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Socially Aware: The Social Media Law Update

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In this issue of *Socially Aware*, our Burton Award-winning guide to the law and business of social media, we discuss the crime of "e-personation"; take a look at an ongoing dispute between a company and an ex-employee over ownership of a popular Twitter account; highlight legal risks in using Facebook's "Like" feature in connection with online promotions; summarize the much-discussed crowdfunding provisions of the JOBS Act; examine key considerations in using arbitration provisions in online terms of service; and provide tips on strengthening the enforceability of online terms of service. Plus, check out our statistical snapshot showing the changing fortunes of leading social media platforms, and *Status Updates*, our round-up of social media news items.

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Vindictive Ex-Girlfriend Could Face 18 Months in Prison for Facebook "E-Personation"

Late last year, Superior Court Judge David Ironson in Morristown, New Jersey, declined to dismiss an indictment of identity theft against Dana Thornton, who allegedly created a false Facebook page that portrayed her ex-boyfriend, narcotics detective Michael Lasalandra, in a highly unfavorable light. According to the prosecution, Thornton used the page to impersonate her ex-boyfriend, publishing posts through which the false "Lasalandra" admitted to using drugs, hiring prostitutes and contracting a sexually transmitted disease.

Thornton's defense attorney Richard Roberts did not deny that Thornton created the bogus Facebook page, but argued that the indictment against Thornton failed to "quantify or qualify" the injuries Lasalandra suffered because of the impersonation. Roberts also argued that New Jersey's impersonation and identity theft statute does not include "electronic communications" as a means of unlawful impersonation and that Thornton's actions thus did not fall within the scope of activity that the statute proscribes.

Judge Ironson disagreed, holding that Thornton's postings, by their nature, could harm Lasalandra's "professional reputation" as a police officer. He further held that New Jersey's law is "clear and unambiguous" in forbidding impersonation activities that cause injury, and does not need to specify the means by which the injury occurs. New Jersey's impersonation and identity theft statute provides that a person is guilty if he or she "[i]mpersonates another or assumes a false identity and does an act in such assumed character or false identity for the purpose of obtaining a benefit for himself or another or to injure or defraud another." Judge Ironson construed this law broadly to include Thornton's actions.

As social media ambles from infancy into toddlerhood, the avenues for abuse available to users continue to increase. Establishing a false Facebook page for the purpose of defaming another is part of a growing form of destructive impersonation through electronic means, sometimes referred to as "e-personation." E-personation requires far less information than many other forms of identity theft require. In order to create a false Facebook page, a would-be e-personator does not need any of the victim's personally identifiable information other than his or her name. The power of the Internet to disseminate information, and the popularity of Facebook and other social media sites, make e-personation particularly harmful by enabling perpetrators to spread injurious statements much more quickly and effectively than would be possible using conventional, non-electronic means.

To combat this phenomenon, some states have begun to enact legislation that explicitly criminalizes e-personation. New York's criminal impersonation statute makes it illegal to impersonate somebody "by communication by internet website or electronic means." In January 2011, California added an entire e-personation statute to its penal code, which includes opening a "profile on a social networking Internet Web site in another person's name" in the definition of "e-personation." The Texas penal code includes a narrower "online harassment" statute that is limited to barring impersonation on "commercial social networking sites." And most recently, Washington state enacted an e-personation statute.

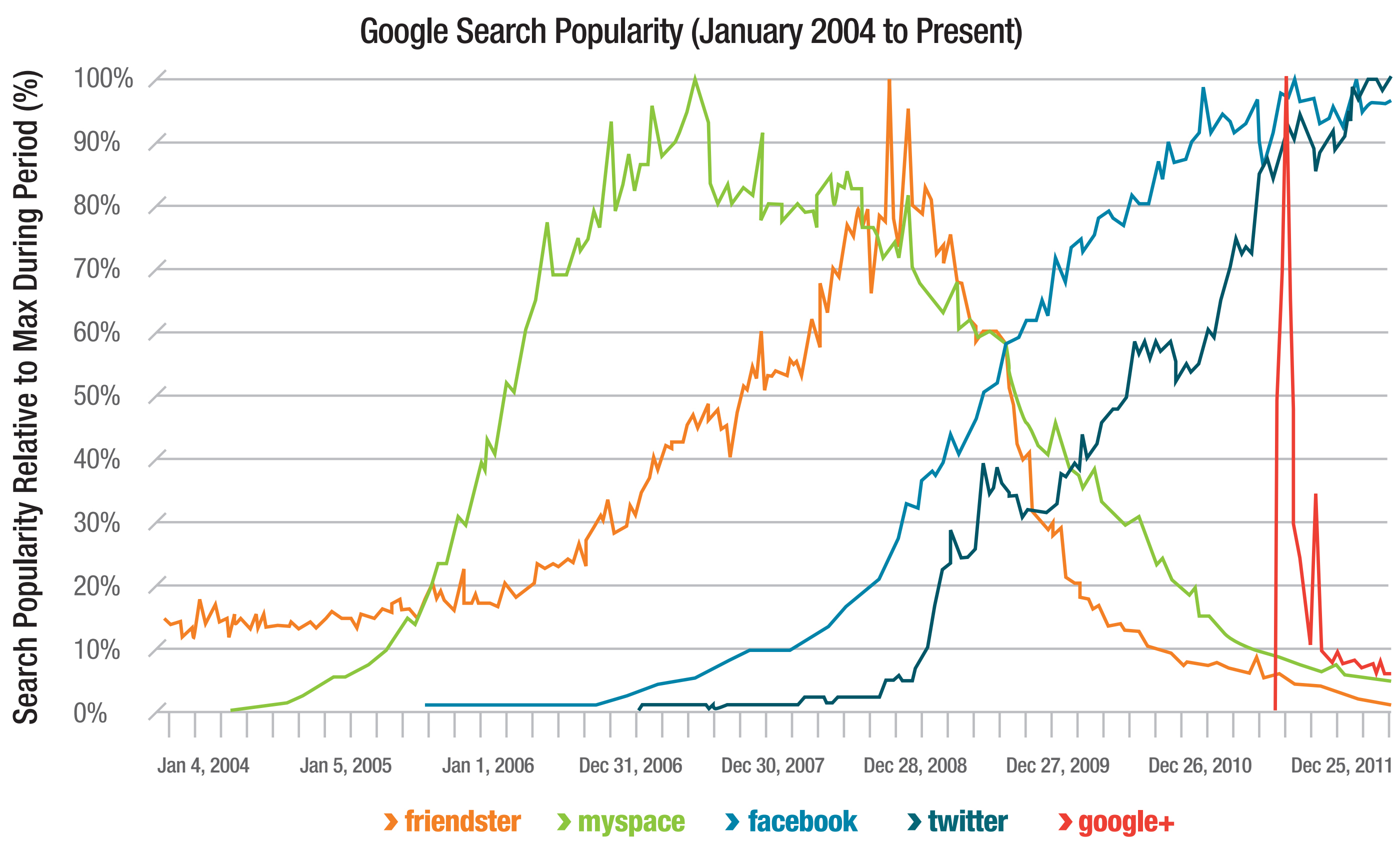
New Jersey does not currently include any express e-personation provisions in its penal code, but an amendment that would specifically criminalize e-personation has passed the state Assembly and is currently being considered by the state Senate. In Thornton's hearing before Judge Ironson, Roberts attempted to use this fact to argue that Thornton's alleged e-personation was outside of the scope of the current New Jersey statute. Judge Ironson, however, agreed with prosecutor Robert Schwartz that the proposed amendment is only a clarification of the current law, under which e-personation already constitutes a form of injury-inducing impersonation. As Schwartz stated, "In no way [is the current law] saying that electronic communication has been excluded. No way did the Legislature ever intend for Ms. Thornton to get away with this kind of conduct."

As social media ambles from infancy into toddlerhood, the avenues for abuse available to users continue to increase.

As noted, a small handful of states currently have e-personation statutes, but Judge Ironson's ruling in New Jersey demonstrates that even traditional identity theft and impersonation statutes can be applied by courts to prohibit e-personation. This raises the issue of whether e-personation is an issue best dealt with through new legislation or under existing identity theft and impersonation laws, a question that has divided the Internet legal community. Some legal scholars oppose express e-personation statutes, noting that laws attempting to respond to rapidly changing technology often become outdated quickly, may result in narrowing the scope of sufficient laws already in place, and can raise First Amendment issues. Others call for e-personation statutes in all states in order to increase protection for victims of acts similar to Thornton's.

The final outcome of Thornton's case may not be particularly useful to legal scholars, pundits or other social-media enthusiasts awaiting developments in e-personation law with bated breath, given that Judge Ironson ultimately admitted

Social Media Platforms: Popularity Over Time



Editors' note: The graph above shows the ebb and flow in popularity of five social media platforms using data from Google Trends on how often each service's name has been searched on Google. The Y axis tracks each service's Google search frequency over time, as a percentage of its "peak" frequency during the period for which data is available (January 2004 to present).

Source of data: Google Trends

Thornton into a state Pretrial Intervention program, under which Thornton will see a probation officer, complete 50 hours of community service, and undergo a psychological evaluation in lieu of going to trial. Nonetheless, as long as people with malicious intentions continue to have access to computers, smartphones and tablets, it will be interesting to watch how different states reevaluate their approaches to e-personation, an ever-growing and evolving negative side effect of the social media revolution.

Man Bites PhoneDog: Twitter Account Ownership Dispute

"Man, what do I write here? And what's it going to be valued at?" So read Noah Kravitz's Twitter profile soon after Magistrate Judge Maria-Elena James of the Northern District of California denied Kravitz's motion to dismiss a number of claims brought against him by his former employer related to the Twitter account. While Kravitz continues to control the @noahkravitz Twitter account currently, the case raises questions as to whether he will retain control of the account and how the account should be valued.

October 15, 2010 was Kravitz's last day at PhoneDog, an "interactive mobile news and reviews web resource." After about four and a half years of providing product review and video blogging services for PhoneDog, Kravitz moved on to work at a competing website called TechnoBuffalo. While at PhoneDog, Kravitz used the Twitter account @PhoneDog_Noah to publish content related to mobile products and services. During the course of Kravitz's employment at PhoneDog, the @PhoneDog_Noah account accumulated approximately 17,000 Twitter followers.

After Kravitz ended his employment with PhoneDog, the company requested that he relinquish use of the Twitter account. Instead, Kravitz kept the account and changed the account handle to "@noahkravitz." Kravitz's farewell post, published on the PhoneDog website days after Kravitz left the company, told PhoneDog website visitors that they could continue to follow Kravitz using the new @noahkravitz handle. As of the end of March 2012, the @noahkravitz Twitter account had more than 24,300 Twitter followers.

Employers should consider explicitly addressing ownership of company-related social media accounts in their agreements with their employees and independent contractors, including providing for transfer of control (including passwords) of such accounts to the company at the end of the employment or independent contractor relationship.

PhoneDog proceeded to file a complaint against Kravitz in the U.S. District Court for the Northern District of California that asserted a number of claims, including trade secret misappropriation, conversion, and intentional and negligent interference with economic advantage. Kravitz filed a motion to dismiss PhoneDog's complaint based on, among other things, the argument that PhoneDog could not establish that it had suffered damages over the $75,000 jurisdictional threshold.

The jurisdictional amount-in-controversy issue raises interesting questions regarding the ownership and proper valuation of a Twitter account and its followers. PhoneDog asserted that Kravitz's continued use of the @noahkravitz Twitter account resulted in at least $340,000 in damages to the company, using a calculation based on the total number of followers, the time during which Kravitz had controlled the account, and a purported industry standard value of $2.50 per follower. Kravitz disputed PhoneDog's calculations and argued that any value attributed to the account came from his efforts in posting tweets and the followers' interest in him, not from the account itself. Kravitz also argued that, to the extent a value can be placed on a Twitter account, it cannot be determined simply by multiplying the number of followers by $2.50, but rather requires consideration of a number of factors, such as: (1) the number of followers, (2) the number of tweets, (3) the content of the tweets, (4) the person publishing the tweets, and (5) the person placing the value on the account.

Kravitz also disputed whether PhoneDog had any ownership interest in the Twitter account or its followers at all. Kravitz argued that Twitter's terms of service state that all Twitter accounts belong to Twitter, not to Twitter users such as PhoneDog. Kravitz also asserted that Twitter followers are "human beings who have the discretion to subscribe and/or unsubscribe" to the account and are not PhoneDog's property. Finally, Kravitz argued that "[t]o date, the industry precedent has been that absent an agreement prohibiting any employee from doing so, after an employee leaves an employer, they are free to change their Twitter handle."

For its part, PhoneDog claimed that it had an ownership interest in the @noahkravitz Twitter account based on the license granted to it by Twitter to use and access the account, and in the content posted to the account. PhoneDog also argued that it had an "intangible property interest" in the Twitter account's list of followers, which PhoneDog compared to a business customer list. Finally, PhoneDog asserted that, regardless of any ownership interest in the account, it was entitled to damages based on Kravitz's interference with PhoneDog's access to and use of the account, which (among other things) affected PhoneDog's economic relations with its advertisers.

The court determined that the amount-in-controversy issue was intertwined with the factual and legal issues raised by PhoneDog's claims and, therefore, could not be resolved at the motion-to-dismiss stage. Accordingly, the court denied without prejudice Kravitz's motion to dismiss for lack of subject matter jurisdiction. The court also denied Kravitz's motion to dismiss PhoneDog's trade secret and conversion claims, but granted Kravitz's motion to dismiss PhoneDog's interference with prospective economic advantage claims.

While we wait to learn the final disposition of the @noahkravitz Twitter account, employers should consider explicitly addressing ownership of company-related social media accounts in their agreements with their employees and independent contractors, including providing for transfer of control (including passwords) of such accounts to the company at the end of the employment or independent contractor relationship. In addition, if a social media account is intended to constitute the employer's property, the account name or handle should refer only to the company and should not include the employee's name.

Warning Signs: Promotions Using Facebook's "Like" Feature

In a recent case of first impression, the National Advertising Division of the Council of Better Business Bureaus ("NAD") – an industry forum for resolving disputes among advertisers – addressed an advertiser's use of Facebook's "like" feature in connection with an online promotion. Such promotions, referred to as "like-gated" promotions, typically ask a Facebook user to "like" the advertiser's Facebook page in order to receive a discount, rebate or other deal. If the user chooses to "like" such page or content, this information will appear on the user's Facebook wall and possibly his or her Facebook news feed, where it can be viewed by the user's Facebook friends. Moreover, the user's name and image may be displayed in connection with the "liked" page or content. As a result, Facebook's "like" feature can generate invaluable exposure for an advertiser, transforming a user's interest in the advertiser into a public endorsement of such advertiser's products and services.

In the NAD case, Coastal Contacts, Inc., offered a free pair of glasses to each person who "liked" its Facebook page. A competitor, 1-800 Contacts, Inc., challenged the offer, alleging that Coastal Contacts had failed to adequately disclose the offer's material terms. 1-800 Contacts also charged that, on account of that failure, the "likes" that Coastal Contacts received were not legitimate, and the company's use and promotion of such "likes" on the Facebook platform and in press releases were therefore fraudulent. 1-800 Contacts urged the NAD to recommend that Coastal

An issue that the NAD did not address: Should an advertiser be required to disclose that the Facebook "likes" received through a like-gated promotion were received in exchange for consideration?

Contacts remove and stop promoting the "likes" that it received via the allegedly misleading promotion, in order to remedy its allegedly unfair social gain.

The NAD agreed with the challenger that Coastal Contacts had failed to clearly and conspicuously disclose the terms of its free offer; however, the NAD did not agree that such failure rendered the resulting "likes" invalid, and it therefore declined to recommend that Coastal Contacts remove or stop promoting those "likes." The NAD explained that, although Coastal Contacts' promotion required modification, there was no evidence showing that participants were denied free pairs of glasses because they failed to understand the offer terms. In the NAD's view, because actual consumers "liked" Coastal Contacts' Facebook page and the consumers who participated in the offer received the benefit of such offer, Coastal Contacts did, in fact, have the general social endorsement that the "likes" conveyed.

What About the Endorsement Guides?

The case raises an issue that the NAD did not address: Should an advertiser be required to disclose that the Facebook "likes" received through a like-gated promotion were received in exchange for consideration? Under the Federal Trade Commission's ("FTC") Endorsement Guides, an advertiser is required to disclose any material connection between itself and a consumer who endorses its business. So, should a "like" given in exchange for a discount or other deal be accompanied by a disclosure of the connection? Is such a disclosure even possible?

The FTC has not yet publicly addressed this issue, but we think that it could challenge an advertiser's failure to disclose the consideration received in exchange for an endorsement conveyed by a "like." Any disclosure that the FTC would seek to prescribe in connection with "likes" displayed within the Facebook platform would most likely have to be built into Facebook's "like" feature itself – something that is not within advertisers' direct control. This does not rule out an FTC action, as the FTC could take the position that advertisers should not use like-gated promotions if they are unable to make the disclosures required under the Endorsement Guides. The FTC may also assert that corporate Facebook users have the power to impress upon Facebook the need to modify the "like" feature to allow for necessary disclosures.

An advertiser considering a like-gated Facebook promotion should keep these issues in mind – and keep an eye on developments. We understand that the FTC plans to seek input on exactly this topic on May 30, 2012, when it holds a public workshop to consider the need for new guidance about making online disclosures. The FTC's press release announcing the workshop says that topics may include how an advertiser can effectively disclose a consumer's receipt of consideration in connection with an endorsement on platforms that allow only short messages or a simple sign of approval. In the meantime, an advertiser should ensure compliance with the FTC's Endorsement Guides to the extent possible (i.e., where it can make required disclosures), such as on its own Facebook page and in other online and offline media in which it promotes the "likes" that it has received as a result of any promotion.

Don't Forget the Facebook Promotions Guidelines. When structuring a contest, sweepstakes or similar promotion using Facebook, an advertiser must also comply with the Facebook Promotions Guidelines, which Facebook revises from time to time. Among other things, the Guidelines set limits on a promotion sponsor's use of Facebook's "like" feature. For instance, while "liking" a sponsor's own Facebook page is a permissible requirement under the Guidelines for a user's participation in a promotion, the act of "liking" such a page cannot function to automatically register the user for the promotion. Further, if a sponsor does condition participation on "liking" the sponsor's Facebook page, the sponsor must extend eligibility for the promotion to users who previously "liked" the page, as well as to users who "like" the page for the first time in connection with the promotion.

Sponsors of promotions are also prohibited under Facebook's Guidelines from requiring prospective participants to take any action using any Facebook features or functionality *other than* either "liking" the sponsor's own Facebook page, checking into a particular location or connecting to the sponsor's Facebook app. Nor may a sponsor require prospective participants to "like" *any content other than the sponsor's own Facebook page* – for example, a sponsor may not condition a user's participation on "liking" a specific wall post or any other particular piece of content. The Guidelines do not explain the reason for this distinction; however, it may be that the "News Feed" and other posts that result when a user "likes" particular content (as opposed to a Facebook page generally) may often constitute "unauthorized commercial communications," which are prohibited by Facebook's Statement of Rights and Responsibilities.

All this serves as an important reminder that running a successful *and legally compliant* promotion requires the promotion's sponsor to be familiar with applicable laws, the social media platform provider's various guidelines and contractual terms, and emerging best practices.

The JOBS Act Opens Door for Crowdfunding Offerings

For several months, various legislative proposals that would ease regulatory and financing burdens on smaller companies have been discussed by legislators, business leaders and commentators. These proposals were brought together under the Jumpstart Our Business Startups (JOBS) Act (H.R. 3606). The JOBS Act was passed by Congress on March 27, 2012 and signed into law by President Obama on April 5, 2012. For a comprehensive overview of the JOBS Act, see our Client Alert.

The JOBS Act tackles various issues relating to financing businesses, however, within the realm of social media, "crowdfunding" is a key topic which Congress has chosen to regulate. In this article, we take a close look at the crowdfunding component of the new law.

Background on Crowdfunding
"Crowdfunding" or "crowdsourced funding" is a new outgrowth of social media that provides an emerging source of funding for ventures. Crowdfunding works based on the ability to pool money from individuals who have a common interest and are willing to provide small contributions toward the venture. Crowdfunding can be used to accomplish a variety of goals (*e.g.,* raising money for a charity or other causes of interest to the participants), but when the goal is commercial in nature and there is an opportunity for crowdfunding participants to share in the venture's profits, federal and state securities laws will likely apply. Absent an exemption from SEC registration (or actually registering the offering with the SEC), crowdfunding efforts that involve sales of securities are in all likelihood illegal. In addition to SEC requirements, those seeking capital through crowdfunding have had to be cognizant of state securities laws, which include varying requirements and exemptions. By crowdfunding through the Internet, a person or venture can be exposed to potential liability at the federal level, in all 50 states, and potentially in foreign jurisdictions. Existing exemptions present some problems for persons seeking to raise capital through crowdfunding. For example, Regulation A requires a filing with the SEC and disclosure in the form of an offering circular, which would make conducting a crowdfunding offering difficult. The Regulation D exemptions generally would prove too cumbersome, and a private offering approach or the intrastate offering exemption is inconsistent with widespread use of the Internet. Section 25102(n) of the California Corporations Code might provide a possible exemption for some California issuers, given that it permits general announcement of an offering without qualification in California (with a corresponding exemption from registration at the federal level provided by SEC Rule 1001, the California limited general solicitation exemption). Crowdfunding advocates have called on the SEC to consider implementing a new exemption from registration under the federal securities laws for crowdfunding. For more on crowdfunding, see also our prior Client Alert here.

When H.R. 3606 was adopted in the House of Representatives, the bill included Title III, titled "Entrepreneur Access to Capital." This Title provided an exemption from registration under the Securities Act for offerings of up to $1 million, or $2 million in certain cases when investors were provided with audited financial statements, provided that individual investments were limited to $10,000 or 10 percent of the investor's annual income. The exemption was conditioned on issuers and intermediaries meeting a number of specific requirements, including notice to the SEC about the offering and the parties involved with the offering, which would be shared with state regulatory authorities. The measure would have permitted an unlimited number of investors in the crowdfunding offering, and would have preempted state securities regulation of these types of offerings (except that states would be permitted to address fraudulent offerings through their existing enforcement mechanisms).

The House measure also contemplated that the issuer must state a target offering amount and a third-party custodian would withhold the proceeds of the offering until the issuer has raised 60 percent of the target offering amount. The provision also contemplated certain disclosures and questions for investors, and provided for an exemption from broker-dealer registration for intermediaries involved in an exempt crowdfunding offering.

After it was adopted, the House crowdfunding measure drew a significant amount of criticism, with much of that criticism focused on a perceived lack of investor protections. In a letter to the Senate leadership, SEC Chairman Mary Schapiro noted that "an important safeguard that could be considered to better protect investors in crowdfunding offerings would be to provide for oversight of industry professionals that intermediate and facilitate these offerings," and also noted that additional information about companies seeking to raise capital through crowdfunding offerings would benefit investors.

In the Senate, an amendment to H.R. 3606 submitted by Senator Merkley and incorporated in the final JOBS Act provides additional investor protections in crowdfunding offerings. Title III, titled "Crowdfunding," amends Section 4 of the Securities Act to add a new paragraph (6) that provides a crowdfunding exemption from registration under the Securities Act. The conditions of the exemption are that:

- The aggregate amount sold to all investors by the issuer, including any amount sold in reliance on the crowdfunding exemption during the 12-month period preceding the date of the transaction, is not more than $1,000,000;
- The aggregate amount sold to any investor by the issuer, including any amount sold in reliance on the crowdfunding exemption during the 12-month period preceding the date of the transaction, does not exceed:
    - the greater of $2,000 or 5 percent of the annual income or net worth of the investor, as applicable, if either the annual income or the net worth of the investor is less than $100,000; or
    - 10 percent of the annual income or net worth of an investor, as applicable, not to exceed a maximum aggregate amount sold of $100,000, if either the annual income or net worth of the investor is equal to or more than $100,000;
- The transaction is conducted through a broker or funding portal that complies with the requirements of the exemption; and
- The issuer complies with the requirements of the exemption.

Among the requirements for exempt crowdfunding offerings would be that an intermediary:

- Registers with the SEC as a broker or a "funding portal," as such term is defined in the amendment;
- Registers with any applicable self-regulatory authority;
- Provides disclosures to investors, as well as questionnaires, regarding the level of risk involved with the offerings;
- Takes measures, including obtaining background checks and other actions that the SEC can specify, of officers, directors, and significant shareholders;
- Ensures that all offering proceeds are only provided to issuers when the amount equals or exceeds the target offering amount, and allows for cancellation of commitments to purchase in the offering;
- Ensures that no investor in a 12-month period has invested in excess of the limit described above in all issuers conducting exempt crowdfunding offerings;
- Takes steps to protect privacy of information;
- Does not compensate promoters, finders, or lead generators for providing personal identifying information of personal investors;
- Prohibits insiders from having any financial interest in an issuer using that intermediary's services; and
- Meets any other requirements that the SEC may prescribe.

Issuers also must meet specific conditions in order to rely on the exemption, including that an issuer file with the SEC and provide to investors and intermediaries information about the issuer (including financial statements, which would be reviewed or audited depending on the size of the target offering amount), its officers, directors, and greater than 20 percent shareholders, and risks relating to the issuer and the offering, as well specific offering information such as the use of proceeds for the offering, the target amount for the offering, the deadline to reach the target offering amount, and regular updates regarding progress in reaching the target.

The provision would prohibit issuers from advertising the terms of the exempt offering, other than to provide notices directing investors to the funding portal or broker, and would require disclosure of amounts paid to compensate solicitors promoting the offering through the channels of the broker or funding portal.

Issuers relying on the exemption would need to file with the SEC and provide to investors, no less than annually, reports of the results of operations and financial

For those issuers who are seeking to raise small amounts of capital from a broad group of investors, the crowdfunding exemption may ultimately provide a viable alternative to current offering exemptions.

statements of the issuers as the SEC may determine is appropriate. The SEC may also impose any other requirements that it determines appropriate.

A purchaser in a crowdfunding offering could bring an action against an issuer for rescission in accordance with Section 12(b) and Section 13 of the Securities Act, as if liability were created under Section 12(a)(2) of the Securities Act, in the event that there are material misstatements or omissions in connection with the offering.

Securities sold on an exempt basis under this provision would not be transferrable by the purchaser for a one-year period beginning on the date of purchase, except in certain limited circumstances. The crowdfunding exemption would only be available for domestic issuers that are not reporting companies under the Exchange Act and that are not investment companies, or as the SEC otherwise determines is appropriate. Bad actor disqualification provisions similar to those required under Regulation A would also be required for exempt crowdfunding offerings.

Funding portals would not be subject to registration as a broker-dealer, but would be subject to an alternative regulatory regime, subject to SEC and SRO authority, to be determined by rulemaking. A funding portal is defined as an intermediary for exempt crowdfunding offerings that does not: (1) offer investment advice or recommendations; (2) solicit purchases, sales, or offers to buy securities offered or displayed on its website or portal; (3) compensate employees, agents, or other persons for such solicitation or based on the sale securities displayed or referenced on its website or portal; (4) hold, manage, possess, or otherwise handle investor funds or securities; or (5) engage in other activities as the SEC may determine by rulemaking.

The provision would preempt state securities laws by making exempt crowdfunding securities "covered securities," however, some state enforcement authority and notice filing requirements would be retained. State regulation of funding portals would also be preempted, subject to limited enforcement and examination authority.

The SEC must issue rules to carry out these measures not later than 270 days following enactment. The dollar thresholds applicable under the exemption are subject to adjustment by the SEC at least once every five years.

The provisions of this title of the JOBS Act are not self-effectuating, as indicated above.

Practical Considerations

Issuers: For those issuers who are seeking to raise small amounts of capital from a broad group of investors, the crowdfunding exemption may ultimately provide a viable alternative to current offering exemptions, given the potential that raising capital through crowdfunding over the Internet may be less costly and may provide more sources of funding. At the same time, issuers will need to weigh the ongoing costs that will arise with crowdfunding offerings, in particular the annual reporting requirement that is contemplated by the legislation. Moreover, it is not yet known how much intermediaries such as brokers and funding portals will charge issuers once SEC and SRO regulations apply to their ongoing crowdfunding operations.

Intermediaries: Brokers and potential funding portals will need to consider how their processes can be revamped to comply with regulations applicable to exempt crowdfunding offerings, in particular given the level of information that will need to be provided in connection with crowdfunding offerings and the critical role that intermediaries will play in terms of "self-regulating" these offerings.

Click-Accept Arbitration: Enforcing Arbitration Provisions in Online Terms of Service

Companies that provide services to consumers have often sought to reduce the risk of class action lawsuits by requiring that their customers agree to arbitrate any disputes. Such arbitration agreements may require customers to arbitrate on an individual basis only, with customers being obligated to waive any rights they might otherwise have to pursue claims through class actions. In recent years, many such arbitration provisions, particularly those that included class action waivers, had been held unenforceable under state law contract doctrine. In April 2011, however, the U.S. Supreme Court held in *AT&T Mobility v. Concepcion* that the Federal Arbitration Act preempts most state law challenges to class action waivers.

How broadly lower courts will interpret the *AT&T* decision remains to be seen. For example, on February 1, 2012, the Second Circuit held in *In re American Express Merchants' Litigation* that the *AT&T* decision did not preclude invalidation of an arbitration waiver where the practical effect of enforcement would impede a plaintiff's ability to vindicate his or her federal statutory rights.

For those companies that decide to adopt an arbitration provision in their online Terms of Service, whether with or without a class action waiver, it is important to ensure that such arbitration provision will not be invalidated on the ground that no contract was formed with the consumer.

Nonetheless, in the wake of *AT&T*, many companies that provide online products or services to consumers are exploring whether to include an arbitration clause and class action waiver in their online Terms of Service. For those companies that decide to adopt an arbitration provision, whether with or without a class action waiver, it is important to ensure that such arbitration provision will not be invalidated on the ground that no contract was formed with the consumer.

Courts have enforced the arbitration provision in an online Terms of Service agreement where the consumer clearly assents to – or "click-accepts" – the terms and conditions of such agreement, e.g., by checking a box stating "I agree" to such terms and conditions. For example, in *Blau v. AT&T Mobility*, decided in December 2011, the plaintiff consumers, who were arguing that AT&T Mobility's network was not sufficiently robust to provide the promised level of service, had specifically assented to AT&T Mobility's Terms of Service, which included an arbitration clause. One of the plaintiffs was bound by an e-signature collected by AT&T Mobility at a retail store. He asserted that he was not bound because another user of his account had provided the signature. The court rejected this argument because the user who signed was an authorized user of the plaintiff's account. A second co-plaintiff had accepted the Terms of Service by pressing a button on his mobile phone's keypad; the court held that this acceptance was valid even though the co-plaintiff could not recall whether he had seen the AT&T Mobility Terms of Service.

The enforceability of an arbitration provision becomes more problematic where there is evidence that the consumer did not affirmatively assent to the agreement containing such provision. In *Kwan v. Clearwire Corp.*, decided in January 2012, the Western District of Washington denied the defendant's motion to compel arbitration in a putative class action against Clearwire, an Internet service provider, under a variety of state and federal consumer protection statutes in connection with allegedly poorly performing modems. Clearwire sought to compel arbitration based on an arbitration provision in its online Terms of Service. Two named plaintiffs, Brown and Reasonover, argued that they could not be bound by the arbitration provision because they had never agreed to the Terms of Service. The court held that an evidentiary hearing would be required to determine whether an arbitration agreement had been formed with respect to Brown after she introduced evidence that a Clearwire technician who installed her modem, and not Brown, had click-accepted the Clearwire Terms of Service. Likewise, an evidentiary hearing was required as to Reasonover because Clearwire could not produce a record of a click-acceptance for Reasonover, who testified that she had "abandoned" the Clearwire website without click-accepting the Terms of Service.

What lessons can be drawn from the *Blau* and *Kwan* decisions? First, for an arbitration provision contained in an online Terms of Service agreement to be enforceable against a consumer, there should be clear consent by the consumer to be bound by the agreement. If the arbitration provision is contained in a passive "browsewrap" Terms of Service, requiring no affirmative consent from the consumer, this may be insufficient – absent other factors – to bind the consumer with respect to arbitration. In addition, an online Terms of Service containing an arbitration provision should be presented to customers in a reasonably conspicuous manner before the consumer click-accepts the Terms of Service; the agreement should not be "submerged" within a series of links, placed on a part of the screen not visible before the consumer reaches the "I accept" button or buried in small print at the footer of a long email message.

Second, robust records documenting individual consumers' "click-acceptances" of an online Terms of Service agreement incorporating an arbitration provision will substantially improve the likelihood that such agreement (and the incorporated arbitration provision) will be enforced. A click-accept record that is linked to the individual who actually click-accepted the agreement is best. Moreover, the Terms of Service agreement should be drafted to make clear that it applies not only to the individual who originally click-accepted such agreement, but also to other users to whom the individual provides access to his or her account.

Facebook's Online Terms of Service Held to Be Enforceable

In the recent online contracting case of *Fteja v. Facebook, Inc.*, a New York federal court held that a forum selection clause contained in Facebook's Statement of Rights and Responsibilities (the "Terms") was enforceable because the plaintiff assented to the Terms when registering to use Facebook. The court's analysis and holding followed the recent trend of de-emphasizing the distinction between "clickwrap" and "browsewrap" agreements and instead focusing on whether the user was provided with actual or constructive notice of the agreement's terms and conditions. In this case, the result turned on whether Facebook's Terms were reasonably communicated to the plaintiff prior to his use of the Facebook.com site.

The plaintiff, an active Facebook user, brought the action against Facebook in New York state court asserting that Facebook disabled his Facebook.com account without justification and for discriminatory reasons. He claimed that the disabling of his account hurt his feelings, inflicted emotional distress and assaulted his good reputation among his friends and family.

Facebook removed the lawsuit to New York federal court on the basis of diversity of citizenship, and then moved to transfer the action to federal court in Northern California, citing the forum selection clause in the Terms. Facebook argued that because the plaintiff clicked through Facebook's registration page and expressly acknowledged that he read and agreed to the Terms (including the forum selection clause), the Terms were valid and enforceable. The plaintiff responded that there was no proof that he agreed to the forum selection clause and that he did not remember agreeing to the Terms.

The court reviewed Facebook's registration process, noting that after a new user provides his or her personal information and clicks an initial "Sign Up" button, he or she is directed to a security page that requires the new user to input a series of letters and numbers. Below the box where the new user enters the letter/number combination, the page displays a second "Sign Up" button that is immediately followed by the phrase: "By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service." The phrase "Terms of Service" is underlined, indicating that it is hyperlinked to the Terms.

After this review of Facebook's registration process, the court then described the historical development of online contracting law, referencing the *Register.com, Inc. v. Verio, Inc.*, *Specht v. Netscape Communications Corp.*, and *Hines v. Overstock.com, Inc.* decisions, and the importance of establishing mutual manifestation of assent. Following this discussion, the court pointed out that Facebook's Terms are "somewhat like a browsewrap agreement in that the terms are only visible via a hyperlink, but also somewhat like a clickwrap agreement in that the user must do something else – click 'Sign Up' – to assent to the hyperlinked terms," and that, unlike some clickwrap agreements, a new Facebook user can click to assent whether or not he or she has been presented with the Terms. Finally, the court looked at the plaintiff's level of sophistication and stated that an Internet user whose social networking was so prolific that losing Facebook would cause him mental anguish should understand that the hyperlinked phrase "Terms of Service" really means "Click Here for Terms of Service," thereby establishing constructive knowledge of the Terms.

The court concluded that the plaintiff's registration for Facebook by clicking the "I accept" button constituted his assent to the Terms (including the forum selection clause) even though he may not have actually reviewed the hyperlinked Terms. The court then, after considering the public policy ramifications of the transfer decision, held that the forum selection clause was enforceable and directed the action to be transferred to federal court in Northern California.

Key Take Aways. While the *Fteja* case illustrates that U.S. courts may enforce a hybrid browsewrap/clickwrap agreement even where the user does not have actual knowledge of the terms and conditions, the safest approach for a website operator is to structure its online terms of service as a traditional clickwrap agreement that requires users to scroll through the terms and conditions and then click an "I accept" button. In situations where this structure is not commercially reasonable, the following tips can be used to help establish user assent under U.S. law through constructive knowledge of the terms and conditions of an online agreement:

- **Prominent Notice:** Include a prominent notice that cannot be skipped by users; such notice ideally should state that the use of the service is subject to the hyperlinked terms of service. Such notice should be provided in reasonably large font and contrasting colors that do not blend into the website's background. If possible, include an "I accept" button next to the notice.
- **Easy Access/Full Disclosure:** Provide easy access to the full text of the terms of service via a clearly identifiable hyperlink that links to a downloadable and printable version of the terms of service. The hyperlink should be provided next to the notice and an "I accept" button (if any).
- **Readability:** Structure and phrase the terms of service so that they can be reasonably understood by users based on their anticipated level of sophistication.
- **Highlight Important Terms:** Make sure that any particularly important terms are clearly identifiable and not hidden. If the website operator is especially concerned about an issue (e.g., enforceability of the limitation of liability provision of the terms of service), consider expressly referencing the concern as part of the general notice (e.g., "By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service, including the limitations on vendor's liability described therein").

Status Updates

Social media is in the news again for its power to wreak havoc on courtroom proceedings and, in particular, jury trials. In one instance, a Florida civil trial juror was dismissed from the jury after it turned out that he had sent a Facebook friend request to Violetta Milerman, one of the trial's defendants. He was ultimately held in contempt of court, a misdemeanor in Florida, and sentenced to three days in jail. We imagine that his status update after the incident – "Score ... I got dismissed!! apparently they frown upon sending a friend request to the defendant ... haha" – didn't help.

On March 22, 2012, Facebook closed the period for commenting on its proposed changes to its online terms of service. Interestingly, Facebook received 36,878 comments in German, compared to only 526 comments in English. Facebook's proposed changes can be view here.

In South Korea, candidates for government office now have a clear right to use social media sites to communicate with voters. According to Yonhap News Agency, candidates are generally prohibited from distributing promotional materials during the 180-day period before a vote, and the National Election Commission, an independent agency in South Korea charged with managing fair elections, had previously lumped tweets into this prohibition. But the Constitutional Court, in a 6-2 decision that is bound to impact the country's upcoming April elections, has ruled the Commission's ban on Twitter use to be unconstitutional.

The Guardian reports that Sky News is taking strong steps to curb and control its reporters' social media use. Since early February, Sky's reporters have reportedly been prohibited from retweeting the tweets of "other journalists or people on Twitter," in part to ensure the news organization's sufficient editorial control. The U.K. paper recently noted that the new guidelines, which have been less than popular with journalists at Sky, may be behind more than one recent, high-profile departure.

Can this really be the end? On March 5, 2012, the U.S. Supreme Court denied a petition for writ of certiorari in *Perfect 10 Inc. v. Google Inc.* The denial leaves intact the Ninth Circuit's determination that the rule established in *eBay Inc. v. MercExchange LLC* regarding the presumption of irreparable harm in patent cases also applies to copyright cases, with the result that Perfect 10 was not entitled to an injunction stopping Google from displaying thumbnails of Perfect 10's copyrighted images.

It's been said that you don't lose when you lose fake friends. It should, therefore, not alarm you to hear that Facebook's disclosures in connection with its upcoming IPO reveal that "false or duplicate accounts may have represented approximately 5-6%" of the social networking giant's monthly active users as of the end of 2011.

The U.S. District Court for the Southern District of New York recently upheld a unilateral "prices may change" provision in Dow Jones's terms of service for the Wall Street Journal Online and Barron's Online. The plaintiffs objected that they had paid for subscriptions to both the Wall Street Journal Online and Barron's Online, but that Dow Jones then spun off Barron's and started charging more for continued access to both services. The court held that, because Dow Jones acted reasonably and provided notice of the price change as required by the terms of service, there was no breach of contract and the user agreement was enforceable not illusory.

We've been surprised by how few mobile apps incorporate privacy policies. This is likely to change in the wake of the adoption of the Joint Statement of Principles by California's Attorney General and six leading mobile app platform providers, seeking to ensure broader, more consistent use of privacy policies by mobile app developers.

From *Cry Me a River* to *Bringing Sexy Back*? With help from celebrity investor Justin Timberlake, MySpace appears to be on the rebound, recently adding one million new members over a 30-day period.

Google's "autocomplete" feature, which suggests words and phrases as users type in their Google search queries – and which is periodically lampooned by those with a thirst for memes – is under scrutiny in Japan. The Mainichi Daily News reports that the Tokyo District Court has approved a Japanese man's petition demanding that the search giant delete certain autocomplete suggestions that, he alleges, have caused him to lose his job and be rejected by potential employers. The claimant's lawyer says that when his client's name is typed into Google, autocomplete adds words suggesting criminal acts, and if one of the Google-suggested term is clicked, over 10,000 allegedly defamatory or disparaging items appear. Meanwhile, Google's support page notes that autocomplete's suggestions are "algorithmically determined based on a number of purely algorithmic factors (including popularity of search terms) without human intervention." We'll keep you posted on this interesting development.

Death before disconnection: A bill pending in Nebraska would give estate representatives the power to manage social media accounts after the death of the account holder, including the ability access or close the account. The Nebraska bill is modeled on a similar law in Oklahoma.

Announcements

Relevance of Securities Laws in the Social Media Age Seminar Series

New York Office
Tuesday, April 24, 2012

Palo Alto Office
Wednesday, May 2, 2012

San Francisco Office
Thursday, May 3, 2012

For more information on this Seminar Series, please click here or visit our website at www.mofo.com.

Topics will include:

- The latest trends in the use of social media for communicating corporate and investor information
- The use of social media in the public and private securities offering process, including crowdfunding
- Social media considerations under Regulations FD and G and proxy solicitation
- Social media guidelines vs. policies
- Antifraud considerations with social media communications

NY and CA CLE credit are pending.

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