

Restaurant, Food & Beverage Legal Briefing Series

Top Social Media Legal Issues

March 22, 2011

*Presented By James Gatto, Partner and leader of the
Social Media, Entertainment and Technology Team*



Overview

- Social Media Landscape
 - Applications
 - Technologies
 - Business Models
- Why Social Media Creates Unique Legal Issues
- Overview of Select Legal Issues
- Questions

Social Media – It's on the Menu...Everywhere.



- 81% of restaurants are using some form of social media
- According to Technorati, there are approx. 33,000 food and restaurant blogs in the US
- Consumers trust friends above experts when it comes to product recommendations

Social Media Landscape

Applications

- Social Media applications
- Location-based services
- Mobile applications
- Online/social games
- Mirror worlds
- Blogs
- Consumer reviews & recommendations sites

Technologies

- Social networking platforms
- Location-aware devices
- Smartphones
- Augmented reality
- Content authorizing tools
- Broadband
- Wireless

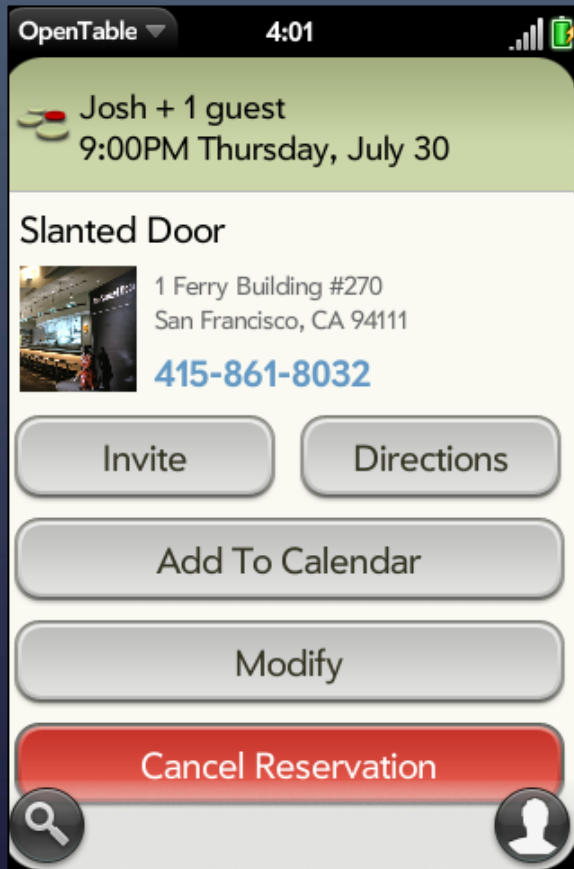
Business Models

- Micro-transactions
- “Freemium” models
- Virtual goods
- Virtual currencies
- Mobile payments
- Gamification (use of game mechanics for non-game purposes)
- User-generated content-based models

Location-Based Services (LBS)

- Increased use of LBS for proximity marketing
- Growth of smart phones (with GPS/digital compass)
- Many LBS apps are geared towards restaurants and other retailers
- Promotions based incentives delivered when consumer is in proximity of business – effective targeting!

Location-Aware Applications



- OpenTable
 - Online reservation service
 - Application lets users search for restaurants near a given location based on price, number in the party, and type of cuisine.
- Only helps restaurants registered with OpenTable!

Location-Aware Applications

- UrbanSpoon

- Nearby restaurant locator
- Provides maps
- Works with restaurants



- Yelp

- User-generated content
- Provide personal reviews and recommendations



Location-Aware Applications (Niche)



- VegOut
 - Searches for nearby vegetarian restaurants
 - A much more targeted market

Location-Aware Applications

- LocalEats
 - Provides a list of the “best” restaurants in a particular city
 - No chains listed – only locally-owned restaurants



Location-Aware Applications

- Enable Table
 - After-the-Meal Restaurant Mobile Coupons
 - Provides coupons directly to smartphone after meal
 - First commercial restaurant application to support Near Field Communications (NFC) technology on the Android market.



Mirror Worlds

- EveryScape

- Re-creates 3-D cities & towns, building exteriors and interiors, and more
- Allows users to go into a restaurant and look at the menu and also check-out customer reviews

In a recent demonstration, EveryScape Founder and CTO, Mok Oh, navigated into a restaurant and found the exact table he wanted to reserve.



Blogs

Eater.com

The screenshot shows the Eater.com website with a red header. The word "EATER" is in large, stylized letters. To the right, there's a "City" dropdown menu set to "NATIONAL" and a "TOP STORIES" button. Below the header, there are three main article thumbnails. The first is titled "FEUDS" and features a photo of John Mariani and Grant Achatz, with the text "John Mariani, Feeling Slighted, Attacks Grant Achatz". The second is titled "YELP WANTED" and features a screenshot of a Yelp page with a red box around the word "Ambience", with the text "Yelp Officially Recognizes 'Hipster' as an Ambience". The third is titled "VIDEO INTERLUDE" and features a photo of Jay Leno, with the text "Epic Meal Time on Jay Leno: Meat Cars and Leprchauns". At the bottom, there are navigation buttons for "EATER NAT'L" (3 new posts), "EATER NY" (12 new posts), "EATER DC" (3 new posts), "EATER CHI" (4 new posts), and "JOBS" (9 new listings).

Covers all things food-related, including celebrity chefs, food magazines, and restaurant trends.

GuyFieri.blogspot.com

The screenshot shows the GuyFieri.blogspot.com website. At the top, there's a banner with a photo of Guy Fieri and the text "Fans of Guy Fieri" and "For anyone who wants to keep up on what The Guy has goin' on...". Below the banner, the date "SUNDAY, MARCH 20, 2011" is displayed. The main content area features a post titled "Guy Fieri pretzels and pizza recipes in FN Mag" with a "food magazine" logo. The post text says: "I am, once again, behind on keeping up with Guy Fieri recipes via Food Network Magazine. Better late than never? If not, and you need your Guy fix of new recipes faster than I can provide them, consider a subscription? [Click here.](#)" There are social media sharing options for "0 tweets" and "Share". Below the text, it says "From Food Network Magazine: [January/February 2011](#)" and "Soft Pretzels - [recipe](#)". At the bottom, there's a photo of a stack of soft pretzels.

Social Networking Platforms

The “Big Three”



Social Networking Platforms



Restaurants and chefs tweet daily specials to patrons.

Top 3 Accounts:

1. KogiBBQ (57,105 followers)
2. Bryan Voltaggio (15,578 followers)
3. In-n-Out Burger (11,544 followers)



Restaurants are using Facebook to:

1. Update fans about business happenings
2. Communicate with their fans on a national and local level
3. Show off food and dining experience by using multimedia

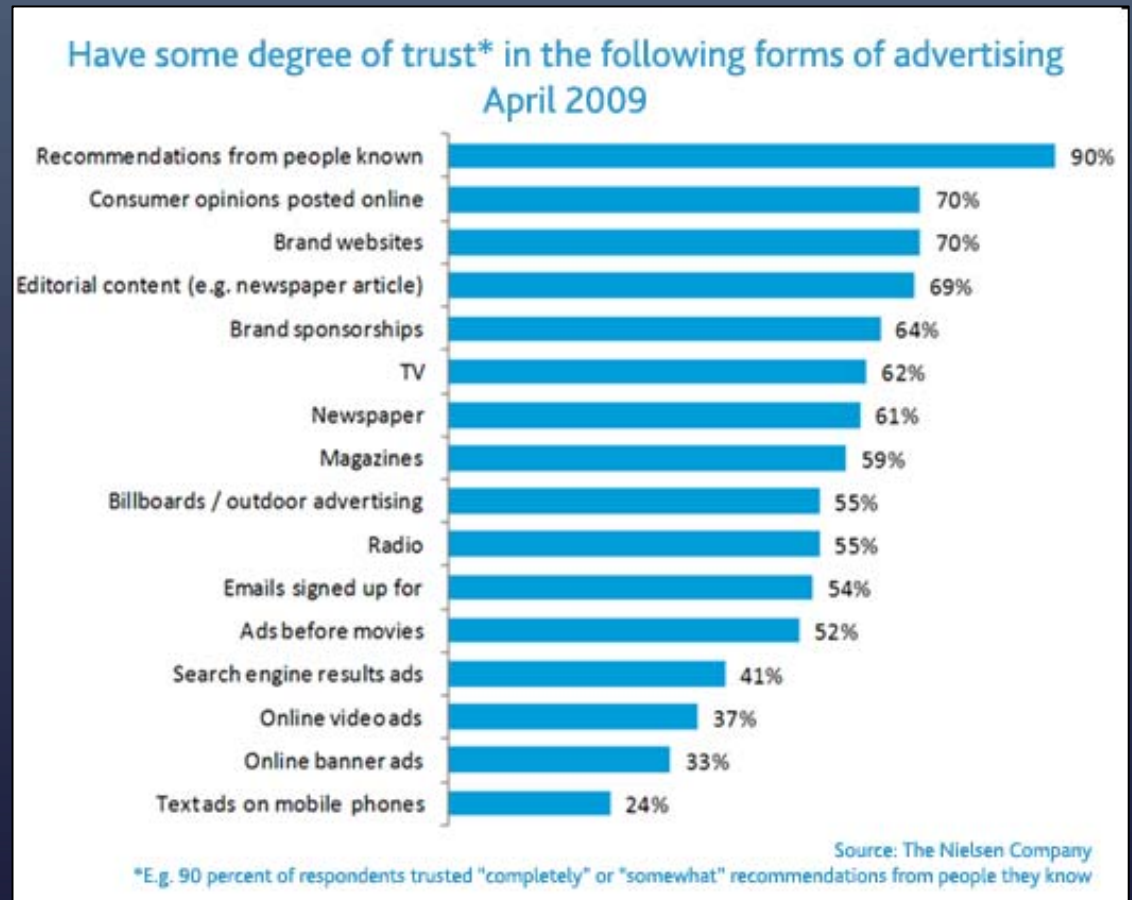


Restaurants are using LinkedIn to:

1. Develop business connections
2. Post jobs
3. Establish a presence in another social medium

Consumer Reviews & Recommendations Sites

- Recommendations from personal acquaintances or opinions posted by consumers online are the most trusted forms of advertising



Social Networking Platforms

- Favored food items can go viral with one picture
- Influenced by Big-name chefs, bloggers, urban hipsters, eater tweeters and journalists
- “Experts?”

TV may have started food fad trends, but food blogs and food-centric websites offer more possible trends at a faster rate.

EAT ITALIAN
The Online Community for Italian Food Lovers

SEARCH

HOME MEMBERS RESTAURANTS RECIPES GROUPS TABLE TALK MARKETPLACE BLOGGERS

Join the Community & Share your love of Everything Italian!

Share Recipes Start a Group
Review Restaurants Share a Story

SIGN UP TODAY!

ALREADY A MEMBER? | LOGIN

Username: *
Password: *
 Remember me

Create new account | Request new password

Connect LOG IN

Sign in using Facebook

Andrea Correale - Inspiration!

“Top Chef” Star Mike Isabella

Author - Michele Scicolone

Made By Hand and By Heart.

Di Palo's Fine Foods

Arnaldo Caprai Premium Wines

GRAFFIATO.

Read more...

THE CULINARY LOFT
The Premier Venue for Culinary Special Events

PR Media Events
Cooking Class & Tasting Building Events
Corporate Events
Client Entertainment
TV/Video Productions

2000 sq Private Loft
400 sq Double Kitchen
On-Site Event Planning
Guaranteed Event Services

Experience the Difference...
Call for an Appointment Today!

515 Broadway Suite 5A - 212.431.7425 - www.culinaryloft.com

Augmented Reality

- Junaio

- Augmented reality browser designed for camera-equipped mobile devices
- Point camera at a restaurant and informational text overlays onto real objects
- Learn about coupons, specials, and other offers



Mobile Payments

- New iPhones/iPads will have NFC Payment Features
 - Enables mobiles devices to be used for payment
- McDonald's teaming up with VISA to bring NFC technology to all 1,200 UK restaurants.



Location-Based Games

- Richochet Labs – QRANK
 - Trivia game
 - Play with friends; make new ones
 - Location-based events/contests
 - Can customize to include information about the venue



Gamification

- Gamification is the process of adding game mechanics and rewards to non-game contexts to boost engagement, loyalty and fun
- Best example for restaurants: Foursquare

Foursquare pairs LBS with social game play. The game rewards points and badges for checking in at bars and restaurants.



Deal-of-the-Day



- Across all deals and locations, the average Groupon drove 350 sales and \$8,750 in revenue during February, 2011
- There are no restaurant offers in the top 50 grossing Groupons

Why Social Media Creates Unique Issues?

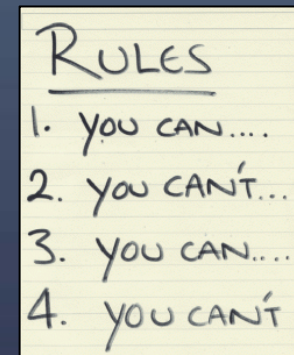
- The **internet, user generated content, location-based services and social networks** are:
 - causing a societal shift in the way consumers interact
 - changing the balance of power from traditional/big business to new/small businesses (UGC, Distribution)
 - driving new business models (“**freemium,**” **virtual goods, virtual currencies**)
- Companies, including traditional media companies, need a digital media strategy, they cannot simply digitize their existing content and expect great things

Why Unique Legal Issues?

- Not just user/website interaction
 - Platforms/third parties/users
 - Multiple interactions
 - Need to protect business/third parties/users
- Unique Business Models
 - UGC – DMCA issues
 - Points/Currencies – regulatory and property rights issues
 - Location-based - privacy issues
- Greater Interplay Between Business/Technology/Law

Overview of Some Legal Issues

- Gamification/Points/Virtual Currency
- Terms of Service/EULA
- Intellectual Property
- Employment/Social Media Policies
- Questions



Gamification

- Definition: Use of game mechanics for non-game purposes
 - leader boards
 - Points
 - status (expert)
 - badges
- Legal Issues
 - FTC Guidelines on Endorsements
 - Experts
 - CARD Act

FTC Endorsement Guidelines

- Covers consumer testimonials, such as reviews or recommendations endorsing a product or service on any social media site, not just blogs
- Need to disclose connection between endorser and advertiser – anything of value, including points
- *Need to advise the consumer giving the testimonial that this connection should be disclosed, and have procedures in place to try to monitor the consumer's postings for compliance*

Experts

- When you represent an endorser is an *expert*, endorser's qualifications must in fact give the endorser the expertise that he or she is represented as possessing with respect to the endorsement
- Potential gamification issues with leader boards, badges and expert status to the extent that this implies an "expert" status that the user does not actually possess.

Federal Card Act

- Expiration of Points/Virtual Currency/Gift Cards
- Service Fees
- Disclosure to Consumers
- Enforcements are Starting

The CARD Act – What is covered

- CARD Act regulates (1) Gift Certificates, (2) Store Gift Cards and (3) General-Use Prepaid Cards, which include cards, codes and other devices
- CARD Act includes the following exclusions for cards, codes and other devices:
 - (1) used solely for telephone services
 - (2) reloadable and not marketed or labeled as a gift card
 - (3) a loyalty, award, or promotional card (if required disclosures are made)
 - (4) not marketed to the general public
 - (5) issued in paper form only
 - (6) redeemable solely for admission at events or venues or to obtain goods and services in conjunction with admission to such events or venues
- Less formal exclusion for certain virtual currency accounts and “experience” cards

The CARD Act – What it does

- CARD Act regulates fees and expiration dates:
 - Prohibits dormancy, inactivity and service fees unless the card, code or other device has been inactive for 12 calendar months
 - Permits only 1 fee per month
 - Minimum expiration date of 5 years from date of last load
 - If card, code or other devices is assessed fees or expires, CARD Act requires particular disclosures prior to purchase, on the card and with the card
 - Clear and conspicuous disclosures are required

The CARD Act – Why you need to comply

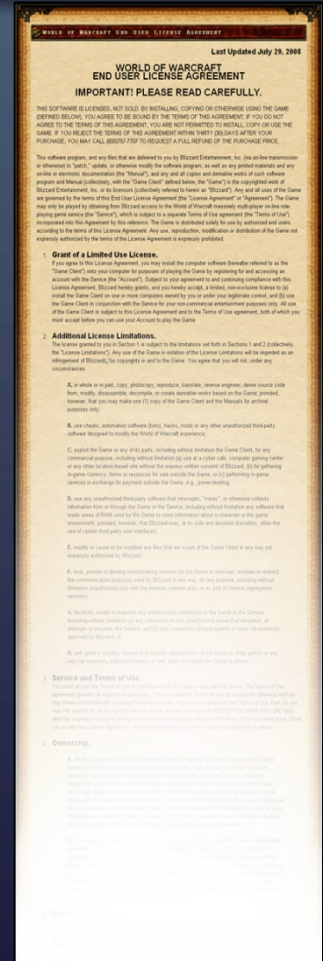
- Federal law (Reg E):
 - Private right of action by individuals for actual damages and penalties (strict liability)
 - Governmental agencies may also enforce (FTC, AG)
 - Reg E penalties for willfulness or negligence
- State Law:
 - State unfair competition laws generally permit a consumer to bring a cause of action individually or on behalf of a group of individuals for violation of the federal and/or state gift card law for actual damages, restitution, injunctive relief
 - Other state laws may provide consumers with a private right of action for actual damages and penalties (e.g., California's Consumers Legal Remedies Act)

The CARD Act – Litigation

- First class action under the CARD Act filed on January 21, 2011
- *Ferreira v. Groupon, Inc., Nordstrom, Inc.*, U.S. District Court, Southern District of California
 - “Plaintiff Class” – All persons who purchased or acquired a “groupon” gift certificate from Groupon with an expiration date of less than five years from the date of purchase
 - Nationwide class
 - “Defendant Retail Class” – **All persons or entities that contract and/or partner with Groupon** to promote their products and/or services using “groupon” gift certificates with expiration dates
 - Alleges violations of CARD Act, and California’s unfair competition law, false advertising law and Consumers Legal Remedies Act
 - Seeks declaratory and injunctive relief, restitution, compensatory and punitive damages, prejudgment and post-judgment interest, and attorney fees and costs

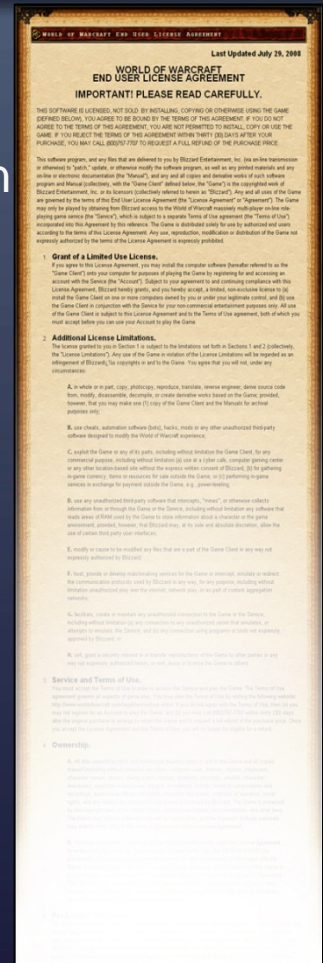
Terms of Service Agreements

- TOS critically important for all websites ... but there are some unique issues for Social Networks, Virtual Goods, Virtual Currency, User Generated Content, Location-based service, etc.
- **One size does not fit all – need careful consideration and customization**
- Points/Virtual Goods/Virtual Currency
 - Ownership v. license
 - Right language to avoid liability if user account terminated



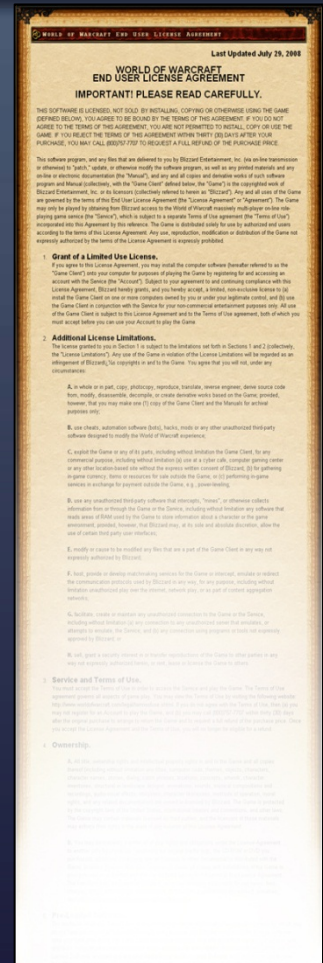
Terms of Service Agreements

- Example: Bragg v. Linden Lab
 - Dispute over right to virtual property upon account termination
 - Court informally acknowledged a right to virtual property
- Class Action
 - Conflict between TOS/Advertising
 - need to coordinate business/legal strategy



Terms of Service Agreements

- IP issues
 - Ownership/licensing - UGC
 - Qualify scope of licenses/conditions - **to get copyright infringement instead of breach of contract (MDY v. Blizzard)**
 - **(Link to Case Advisory)**
- Impact on Those Not Bound by Terms
 - DMCA
 - Gmail litigation



Terms of Service - Exploits

Blizzard v. MDY

- **At Issue:** Using a “Bot” – an Automated Program For Playing World of Warcraft
- Enabled Users to Progress through Skill Levels and “Farm Gold” – Some People Then Sold Avatars with the Enhanced Skill Levels, and Sold Gold
- **TOS and EULA well drafted** - Prohibited Bots, Gold Farming, and Account Sales, Revoked Software License for Certain Violations

Terms of Service Agreements

- Need to enable modifications – consider impact on users
- Draft carefully – you can write anything, but may not be enforceable
- *Harris v. Blockbuster* - if you go to far, courts will not enforce
- Other issues

Need Comprehensive Social Media-Focused IP Strategy

Copyrights

- Timely Filings
- Work for Hire
- DMCA



Patents

- Many patents being filed
- Many misperceptions about patentability (e.g., business methods)

Trademarks



- New Trademark Office Class Descriptions relating to virtual goods/currency
- Trademarking avatars
- Policing/Enforcement strategies

Copyrights

- Timely Filings - many companies overlook the value of timely filing copyright registrations
 - statutory damages
 - attorneys' fees
 - ([Link to Advisory](#))
- Work for Hire – if you rely solely on work for hire, you may not own the IP that you think you do
 - ([Link to Advisory](#))

User Uploaded Content

- Many services enable users to upload content
- Hosting infringing copyrighted content can create liability for contributory infringement
- Digital Millennium Copyright Act provides some protections – if you fully comply!
 - ([Link to Advisory](#))
 - ([Link to Advisory](#))

DMCA – User Uploaded Content

Service Providers

Limit liability

Must strictly comply

Content Creators

Facilitates Take
Downs

Must strictly comply

Misuse liability

DMCA – User Uploaded Content

- Need to register agent with Copyright Office – Name, all URLs
- Make agent info available through service, in location accessible to the public
 - In TOS?
- Policy to Terminate Repeat Infringers – adopt, reasonably implement, inform subscribers and account holders of policy for termination of repeat infringers
- Other Key Issues
 - Polices for handling notices – non compliant notices
 - automated notices
 - no direct financial gain
 - accommodation/n interference with technological measures 512(i)(2)

DMCA – User Uploaded Content – Content Owners

- Notices
 - Requirements of proper notice by content owner – to trigger obligation for takedown
 - Liability for notice without good faith basis for copyright infringement
 - need to consider fair use
 - ([Link to Case Advisory](#))

Patent Issues

- There are many myths and misunderstandings about patents
- Rapidly Growing Number of Patent Applications Being Filed
- Patent Infringement lawsuits are growing

Patents

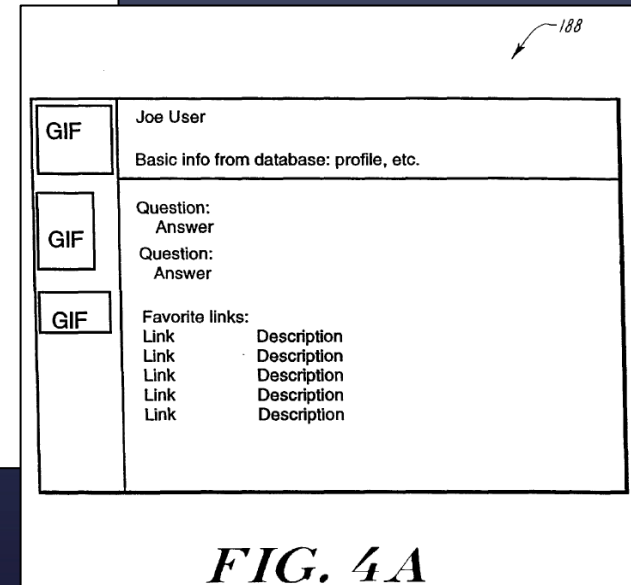
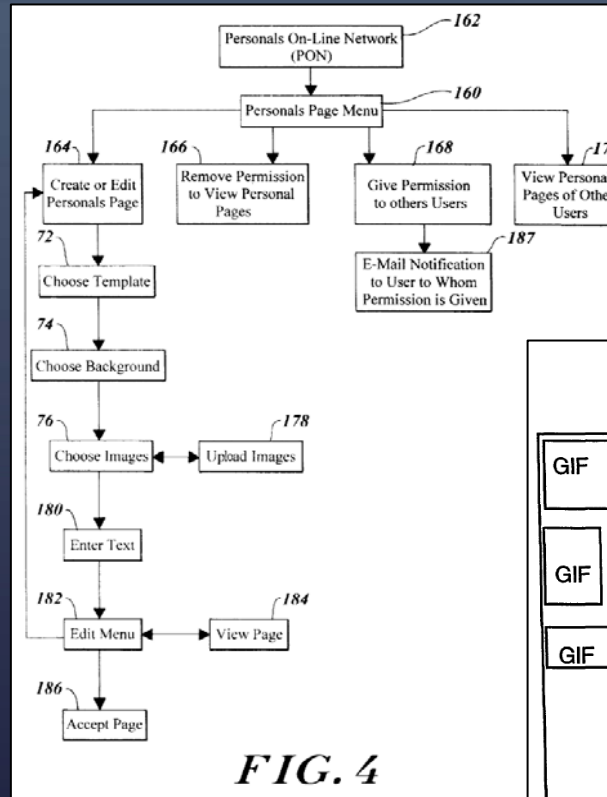
- Patents
 - Design/Utility Patents
 - What can you patent?
 - Implications of TOS on patent rights
 - Drafting Valuable Patents
 - Increasing Patent Litigations

Patents - Strategy

- Important to understand what can be patented
- Need to assess patentability at multiple levels and from multiple perspectives (methods, processing, systems, components, tools, features, functions, etc.)
- Need to understand various ways in which you can claim an invention and the ramifications of different ways in which patent claims are drafted
- Need offensive and defensive component

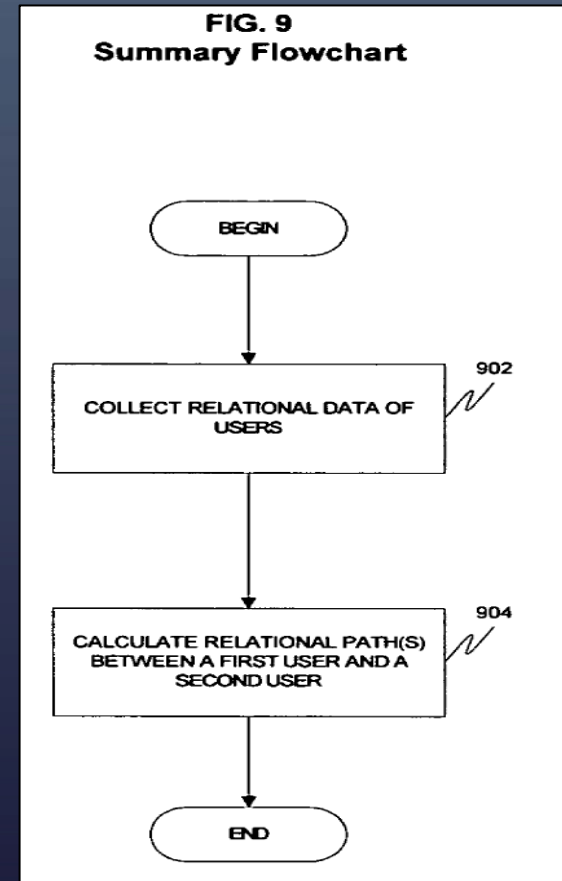
Patents

- Phoenix Media
 - U.S. Patent No. 6,253,216 (Method and apparatus for providing a personal page)
 - Ongoing suit.
 - Figures (4 and 4A)



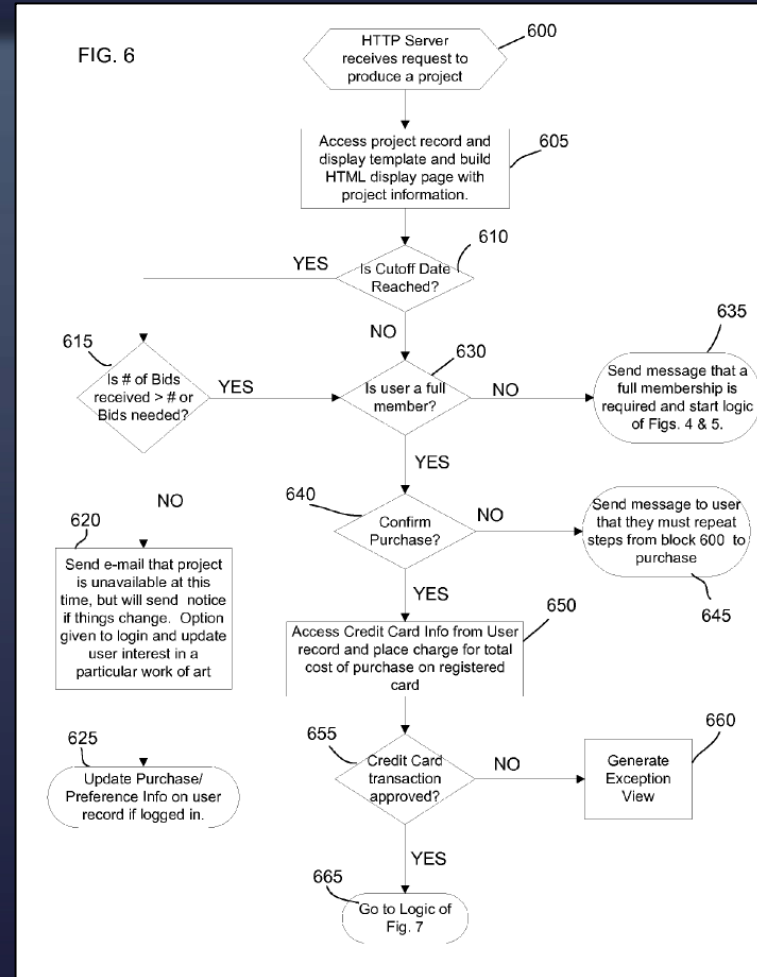
Patents

- Friendster
 - Acquired by Facebook for \$40 Million.
 - First issued – U.S. Patent No. 7,069,308
 - FIG. 9



Patents

- MobGob
 - Ongoing litigation with Groupon.
 - U.S. Patent No. 7,672,897
 - FIG. 6



Drafting Valuable Patents

- *BMC v. Paymentech* - invention **as claimed** related to a payment method that required the cooperation of a merchant, Paymentech, and a debit network
- Court held that Paymentech's involvement in the claimed method was not **direct** infringement because a direct infringer must perform **every step** in the claimed method
- also found no **indirect** infringement because no one party performed all claim steps
- The burden is on the patentee to draft claims that are infringed by a single party
- The court noted that BMC could have drafted its claims to focus on one entity. However, BMC chose instead to have four different parties perform different acts within one claim
- Several more recent cases

Patent Example

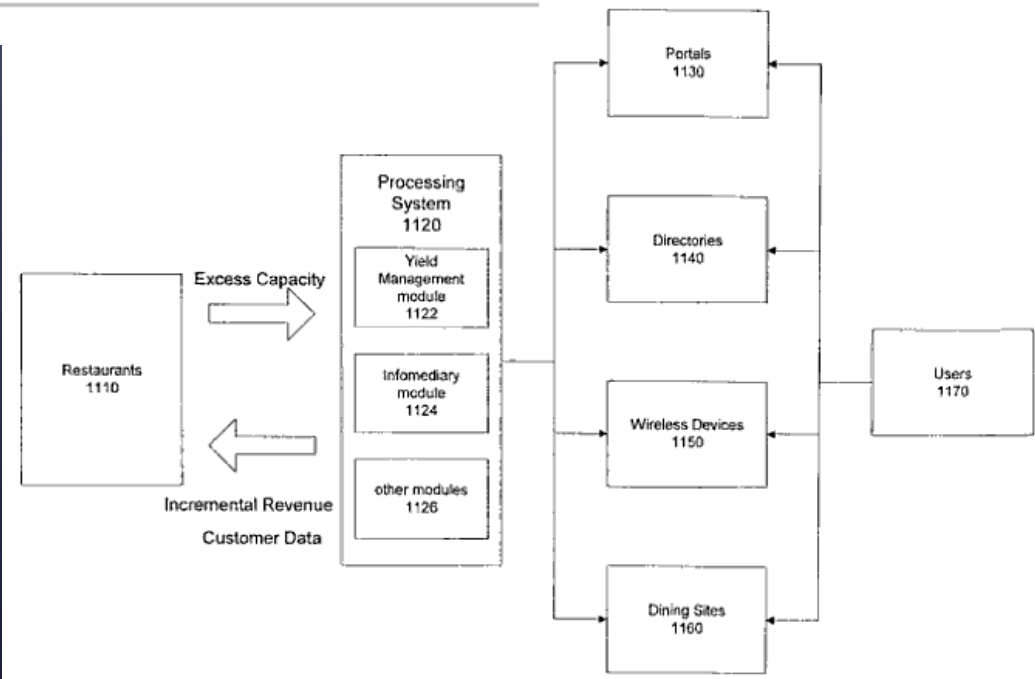


US006741969B1

(12) **United States Patent**
Chen et al.

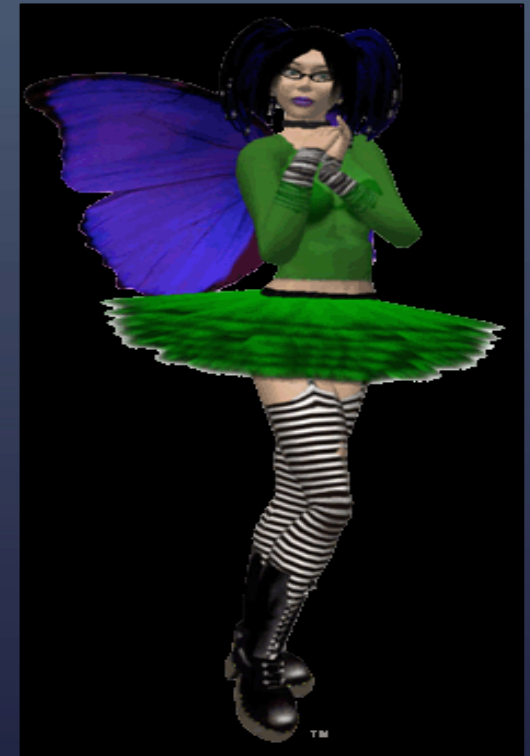
(10) Patent No.: **US 6,741,969 B1**
(45) Date of Patent: **May 25, 2004**

- System and method for reducing excess capacity for restaurants and other industries during off-peak or other times



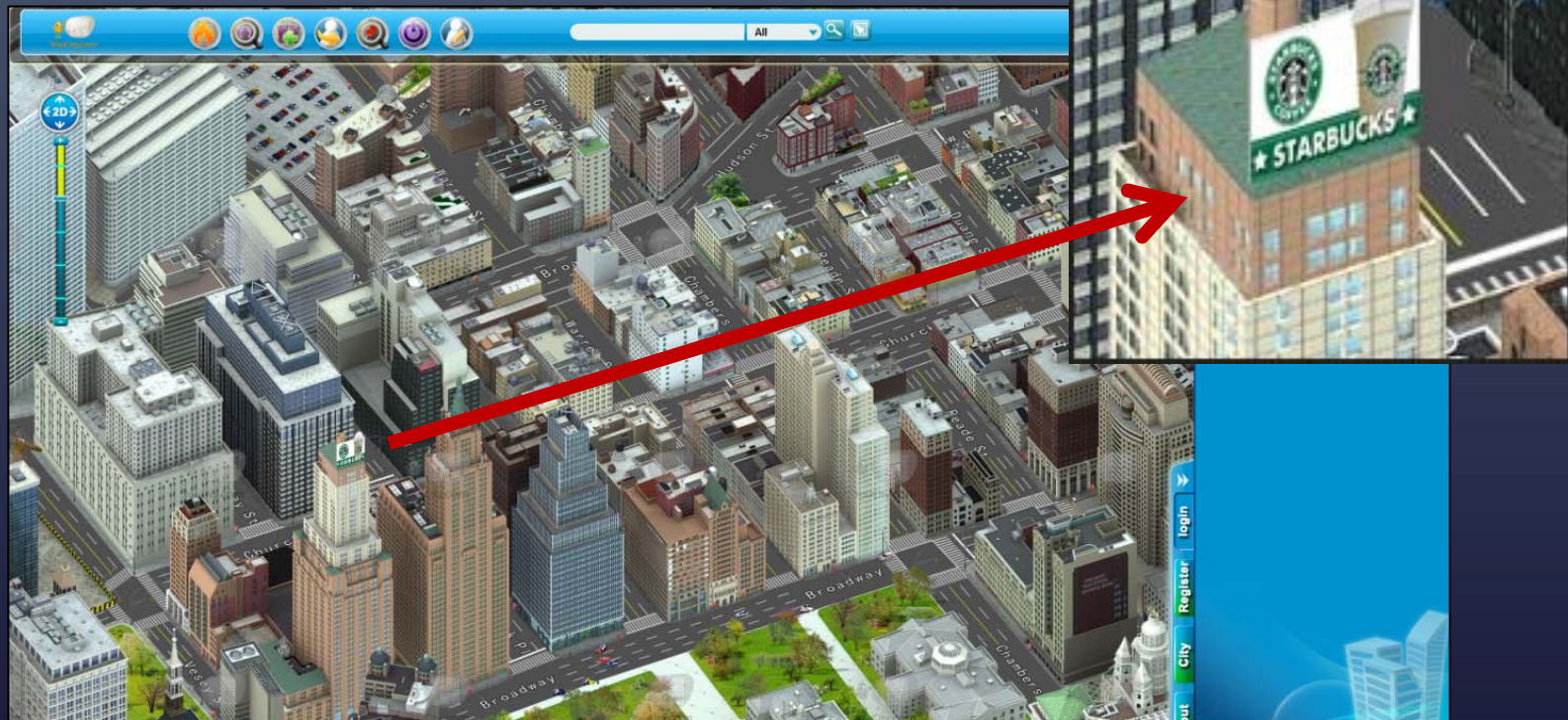
Trademarks

- Should your trademark registrations cover digital goods?
 - Does description of goods/services for real world items cover virtual goods/services?
 - Trademark Classes
 - Class 9 - Downloadable virtual goods, namely, computer programs featuring {specify nature, type, e.g., articles of clothing} for use in online virtual worlds
 - Class 35 - Retail store services featuring virtual goods, namely, {specify type, e.g., clothing} for use in online virtual worlds
- Trademark for Avatars



Trademarks in Mirror Worlds

Users can add real-world trademarks, famous buildings, stores, landmarks, artworks, etc.



Trademarks - Mirror Worlds

- Google – recently published patent for putting ads on virtual billboards
- This can cause potential issues with TM infringement for buildings, famous places and business, among other things



TM litigation - Likeness of Real World Business

- Recent case involving alleged TM infringement for use of likeness of real business in virtual world game

E.S.S. Entertainment 2000 v. Rock Star Video, ___ F.3d ___ (9th Cir. 2008)
([Link to Case](#))



Employment/HR


- Legal Issues
 - Employees use of Virtual Worlds and Social Networks at Work (personal use)
 - Employees use of Virtual Worlds and Social Networks on Behalf of Company
 - Twitter and Blogs
 - Employment Law Compliance
 - ADA Compliance
 - FTC Endorsements issues
- Develop, Implement and Enforce Social Media Policies

Social Media Policy

- Many readily apparent issues
- Personal or business use
- Recommendations/Reviews – Own Products/Others
- Proprietary or Confidential Information
- TOS
- Avatar Policies
- “Friending” subordinates
- Use in hiring/firing

Pillsbury's Social Media, Entertainment & Technology Team

10
Frequently
Asked Questions
About
Virtual Worlds



Social Media, Entertainment & Technology

A confluence of factors is radically transforming the way that people interact socially, the way businesses develop and maintain relationships, the power that individuals have to impact consumer and business decisions, and the value users add to the contents of websites and other online services. A number of social media technologies and platforms are maturing simultaneously, creating a seismic shift in online social and commercial activity.

These are some of the applications, technologies and business models behind the social media revolution that are transforming the ways people interact and how business is being conducted:

- Applications**
 - Social media applications
 - Location-based services
 - Mobile applications
 - Online/social games
 - Virtual worlds
 - Minor worlds
 - Blogs
 - Consumer review/recommendation sites
- Technologies**
 - Social networking platforms
 - Location-aware devices
 - Smartphones
 - Augmented reality
 - Content authoring tools
 - Broadband
 - Wireless
- Business Models**
 - Micro-transactions
 - "Freemium" models
 - Virtual goods
 - Virtual currencies
 - Mobile payments
 - Gamification (use of game mechanics for non-game purposes)
 - User-generated content-based models

Pillsbury Winthrop Shaw Pittman LLP www.pillsbury.com

- Regular Client Alerts
- Studying/Following Emerging Issues
- Industry Specific Fact Sheets

Virtual World Law Blog <http://www.virtualworldlaw.com/>

Pillsbury's Social Media Team

- Pillsbury is one of the largest, full-service US law firms, with market-leading strengths in the energy, financial services, real estate and **technology** sectors, with nearly 800 attorneys, in 14 offices in the US and abroad
- We are the first major law firm to offer a **Social Media, Entertainment & Technology Group and Virtual Worlds and Video Games Team**
- Our multidisciplinary team includes over 35 lawyers who have hands-on experience with social media, virtual worlds and games and a broad array of legal backgrounds
- Our team understands the business and technology issues involved with social media – we conduct regular and extensive internal training to all team members to stay abreast of cutting edge legal and business issues in the industry
- Pillsbury's team includes attorneys who are at the forefront of issues central to the social media, virtual worlds and video games industry
- We **proactively** advise clients – we anticipate trends and offer a 360-degree perspective on business and legal issues—helping you take greater advantage of opportunities and better mitigate risk.

Thank You

Questions?

Social Media, Entertainment & Technology Team
Pillsbury Winthrop Shaw Pittman

James Gatto

james.gatto@pillsburylaw.com