



A.S. Pratt & Sons

Dear Customer,

E-commerce law continues to evolve at a rapid pace. The enclosed new materials provide you with the latest information on this area of law, which affects most commercial transactions taking place today. To protect your interests or those of your clients, you need to stay up to date on these important changes. This update to *The Law of Electronic Commercial Transactions* provides timely coverage of the following:

- Discussion of the first U.S. appellate decision on enforcing an open source license. See ¶¶ 2.15[6], 8.03[2].
- Holding by the Second Circuit that an automated system that created a digital copy of a work at the request of a customer did not expose the system operator for direct copyright infringement and that momentary copying in a computer was not sufficient to constitute making an actionable copy. ¶¶ 2.15, 2.16.
- New standard set by Second Circuit regarding when a public performance or display occurs in an automated system. ¶ 2.16.
- Discussion of case law analyzing when making a work “available” on a peer-to-peer or similar system infringes the copyright of the work. ¶ 2.16[8].
- Second Circuit holding that Google’s use of trademark terms to trigger keyword ads is a use in commerce for purposes of trademark infringement. ¶¶ 2.20[6], 2.28.
- Extensive analysis of the revised federal Computer Fraud and Abuse Act, reflecting changes that impact the availability of the statute to provide for civil remedies against unauthorized access to a computer or online site. ¶ 3.05[2].
- An extensive analysis of the issues involved under various laws in establishing sufficient reliability of electronic records. ¶ 4.03[6].

- Conclusion by Sixth Circuit that an online system allowing parties to contact other persons was a service and did not involve a sale of goods, thus giving no basis for a breach of warranty claim. ¶¶ 8.01[4], 8.10[6][b].
- Finding by a court that the durability of a posting on the Internet creates greater adverse impacts on a person’s liberty and privacy interests than would publication in other media. ¶ 8.02[1].
- District court holding that fair use issue must be considered under good faith standard for issuing a takedown notice for allegedly infringing content under DMCA 512. ¶ 8.04[4][a].
- Discussion of new federal law requiring registration of the Internet identifiers of convicted sexual offenders and allowing social networking sites to compare that data with their data to identify offenders using the site. ¶ 8.08[7].
- Holding by lower court (later affirmed on other grounds) that notation on materials submitted online cannot alter the terms of an online contract where provider offered its services only under its specific terms. ¶ 8.10[7].
- Discussion of new cases involving whether or to what extent the federal Constitution precludes state or federal laws that restrict data aggregators collecting data. ¶ 12.01.
- A Texas court distinguishes privacy and data protection concepts in limiting the scope of a privacy exception to an open records law. ¶ 12.02[1].
- Computer owner had no expectation of privacy in files in the “download” file which could be accessed by any peer-to-peer software user. ¶ 12.02[2].
- Extensive discussion of personal data protection laws that apply to employers. ¶ 12.04[3][b][ii].
- Discussion of a new Canadian ruling about the extraterritorial effect of Canada’s privacy law, applying to transactions between Canadian and U.S. companies. ¶ 12.08.
- Discussion of recent case holding that GLBA places a direct obligation on unaffiliated third parties not to redisclose information, even if the third party is *not* a financial institution. ¶ 12.10[1].

- FTC levied a fine of \$1 million in *U.S. v. Sony BMG Music Entertainment* for the online site's failure to comply with the Children's Online Privacy Protection Act (COPPA) by not providing sufficient notice of what information was being obtained from children and, among other things, not obtaining valid parental consent. ¶ 12.11.
- Discussion of new FTC positions and new state laws regarding use of a social security number as a means of verifying a user's identity. ¶ 12.14.
- Federal appellate court in *U.S. v. Forrester* holds that e-mail and Internet users have no expectation of privacy in the to/from addresses of their messages or the IP addresses of the web sites they visit. ¶ 12.15.
- Updated and revised discussion of the application of the federal Wiretap Act to e-commerce contexts. ¶ 12.15[1].
- Analysis of the PROTECT Our Children Act of 2008 which creates a duty to report the discovery of child pornography. ¶ 12.15[3][c].
- Discussion of new laws on the use of genetic information, including a federal law focused on use of genetic information to discriminate in health insurance and employment. ¶ 12.20[1][2].
- Analysis of recent FTC steps that target the failure to conduct reasonable authentication practices online as an unfair act or deceptive practice. ¶ 16.02[2][b].
- Analysis of recent amendments by the Department of Education to Family Educational Rights and Privacy Act data security rules. ¶ 16.06[3][f].
- Discussion of a Massachusetts state regulation that imposes, among other things, a duty that every "person that owns, licenses, stores or maintains personal information about a resident of the Commonwealth shall develop, implement, maintain and monitor a comprehensive, written information security program applicable to any records containing such personal information." ¶ 16.08[1].

Our goal with *The Law of Electronic Commercial Transactions* is to help you keep up to date in this rapidly changing and complex field. Please let us know how we are doing. If you have questions or comments, you can call us at 1-800-572-2797 or visit us on the web at www.aspratt.com.