaging Network, Inc. (SDNY March 2011)*

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What is a Patent?

Legal right to a new, innovative

- Article
- Process
- Composition of matter

Must be granted by government (USPTO)



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Patents - Intro

Patents are granted for *new*, useful, and *nonobvious* inventions

- Invention = product or process
- Software functions can be a process
- Novelty vs. nonobviousness

How do you read a patent?

- Focus on the claims

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Amazon.com: USPN 5,960,411

Title: *Method and System for Placing a Purchase Order via a Communications Network*

“one-click ordering”



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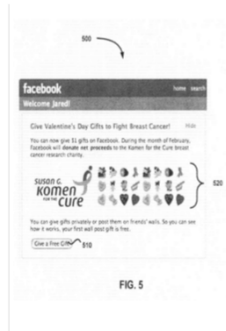
Amazon.com: “one-click” patent

1. A method of placing an order for an item comprising under control of a client system, displaying information identifying the item *purchasable through a shopping cart model*; and in response to only a single action being performed, sending a request to order the item along with an identifier of a purchaser of the item to a server system; under control of a single-action ordering component of the server system, receiving the request; retrieving additional information previously stored for the purchaser identified by the identifier in the received request; and generating an order to purchase the requested item for the purchaser identified by the identifier in the received request using the retrieved additional information; and fulfilling the generated order to complete purchase of the item, whereby the item is ordered without using [a] *the shopping cart ordering model*.

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Facebook: USPN 7,970,657

Title: *Giving Gifts and Displaying Assets in a Social Network Environment*



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Google Doodle USPN 7,912,915



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Non-Practicing Entities

Examples:

- Acacia Media Technologies
- Orion IP
- RPX
- SFA Systems
- Walker Digital

What do NPEs typically want?

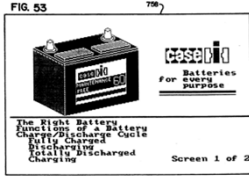
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Orion IP: USPN 5,367,627 and 5,615,342

Computer-Assisted Parts Sales Method ('627)

Electronic Proposal Preparation System ('342)

Sued more than 500 companies since 2006



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Walker Digital: USPN 7,801,802

Jay Walker – Priceline.com founder

Title: *Method, System and Computer Program Product for Facilitating an Auction Behavior and Automatic Bidding in an Auction*

April 11, 2011: filed 15 lawsuits against 100+ companies

- Defendants include Amazon.com, Apple, eBay, BMW, Facebook Google, Mapquest, Microsoft, Samsung Electronics, Wal-Mart, Yahoo, and many others

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Responding to patent notice letters

“You are infringing”

- May be a “friendly” invitation to license”
- May be a complaint

Contact patent counsel

- Do you need an opinion?

Train corporate staff

- Protect attorney-client privilege
- Caution about emails, memos, internal notes

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Minimizing the risk

IP Audit

- Website terms and conditions, legal notices
- Social networking site terms and conditions
- Website functionality
- Data presentation and retrieval
- Contracts with third party developers
- Insurance

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Insurance – advertising injury

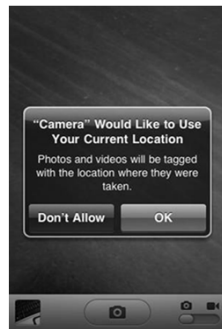
- *Hyundai Motor America v. National Union Fire Ins. Co. of Pittsburgh* (Apr. 5, 2010)
- *Dish Network v. Arch Specialty Ins. Co.* (10th Cir. Nov. 17, 2011)

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Questions?

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Privacy



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A screenshot of a social media website interface. The top navigation bar includes "Cloud Player", "Cruises", "Vacation Rentals", and "Forums". A "VISA" logo is visible. The main content area features a map with the text "Hi Jim, your friends have been to 755 cities - what's this?" and "Your friends have maps! Choose a friend to see their map or update your map". Below the map is a "Spotlight Destination" section for "Sebastian River Area, FL". On the right, there are sections for "Friends' activity" and "Your friends' most popular destinations".

Privacy – Legal Framework

Federal Laws:

- FTC Act
- FDA regulations
- FISMA
- FERPA
- Gramm-Leach-Bliley
- HIPAA
- Sarbanes-Oxley (SOX)

State Laws:

- 46 state laws
- Require notice of security breach
 - "without undue delay"
 - "reasonable time"

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Privacy – Legal Framework

- International laws
 - EU Data Protection Directive
 - Canada (PIPEDA)
 - others
- Obligations imposed by private contract
 - NDA
 - Privacy Policy
 - Service Provider Agreement

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COPPA

- Children’s Online Privacy Protection Act
 - Website operators who direct products and services to children under age 13,
 - Websites with a separate children’s area
 - Website operators who knowingly collect personal information from children under age 13

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Privacy

Privacy policies

- Federal Trade Commission – failure to follow your own privacy policy is a deceptive practice under Section 5 of the FTC Act
- “Say what you mean and mean what you say”

When sharing information with a social media partner, whose policy applies?

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COPPA

- Requirements:

- Post privacy policy and link to it on the page where information is collected
- Notify parents of information collection practices
- Give parents choice to consent
- Provide parents with access and opportunity to delete information
- Don't condition participation on submission of child's personal information
- Maintain confidentiality and security

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Questions?

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Promotions and Sweepstakes

"Sweepstakes" – elements:

- Chance (randomness)
- Prize

"Lottery" – additional element:

- Consideration

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Promotions and Sweepstakes

- State regulations
 - Prohibit consideration or entry fee
 - Winner must be chosen by random chance
 - Some states require registration (value threshold)
 - Highly regulated industries
 - alcohol, tobacco, firearms, motor fuel, timeshares, financial services
 - Limit entry to 18 years of age or over?

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Promotions and Sweepstakes

- COPPA
 - Does entry form obtain information from children under 13?
- International considerations
 - Limit to U.S. entrants

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Key points for sweepstakes rules

- Clearly post official rules
- "No fee"
 - Not limited to actual purchasers
 - Explain process for alternate (free) means of entry
- Clarify that employees and family are not eligible
- Clearly describe the prizes and number of prizes
- Explain how and when winner will be notified
- Closing date for registration
- Obtain consent
 - Do you want to use winner's name and likeness for marketing?

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Consider social media site policies

Facebook Promotions Guidelines

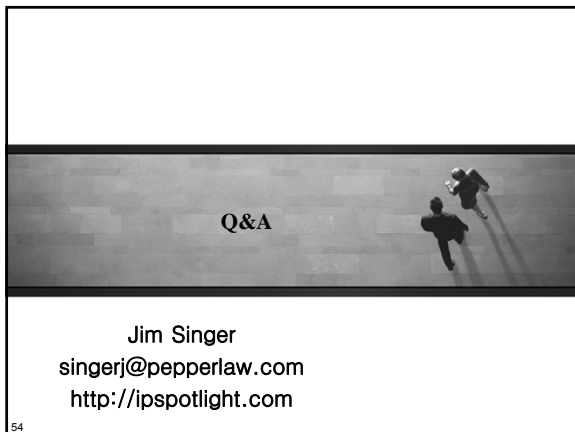
- Only through apps
- All entrants must agree to release Facebook
- Cannot use “likes” or other features
- Cannot notify winners through Facebook

Twitter Guidelines for Contests

- Must have a rule stating that multiple accounts for one user renders you ineligible

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