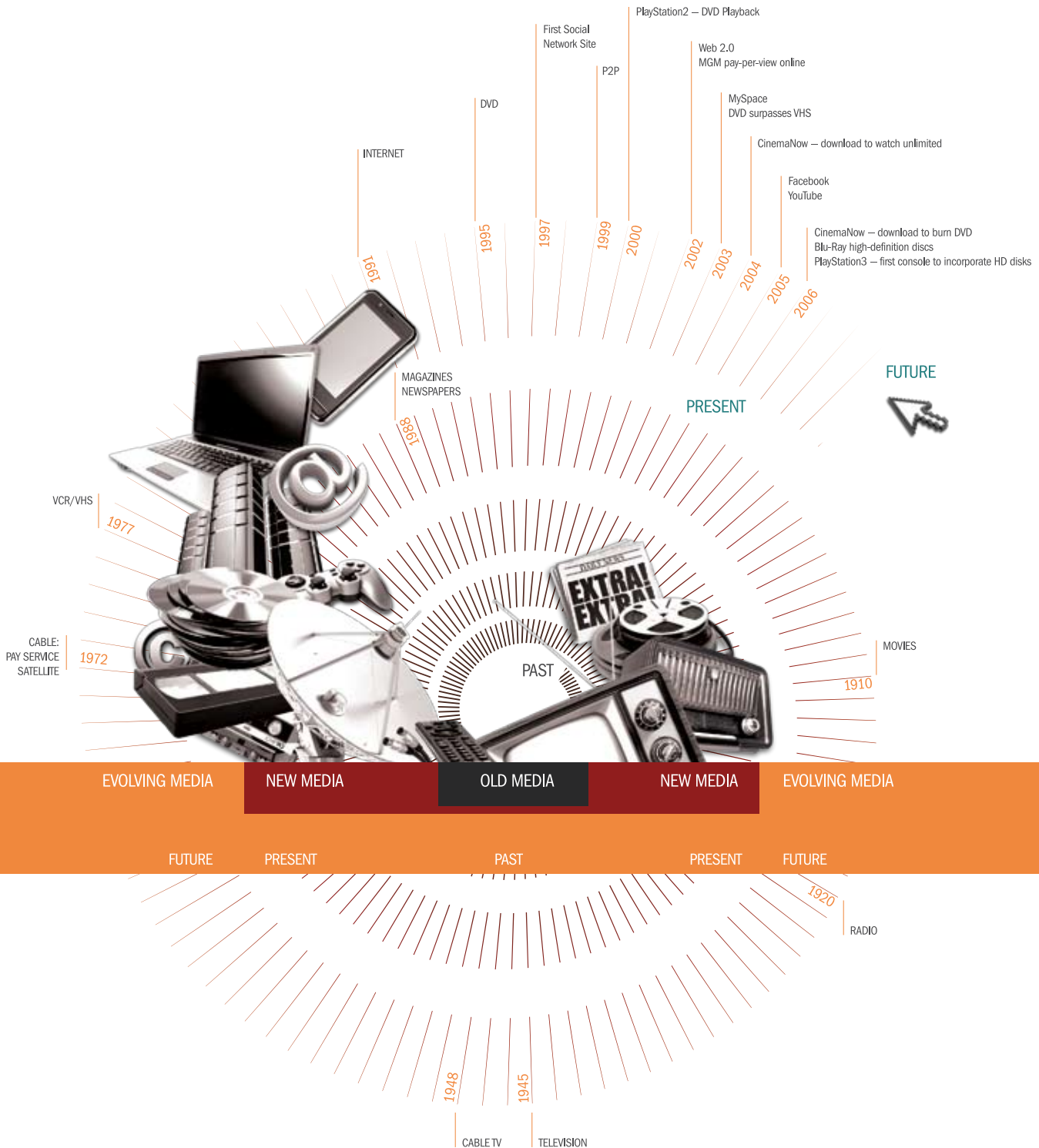


# M/E INSIGHTS

EVOLVING MEDIA ISSUE | SUMMER 2009



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NEW MEDIA

OLD MEDIA

NEW MEDIA

EVOLVING MEDIA

FUTURE

PRESENT

PAST

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## LETTER FROM THE GUEST EDITOR

By James D. Nguyen  
Partner - Wildman, Harrold, Allen & Dixon LLP

I'm pleased to serve as guest editor for this issue of M/E Insights. I was told this issue would focus on "new media" but promptly decided we should change the title to "evolving media." Here's why.

For many years now, "new media" has been the phrase of choice to describe a rapid transformation of communication platforms that began in the 1980s and 1990s. But for some time, I've been questioning whether the phrase "new media" is outdated. One day, some partners at my firm and I began searching for another term to more accurately describe the phenomenon of new media today and for tomorrow. We suggested many ideas, but one phrase kept leaping out at us. It is a phrase we hope will become adopted in the common vernacular: EVOLVING MEDIA.

The concept of "new media" is meant to distinguish from "old media" — such as print publications, analog broadcast models of television and radio, and theatrical motion picture distribution. Looking back today, "old media" are methods of communication delivery that tend to be more static in nature rather than interactive, and were not particularly portable. With technological advancements in the last 25 years, the term "new media" arose. It is now commonly used to encompass a whole variety of technologies that are more interactive, mobile and provide powerful

functionality for users. But of course, it is no longer new. Many of the technologies which are being called "new media" have been around — in some form or another — for up to 25 years.

In my humble opinion, "new media" is an outdated term. It's time for the business and legal communities to be bold and start adopting a new term for our discourse. The concept of "evolving media" pays homage to the history of media past; it captures what is happening in the present; and it anticipates what advancements will come in the future. And unlike "new media," the term — by definition — can never become outdated.

In the words of American writer Rita Mae Brown, "Language is the roadmap of a culture. It tells you where its people came from and where they are going." I could not agree more. As legal practitioners, business minds and industry leaders, the language we use in our discourse should provide a roadmap of our media culture. The phrase "evolving media" tells us where our media culture came from, and where we are going.

This issue of M/E Insights will help you stay on top of cutting-edge issues in evolving media. I want to thank our contributors: my partners Alan Friel and Nancy Derwin-Weiss from Wildman Harrold; Carys Damon and Eitan Jankelewitz from

Marriott Harrison in the United Kingdom; Rajan Samtani from DigiMarc Corporation; the Digital Watermarking Alliance for permitting use of one of its white papers; Bill Simon from Korn/Ferry International; and Drew Wheeler. Special thanks for Michael Fricklas from Viacom, Inc. for taking the time to answer my questions in this issue's General Counsel Q&A. I've also taken the liberty of including my own thoughts about 10 Top Trends in Evolving Media.

So read on and let's evolve. "New media" is so yesterday; it's time for "evolving media."

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# SIMON SAYS MAKING THE TRANSITION FROM OLD MEDIA TO NEW MEDIA

By William Simon,  
Global Sector Leader, Media & Entertainment  
Korn/Ferry International

William D. Simon is a Senior Client Partner in Korn/Ferry International's Los Angeles office and Managing Director of the Media, Entertainment and Convergence sector. He is recognized in Nancy Garrison-Jenn's survey of the top 200 global executive recruiters and ranked among the top 35 in CableFax Magazine's most influential in cable. He can be reached at [william.simon@kornferry.com](mailto:william.simon@kornferry.com)

There was a time not too long ago when "new media" described cable television or home video (Betamax or VHS for the VCR). And during this period there was fairly consistent growth and career opportunities for entertainment/ media executives, not to mention a few traditional consumer packaged goods executives and some very smart "MBAs". The "pie" kept getting bigger and bigger, we went from three broadcast networks to 100 channels to "500 channels". And this period ran from the early 1980's until the "bubble bursting" of 2000. Admittedly, there were a few bumps along the way, a couple of marketplace slow downs, but all in all, a very strong period of growth in the media sectors related to content and content delivery.

Then we moved into the "digital age" for content and content delivery. We entered the "internet age", broadband became established, mobile content started to come of age, games exploded on the various platforms, and much more. The "internet bubble" came and went, venture capital and private equity looked brilliant and dumb, lots of companies came into existence and changed the balance of power with consumers, many of these same companies then disappeared, marketplace conditions changed, then completely fell apart, the overall global economy tanked, and still the world of media and content continues to grow and evolve.

What hasn't yet evolved is the key revenue models. Clearly, the consumer has "more power" than previously; clearly, (content) rights holders are challenged by rising costs, falling advertising and alternative forms of entertainment. And then there is the big issue of copyright protection and theft. I will leave those last two issues to the attorneys, legislators, and engineers (and what a great mix that would be to have in "one room").

As the eternal optimist, I believe that the technical and regulatory issues will somehow get resolved.

But given all of the pressures on the ultimate consumer who is faced with multiple forms of content delivery: big screen, mobile screen, lean back, lean forward, interactive, at home, on a schedule, on demand, etc., it's a lot to deal with when trying to build businesses that allow for building one's career.

My own experience working with hundreds of entertainment and media companies and literally thousands of executives is that successful careers within this space are built on their ability to deal with fast (and sometimes dramatically) changing: technologies, consumer tastes, consumer habits/ trends, and the desire to constantly be "new and improved".

All of us have to constantly work hard to keep up with the rate of change – and some are better at this than others. But it's more than getting the better gadget, it's really about how to work successfully when so much is changing so fast. Some might suggest that people are already "wired" a certain way and can therefore deal with change or not. Others think it can be learned.

First of all, you have to be true to yourself: what are you good at, what do you like to do, what kind of environment do you like to work in, etc.

When you are in senior management, at the top of virtually all companies, these positions become all about leadership....it's the "leadership thing". It has to do with how you communicate, how you lead, how you think, how you manage others, and so on.

One might assume that someone who can move quickly and deal with change and changing environments in one place can automatically do it in the next one. That's not necessarily the case at all. Successful executives all have to keep pushing to make it work the next time and the next time. We all have seen very successful executives seem to suddenly "hit the wall" and fail. The reasons may be many, but certainly one of the reasons was not to truly see what is taking place within one's company, one's industry or the broader marketplace and overall economy. We live in a world with big swings in the economy, the stock market and even more.

Feedback from colleagues, bosses, staff, mentors, advisors and spouses are all valuable – but we have to take it in – truly listen and take action – if we are to learn from others. We have to understand the "context" of both the advice/ comments as well as the situations we are facing. And yes, there is learning, there are plenty of books, classes, seminars, professional coaches and other resources that are out there to enable each of us to maximize our professional potential. Let's not be shy or afraid to ask for help and advice. You might be surprised that some of the most highly regarded executives in both the traditional and digital media space continue to sharpen their professional focus through the use of a professional coach.

Making any change is hard; learning is hard; the economy is hard....But we can all do better in these challenging times if we can make the extra effort to learn, understand and improve our own leadership styles – the way we lead, communicate and team with others in our business. And while digital is changing the way we receive and view our entertainment and media, leadership is still the key to our ability to being successful in a "broadcast world or a digital world".

By William Simon



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# STATE OF EVOLVING MEDIA 2009: 10 TOP TRENDS

By James D. Nguyen,  
Wildman, Harrold, Allen & Dixon LLP

2009 will be another year of rapid developments in the world of evolving media, as technology platforms for distributing content continue to proliferate. From my industry observation, here is a list of 10 top trends (in no particular order) to watch out for 2009:

## POLITICS

### Evolving media enters politics.

Regardless of your politics, it was evident from the 2008 Presidential Campaign that the age of new media in politics has arrived. The top candidates – in particular Barack Obama and later in their respective campaigns Hillary Clinton and John McCain – took advantage of the Internet, social networking sites, text messages and other new media tools to reach voters and draw significant donations. Obama's evolving media campaign was particularly impressive. Obama launched an official YouTube channel that received 4 times as many views as McCain's: 97 million vs. 24 million. His YouTube channel was rich with content – growing to nearly 2000 videos. Obama also used an official video podcast. He also had an iPhone application, viral video content, and presences through Facebook, Myspace, Flickr, Digg and Twitter.

While 2009 is not a major election year, expect evolving media platforms to continue playing a key role in politics.

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## BLU-RAY

### Blu-ray will break out... but may be challenged by digital media services flowing into the living room.

Once Warner Bros. withdrew support for the burgeoning HD-DVD video format, the road was left clear for Blu-ray to become the standard format for high definition DVD. But before Blu-ray can even take over the home entertainment market, there is some chance that it will be usurped by digital media services that may flow directly into living rooms and television sets. For example, at the 2009 Consumer Electronics Show, Korean television manufacturer LG Electronics announced a new line of high-def televisions that connect directly to the Internet with no set-top box required. Netflix and Blockbuster have their own efforts to deliver film videos to consumers via the Internet. If HD movies can easily be downloaded or accessed directly on home television monitors – the era of Blu-ray may be shortlived.

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## FILE-SHARING

### The RIAA stopped suing file-sharers; this should help usher in a new era of increased cooperation and strategic partnerships between old media and new media.

In a major strategy for battling online music piracy, in December 2008, the Recording Industry Association of America announced that it would no longer sue users for illegal file-sharing. Instead, it will try an approach that relies on cooperation with Internet service providers to combat piracy. Many industry observers have long believed that success in evolving media environments will depend on partnerships between "new media" and "old media" constituents. The RIAA's move is not the first attempt to create such a partnership, but is one of the most notable. It may lead more content owners to consider partnerships with "new media" technology partners to both generate revenue and protect IP.

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## SOCIAL GATHERING SITES

### Social networks will broaden their reach and utility and users will increasingly look to Internet destinations as social gathering sites.

With MySpace, Facebook, LinkedIn, Classmates and other sister social destinations, online social networking sites are all the rage. 35% of US Web users aged 18 or older have a profile on a social network such as Facebook, MySpace or LinkedIn, according to a Pew Internet & American Life Project survey released in January 2009. Among teenagers, usage is far higher; 65% percent of online Americans aged 12 to 17 years old use social networks.

The Internet is also becoming a social gathering site. SocialLister.com claims to be the Internet's hottest social gathering site. Popular blogs such as The Huffington Post; game communities such as Sony Playstation's new HOME virtual world (in Beta testing); and other special interest web sites are becoming places where like-minded users gather to share interests and ideas. They are virtual block parties, especially during events of public interest – such as the 2008 election season and major sporting events.

In 2009, look for social networking sites and many other web properties to continue their rise as the destination at which Internet users to gather.

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## SOUNDBITE COMMUNICATION

### Text messaging, Twitter and other forms of "soundbite" communication will rise.

Text messaging continues to be very popular. According to the Mobile Data Association, as of May 2008, there was a 30% annual increase in the number of mobile phone messages being sent worldwide. Every day, some 212,616,000 SMS text messages are sent, and every week, more than 10 million pictures and video messaging (MMS) are sent.

"Soundbite" communication is advancing with technologies. For example, Twitter is a free social networking and micro-blogging service that allows users to send text messages ("tweets") of 140 characters maximum. Updates are displayed on a user's profile page and delivered to other users who have signed up to receive them ("followers"), or just to a user's "circle of friends" if so selected. Users can receive updates via the Twitter website, SMS, RSS feed, email or through other applications such as Facebook. Some estimates place Twitter as having over 3 million accounts, and over 5 millions visitors in September 2008. Twitter has proven to be especially powerful during news events. For example, Twitter was used to spread information quickly during the 2008 terrorist attacks in Mumbai, India. Some media outlets such as CNN are starting to use Twitter to gauge real-time public opinion on issues.

Expect more soundbite messaging platforms to take off in 2009.

# 5.

## TV “WEBIFIED”

**Television will become increasingly “webified”.**

In 2008, free, high-quality television episodes became available on the Internet in far better fashion. Hulu.com was launched (in an alliance between NBC Universal and News Corp.) and instantly provided a good library of television program content. It joined AOL Video, Joost and other online television platforms. Broadband television channels proliferated with high-quality video content available for free viewing.

For the download market, in January 2009, Apple announced changes to its iTunes pricing model and that it would forego DRM copy protection. This will affect not just the market for online music, but also television programs available (though not all content owners have reached agreement yet with Apple over the new pricing structure for downloadable TV episodes).

In 2009, expect the webification of television to progress even further. However, do not expect the Internet to take over yet as the preferred destination for watching television programs. Until Internet content can easily be delivered to TV screens in the living room, consumers will still prefer the “lean-back” experience of watching programs on a television screen over the “lean-forward” experience of watching video on a computer monitor.

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LETTER FROM  
THE GUEST EDITOR

## WEB-ONLY CONTENT

**Dr. Horrible’s Sing-A-Long Blog is a harbinger of more successful entertainment content being launched virally through the Internet.**

In 2008, it was all the rage on the Internet: “Dr. Horrible’s Sing-A-Long Blog,” a 3-part, 45 minute super-hero musical featuring actor Neil Patrick Harris and produced exclusively for Internet distribution. It tells the story of Dr. Horrible, the aspiring supervillain alter ego of Billy, his nemesis Captain Hammer, and Penny, their mutual love interest. The writing team was led writer/director Josh Whedon, and the project was written during the WGA writer’s strike. “Dr. Horrible’s Sing-A-Long Blog” confirms that there is definitely a market for Web-only content, but it also instructs that Web-only programming needs to be more daring and creative to attract fickle Internet audiences. In 2009, expect some more attempts to capture the zeitgeist of Dr. Horrible.

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## WIDGETS

**Widgets will increase the customizing power of the Internet for users.**

Widgets are HTML mini-applications or “gadgets,” which can be incorporated into a user’s personal web site, blog, social network page, or computer desktop. They are especially popular additions to social network pages on MySpace and Facebook. Google, Yahoo! and other Internet services offer thousands of widgets: calendars; clocks; news updates; sports scores; weather information; games; an iPod player control; a thesaurus-dictionary look-up function; and even “mood rings” to let users know what mood their computers are in.

The magic of widgets is that they are “live,” constantly updating with content or information. Widgets also allow Internet users to personalize and customize their Web experience – everything that interests you can be on one homepage for easy access. They are powerful new tools for trademark and copyright owners to promote their brands, and to deliver content, products and services over the Internet.

Expect to see the rise of widgets to continue in 2009, and also spark further innovations for customizing users’ Internet experiences.

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## WEB APPS

**The rise of apps: web applications will become increasingly valuable for mobile devices.**

Like widgets, web applications have become a phenomenon. A webapp is a software application that is accessed via a web browser over the Internet (or an intranet network). In layperson’s terms, webapps are those really cool features that can be loaded onto and used on an Apple iPhone, Blackberry or other mobile devices. They provide access to Facebook, AOL Instant Messenger, the Zagat restaurant guide, news, music, and more services. Users love webapps because they permit customization of your mobile device. Content and brand owners love webapps because they present a compelling opportunity to connect their properties and generate revenue with mobile device users. Apple launched an online “App Store,” which now features over 10,000 applications for download and usage for iPhone. Over 100 million apps were downloaded in just the first 60 days. In 2008, Google announced Android Market, an online center for users to find, buy, download and rate applications and other content for mobile phones.

Expect webapps to continue to grow in sheer number and functionality, and expect more users to download and use web apps.

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## GAME INDUSTRY

**Video/online games and virtual worlds will increase their user base and value.**

According to an ABI research study, video game industry revenue is expected to double from \$32.6 billion in 2005 to \$65.9 billion in 2011. The main growth areas appear to be in online and mobile gaming.

While video games have long been the domain of young men, demographics are changing. According to the Entertainment Software Association, in 2007, 40% of game players are now female, and 44% of online gamers are were. From an age perspective, 20% of Americans over the age of 50 played video games compared to only 9% in 1999. In 2009, expect the age and gender demographics of gamers to continue to diversify.

Nintendo’s Wii, SonyPlaystation 3, Microsoft’s Xbox 360 and other game consoles have advanced the capabilities of video game units to be universal entertainment devices. Music video games like Guitar Hero and MTV’s Rock Band are now popular franchises. Games have also migrated to mobile devices and to the Internet. In massively multiple player online role playing games (MMORPGs) like “World of Warcraft” and “City of Heroes,” players do battle with dozens if not hundreds of other players at the same time.

Meanwhile, living “la vida virtual” is all the rage. Virtual worlds allow online users to create avatars to represent their personas, socially interact, play games and inhabit lives online with thousands of other people worldwide. Linden Lab’s “Second Life” allows players to create a second life for themselves in a cyber universe. Since opening to the public in 2003, Second Life has attracted over 200,000 worldwide “inhabitants.” Other rising virtual worlds include Habbo Hotel and Disney’s Club Penguin. By inspiring digital creativity and interaction, these virtual worlds are now havens for creating content and marketing real life brands.

In 2009 and beyond, expect video games and virtual worlds to account for a greater piece of the entertainment revenue pie.

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# GC 2.0



**INTERVIEW WITH MICHAEL FRICKLAS,**  
*Executive Vice President, General Counsel and Secretary of Viacom, Inc.*

Michael Fricklas certainly stays as general counsel for Viacom, Inc., one of the world's leading media companies. In this interview by our guest editor Jimmy Nguyen, Michael talks about his rise to the general counsel role, shares some thoughts on the new media universe, and reveals whether you can find him on Facebook, tweeting on Twitter or playing the popular Rock Band video game. Read on about this GC 2.0.

*Why did you become a lawyer? What led you to start being a lawyer for the entertainment industry?*

M.F.

I'd like to say that I always wanted to be a lawyer for the entertainment industry, but it didn't happen that way at all. I became interested in computers in high school (growing up in southeast Denver), and attended the University of Colorado to become an engineer. Along the way, I became interested in the business aspects of technology and it was kind of a coin toss between business school and law school. I did better on the LSATs than the GMATs and chose law school. It turned out that I really enjoyed law school and did very well. I spent summer one year working as a patent lawyer, and then the following year practicing in the nascent field of computer law at a Boston law firm.

Although the Silicon Valley firms didn't interview at my school, I made a job hunting trip there and met with the leading technology law firms, picking a firm in Palo Alto called Ware & Freidenrich that ultimately merged into DLA Piper. Ware & Freidenrich at the time was a small firm with a great practice advising technology companies in financings and intellectual property law matters. I worked on the team that took several companies public. Shearman & Sterling's San Francisco office represented the underwriters on several of those deals, and I was very impressed with the quality of the people. I was also very impressed with the training they provided to their lawyers – something a small firm just couldn't do. I really wanted to get that sort of experience. Shearman & Sterling hired me as a securities and transactional lawyer just before a different market crash – the one in 1987. After a couple of years in San Francisco, they asked me to do a one year rotation in the M&A group in the much larger New York office. Two great things happened there – I met Philippe Dauman, then a partner in the M&A group, and I impressed a client that was trying to grow in the United States in the mining business. With the legal services market extremely weak, I accepted a position as general counsel of the client and had the opportunity to spend more time in Denver with my family.

In 2003, Philippe Dauman joined Viacom as general counsel and invited me to join him as his deputy general counsel. Philippe had represented Sumner Redstone since 1986 and was on the Viacom Board of Directors. I didn't know Viacom well, but was impressed with the results of my research and I respected Philippe enough to trust that if he took the position, the company must be poised for great success.

I guess that's a long way around to say that my only plan was to follow my interests in technology, to work hard and learn as much as I could from my experiences. I didn't know what opportunities would present themselves, but I wanted to be as well trained as possible so that I was well positioned when the opportunities did present themselves. I was very fortunate that an opportunity as great as the Viacom position became available. When Philippe and I first discussed the position, my interest and background in technology turned out to be a big factor – even in 1993 Philippe could see the importance that digital technology would play in the evolution of the media business. And for those who ask what my background in the mining business has to do with MTV – I think the answer is obvious: Rock is clearly in my blood.

*What have been the most exciting parts of your job as general counsel at Viacom? What have the most challenging?*

M.F.

The entertainment business is centrally involved in trading in rights – a field that lawyers understand well. As a result, our role is more central to our business than to many others. The centrality makes the job interesting; on the other hand with that role there is a lot of responsibility and many of the situations are very complicated to resolve. There are often a lot of constituencies and what might seem right in the abstract is rarely the complete answer when put into practice.

Many of the most challenging issues relate to the battles around the extent of copyright law. There are those who paint copyright as an effort of big business to limit consumers' rights or prevent access to knowledge and capital. Many of the people making these arguments are either inexperienced in the commercial world and don't understand how difficult it is to raise capital or build a business or that it is this world of capital formation, investment and risk taking that supports the creation of books and movies and journalism online and off. Others who make these arguments are simply out to make money from new businesses and technologies and find it inconvenient or expensive to actually pay for the creative works they are exploiting. Copyright law is far from perfect – but buried in esoteric areas like trafficking in anti-circumvention technologies and the so-called right to make a back-up copy of a DVD is the serious question of whether creators have the right to effective protection against piracy and to experiment with businesses online.

M.F.

*The rise of new media platforms has been transforming the entertainment industry. How is Viacom dealing with the opportunities and challenges presented by evolving methods for distributing entertainment content?*

Viacom has long been at the forefront of digital exploitation. Our movies and television shows are available on an enormous number of devices and through many different aggregators as well as on our own sites. We own Harmonix, the incredibly creative video game studio behind Rock Band, which distributes millions of songs online and is launching a *Beatles* game this fall. We are a big player on mobile devices. Online sometimes is a new way to receive content, other times is promotional, and other times can create entirely different experiences such as social media or casual games. The strength of our brands and our creative voices enable us to leverage our base into these new opportunities.

M.F.

*What role does your legal team play in working with Viacom business executives on new media initiatives?*

We are very involved. The deals are complicated and novel, and therefore consume a lot of lawyer time. We need to understand what our partners are doing for us in the piracy area, where our content is going to go and on what platforms. There are patent issues and security to work out. There are often complicated copyright issues, including issues about who is responsible for clearing content and whether geofiltering will be implemented.

Our lawyers are very tech-savvy and interested in seeing the business go forward. Risks are addressed, but some things just aren't knowable at the time of the contract. We are used to making decisions on imperfect information, and this requires a team that is well integrated and where there is a high degree of trust.

Of course, this means there are lots of disputes. Some times they come up with partners and we have to be sophisticated about making sure our interests are represented without creating enemies. Sometimes the claims come from people just trying to get in the way of the business with claims that are simply opportunistic. We refuse to settle bogus claims and have a very good track record in court when we need to try cases.

M.F.

*The Viacom copyright infringement lawsuit against Google/YouTube is of course being closely watched. What does Viacom hope to accomplish through the litigation? How do you think that litigation will affect the future of online distribution of entertainment content?*

Because this case is in litigation, I will need to be measured about what I can say. But at bottom, businesses that cause harm generally are required to take reasonable steps to minimize the damage. YouTube without question has enabled a large degree of copyright infringement and has profited handsomely from its illegal conduct. YouTube could have taken simple steps to prevent infringement. Instead, YouTube chose to ignore obvious piracy on its site, leaving it to copyright owners to bear not only the cost of monitoring the site, but also the burden of infringement. Today, most of the leading User Generated Content (UGC) sites are accepting that the responsibility to deter infringement is shared – content owners have to load systems with so-called “fingerprints” of their content, and if they do, UGC site owners will filter out infringing content before it is shown. The UGC Principles have become the rules of the road, and it has been established that effective tools are available and are being implemented every day.

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*One of the current challenges for entertainment content owners is to figure out business models that work to generate revenue from distributing content on the Internet or other evolving media platforms. How do you think content owners can best make money from distributing their content via evolving media technologies? (For example, do you think ad-supported models are the way to go? Pay per download or stream? Subscription models? Brand integration?)*

M.F.

Assuming that piracy is kept under control, there will be a mix of business models just like there is today. Today, if you want to watch a movie, you can pay a per ticket price on the day it is released to see it on a large screen – maybe in 3D or on IMAX. A little later, you can rent a DVD on a per night basis, or through a subscription from a provider like Netflix or Blockbuster. You can pay a per transaction fee through your cable provider or own the movie or pay per view via iTunes. Later it will be available on a subscription basis through Showtime or HBO, and finally it will be available on an advertiser supported basis on over the air television or basic cable tv associated with a subscription fee charge paid by the cable operator and passed along to consumers.

Ultimately consumers will tell the industry what models they like best for receiving content. It's important not to confuse consumers and, of course, to create value that's incremental and that doesn't cannibalize earlier windows.

M.F.

*Viacom's television networks have been very active at launching virtual worlds to promote their television program brands. Do you think that virtual worlds will one day become viable revenue generators for media companies?*

Virtual worlds are already viable revenue generators for us, and aren't merely promotional. In fact, Neopets, one of our first stand-alone virtual worlds, has more than 50 million registered users. We have a number of sites targeted at a wide variety of different interests and demographics. There will certainly be a place for them and the way we think about virtual worlds will continue to evolve.

M.F.

*Online social networking and micro-blogging are all the rage now. Can we find you on Facebook or Twitter?*

I'm on both, although I don't tweet much. My oldest daughter introduced me to Facebook two years ago when she spent a summer abroad and I noticed that she would answer me on Facebook and never checked her email. I rarely have anything useful to communicate to the public in 140 characters, but I do track tweets from journalists and friends I find interesting.

M.F.

*How is the entertainment industry different today than when you first entered it?*

It is evolving much more quickly – and under more pressure. It used to be that new forms of distribution required new hardware – high def televisions or dvd players – and so cycles took years. There were experiments with new business models and new technologies took years to become mainstream. Those cycles are now implemented in software and new “betas” are introduced every day. We have a number of very smart people working hard to understand every development and how they are likely to affect the business.

In the physical property world, people understand that you have to control your assets in order to operate a business. No one questions that a manufacturer needs to maintain physical possession until its goods are sold. So, too, a creative company must maintain control over our creations – but control is much more difficult than it used to be and pirates and legitimate businesses both are pushing hard to limit our control and therefore threaten the business.

M.F.

*When you're not acting as top legal eagle for Viacom, what do you do for fun or relaxation?*

These jobs don't give you a lot of time off, but I most enjoy spending time with my four daughters and my wife, Donna. Shanna and Jaimee, 21 and 19, are both away at college, but spend time at home over the summer. My ten year old daughter, Gabriella, and I are both trying to learn how to play golf and Rock Band. My five year old daughter, Genevieve, is particularly fond of silly jokes and reading books – both things I'm good at. I'm also a big fan of Jazz music. You can often find Donna and me at any of the three venues of Jazz at Lincoln Center (where I'm a member of the board as well).

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# FOR A FEW DOWNLOADS MORE GROWING OPPORTUNITIES FOR CYBER-SAVVY COUNSEL IN THE “WILD WEST” WORLD OF NEW MEDIA

by Drew Wheeler

THE VIEWS AND OPINIONS EXPRESSED IN THE FOLLOWING ARTICLE BELONG SOLELY TO DREW WHEELER AND ARE NOT THE VIEWS OF THE MOTION PICTURE ASSOCIATION OR ITS MEMBER COMPANIES.

Drew Wheeler is Registered In-House Counsel for the Motion Picture Association, an entertainment industry trade association currently representing six major motion picture and television studios. Over the past two years, he has coordinated a broad range of worldwide new media protection initiatives involving content filtration, copyright litigation, and graduated response. The opinions expressed in this article are his own and not that of the MPA.

The success of a “low-to-no-budget” new media production like Joss Whedon’s *Dr. Horrible’s Sing-Along Blog* has filled producers in Hollywood and Middle America alike with cautiously optimistic visions of profitable, Internet-enabled content distribution. Conversely, Ed Zwick and Marshall Herskovitz’s made-for-new media production *Quarterlife* failed to find success (as defined by traditional standards) when repurposed for network television. Recent plateaus of traditional production and distribution revenues have been compounded by the significant impact of infringing, non-revenue-generating content widely available through illegitimate channels. With unlimited possibilities and daunting challenges facing modern content owners in the form of new media, attorneys attracted to the excitement and personal rewards offered by the business of show business have never been gifted with so many opportunities to play a starring role in the storytelling world.

## FAN FACTOR: THE “NEW HOLLYWOOD”

A key benefit new media provides all parties to the creative process is the ability to interact with die-hard fans in a real-time environment. Luckily for the creative industry, the Internet has already provided the perfect testing ground by enabling the development of vibrant fan communities. As case law surrounding online discussion forums continues to evolve, legal analysis will continue to be an essential step in the outreach process. Producers of popular television shows such as *Heroes* already create online-exclusive “special features” that explain how episodes are produced in a “behind-the-scenes” manner. The possibilities of fan-moderated roundtable discussions, fan-selected additions to ensemble casts, and semi-canonized “creative communities” seem mere steps away from such current offerings. Unfortunately, tort liability such as unintentional defamation remains a serious concern for responsible content owners in the new media world. Unless traditional disclaimers retain their strength and flexibility throughout this shift to wide-spread fan interaction, new strategies may be required to handle situations where views and opinions of creators and content owners diverge.

The new media revolution has also made it easier than ever for aspiring storytellers to enter the entertainment business. As a result, the opportunity to represent new and diverse creative voices seems poised to grow exponentially with each new generation of skilled talent. If the explosive growth in the number of fan-created works available on user-generated content sites enables an evolution from a traditional “spec script” gate-keeping regime into a “spec production” worldwide try-out process, countless new creators will provide demand for preliminary and perpetual advice when faced with established and emerging legal issues lurking as barriers between content conception and content consumption.

Legislative and regulatory steps such as rights clearance, trademark review, and title registration that may be considered passé by established creators can leave neophytes stranded at the precipice of production. Non-traditional media issues of data security, privacy, and online advertising will also require constant re-evaluation as case law develops. Whether dealing with standard license agreements or establishing new and groundbreaking relationships between creators and distributors, counsel will continue to hold a distinguished seat at the table of entertainment development and consumption for a fresh generation of creators who have never known a world without new media.

## PLENTIFUL, RELIABLE, AND LEGITIMATE ONLINE DISTRIBUTION

Over the past two decades, Hollywood has demonstrated the power of library exploitation by successfully issuing new versions of old content wrapped in improved audio / video quality, supplemented with informative special features, and buttressed by additional advances over the preceding media format (e.g., smaller packaging, the demise of the anachronistic request to “Be Kind, Rewind,” chapter search, etc.). In order to “compete with free” and combat the wave of infringing materials available online, distributors of creative works may need to bring even more fresh ideas to the table. Although the most popular video-streaming services like Hulu are still in their infancy compared to historic models of media distribution, these sites represent an important step towards omnipresent content.

New media distribution options often enable the collection of valuable consumer data. Advertisers continue to demand targeted venues for their messages, and consumer-specific ads are on the verge of widespread deployment. Thanks to the growing judicial enforcement of “Click Wrap” online Terms of Service agreements that provide adequate notice, opportunity for review, and no unconscionable terms, attorneys are positioned to advise and aid content owners in their plans to elicit substantial revenue from these services by finding new ways to provide advertisers with access to the audiences they desire. The opportunity to benefit from consumers’ penchant for divulging personal information in fan community contexts must be tempered by well-researched understanding of the reasonable expectations of privacy in any information-sharing scenario.

In addition, content owners regularly announce new and supplementary online distribution options, which remain a key component of industry evolution. These can take many forms, including subscription-based “speed-download” services for heavy consumers that benefit from the dedicated fan bases flourishing across the Internet, real-time on-demand access to thousands of catalogue titles as “rentals” through existing set-top machinery such as video game consoles and digital video recorders, and “living” aggregation portals that provide both mile-high and microscopic views of the content maelstrom that is the online world. These and countless other possibilities that may seem obvious in hindsight all rely on the creative freedoms afforded by the architecture of the Internet. Geographic distinctions have become less meaningful in an online world (with the notable exception of a handful of “closed network” countries), and counselors who can leverage their expertise across multiple territories will become essential resources for these borderless methods of distribution and their successors.

## GUARDING THE CARAVAN

*MGM v. Grokster*<sup>1</sup> set a critical precedent for content owners seeking to protect their property and provided a judicially-supported mechanism essential to addressing the widely-distributed nature of online infringement. *Grokster* provided content owners with the legal tools necessary for action against the myriad content infringers hiding amidst the pseudonymous traffic of the Internet. In a post-*Grokster* world, content owners employ skilled litigators across the globe as proactive enforcers to combat online copyright infringement.

The RIAA’s discontinuation of its end-user litigation campaign and the growing international discourse surrounding Graduated Response legislation (varied approaches sharing the core principles of providing meaningful consequences for infringement, facilitating copyright education, and raising awareness of legal alternatives) suggest that rights-owners will continue to direct actions against major hubs of infringement that are easily accessible to the average web user. In the current “Wild West” of new media, legal enforcement against such hubs can help ensure that legitimate content owners will be able to serve their intended consumers in an environment safe from the disruption caused by illegal offers of stolen product.

No matter how many in-house employees are directed to perform anti-piracy enforcement actions on behalf of large-scale content owners, they will be invariably outnumbered by cyber-savvy individuals around the world who seek to procure massive profits from their illegal actions – much like DEA agents and drug dealers. As facilitators’ site-hosting habits trend toward the protection of “safe haven” countries with Internet-related intellectual property laws still open to legal interpretation, content owners’ attention will be drawn to these regions as potential firebreaks. Comprehensive knowledge of Internet-related laws in countries large and small can make any lawyer intrigued by the field of content protection a much more attractive hire to forward-thinking content owners.

## THE LONG AND PROMISING ROAD AHEAD

Traditional legal work is likely to be supplemented by new and exciting opportunities for ambitious attorneys to support visionary ventures in fields of fan interaction, online distribution, and content protection. In spite of a seemingly radical industry metamorphosis, in-house and firm-based counsel alike will continue to be positioned as advisors to established content owners as they adapt pre-millennial tactics to an Internet era while developing innovative strategies for continuing success in the context of the new media paradigm.

1. *Metro Goldwyn Mayer Studio Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

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# EVOLVING MEDIA TOOLS

## LEAD WEB SITES TO PLAY COMPLIANCE CATCH-UP AND REQUIRE COMPANIES TO NAVIGATE CHANGING WATERS

By Alan L. Friel and Nancy Derwin-Weiss, Wildman, Harrold, Allen & Dixon LLP

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### PART 1: WEB SITE COMPLIANCE

Digital media provides an ability to build and exploit consumer information databases for marketing and customer relationship management, a valuable asset. Collection, maintenance and use of personally identifiable information is regulated by the Federal Trade Commission and the states. Web sites and online services are required to post a privacy policy that accurately describes what consumer information (both personal and nonpersonal) is gathered and how it is captured, maintained, used and shared. Accordingly, it is insufficient to merely “borrow” from another Web site.

Once a privacy policy is posted, the real work begins in ensuring compliance. This can be difficult to accomplish because Web sites and marketing practices are constantly evolving, new technology and content is regularly deployed, and new personnel are tasked without any fundamental privacy awareness. For example, a company may start selling advertisements on a site without considering whether its privacy policy includes legally required disclosures regarding the ad serving technology and vendors. Or, the marketing department might desire to share personally identifiable information with co-promotional partners or sell the list even though when it lacks the authority to do so. Another common error is adding statements to company’s Web site to encourage newsletter registrations (e.g. “Your information is 100 percent secure with us. We will never share your information with third parties.”) without realizing that these types of statements conflict with the privacy policy and the company’s asset strategy. In fact, the FTC has held companies liable for violating such promises, even where there has not been any “actual proven” harm done to the consumer.



#### PRIVACY CONCERNS ARE EVOLVING

Companies should regularly audit their sites and data practices to ensure legal compliance and periodically update privacy policies to reflect current reality. When material changes are made to a privacy policy, notice to consumers must be given and consent to these changes obtained before they are applied. Companies too often mistakenly believe they can unilaterally change the compact by merely posting a new policy and applying it retroactively. Working with privacy counsel whenever changes are made to consumer data collection and use is essential. Privacy counsel can also help create business-oriented guidelines and “dos and don’ts” to assist marketing and management information systems departments in operating in a legally compliant manner.

#### CALIFORNIA IS SPECIAL

California requires privacy policies to include specific disclosures and to be identified and linked to in a specific manner, an approach a proposed Washington bill would also follow. California also requires that if a site shares personally identifiable information with others for third-party, direct-marketing purposes, that it either have obtained users’ advance consent or maintain a system for giving notice to California consumers, on request, of parties that were given that information. Compliance with this law may be tricky where a company shares personal data between subsidiaries.

#### WHO’S WATCHING THE KIDS?

Children’s privacy is of particular concern to regulators, even for sites that are clearly targeted toward adults, as Sony/BMG recently learned when it settled an FTC action arising out of its improper collection of personal information, including e-mail addresses, from children younger than 13 in violation of the Children’s Online Privacy Protection Act, for \$1 million. The act requires verified parental consent before personally identifiable information can be collected from children under 13. Both the FTC and the Children’s Online Advertising Review Unit of the Better Business Bureaus actively monitor compliance and bring actions against violators. The review unit and other industry groups offer a service to review sites and certify them as being in compliance, which will result in an FTC “safe harbor.” Frequent traps for the unwary include the general audience Web site that violates the act by either collecting date-of-birth information without employing appropriate age screening and blocking technology; and/or simply asking users to agree to such statements on registration pages: “I certify that I am at least 13 years of age.” These kinds of inadvertent age collection mechanisms have twice resulted in seven-figure FTC settlements in recent years. In addition, as a result of settlements with multiple state attorneys general, Web sites frequented by tweens, such as Myspace, should engage in additional age screening and monitoring to address risks posed by sexual predators.

#### ARE YOU SNOOPING?

As technology has evolved, marketers can now target consumers with ads and direct messages that are relevant specifically to them. For instance, it is said, a stamp collector will welcome e-mails on releases of new commemorative stamps, and a mother of young children would rather have ads delivered to her on diapers and minivans than for arthritis medicine and fishing tackle. Accordingly, marketers, Web sites, search engines, Internet service providers and online ad server networks have been busily launching ever more sophisticated technology that tracks online user behavior and builds profiles to help better target them with relevant marketing. But consumer protection groups and privacy advocates are up in arms, and the issue of the type of notice and consent that should be required to engage in so-called “behavioral marketing” is being addressed by the FTC, the advertising industry and the Network Advertising Initiative, a self-regulatory group of ad server networks. Several recent class actions have involved violation of consumer privacy for tracking peoples’ activities. While various self-regulatory measures have been proposed and are under consideration, this issue remains unresolved with regard to the level of notice and consumer control that is appropriate, and whether different degrees of consumer control should apply, given the sensitivity of the information being collected (e.g., medical condition) and whether the consumer is an adult or a child.

#### IS YOUR DATA SECURE?

The majority of states, following the lead of California, have enacted data security requirements and breach notification laws. These laws apply to the collection and use of sensitive personal data, such as social security numbers, drivers’ license and credit card account numbers. Companies who engage in e-commerce and/or solicit resumes through their consumer-facing Web sites need to be mindful of these laws. Additionally, for businesses that accept credit card transactions through their Web sites, the Payment Card Industry Data Security Standards impose significant security obligations with respect to credit card data captured during the transaction. Contracts with vendors that access sensitive data should include provisions requiring the vendor to securely store data and to promptly notify the company of any security breach. In order to ensure compliance and be prepared to promptly take the required actions in the event of a data security breach, all companies should regularly conduct a comprehensive consumer and employee data security audit and have a breach notice plan in place. A new Massachusetts law requires a written security program, including auditing and certification of vendors and encryption of certain personally identifiable information (which is also required by a new Nevada law). This trend can be expected to be followed by other states and is quickly becoming the de facto best practice standard. The costs of security breach can be high and may include legal, investigative and administrative expenses, notification costs, opportunity loss, customer defections and other costs such as information hotlines and providing free credit-monitoring services. Additional intangible costs can include lost productivity as employees are diverted from their normal duties to address data breach issues, and difficulty in acquiring new customers after negative publicity. Companies that experience a breach may find themselves subject to governmental investigation, enforcement actions and private lawsuits.

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## PART 2: MARKETING WITH EVOLVING MEDIA TOOLS

Web sites and third-party sites employed by companies enable vibrant consumer interaction with brands and unique methods of conveying sales messages and making sales. Marketers have become the early adopters of new trends and tools, such as blogging, social networking (e.g., Facebook), and user-generated content (e.g., video posts on YouTube). E-mail marketing is widely used and text message campaigns are gaining traction. Legislatures, regulatory agencies, including the Federal Trade Commission and self-regulatory bodies, including the Mobile Marketing Association, have stepped in to regulate digital marketing. To protect the value proposition evolving media can bring to marketing, and to avoid damage to valuable brands and intellectual property, it is essential that knowledgeable counsel be sought to ensure that marketing campaigns are executed legally and do not violate consumer trust.



### SPAM

Today, most companies use e-mail to communicate with their customers and prospective customers. In 2003, Congress passed the Controlling the Assault of Non-Solicited Pornography and Marketing Act, also known as the CAN-SPAM Act, and the FTC implemented rules, revised last year, further to the act. CAN-SPAM does not prohibit the sending of commercial e-mails, that is e-mails that do not directly concern a transaction the consumer has previously entered into with the sender. Rather, it is designed to prevent fraudulent e-mails and imposes specific labeling, opt-out and do-not-send requirements on the senders of commercial e-mails. Commercial e-mails must clearly disclose the opt-out mechanism and recipients who opt-out must be added to a list used to suppress future commercial e-mails from the sender absent express prior consent.

The FTC has recently modified its rules to address questions of who will be deemed a sender and responsible for compliance, including when multiple companies' products are promoted in a single e-mail or when e-mails are distributed between consumers, at the suggestion of a company, that advertise or promote that company's products. E-mails sent to domain names provided by wireless service providers are subject to greater regulation. Marketers should also exclude domains included on a list maintained by the Federal Communications Commission absent meeting additional compliance requirements. Every e-mail campaign should be reviewed for CAN-SPAM compliance, as marketers and their vendors frequently fail to properly follow the requirements and unwanted e-mails, so-called spam, are a source of frequent consumer complaints to regulators and increasing class action litigation and settlements.

### MOBILE MAYHEM

Advancements in cell phone devices have brought rich media to the mobile device.

Since many users are charged for receiving mobile messages, CAN-SPAM and the Telephone Consumer Protection Act require advance notice and express consent prior to the delivery of a mobile marketing message.

Programs that allow consumers to send marketing messages to their friends via text require careful legal review as advance consent from the recipient is difficult to obtain in practice.

Web site registration pages that collect cell phone numbers must include certain disclosures regarding fees and applicable devices. Even enabling a Web site for easy viewing on mobile devices (e.g., a "WAP" site) requires specific notices.

The Mobile Marketing Association provides guidelines to assist marketers on the use of mobile media, but it is not a substitute for legal counsel.

Further, the law as it respects mobile media is, like the medium itself, evolving. For instance, text-to-win sweepstakes have spawned a slew of class action lawsuits (now consolidated) that are pending in California federal courts. New mobile media applications, such as mini-games that include a pre-recorded call from a character from a television show, or are otherwise identified with the brand (e.g., the Michelin man), raise issues of compliance with the FTC and FCC's telemarketing rules, even if the recording itself lacks a sales pitch or purchase opportunity.

### THE BUZZ

Marketers consider consumer word-of-mouth one of the most powerful methods of promotion. Digital media enables consumers to communicate more easily and in a more far-reaching manner than ever before. Companies seek to foster a positive consumer buzz about their brands online, but their techniques frequently cross ethical and legal lines. For instance, "astroturfing" or "stealth marketing," where a brand is promoted surreptitiously by company employees or contractors pretending to be customers, may be considered a deceptive advertising practice.

Buzz activities conducted on a third-party site, like MySpace, in violation of its terms of use, can subject marketers to claims by the sites and potentially even result in liability under certain state and federal laws regulating unauthorized accessing of Web sites. Recommendation marketing is a practice whereby online users are encouraged to promote products in chat rooms, on blogs and otherwise. Where the user has been paid or given other valuable consideration without disclosing that fact at the time the recommendation is made, this can result in charges of deceptive advertising and violation of the FTC's testimonial rules.

A good source of guidance on how to run a cool yet compliant online buzz campaign is the Code of Ethics of the Word of Mouth Marketing Association ([www.womma.org](http://www.womma.org)), but legal counsel should also be obtained.

### WHO IS RESPONSIBLE?

Even the most basic corporate image Web site presents content ownership and infringement issues. Too frequently, companies do not properly document their engagement with their vendors hired to develop Web sites, banner advertisements and cool viral applications, and execute interactive campaigns, leaving them without the necessary contractual protections in place, including insurance requirements, legal compliance, ownership of work product and indemnity obligations.

Also, developers and company employees recurrently use unlicensed software, music, images and other content, creating the risk of infringement claims.

YouTube and other sites that permit users to create and post their own pictures, videos and content (so-called "user-generated content") have become a pop culture phenomenon. Traditional media like Al Gore's cable television network, Current, have integrated viewers into the programming process and enable users to create programming, and even commercials, distributed by the network's Web sites and cable channel.

Consumers, however, have been known to include third-party content without permission in their user-generated content, raising the issue of whether the site operator, or the sponsor of a campaign involving such content, should be secondarily liable for the infringement.

There are potential safe harbors and immunities that may apply to Web site operators and users under the Digital Millennium Copyright Act and the Communications Decency Act, when the user-generated content remains owned by the user and has not been selected, edited or substantially directed by the party seeking the protection.

The conditions and constraints of the protections, which are still being articulated by the courts, require operators to make many decisions regarding how they design and execute campaigns that have user-generated content elements.

Furthermore, the Communications Decency Act and the Digital Millennium Copyright Act do not protect against all potential claims such those arising under trademark, and potentially the Lanham Act, and courts are split regarding whether a shield to rights-of-publicity claims exists.

In addition to legal concerns, marketers should consider potential unflattering use of their content and brand when they make it available to consumers to use in connection with user-generated content.

Different approaches to control over such use results in different outcomes regarding potential protection under the Communications Decency Act and Digital Millennium Copyright Act.

Further, user-generated content promotions, such as those where consumers create and submit videos promoting a product and one or more winners are selected, present questions of whether the states' lottery, sweepstakes and contest laws are being followed.

Finally, the distribution of user-created videos to promote companies' products raises issues regarding the applicability of deceptive advertising laws.

Interactive marketing presents companies with powerful new tools for cost efficiently interacting with consumers. In times of decreasing advertising budgets, television viewership and print circulation, these are much welcomed.

But a positive return on investment requires marketers to work closely with legal counsel knowledgeable in the area to navigate the treacherous and constantly changing waters of evolving media.

### CONCLUSION

New media will continue to evolve cost-effective ways for companies to reach and interact with their customers while keeping their messaging fresh. In so doing, companies must mind the shop and ensure that their online efforts and their data practices are maintained in a legally compliant fashion without breaking any promises or laws along the way.

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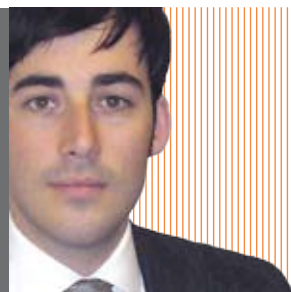
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# WEBSITE COMPLIANCE: A EUROPEAN PERSPECTIVE

By Eitan Jankelewitz,  
Marriott Harrison (United Kingdom)



Marriott Harrison advises a variety of business on these and other compliance issues and also provides website operators and online retailers with privacy policies, website terms of use and standard terms of supply as part of a customized pack. For more information please contact Carys Damon at [carys.damon@marriotharrison.co.uk](mailto:carys.damon@marriotharrison.co.uk) or Eitan Jankelewitz at [eitan.jankelewitz@marriotharrison.co.uk](mailto:eitan.jankelewitz@marriotharrison.co.uk).

**This article considers the compliance issues faced by website operators, online retailers and email marketers operating in the EU.**

## APPLICATION OF EU AND DOMESTIC LEGISLATION

Regulation of e-Commerce is driven primarily by EU legislation. There is a common understanding outside of the EU that, when EU legislation is applicable, all countries that are members of the EU (“**Member States**”) operate under a pan-European legislative framework. This is only partly correct. EU legislation may take one of two forms: Regulations or Directives. Regulations are binding on Member States automatically, without any need for the Member State to implement them. Directives on the other hand require implementation by Member States in the form of domestic legislation or regulation. The result is that, although the Member States are compelled to achieve the objectives of a Directive, the objectives may be achieved by different methods. The consequence is the existence of distinct, albeit similar, legislation or regulation in each Member State.

## PROVISION OF GENERAL INFORMATION

The European Electronic Commerce Directive 2000/31/EC (the “**e-Commerce Directive**”) applies to practically every commercial website in the European Economic Area (EEA) (namely the EU, plus Norway, Iceland and Liechtenstein). Application of the e-Commerce Directive is determined by the territory in which the business operates. Therefore, basing the servers in, for example, California, will not obviate the application of the e-Commerce Directive to a business operating from within the EEA.

The e-Commerce Directive requires website operators to make certain information available on its website. This is commonly achieved by the publication of a website privacy policy. The operator must set out its name and any trading name, and its email and geographic addresses. If applicable, it must also set out its VAT number and trade or professional association reference number. If the operator is a company, it must also set out its place of registration, registered number and registered office.

Regulatory bodies in Member States are able to issue to ‘Stop Now Orders’ non compliant websites pursuant to the European Injunctions Directive 98/27/EC. In the UK, failure to comply with a Stop Now Order amounts to contempt of court, which is punishable by fines or imprisonment.

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## CONCLUDING CONTRACTS ONLINE

If the website is used to conclude contracts online, either with other businesses or with consumers, further information must be provided. This information includes the details of the technical steps used to complete the contract and to correct any order or pricing errors, what languages the contract may be concluded in, and whether or not the contract will be permanently accessible. Any prices must be clear, unambiguous and set out whether taxes and delivery charges are included. The website must also provide a hyperlink to any applicable codes of conduct, and any terms and conditions must be provided in such a way that enables the customer to store and reproduce them.

The European Distance Selling Directive 97/7/EC (the “**Distance Selling Directive**”) places additional obligations on online retailers when contracting with consumers. The Distance Selling Directive applies to contracts with consumers where the parties do not meet face-to-face and the contract is concluded via an organized distance sales system run by the retailer. Therefore, call centres are caught by the Distance Selling Directive as well as websites, however one-off contracts concluded by email are not.

Under the Distance Selling Directive, certain information must be provided to the consumer before the contract is formed. This information includes that information required to be disclosed under the e-Commerce Directive, plus a description of the characteristics of the goods and services; the arrangements for payment, delivery or performance; how long a discount or promotion remains valid; the cost of any premium rate telephone number; the duration of the contract (if applicable), and whether substitute goods or services will be provided in the event the goods ordered by the consumer are unavailable. The retailer must also inform the consumer of its right under the Distance Selling Directive to cancel the order within seven days of delivery and return goods at the retailer’s expense.

The Distance Selling Directive also requires retailers to provide consumers with details of the contract in a durable form. This is typically achieved by automatic email confirmations sent when the contract is concluded.

Late provision of information extends the seven day right of cancellation by up to 3 months. Failure to provide any information at all will cause the contract to be unenforceable against the consumer.

## THE DANGERS OF ONLINE CONTRACT FORMATION

In 2002, Kodak was obliged to sell 2,000 of its cameras at 30 per cent of their intended retail price due to a pricing error on its website. On entering their payment details, customers received an automated email from Kodak stating their order had been accepted. It was at this point that a contract was formed and both parties were bound to honour its terms or be in breach.

If, however, Kodak’s confirmation had simply stated that the order had been received and that the contract would be formed once the Kodak had accepted the order, Kodak would have been under no obligation to sell at the incorrect price, as no contractual relationship would ever have existed. A retailer may even receive payment from a consumer under the Distance Selling Directive before any contract between the supplier and customer is actually entered.

## UNSOLICITED COMMERCIAL COMMUNICATIONS

Under the Directive on Privacy and Electronic Communications (2002/58/EC) (the “**Privacy Directive**”), all email and SMS marketing communications (“**Direct Marketing**”) must state they are commercial communications, on whose behalf they are being sent and, if applicable, that the communications are in respect of a promotion or special offer. Unlike the position in the US, there is no EU guidance on how Direct Marketing should be identified as such. Direct Marketing must also contain information on how the recipient can request not to be contacted.

Unlike some Member States, the UK’s Privacy and Electronic Communications (EC Directive) Regulations 2003, which implemented the Privacy Directive, do not extend all protections to corporate recipients. It is important to remember that the laws of the Member State in which the email is received will also apply, and therefore local law advice may need to be sought in the country to which it is being sent.

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The Privacy Directive states that Direct Marketing may not be sent to an intended recipient without the recipient's prior consent. The Privacy Directive distinguishes between two types of consent, which are both usually obtained by website 'tick' boxes. The first type is where the intended recipient affirms that they would like to receive Direct Marketing ("**Opt-In Consent**"). In this instance, the box appears on the website without a tick. The second type is where the intended recipient affirms that they *do not* wish to receive Direct Marketing ("**Opt-Out Consent**"). In the instance of Opt-Out Consent, the box appears with a tick already in place; the default position is that the intended recipient consents to Direct Marketing. Not surprisingly, by using Opt-Out Consent, direct marketers can receive up to 10 times more consents than by using Opt-In Consent. However, under the Privacy Directive, direct marketers are prohibited from sending Direct Marketing without Opt-In Consent, although there are notable exceptions.

A direct marketer may only rely on Opt-Out Consent if the following conditions are met:

1. the contact details of the recipient were obtained by the same company in the course of a sale, or negotiation for sale;
2. the Direct Marketing is in respect of similar goods or services; and
3. the Direct Marketing also provides a simple and free method by which the recipient can easily opt-out of future Direct Marketing.

Direct marketers must also ensure that they remain in compliance with the provisions of the data protection regulation.

## DATA PROTECTION

The European Directive on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data 95/46/EEC (the "**Data Protection Directive**"), as implemented by each Member State, imposes extensive obligations on those who collect personal data (the "**Data Controller**"), and rights to the individuals about whom personal data is collected (the "**Data Subject**"). There are some substantial discrepancies between each of the Members States' implementation of the Data Protection Directive. This is partly because the Data Protection Directive gave a relatively high level of discretion to Member States when implementing it, and partly because the Data Protection Directive, in places, somewhat unclear.

While the Data Protection Directive applies to any number of companies and organizations in the public and private sector, it has particular relevance to the online businesses, especially in light of the increased prevalence of Direct Marketing and user generated content ("**UGC**").

'Data' is defined as information processed by means of equipment operating automatically in response to instructions given for that purpose. Clearly, this catches computer databases, but it also sufficiently broadly termed to apply to manual records held in a filing cabinet. Personal Data is therefore any information which enables the individual to be identified, and includes, amongst other things, names, addresses, telephone numbers, job titles and dates of birth. A list of employee extension numbers will qualify as personal data if the individual can be identified from that number, because for example, the number is linked in a database to the individual's name.

'Processing' also very broadly defined and includes obtaining, recording, holding, using, disclosing or erasing data.

## THE OBLIGATIONS OF THE DATA CONTROLLER

Data Controllers must adhere to eight 'principles' of data protection. They must seek to ensure Data is processed fairly and lawfully. In order to justify fair and lawful processing, Data Controllers must obtain the consent of the data subject. Alternatively, Data Controllers must be able to show the processing is necessary for the performance of a contract with the Data Subject; for compliance with the law or the administration of justice; for the protection of the Data Subject's vital interests; or for the pursuit of legitimate interests of the Data Controller which do not harm the rights or interests of Data Subjects.

## TRANSFER OF DATA OUTSIDE OF THE EEA

Data must be collected for a specified purpose and should not be excessive in scope. Data must be accurate and kept up to date, and it should not be retained for longer than is necessary. Processing must be done in accordance with the rights of the Data Subject, and the Data Controller must take measures to prevent unauthorized disclosure, damage or loss of the data. Finally, the Data Controller must not allow the data to be transferred outside of the EEA unless the territory to which it is transferred provides adequate protection of the Data Subjects' rights.

Many Data Controllers that operate websites, especially sites which make use of UGC, obtain consent by way of a privacy policy. However, Data Controllers must ensure the privacy policy also explains to Data Subjects how they may withdraw their consent.

Transfer of data includes any disclosure to a person outside of the EEA, for example by posting such information on a website or selling a marketing database overseas. The European Commission may make a finding of adequacy (or inadequacy, as the case may be) in respect of the data protection available in the destination country. Switzerland, Canada, Argentina, the Isle of Man, and Guernsey are among the countries considered to have adequate data protection. Accordingly, the transfer of personal data to these countries complies with the obligations of the Data Controller. Although the US is not considered to have adequate data protection, companies or organisations which sign up to the self-regulatory scheme known as 'Safe Harbor' may receive personal data from within the EEA.

Data Controllers are also permitted to transfer data to companies or organisations if the transfer is subject to certain model contractual clauses, published by the European Commission, which offer contractual safeguards to Data Subjects.

## SENSITIVE INFORMATION

The Data Controller is subject to additional obligations in respect of data relating to the Data Subject's racial or ethnic origin, political opinions, religious beliefs, physical or mental health or condition, trade union membership, sexual life or criminal offences ("**Sensitive Information**"). In such cases, the Data Subject may only legally process the data with the explicit consent of the Data Subject (i.e. Opt-In Consent) or if it is necessary to defend legal rights or to comply with employment law, for example equal opportunities legislation.

The requirement for Opt-In Consent means that obtaining consent from the Data Subject by use of a privacy policy, as described above, is insufficient in the case of Sensitive Information. Data Controllers must ensure Data Subjects *explicitly* consent to the processing of Sensitive Data.

## THE RIGHTS OF DATA SUBJECTS

Data Subjects are entitled to access their own personal data; object to processing which causes damage or distress; object to automated decision making and object to Direct Marketing.

## CONSEQUENCES OF NON-COMPLIANCE

The Data Protection Directive requires Member States to provide certain sanctions when implementing the Data Protection Directive. In particular, Member States must ensure there are judicial remedies available to Data Subjects, liability for Data Controllers and sanctions to be imposed in the case of infringement, including the adoption of "suitable measures to ensure the full implementation".

In the UK, the Data Protection Act 1998, which implements the Data Protection Directive, provides that Data Controllers may be prevented from processing data if found in breach of their obligations or the rights of Data Subjects, and they may be subject to criminal liability in the form of an unlimited fine. If the Data Controller is a company, its officers may face personal criminal liability for breaches committed by the Data Controller with their consent, connivance or neglect.

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# ONGOING INNOVATION IN DIGITAL WATERMARKING

By Rajan Samtani, Digimarc Corp.

Digital watermarking is the process by which digital information—referred to as a “payload”—is embedded into all forms of digital media in a way that is imperceptible to humans yet persists with the file through format changes and nonlinear distribution paths. Infusing digital data has little or no impact on the file’s integrity or fidelity. Reading devices equipped with special software detect the payload to facilitate lookup of the file and appropriate responses by a wide range of applications.

Rajan Samtani is director of business development at Digimarc Corp., a leading watermarking technology company based in Beaverton, Oregon. Contact him at [rajan.samtani@digimarc.com](mailto:rajan.samtani@digimarc.com).



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## CONTENT PROTECTION

Beginning in the late 1990s, digital watermarking was considered a viable solution to the problem of content piracy. Ever since digital distribution became mainstream, the content industry has struggled to control its distribution channel by employing a combination of strict licensing to authorized distribution partners, legal enforcement to impose limits on copying and redistribution of copyrighted content, and digital rights management (DRM)—a collection of technical measures designed to protect content from unauthorized use.

During the past decade, DRM became a cornerstone of investment by major content deliverers. Digital watermarking, although a different technology originating in the broader discipline of steganography, was subsumed into the category of DRM applications.

In this same time frame, the content, IT, and consumer electronics (CE) industries engaged in lengthy negotiations to create a comprehensive watermark-based standard for protected music. The Secure Digital Music Initiative (SDMI) was an ambitious effort requiring the cooperation of all constituents in the value chain. It called for a new SDMI-compliant format, a standardized player, and a system that enabled copy control through the use of both *robust* and *fragile* watermarks. The robust watermark was designed to persist through digital file transformations, while the absence of the fragile watermark identified unauthorized copies.

SDMI was a relatively complex solution that required expensive implementation overhead on the part of CE manufacturers. Moreover, it was developed during the age of Napster’s free peer-to-peer content sharing. Adoption of the new standard was also hurt by the concurrent, exponential rise of the MP3 format.

SDMI consequently failed in late 2001, and industry members were left somewhat jaded about their ability to achieve a consensus on a mainstream watermarking solution. This angst was particularly high among the technical and legal communities within major music industry labels.

Nevertheless, watermarking found success in the prerelease markets for music, theatrical, and TV content. Unlike SDMI, proprietary watermarking solutions worked well in these markets, as there was no need to impose the solutions on parties that had no interest in adopting them. They also reduced the significant financial losses of pre-release piracy and internal leaks early in the production and marketing cycles.

In addition, leading watermarking technology providers developed solutions for other emerging applications, such as using watermarks in digital cinema implementations to help law enforcement determine which specific theater a camcorder copy came from. Watermarking-based approaches for monitoring both airplay and ad verification on radio and TV broadcasts also took hold, as did widely deployed audience measurement technologies for broadcast content from industry leaders such as Nielsen.

In the face of the unrelenting onslaught of P2P distribution, several major content companies have begun championing mainstream watermarking solutions as a substitute for DRM, while others such as Apple iTunes and Amazon.com have thrown up their hands, advocating completely open, “naked” DRM-free distribution. A major music label’s recent experiment to include watermarking in MP3 distribution indicates that the technology continues to find favor among digital content distributors.

## BUSINESS DRIVERS

Unlike DRM, which is based on the premise that only explicitly licensed uses of content are allowed, watermarking doesn’t necessarily impose a priori restrictions on the use or interoperability of content. This in itself is a huge business advantage because it doesn’t negatively impact consumer enjoyment.

However, watermarking could also be used in some media, such as Blu-ray discs, to achieve the same goals as DRM. It’s important to note that in such applications watermarking typically supplements the underlying encryption-based technology. For example, Blu-ray disks use watermarking to augment the Advanced Access Content System (AACS) encryption-based DRM scheme, which is used to protect the content.

Currently, the content industry is interested in adopting digital watermarking technology in new applications to:

- demonstrably deter piracy and reduce the resulting financial losses, especially early in the release cycle;
- increase sales by exploiting new and innovative business models for value-added digital distribution of content;
- provide reliable and automated reporting of content use at the right level of granularity so that revenues from both linear and nonlinear distribution can be fairly and appropriately allocated to all parties involved in the distribution chain; and
- increase consumer engagement through improved content search and targeted ad pairing based on content and opt-in.

These motivations represent a remarkable change in content owners’ attitude—from a strict command-and-control emphasis on explicitly allowed content usage to enabling substantially more on-demand enjoyment of content. This change is the first step toward the creation of watermarking-based applications that can help balance content owners’ business requirements with consumer choice.

## APPLICATION AREAS

Watermarking applications for digital content distribution fall primarily into one of three major categories:

- *Flag-based* applications use the watermark as a flag to enable copyright communication and enforcement. The watermark must survive normal transformations but isn’t subject to DRM interoperability restrictions. Examples include SDMI and Blu-ray.
- *Forensic* applications use the watermark to detect where or how a piece of content left the authorized domain. Examples include pre-release watermarks, digital cinema, transactional watermarking, and media serialization for music and video on demand.
- *Content-identification-based* applications use the watermark to enable innovative business models for content distribution while enhancing the consumer’s ability to experience the content. Examples include filtering, management, measurement, and tracking.

Each application has an ideal combination of:

- payload-carrying capacity;
- robustness, or the ability to survive transformations and attacks;
- imperceptibility, or the ability to minimally impact the fidelity of the content experience;
- level of security; and
- computational power to embed and detect the watermarks depending on the scale and latency requirements.

Leading technology companies and service providers are regularly delivering solutions in the first two categories, proving that digital watermarking can augment a DRM system or in some cases be a viable substitute in all kinds of online audio, video, and image applications. The Digital Watermarking Alliance ([www.digitalwatermarkingalliance.org](http://www.digitalwatermarkingalliance.org)) provides a comprehensive list of these providers with case studies of successful deployments.

The third category includes some of the most promising future watermarking applications.

Some content ID-based applications extend traditional DRM technologies or serve as a substitute for encryption-based content protection (M. Kirstein, “Beyond Traditional DRM: Moving to Digital Watermarking and Fingerprinting in Media Monetization,” MultiMedia Intelligence report, Jan. 2008; [www.researchandmarkets.com/reports/c83296](http://www.researchandmarkets.com/reports/c83296)).

Others use content identification to solve problems related to tracking content flows rather than strictly controlling content usage (B. Rosenblatt, “Content Identification Technologies: Business Benefits for Content Owners,” white paper, 15 Apr. 2008, GiantSteps Media Technology Services; [www.giantstepsmts.com/whitepapers.htm](http://www.giantstepsmts.com/whitepapers.htm)).

Content-ID-based applications need the right infrastructure to be successful. They require the formation, deployment, and nurturing of an infrastructure by supportive partners including content owners, service operators, device manufacturers, advertisers, applications, and various technology and middleware providers.

However, unlike the experience of SDMI, these applications need not be all-encompassing standards embraced by every constituent in the digital distribution value chain. All that is required is for at least one set of participants to have the right incentives to adopt these innovative new services.

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## BUSINESS MODEL INNOVATION

A core premise behind the deployment of content-ID-based applications is the need to monetize distribution in such a way that revenue is shared equitably. This requires rethinking the overall business model while engaging various participants early, keeping an eye toward rapid innovation and experimentation.

In addition to working through various legal and technical issues, content providers must form a compact with consumers and devise a new set of administrative and policy decisions. For example, using digital watermarks to identify content in an ad-supported model instead of in a download-to-own model would necessitate changes in distribution agreements and contractual compliance up and down the value chain.

Video and some music websites are currently testing ad-supported models. Service providers could also create "carrot-based" promotional scenarios and unique offers for legitimate users by combining a content ID payload with other information such as a retailer ID, a distribution method ID, and even media-serialized unique content.

For example, a digital retailer ID on the user's player application would make it possible to offer retailer-specific bonus content or promotions to the consumer. Validation/authentication could occur by activating a lightweight watermark detector on the client side when the consumer downloads the watermarked content from the retailer's site, or by detecting a small portion of the original watermarked content on the retailer's server.

Further, promotional content can be customized using a distribution method ID. For example, consumers who have previously purchased download-to-own music tracks for 99 cents could get completely different offers than those who pay upwards of \$100 per year for a subscription. Heavy users of ad-supported music could also get "frequent-flier miles" to accumulate prize tiers, access to artists' raw studio cuts, and so on.

A band, movie studio, or music label could likewise make special offers using the content ID itself to identify the music track, movie, or label. Promotional premiums could include concert ticket discounts, special screenings, "meet the director" or "meet the artist" events, "roadie for a day contests," and so on.

Once content owners agree upon the payload schema and other watermarking technology criteria, they must establish and enforce mandates for the licensing and distribution process. In a nonlinear ad-supported scenario that encourages viral distribution and syndication, the watermark acts as a "barcode" to identify the content itself as well as the copyright owner. Watermark detectors deployed at various choke points in the distribution network report on and monetize content flows per the established business rules.

In an age of heterogeneous devices requiring portability and interoperability of content formats, it's up to providers to define digital watermarking use cases in both DRM and non-DRM scenarios based on business models or application needs. For example, age-rating information can be embedded within the content itself, enabling devices to impose usage rules designated by parents who register the device as belonging to a minor.

Watermarking itself doesn't impose any privacy risks. However, like other technologies, it could create problems if implemented in a malicious manner or in ways that fail to consider privacy in the design and implementation of the targeted application. To address this potential concern, in May 2008, the Center for Democracy and Technology issued a white paper, "Privacy Principles for Digital Watermarking" ([www.cdt.org/copyright/20080529watermarking.pdf](http://www.cdt.org/copyright/20080529watermarking.pdf)), enumerating a well-defined set of best practices.

Although much work remains to be done to create viable business models, the technical underpinnings to implement robust, scalable, and efficient content distribution systems involving digital watermarking are already available. Leading vendors have been perfecting the state of the art with security considerations in mind for the past several years. With participants' commitment to fairly share in the risks and rewards of the requisite investments, watermarking promises to be a very powerful tool to unleash unprecedented growth in the content industries as consumers enjoy media when, where, and how they want it.

## Dispute Resolution for the Entertainment Industry

Employment • Business/Commercial

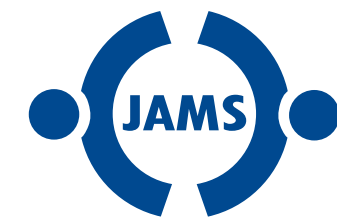
*Kimberly Sheffield Deck, Esq.*



A highly experienced mediator and one of the *Los Angeles Daily Journal's* **Top 40 California Neutrals** in 2007, Kim Deck has devoted the past 10 years exclusively to a full-time alternative dispute resolution practice. She has mediated more than 2,000 cases, including complex, high-stakes matters for all major film and television studios.

Ms. Deck has substantive expertise in virtually every kind of employment claim, including all types of discrimination, sexual harassment, disability, wrongful termination, and wage-and-hour class action cases. She has also successfully handled a range of business/commercial cases for the entertainment industry, including multi-million-dollar partnership dissolutions, bond claims, insurance coverage issues and highly sensitive contract matters.

Counsel and their clients praise Ms. Deck for her extraordinary listening skills, acute problem solving abilities particularly when dealing with the sensitive dynamics between parties in difficult, emotional disputes, and her perseverance and ingenuity in helping parties reach creative, equitable resolutions.



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WHITE PAPER ON  
ORPHAN WORKS FROM DIGITAL  
WATERMARKING ALLIANCE

# WHITE PAPER ON ORPHAN WORKS FROM DIGITAL WATERMARKING ALLIANCE

## EXECUTIVE SUMMARY

In 2005, the U.S. Copyright Office embarked on a study of the issues raised by “orphan works”—copyrighted works whose owners may be difficult or impossible to identify and locate. Concerns had been raised that the uncertainty surrounding ownership of such works might needlessly discourage subsequent creators and users from incorporating such works in new creative efforts, or from making such works available to the public.

The Digital Watermarking Alliance, an international alliance of industry leading companies that deliver valuable digital watermarking solutions to a broad range of customers and markets around the world, believes digital watermarking technology can play a key role in providing content identification and copyright communication to address the issue of orphan works.

Balancing the needs of consumers with the rights of content owners is of paramount importance. Consumers deserve to have access to content options currently unavailable to them. Content owners and artists deserve to be recognized and compensated for their work, but the rapid proliferation of technology has made this balancing act increasingly difficult. The U.S. Supreme Court tackled this issue in its 2005 opinion on *Metro-Goldwyn-Mayer Studios v. Grokster*, in which the court ruled that file-sharing networks (also known as peer-to-peer or P2P networks) can be held liable when their users illegally exchange copyrighted material.

In its ruling, the Court identified digital watermarking as a technology that can be used by rights holders and file-sharing networks to communicate copyrights and deter piracy and illegal use of copyrighted entertainment content.

Digital watermarking technology is currently available from many suppliers, such as Cinea, Inc., a Dolby company, Digimarc, GCS Research, Gibson, Jura, MediaGrid, Media Sciences International, Philips Electronics, Signum, Teletrax, Thomson, Verance, Verimatrix, Widevine Technologies, and others.

Digital watermarking can enable content identification and copyright communication on a broad scale and can provide a range of solutions for identifying, securing, managing and tracking digital images, audio, video, and printed materials. In fact, digital watermarking technology has already been adopted by many photographers, movie studios, record labels, television broadcasters, and corporate enterprises as a way to identify, protect, and manage the rights to their content while still offering their consumers the convenience and portability they have become accustomed to.

Digital watermarks can identify copyrighted content and associated rights, during and after distribution, to determine copyright ownership and enable rights management policy while enabling innovative new content distribution and usage models. Digital watermarking is a proven technology that is broadly deployed with billions of watermarked objects and hundreds of millions of watermark detectors in the market supporting various applications. For example, digital watermarking enabling communication of copyright and ownership information has been a standard feature of Adobe Photoshop for more than a decade and is used by companies, such as Warner Bros. movie studios, Microsoft and Corbis to identify their images.

The Digital Watermarking Alliance believes that policy makers can facilitate the adoption of technologies, such as digital watermarking, to enable content owners and users to improve their level of collaboration in addressing the challenge of orphan works. In particular, we urge the Copyright Office and Congress to consider:

- 1 Amending Chapter 5 of the Copyright Act, expressly authorizing courts to consider whether a copied digital work included a publicly-readable digital watermark—by which the copyright owner could have been identified and contacted—in determining whether infringement of the work was “willful;”
- 2 If provisions akin to those proposed by the Glushko/Samuelson Copyright Clearance Initiative are adopted, then listing a search for a publicly-readable digital watermark - by which the copyright owner could have been identified and contacted -- as one of the factors appropriate for consideration in determining whether a user’s inquiry was a “reasonable efforts search;” and;
- 3 Recommending that the Copyright Office host a web page with information about digital watermark reader software that can be freely downloaded by the public, to check audio, video and image content for watermarked data by which the copyright owner of such content may be identified and contacted.

## PROBLEM

Today, a large number of “orphan works” — presumably copyrighted works whose owners cannot be identified or located—exists. Typically, such works are excerpts or newly digitized versions of books, movies, photos, and music whose ownership information has been stripped away or lost during distribution, re-formatting, or editing. Unfortunately for those individuals and organizations seeking permission to use such works, much of this rich material ends up left untouched due to the fact that ownership cannot be determined.

In its study of the problem, the U.S. Copyright Office solicited responses from the public. From libraries and business to legal institutions and individuals, the problem of orphan works is clear. A few examples from the responses:

- 198 of 397 sampled works were deemed to have unresolved copyright issues during the digitization of The Core Historical Literature of Agriculture by the A.R. Mann Library at Cornell University.

- More than 100,000 photographs made by participants on oceanographic voyages had no identifying photographer or copyright information, causing The Scripps Archives at the University of California, San Diego to only publish 4,000 of these images online.

- Countless other libraries, universities, artists, teachers, and students have been unable to use works because of the inability to identify or locate copyright owners.

## SOLUTION: IDENTIFY COPYRIGHTED WORKS WITH DIGITAL WATERMARKING

When music, movies, images, programming, or books are digitized, their identity (the detailed information about the content, its copyright ownership or the purchaser’s rights) is often lost, having been reduced to ones and zeros that only computers can read. This makes the content difficult to manage, protect, and track, leaving the door wide open for both casual—and malicious—digital piracy and copyright infringement.

As a result, content often circulates anonymously, without owner identification, or without an easy means to contact the owner/distributor to obtain rights for use.

The U.S. Supreme Court recently tackled this issue in its 2005 opinion in *Metro-Goldwyn-Mayer Studios v. Grokster*, in which the court ruled that file sharing networks (also known as peer-to-peer or P2P networks) can be held liable when their users illegally exchange copyrighted material.

In its ruling, the Court identified digital watermarking as a technology that can be used by rights holders and file-sharing networks to communicate copyrights and deter piracy and illegal use of copyrighted entertainment content.

Digital watermarking is the science of hiding extra information, such as identification or control signals, in media content. For example, the digital “pixels” making up a movie or a photograph can be slightly altered in value to represent extra information, while not visibly impairing the appearance of the movie to human viewers. The extra information represented by digital watermarks travels with the content—persisting through changes in file format and through transformation between digital and analog form.

Digital watermarks enable copyright holders to communicate their ownership, usually with a public detector, enabling infringement detection and promoting licensing. A digital watermark embedded within a piece of content can carry a persistent copyright owner identifier. That identifier can be linked to information about the content owner and copyright information in an associated database or to appropriate usage rules and billing information. Digital watermarks are broadly deployed within billions of watermarked objects, and there are hundreds of millions of detectors in the market supporting various applications.

For example, photographs can be embedded with the photographer owner’s ID to determine copyright information and usage rights. The same can occur with video (e.g., TV news and commercials), DVDs, and music.

In fact, millions of copies of digital watermark reader software are currently in distribution, and thousands of creative professionals, organizations, and businesses use digital watermarking to embed copyright notification information into their content, such as images. Leading image-editing applications commonly incorporate digital watermarking technology as a standard feature.

Once an image, musical recording, movie, or TV program contains a digital watermark, these digitally watermarked media objects can be searched and monitored as they are distributed over the public Internet or broadcast systems to determine their location and compliance with usage rights. The digital watermark can provide a link to a publicly accessible database, where complete contact details for the copyright holder or image distributor are stored. This makes it easy for users to license the image in question, license a similar image, or commission a new work.

Current digital watermarks are robust against attack. Attempts to impair a digital watermark require impairing the host content, e.g., making a movie blurry, or a song noisy. Moreover, such tampering with a copyright protection measure may trigger liability under the Digital Millennium Copyright Act<sup>1</sup>.

1. E.g., Section 1202(b) provides “No person shall, without the authority of the copyright owner or the law, (1) intentionally remove or alter any copyright management information, ... (3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered...”

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## CONCLUSION: POLICY RECOMMENDATION

Digital watermarks are available and widely deployed today and can help speed and facilitate deployment of online digital content by enabling identification of copyrighted content, facilitating rights management policy, and enhancing consumer experiences.

Content owners can currently digitally watermark image, audio and video for media serialization, copyright notification, and monitoring. We believe that policy makers should consider facilitating the adoption of technologies that can enable content owners and users to improve their level of collaboration to address the challenge of orphan works. In particular, we urge the Congress and the Copyright Office to consider:

- 1 Amending Chapter 5 of the Copyright Act, expressly authorizing courts to consider whether a copied digital work included a publicly-readable digital watermark — by which the copyright owner could have been identified and contacted—in determining whether infringement of the work was “willful;”
- 2 If provisions akin to those proposed by the Glushko/Samuels Copyright Clearance Initiative are adopted, then listing a search for a publicly-readable digital watermark—by which the copyright owner could have been identified and contacted—as one of the factors appropriate for consideration in determining whether a user’s inquiry was a “reasonable efforts search;” and;
- 3 Recommending that the Copyright Office host a web page with information about digital watermark reader software that can be freely downloaded by the public, to check audio, video and image content for watermarked data by which the copyright owner of such content may be identified and contacted.

In addition to addressing these ideas through direct legislation, the avenue of legislative report language could also be considered. Courts, for instance, could be invited to consider an award of enhanced damages if an infringement plaintiff proves that they marked the copied content with a digital watermark by which the copyright owner of such content could have been identified and contacted. Similarly, courts could be invited to consider a defendant’s unsuccessful attempt to identify or contact a copyright owner by reference to such a digital watermark in assessing a reduced damages award. Private sector organizations, such as the various library associations, could be urged to develop best practice models leveraging advances in technology of the kind discussed above.

In conclusion, we appreciate the opportunity to share our thoughts on ways in which technology can be used to help address the growing challenge of orphan works. We stand ready to assist in whatever manner may be helpful as the Copyright Office and Congress address the orphan works issue.

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# H N O S

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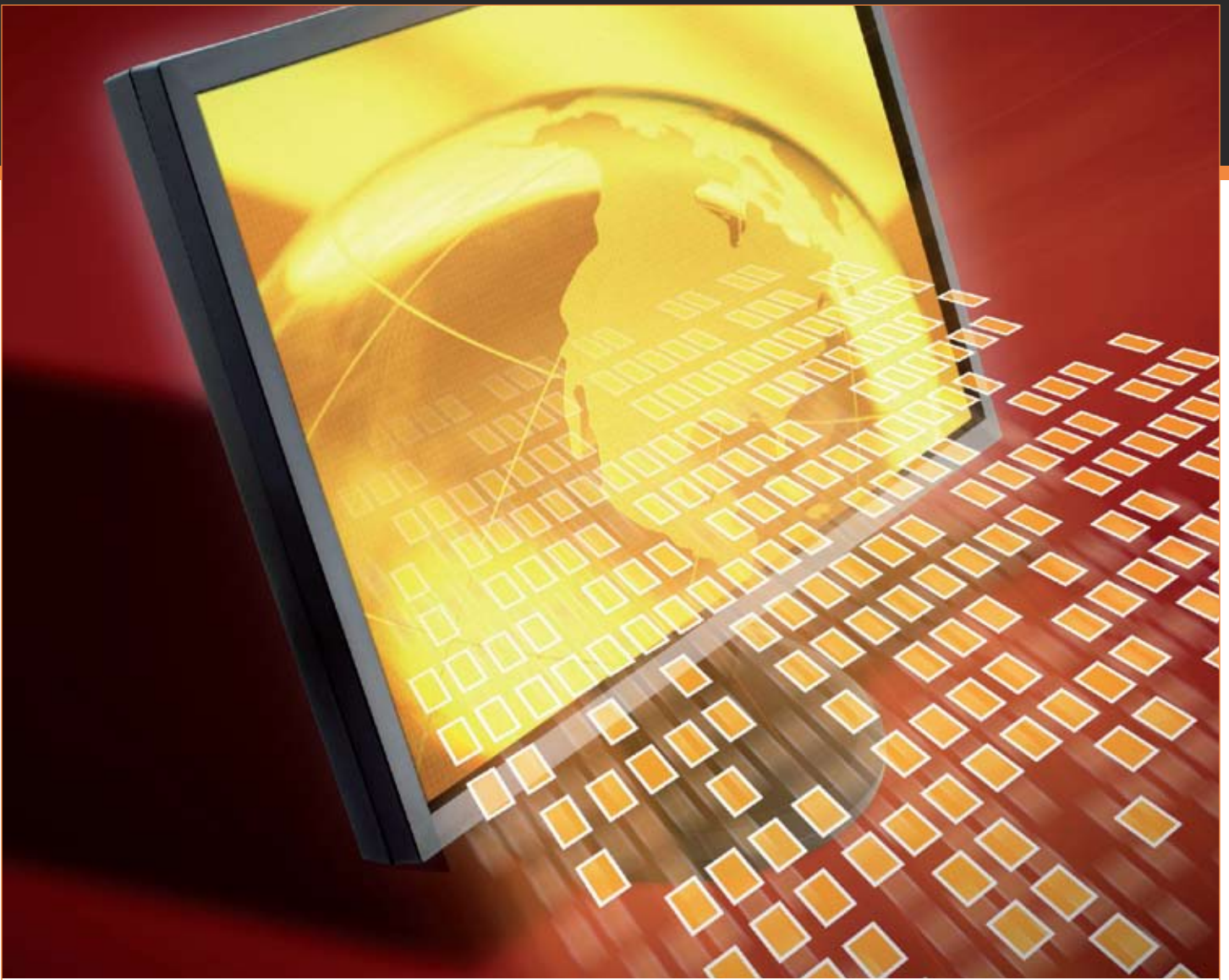
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