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If Litigators Drafted Contracts—Protecting Company Information

Panelists



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Agenda

- Protecting information vis-à-vis employees
- Protecting information vis-à-vis customers and users
- Preparing for litigation and litigation lessons

Protecting Information Vis-à-Vis Employees: Defining Company Information

- What information are you trying to protect?
 - Confidential information
 - Trade secrets
 - Copyright/trademarks
- Confidential information and trade secrets
 - The former is broader than the latter
 - Protect both—Uniform Trade Secrets Act
 - Does not affect contract-based remedies

Protecting Information Vis-à-Vis Employees: When They Walk in the Door

- Initial employment agreements
 - Specific protection of company information
 - Non-compete/non-solicit clauses?
 - May be worth including even if questions of enforceability
- Detail company policies relating to information
 - Who can access?
 - How can they access?
 - Where and by what means can they access?
- Need a strong relationship with IT/CISO

Protecting Information Vis-à-Vis Employees: During and at the Close of the Relationship

- Continue to review employee's position
 - Do access rights need to change?
 - Is the employee granted new incentives?
- Continue to review policies for access
- Upon departure, ensure employee confirms commitment to protect company information

Protecting Information Vis-à-Vis Employees: Best Practices

- Protecting information begins before an employee walks through the door
- Use contracts to create foundations for protection—know the law of your jurisdiction
- Create procedures to buttress the protections
- Document, document, document
 - Include reminders on frequently accessed internal sites

Protecting Information Vis-à-Vis Customers and Users: Key Considerations

- What type of contract are you using?
 - Written contract
 - “Online” contract
- What’s the ultimate goal?
 - Protecting information—of course
 - Setting yourself up for litigation?
 - Ensuring easy relationships with customers?

Protecting Information Vis-à-Vis Customers and Users: the Special Case of the “Online” Contract

- Raises potential questions of notice and assent that are not present with written contracts
- Multiple options on how to present to customers/users
 - “Scrollwrap”
 - “Click wrap”
 - “Sign-in wrap”
 - “Browsewrap”
- Courts generally will enforce any contract where there is evidence of notice and assent
 - *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017)
 - *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359 (E.D.N.Y. 2015)
- Consider mixing and matching presentation methods
 - The more users interact with the contract, the more likely they are to be enforceable

Protecting Information Vis-à-Vis Customers and Users: Additional “Online” Contract Questions

- Online terms and conditions referenced in written documents
 - Invoices
 - Purchase orders
- Updating terms in online contracts—are the updates binding?
 - Enforceability depends on knowledge of possibility of updates

[REDACTED] may update these Terms and Conditions at any time, with or without notice to You. You are responsible for frequently reviewing these Terms and Conditions. The latest version of the Terms and Conditions is available on the [REDACTED] website.

Protecting Information Vis-à-Vis Customers and Users: Terms To Think About

➤ Who is permitted to access the information?

These Terms and Conditions refer to Users and Customers collectively as “You.” No employee, independent contractor, agent, or affiliate of any competing real estate information, analytics or listings service is permitted to be a User or a Customer or to view, use, or access the [REDACTED] website without express written permission from [REDACTED]. By viewing, using, or accessing the Service, You represent and warrant that You are not a competitor of [REDACTED].

- Defines permissible users and sets up potential fraud claim in addition to breach of contract

➤ What is the information at issue?

You agree to treat all information obtained from the Service, [REDACTED], listings, member directory, and any information otherwise made available to You in the Service (individually and collectively, the “Content”) as proprietary to [REDACTED]. You agree that Content reserved for Members will be maintained as confidential and shall be protected as a trade secret of [REDACTED]. [REDACTED] does not ensure the accuracy of, endorse or recommend any

Protecting Information Vis-à-Vis Customers and Users: Terms To Think About

- What are the remedies?
 - Choice of law?
 - Forum or arbitration?
 - Does the business want to treat differently situated customers differently?
 - Liquidated damages?

- Business-Specific Terms?
 - If the company is operating in Europe, GDPR considerations
 - If providing an online forum, consider building in community guidelines

Protecting Information Vis-à-Vis Customers and Users: Best Practices

- Determine your purpose and audience, as it will affect how you structure your contracts
- If your contract is online, take all steps to make it enforceable
 - But we litigators understand there sometime are countervailing interests
 - Document, document, document—in multiple ways
- Build in provisions to set yourself up to prevent misuse and, if necessary, litigate

Preparing for Litigation: Steps

- Starts long before there is a need for litigation
- Display binding terms of use on all websites
- Deploy content-protection technologies
- Employ team, if possible, to monitor usage and develop record of theft
- If that's not possible, use digital records of access
- Decide if a litigation candidate

Preparing for Litigation: Litigation goals

- **Protect the Information.** Stop fraudulent access and prevent future misconduct
- **Hold Fraudsters Accountable.** Recover from the individuals and entities that misused information
- **Educate the Market.** Demonstrate commitment to protecting information and illustrate the significant damages that come with misuse
- **Develop Precedent.** Achieve results that can be used in future cases

Litigation Case Study

Initial Findings

- Credentials of two subscribers used to access database from IP addresses and devices affiliated with a non-subscriber (Choi)
- Search histories of subscribers included a folder labeled with the initials of Choi
- Dueling logins: Access credentials would be used to attempt logins from different IP addresses in different geographic locations at the same time

Further Findings

- Review of records indicate that Choi created property reports containing copyrighted photographs

Litigation Case Study

➤ Summer 2018

- Unauthorized access detected; letter to fraudster
- No resolution, as Choi claims it is an “accident”

➤ Summer-Fall 2018

- Developing evidence of sustained unauthorized access and infringement

➤ October 3, 2018

- Suit filed against Choi and his company, Sandbox Real Estate

➤ November 13 & 16, 2018

- Choi and Sandbox served

➤ January 4, 2019

- Stipulated judgment and permanent injunction entered; no discovery needed

“Defendants **acknowledge** that their actions **constitute a serious violation** of ... Terms of Use” and that Choi’s actions violate the Copyright Act, Computer Fraud and Abuse Act, the New Jersey Computer Related Offenses Act, and constitute fraud, and that Sandbox aided and abetted Choi’s statutory violations.”

Litigation: Practice Pointers

- Develop and use a continuum of responses:
 - Technological defenses—IP blacklists and security modes
 - Confront apparent lone wolves and seek out-of-court resolution when the damage is not widespread
 - If a syndicate of bad actors, identify weaknesses in the group, but, if necessary, pursue simultaneously
 - Do not be afraid to litigate when appropriate
- Choose litigation candidates based on scope of misconduct and effect on company's goals
- If litigating, develop complete record before suit

Questions?

Panelists

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Shawwna is Principal Senior Counsel at MicroStrategy responsible for intellectual property, complex commercial litigation, technology agreements, export controls, and cybersecurity. Prior to going in-house, Shawwna was a partner at Baker Hostetler in Washington DC where she focused on intellectual property litigation, complex commercial litigation, and software licensing. She also served as a law clerk to the Honorable S. Jay Plager at the United States Court of Appeals for the Federal Circuit. Shawwna received her Juris Doctorate, with honors, from George Washington University and bachelor's degree in Chemical Engineering from the University of Illinois in Urbana-Champaign.

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An experienced commercial litigator at both the trial and appellate level, David Riskin manages complex matters in state and federal courts, with a particular focus on (i) defending professional liability and conflict-of-interests claims against law firms and (ii) advising and representing companies in connection with data-protection and information matters. He engages all aspects of a matter by developing case themes, building expert strategies, preparing and defending key witnesses, and designing early-stage litigation strategies resulting in pre-trial dismissals and favorable settlements.

David's broader commercial litigation experience has spanned a variety of industries, including financial services and securities, commercial real estate, medical devices, aerospace, healthcare, and technology. And he has represented individuals in civil, criminal, and governmental proceedings.

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