



Keeping Private Information Private in the Information Age:

Not Only Good Business, It's The Law

By Jon Van Meter

A large HMO maintained detailed notes of psychotherapy sessions in computer records that were accessible by all clinical employees.

A public health employee stole two computer disks containing the names of thousands of people who tested positive for an infectious disease. The worker sent the disks to two newspapers.

A large pharmaceutical company inadvertently revealed hundreds of patient e-mail addresses when it sent a message to every individual registered to receive reminders about taking anti-depressant medication.

The examples cited above are just three of many potential violations of the Health Insurance Portability and Accountability Act (HIPAA) that expose companies to costly investigations, fines and penalties. Enacted by Congress in 1996, one of HIPAA's primary purposes is to provide rigorous safeguards to protect the confidentiality of patient information. As more companies go paperless and increasingly store confidential patient and customer data in electronic databases, the risk of an intentional or unintentional leak of that information is ever growing. *Continued on page 6*



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A Letter from the President

Dear Colleague:

As promised, this issue of *M/PI Source* reflects the breadth of the new Media/Pro, providing topical articles addressing the spectrum of customers we serve and products we now offer, including Lawyers Professional Liability Insurance and Accountants Professional Liability Insurance. In addition to some terrific articles on copyright issues related to video-sharing websites, and regulatory exposures for technologies, this month's issue contains an article about managing metadata written by Alan Lipton of Hinshaw & Culbertson, LLP. We have partnered with Hinshaw to provide risk management services to our law firm insureds as one of the many ways in which we provide additional value to our clients.

We've been busy this summer making Media/Pro better than ever. We're committed to providing our producers with unparalleled service. We recently reorganized our underwriters for our Media, MPLI and Cyber/Tech products into regional teams to better serve our brokers and customers. Our expectation is that this new structure will strengthen the relationship between our underwriters and our customers while continuing our practice of customized underwriting. We have also begun work on a new underwriting platform to be launched in early 2008 that will reduce our turn-around time and make doing business with us easier than ever.

We have also been working on several new policy forms, continuing our tradition of offering new and innovative products to meet our customers' needs. We have just launched our newly updated Media form, which provides the most complete coverage in the industry. Building upon our strengths in the areas of Media, Technology, Cyber, and Intellectual Property, we expect to launch several new products shortly, which will broaden our offerings to meet the changing coverage needs of our clients.

Lastly, we're looking to grow our business internationally by adding more resources and capability to our existing operations. Many people don't realize that Media/Pro underwrites Media, Technology, Cyber and Miscellaneous Professional Liability internationally. We will be making significant investments in our Canadian office in Toronto and our worldwide operation based in London. We expect to add senior staff in both Toronto and London and to launch many of our new forms and products in these locations, as well.

Look for us at the upcoming PLUS International Conference in Washington, D.C. We expect to bring 25 of our underwriters to PLUS to fill you in on the latest at Media/Pro. Mary Schust, our Director of North American Underwriting, and Mike DiSilvestro, our Corporate Expression Product Manager, will be panel participants. Also, be on the lookout for your invitation to the AXIS party, the best event at PLUS.

Sincerely,

A handwritten signature in black ink, appearing to read 'Tim Covello'.

Tim Covello
President

 Media/Professional Insurance

www.mediaprof.com/blog



Looking for a Safe Harbor:

The future of video-sharing websites may hang in the balance.

By Russell Hickey

In its short existence, YouTube has made an indelible mark on popular culture. Thanks to the popular video-sharing website, millions of people worldwide know what happens when you add Mentos to Diet Coke. Far more have seen the “Evolution of Dance” – a video of a comedian that has drawn more than 57 million views since being posted in April 2006.

YouTube’s greatest impact, however, may be the mark it leaves on the United States Copyright Act.

In March, Viacom filed a lawsuit against YouTube in the United States District Court for the Southern District of New York. In the suit, Viacom alleged three counts of direct copyright infringement and one count of inducement of copyright infringement, contributory copyright infringement and vicarious copyright infringement.

At the heart of the case is the Digital Millennium Copyright Act and its “Safe Harbor” provision.

According to the Complaint, Viacom claimed that a “vast amount” of the content on YouTube consisted of “popular (and obviously copyrighted) television programming and motion pictures.” Viacom also alleged that YouTube “know[s] and intend[s] that a substantial amount of the content” on the site consists of unlicensed infringing copies of copyrighted work because YouTube “directly profits from the availability of popular infringing videos on its site.”

In its defense, YouTube has argued that the Digital Millennium Copyright Act

(“DMCA”) requires copyright owners to notify an Internet Service Provider when infringing content is posted to its site by a third party. In other words, YouTube has argued that the DMCA Safe Harbor does not require YouTube to police its own site for infringing content.

The DMCA Safe Harbor – Section 512 of the Copyright Act – insulates Internet Service Providers from liability in certain situations. To benefit from the Safe Harbor provisions, however, the Internet Service Provider must first comply with requirements such as implementing a policy for taking down infringing content and terminating accounts of repeat infringers.

In general, two conditions that could prove problematic for any website containing user-generated content are: (1) whether the website operator had actual knowledge of the infringing material or was aware of facts or circumstances from which infringing activity on its system or network was apparent; and/or whether the website operator acted expeditiously to remove or disable access to the material upon obtaining such knowledge or awareness; and (2) whether the website operator received a financial benefit directly attributable to the infringing activity if it had the right and ability to control such activity.

At its most basic, the key legal question is whether the website operator had a duty to find infringing activity. If a court were to determine the website operator did carry such a burden, the Safe Harbor provisions would then be inapplicable.

Unfortunately for website operators who rely upon user-generated content, there is precious little caselaw interpreting the


requirements of the Safe Harbor. In May 2007, however, the Ninth Circuit Court of Appeals handed down what may become the seminal case for interpreting the requirements of the DMCA Safe Harbor.

In *Perfect 10 v. CCBill*, the defendants operated a webhosting and Internet connectivity business. The plaintiffs sued for various causes of action, including copyright infringement. The defendants claimed the DMCA Safe Harbor precluded liability for copyright infringement.

Among other arguments, *Perfect 10* claimed there were certain “red flags” that should have made the defendants aware of infringing activity. Accordingly, the defendants were aware of such infringing activity, and they could not take advantage of the Safe Harbor provisions. Furthermore, *Perfect 10* argued that the “red flags” relieved it of the burden of finding all potentially infringing activity and alerting the defendants pursuant to the requirements of the DMCA Safe Harbor.

Significantly, the Court said: “The DMCA notification procedures place the burden of policing copyright infringement – identifying the potentially infringing material and adequately documenting infringement – squarely on the owners of the copyright. We decline to shift a burden from the copyright owner to the provider.”

If other courts, such as the court considering the *Viacom v. YouTube* case, decline to follow the Ninth Circuit’s lead, the face of video sharing websites could be forever altered.

 Russell Hickey is a Claims Counsel at Media/Professional Insurance.

Feedback or story ideas? Please send to mpisource@mediaprof.com.



By Alan R. Lipton

Metadata is often referred to as “data about data.” This is not a very helpful definition, particularly where ignorance about the issues raised by metadata could compromise the legitimate interests of a client and its law firm. In fact, law firms aren’t the only ones who should be concerned. Metadata can impact any business transmitting electronic info.

Metadata is ubiquitous. Automatically generated by the particular software application used to create a particular document, spreadsheet, photograph or other electronic file, metadata is embedded or hidden in every document or file created by computer and is generally unseen by the naked eye. Metadata is potentially a matter of concern because it is hidden electronic information, easily revealed, that may contain privileged, proprietary, trade secret or embarrassing information.

The form in which an electronic file is originally generated (for example a WORD document, a WordPerfect document, an Excel Spreadsheet or a JPEG or RAW image) is referred to as “native format.” Typically, the metadata contained in a file viewed in its native format is not visible to an individual viewing the file either electronically or in hard copy. Persons viewing “native format” files electronically, however, can use the same type of software originally used to create the file, or other electronic viewing tools, to view some or all of the embedded information, i.e., metadata. Thus, if electronic duplicates of files in WORD format, for example, are transmitted to

an outside party, the production contains not only what is typically seen on the document when it is opened in WORD, but it also contains the unseen but potentially readable metadata that was embedded in the document when it was first created and each time it was later accessed or modified. That information, of course, can be helpful in some instances, harmful in others and sometimes it may be entirely insignificant.


Everything done or generated by a computer, even deletions or attempts to scrub a hard drive, leaves an electronic trail with varying degrees of detailed information about what has been done, when and by whom, in addition to other information. In some instances the only way to know whether metadata is important to a case or reveals some privileged communication, trade secret or work product is to conduct a metadata review. In an appropriate case, users should be concerned about information residing within electronic files that may be produced in litigation, or transmitted to a potential adversary in correspondence, or in the context of transactional work.

There are methods of sending documents to outside parties and others that should alleviate concerns about the inadvertent or unnecessary transmission of metadata. Any method of transmission that transmits an “image” of a document rather than the native electronic file itself or an electronic duplicate of the native file will not transmit metadata. Read the term “image” to equate with a photocopy. So, for example, when transmitting

documents by e-mail, scan the original document and send the scanned (imaged) version. If it is necessary to send a document in native file format such as a WORD file, “scrubbing” programs, such as iScrub, remove metadata from electronic files before they are transmitted by e-mail.

If scanning, faxing or “scrubbing” are not possible, the next best alternative for transmitting an electronic file without (much) metadata is to convert the native file into a PDF file. Contrary to popular belief, converting a native file to PDF format for e-mail transmission is not necessarily a fool-proof method of removing all metadata that was contained in the original native document. If configured appropriately, however, the quality and quantity of metadata that may remain in a document that has been converted to PDF is likely to be insignificant. Complicating the technical picture, the types of metadata potentially contained in a PDF file vary across different versions of PDF software, making it difficult to use any version of the software, other than the most recent version, to completely examine a PDF document for the presence of metadata.

In the legal context, metadata issues are particularly complex because varying rules of professional responsibility require metadata to be handled differently, if at all, in different jurisdictions.

 Alan R. Lipton is the Chairperson of Hinshaw & Culbertson LLP, e-Discovery Response Team.

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Partnering for Success

'Association of Associations' Sets Standard For Membership Organizations

By Rhonda Reeves with contributions
from ASAE Services

The American Society of Association Executives was founded in 1920 to be the voice of the association profession.

ASAE Services, Inc., ASAE's wholly owned subsidiary, uses a model that creates not only business partnerships, but marketing partnerships. To accomplish its mission, ASAE Services focuses on expanding market share for its partners by leveraging ASAE resources and the ASAE & The Center brand.

ASAE & The Center for Association Leadership serves the professional needs of more than 22,000 association executives, industry partners, and consultant members representing nearly 10,000 associations. ASAE & The Center offer more than 75 learning experiences each year, publish *Associations Now* magazine and the *Journal of Association Leadership*, provide thousands of web-based tools and resources, and host the Annual Meeting and Exposition, which draws more than 7,000 association executives and suppliers each year.

Members of ASAE & The Center manage trade associations, individual membership societies, and philanthropic organizations across the United States and internationally. Associations are everywhere—in every country, every city, and every community. They range from the American Bar Association, to the Michigan Chamber of Commerce, to the San Diego Girl Scouts. ASAE &

The Center seek to help associations transform society through the power of collaboration and by connecting great ideas and great people to inspire leadership and achievement.

ASAE Services designs and delivers quality products and services to the association community. By creating key strategic partnerships with top-quality providers of products and services, it enables association professionals to maximize their time, reduce risk, save money, and make money. These partnerships serve a broad spectrum of association needs including insurance, financial, technology, and key business services.

Dixie Arthur, president of ASAE Services, said, "ASAE Services, in partnership with outside companies, provides benefits to associations that they could not get on their own. The directions and goals of ASAE & The Center for Association Leadership, as well as ASAE Services, are to serve as role models for the association community."

The selection process for choosing an ASAE-endorsed program is based on member needs and a stringent due diligence process to ensure that ASAE partners with top-quality companies. Only business products and services that have demonstrated excellence and are committed to serving the unique needs of associations are selected.


Media/Professional Insurance has been providing its ASAE-endorsed

errors and omissions insurance program to the association community since 1996. The professional liability coverage helps protect association activities relating to certification and accreditation programs, educational services, website services, and other activities conducted by associations for their members. In designing the insurance, the collaboration process with ASAE helps ensure that specific needs of associations are met.

Debra Sher, vice president of ASAE Services, said "It is important to understand that ASAE-endorsed programs are available to all associations. It doesn't matter if a particular association's executives are members of ASAE & The Center. We create our programs to benefit the entire association marketplace."

ASAE Services, Inc. continually evaluates its partnerships, focusing on how to help them evolve as the dynamics of business and association needs change. The group works closely with each partner to co-market the ASAE-endorsed programs to associations thereby maximizing their visibility in the association marketplace.

With its dedication to its mission and ongoing commitment to excellence in services provided, ASAE Services, Inc. certainly stands as a role model to partnering for success.

 Rhonda Reeves is Assistant Vice President, Underwriting at Media/Professional Insurance.

Feedback or story ideas? Please send to mpisource@mediaprof.com.

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It's not only the healthcare industry where strict privacy guidelines exist. In the financial sector, for example, the federal Gramm-Leach-Bliley Act requires companies to keep customer financial information private. A breach can trigger a regulatory investigation, a lawsuit, or both.

In addition, a majority of states have passed laws governing the security of electronic data containing personal information and the notices required when that security is compromised. The federal legislature is poised to enact a similar federal statute. Notifying customers of a data breach can cost a company millions of dollars.

Any data breach can lead to regulatory investigations, fines, lawsuits and reputational damage to an organization.

So what can a company do to ensure it has done all it can to comply with federal, state, and local laws regarding the safeguarding of confidential information?

A combination of due diligence when selecting business partners, sound internal policies and procedures, and the purchase of broad insurance is a must. These steps won't eliminate all exposures, but it will help a company cope with an investigation should a violation occur.

Listed below are some tips for protecting company information.

Disclaimer: *this list is not meant as a guarantee for compliance with federal or state regulations. These are merely rules of thumb to help keep personal information confidential. To guarantee compliance with a specific statute, contact the regulatory agency that enacted the law.*

To protect the data you store, you must know what you've got. Sounds simple,

right? If you've never categorized the information in your databases, it might not be that easy. A good place to begin is to categorize the data obtained and stored by value and confidentiality. Next, analyze the current data and informational flow in your organization. Are any changes made to the data after it's received by the company? Is there a break in the chain of custody? Are your organization's stated internal policies in line with the actual behaviors of your employees? Answering these questions honestly and correctly can assist you in spotting vulnerabilities and eliminating them.

Next, you should make sure that only essential employees have access to sensitive data and that they have been trained on the guidelines in the applicable statute. Make sure all employees are trained on internal policies regarding the handling of private information, and have in place detailed enforcement rules for violations.

As a part of employee training, have as many employees as necessary take outside educational courses. For example, if your organization stores medical information, you should require employees to obtain a HIPAA compliance certificate.

You should also provide a copy of your organization's privacy policy to each employee and have them sign a copy for their personnel file. Post your company's privacy policy on your website as well.

Take compliance seriously. You should review all incident reports. Sometimes major problems can be prevented if they are dealt with early.


Next, when purchasing Professional E & O insurance for your company's technology activities, look for a policy that provides some coverage for regulatory actions because a regulatory compliance action brought by a government agency

is a likely consequence of a privacy violation. Most of the companies offering this coverage option provide a sub-limit to the tech policy that is an exception to the exclusion for claims brought by regulatory authorities, or any federal, state or local governmental agency.

As such, the sub-limit is intended to provide coverage for regulatory actions brought against an insured by any regulatory authority, or any federal, state or local governmental agency. "Regulatory action" is often defined in the policy as a request for information, civil investigation, civil proceeding or any breach or violation of any federal, state or local statutes and regulations associated with the control and use of personally identifiable financial or medical information.

This coverage option is designed to provide coverage should a regulatory agency investigate a policy holder for, or charge the policy holder with, a violation of any such law or regulation.

Finally, remember that protecting confidential information is an on-going responsibility. Review company policies regularly and update when necessary. Stay apprised of changes in laws and other news affecting your industry. And remember, good procedures can even lower your insurance premiums. Note that this coverage is primarily intended to provide a legal defense to the regulatory action; any resulting fines and penalties are typically not insurable.

 **Jon Van Meter** is an Underwriter at Media/Professional Insurance.



Risky Business

Amusing but true stories from today's insurance world



Issue of Grave Importance

A woman bought a multiple-grave cemetery lot with a large and beautiful birch tree growing on the lot. The buyer said that she did not know the tree was there when she agreed to buy the lot and demanded to get her money back for the area consumed by the tree. The cemetery directors contemplated offering to give everything back to her—including her late husband who was buried at that lot.

Insurance for the Second Coming

Three nuns in Scotland took out insurance policies with annual premiums of \$180 each. The policies were to provide coverage in the event that one of them gave birth to Jesus on his second coming. The coverage was designed to provide for expenses related to the rearing of the young Messiah. After a few eyebrows were raised, the insurer decided to withdraw coverage and return the premium collected.

If it Looks Like a Duck...

The subject of a news story brought a small claims action against an insured claiming that the story falsely referred to him as a lobbyist for the government of Iran. He alleged that he was defamed, and the paper should have referred to him as a "Strategic Consultant on Foreign Policy Issues."

Spies Like Us

The CIA plans to launch "A-Space," a social networking website similar to Facebook and MySpace for members of the intelligence community around the world to converse and swap ideas and other information online. The CIA is no stranger to social networking. In fact, the CIA uses Facebook as a recruiting tool. Who knew Facebook was a good place to find future espionage agents? It looks like you really can find anything on the Internet.

If you have an amusing story to share, please send it to mpisource@mediaprof.com

Correction: In our last edition, we edited the article "Reality Show Releases: They May Need An 'Extreme Makeover'" to say that the decision discussed in that article came out of the U.S. Court of Appeal for the Ninth Circuit. In fact, the decision was issued by a California Court of Appeal and can be found at *Higgins v. Superior Court*, 140 Cal. App. 4th 1238 (2006).

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Coverage of claims is decided on an individual basis after evaluating the relevant facts and applicable insurance policy. The content of this publication should not be considered legal advice.

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