

TOP FIVE BEST INTERNET LAW PRACTICES FOR BUSINESS LAWYERS

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BACKGROUND: INTERNET LAW

- No generally accepted definition, and not a category, really, like, e.g., “water law” or “dirt law.”
- More along the lines of “a reasoned application of existing laws in the context of online communications and commerce.”
- Includes a number of IP constructs, but contract law and other foundational laws are also implicated.

TRADITIONAL LEGAL CONSTRUCTS AND THEIR INTERNET LAW COROLLARIES

Traditional

- Contracts
- Copyright
- Trademarks
- Trespass
- Privacy
- Defamation
- Junk Mail
- Street Address

Internet

- E-SIGN, UETA, Click
- DMCA
- ACCPA and UDRP
- CFAA
- COPPA, HIPAA, GLB
- CDA
- CAN-SPAM
- Domain Name

OVERVIEW: THERE ARE A LOT ON “INTERNET LAW” ISSUES . . .

In no particular order:

- Internet/Business Method Patents
- Cyberliability Insurance
- Cybersquatting/SEO/Metatags
- Hacking/Phishing/Spoofing
- Privacy
- Data Security
- Cybercurrencies (Bitcoin)
- Net Neutrality
- Electronic Contracting
- Employer/Employee Use of Social Media
- Internet Defamation
- Communications Decency Act
- SPAM and CAN-SPAM
- Apps and APIs
- Internet of Things
- The Move to Mobile and BYOD
- SaaS and Cloud
- Big Data
- The New gTLDs
- Online Copyright and DMCA
- Internet Taxation
- Revenge porn
- Cyberstalking/Cyberbullying
- Deep Web/Tor/Onion
- File sharing/BitTorrent



BRAD'S VIEW OF THE TOP FIVE

- 1. Privacy/Data Security**
- 2. Big Data**
- 3. Social Media and Employer/Employee Issues**
 - a. Internet Defamation**
- 4. The Move to Mobile**
- 5. SaaS and Cloud Computing**



PRIVACY

1. Not the same thing as “Data Security”
2. Primarily still an issue of contract law
 - a. Your “Privacy Policy” is the key
 - b. In-bound and out-bound considerations
3. No overarching federal privacy law, but . . .
 - a. Federal, e.g., HIPAA, COPPA, GLB, FERPA, FACTA
 - b. State, e.g., Cal. Bus. & Prof. Code § 22575, *et seq.*
 - c. Critical: consider the regulatory environment
4. The “Right to be Forgotten”
5. The EU Safe Harbor



PRIVACY: KEY CONSIDERATIONS

1. Am I receiving PII?
2. Am I surrendering PII?
3. What is my regulatory environment?
4. What does my Privacy Policy say?
5. What do my contracts and NDAs say?



DATA SECURITY

1. Not the same thing as “Privacy,” but related
2. Generally, this means, “What happens if there is a hack?”
3. In-bound and out-bound considerations:
 1. People give you their PII and entrust you with it
 2. You give a vendor your data and trust them with it



DATA SECURITY: KEY CONSIDERATIONS

1. What are my reporting obligations?
2. Who's responsible for the hack?
3. What do the contracts say?
 - a. My contracts with customers and clients
 - b. My contracts with cloud vendors
4. Do I have insurance?
5. What is the regulatory environment?
6. Responding to the hack



BIG DATA

1. What is Big Data?
2. How is it collected?
3. What are data analytics?
4. Why do you care?
5. In-bound and out-bound considerations



BIG DATA: KEY CONSIDERATIONS

1. Who owns the data?
 - a. Please contemplate this in your contracts
 - b. Licensing issues--monetization
2. Inextricably connected with Privacy
3. FTC is watching this actively; issued its “Big Data Report” in January 2016
4. Buzzword: “anonymization.” How much is enough?
5. Can your client, e.g., collect, collate and sell Big Data on its customers without violating:
 - a. Privacy Policy
 - b. Federal law (statute or FTC regulation)
 - c. State law



SOCIAL MEDIA AND EMPLOYER/EMPLOYEE ISSUES

1. **Reviewing applicant's SoMe to form hiring decision:**
 - a. Opens employers to the risk that they will learn details about an applicant — such as race, age, religion, disability or pregnancy — that are protected and legally cannot be taken into account in making hiring decisions.
 - b. Do not ask for passwords/usernames/handles
 - c. *But cf.* OK to use it to recruit
2. **Another aspect: disgruntled former employees**
 1. *Cf.* Internet defamation
 2. *Cf.* CFAA (Computer Fraud and Abuse Act; 18 U.S.C. § 1030)
 3. *Cf.* Trade secrets laws and misappropriation



SOCIAL MEDIA AND EMPLOYER/EMPLOYEE ISSUES

1. Employee Use of Social Media

- a. Employees' using Facebook, Twitter, Instagram, Vine, Tinder and so on at work
- b. Exposures: defamation, loss of trade secrets, breach of contract, IP infringements, employment law risks

2. Tips

- a. Have a social media policy (creates a defense in litigation)
- b. Enforce it
- c. Top-down mandate from C-suite, Legal and HR
- d. Contents of a good social media policy?



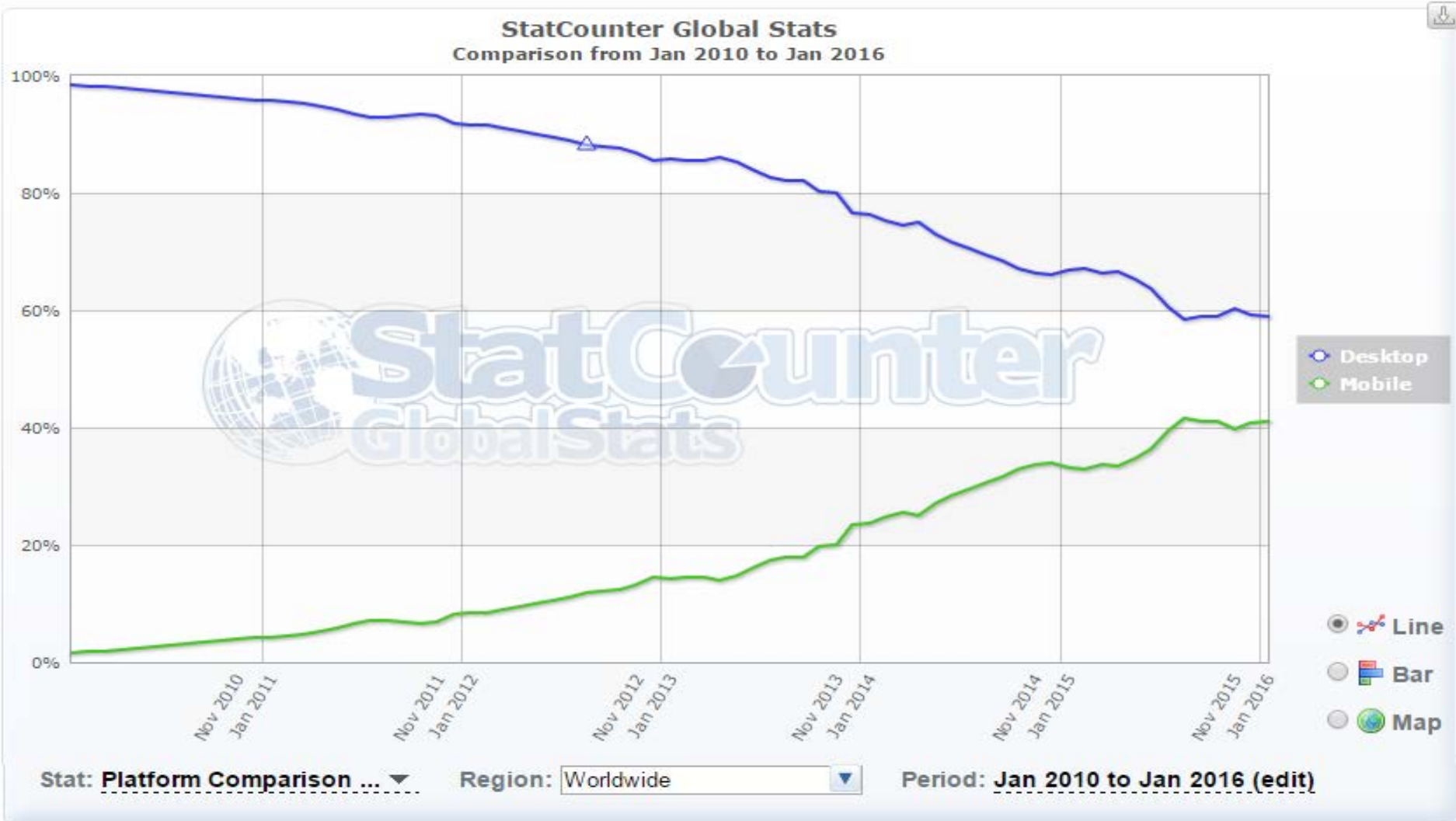
SOCIAL MEDIA AND INTERNET DEFAMATION: KEY CONSIDERATIONS

- 1. Beware Section 230 of the Communications Decency Act (47 U.S.C. § 230)**
- 2. Difficulty of getting injunctions in defamation cases, and what are the real monetary damages.**
- 3. Unmasking the anonymous poster!**
 - a. Can you use DMCA? (17 U.S.C. § 512(h))**
 - b. File a Doe suit**
 - c. Service providers, e.g. Verizon, are actively quashing**
- 4. Invoking Terms of Service of, e.g., RipOffReport.com, Yelp! or other SoMe site**
- 5. Use IP law if you can**
- 6. Best solution: aggressive SEO**

THE MOVE TO MOBILE



THE MOVE TO MOBILE





THE MOVE TO MOBILE: KEY CONSIDERATIONS

1. Privacy implications
2. Contract considerations
 - a. Contract modification
 - b. “Click-wrap hell” for the enterprise client
3. Exposures (not just social media; includes email and texting):
 - a. Defamation
 - b. IP infringements
 - c. Loss of IP, especially trade secrets
 - d. Breach of contract risks
4. Apps and APIs
5. Tips: lock down IP; have mobile device policies and enforce them; know client contracts; use good licenses



SAAS AND CLOUD COMPUTING

1. What is SaaS?
2. What is the cloud? (“Someone else’s computer.”)
3. Contrast with the old enterprise when everything was locked down on servers controlled by IT and software was a thing, not a service.
4. Examples: Gmail, Salesforce.com



SAAS AND CLOUD COMPUTING: KEY CONSIDERATIONS

1. **Cloud Contract Issues:**
 - a. Data Security
 - b. Warranty
 - c. Indemnification
 - d. Data Ownership
 - e. Data Portability
 - f. Data Location
 - g. Regulatory environment (can your data be in Ireland?)
 - h. These all go both ways
2. **Is it a license or is it SaaS?**
3. **Consider apps and APIs and the need for hybrid agreement**

THANK YOU!

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