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HTLI Hosts "Privacy Crimes: Definition and Enforcement"

By Brent Tuttle
Editor-in-Chief

On October 6th, SCU Law's High Tech Law Institute, the Markkula Center for Applied Ethics, and the Santa Clara District Attorney's Office hosted the first ever "Privacy Crimes: Definition and Enforcement" half-day conference. The Electronic Frontier Foundation (EFF), the International Association of Privacy Professionals (IAPP), and the Identity Theft Council (ITC) also sponsored the free event. It brought together practitioners, academics and students to discuss several important questions that both civil and criminal legal professionals face in the digital age. For example, what is a privacy crime? What is being done to enforce the laws addressing these privacy crimes? Furthermore, how can we balance privacy interests in the criminal justice system?

After opening remarks from Santa Clara District Attorney Jeffrey Rosen, Daniel Suvor gave the keynote address. Mr. Suvor is the Chief of Policy to the Attorney General of California, Kamala Harris, and former Senior Director of the Office of Cabinet Affairs at the White House. Mr. Suvor discussed his work with the California Attorney General's Office and elaborated on the AG's stance regarding the current state of privacy crimes.

Prof. Susan Freiwald speaks during "What is a Privacy Crime?" panel. Photo: Eric Goldman

Mr. Suvor spoke of the California AG's efforts to combat cyber-crimes. He noted that California was the first state to have a data breach notification law, implemented in 2003. Mr. Suvor also discussed a recent settlement between the CA Attorney General and Houzz, Inc. that is the first of its kind in the United States. Among other things, the terms of the settlement require Houzz, Inc. to appoint a Chief Privacy Officer who will oversee the company's compliance with privacy laws and report privacy concerns to the CEO and/or other senior executives.

The California Attorney General has also increased privacy enforcement through the creation of an E-Crime Unit in 2011 to prosecute identity theft, data intrusion, and crimes involving the use of technology. To date, the E-Crime Unit has conducted several investigations involving piracy, shutting down illegal streaming websites, and online counterfeit operations. Mr. Suvor noted a recent area of priority to the Unit: the prosecution of cyber exploitation, commonly known as "revenge porn."

Mr. Suvor clarified that the AG's Office adamantly believes the term "revenge porn" is a misnomer. The Office takes the position that cyber exploitation is more appropriate for two reasons. First, porn is generally created for public consumption, whereas "revenge porn" was not created with a public audience in mind. In addition, the Office does not give any credence to the notion that the publisher of non-consensual porn has any legitimate interest in vengeance

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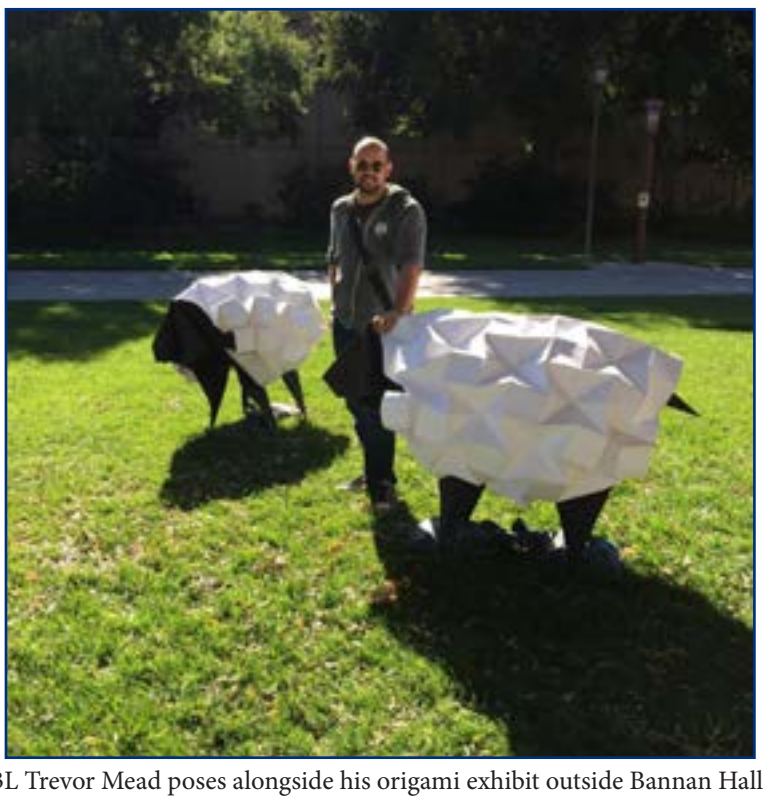
SCU Law Student Showcases Origami with On-Campus Exhibit

By Flora Kontilis
Staff Writer

While I thought it was a logical prerequisite, he doesn't fold paper airplanes. "I never mastered the skill," says 3L Trevor Mead. Even so, he doesn't fall short. Ironically enough, Mead is a bona fide origami artist, creating anything from koi fish made from dollar bills, to a true-to-size horse made from an 18-foot by 18-foot sheet of paper – a project that took nearly seven hours to complete. Yet you probably recognize Mead's more recent work: life-sized origami sheep that dotted the Santa Clara University Mall.

"So many people asked what the sheep were saying about the law school and its students!" Mead recalls from his daytime exhibition. "Their sole purpose is to delight. That's it! Anything more is projecting [and revealing] what the viewer wants," he says. Fair enough. But what does Mead want? What's the takeaway from giant origami? To him, the sheep "are a reminder how much there is to life outside of law school." So the "big picture" message is an invitation to take a step outside of that space. Ultimately, Mead's craft is about finding "work-life balance. I'm passionate about protecting this," he states.


3L Trevor Mead poses alongside his origami exhibit outside Bannan Hall

A Denver native, Mead's legal interests focus on privacy law and copyright licensing for independent artists. He boasts a strong academic and professional resume: while earning a Privacy Law Certificate through the High Tech Law Institute, he has worked in the privacy industry for almost two years as an intern at TRUSTe. Prior to law school, he pursued a career in sales, simultaneously providing business and technology consultation services for over six years in Denver.

How does giant origami come into this? According to Mead, "it's a very complimentary hobby to law, because it's nothing but an exercise in precision, concision and perseverance. If that doesn't describe what we are doing in law school, then I don't know what does." For instance, consider folding koi fish, a special subject to Mead. It was his first complex dollar-bill fold, one he later scaled-up into giant wall art during his 1L year. The project took 15 hours to fold, ten of that dedicated to tedious pre-creasing to form the basis of the design.

Yet, looking at Mead's impressive professional and academic background, his craft comes back to finding work-life balance. For Mead, giant origami is a "very Zen activity"; one that comes down to "protecting personal time by refusing to let go of that part of myself, despite the pressure from law school."

In addition to consistently promoting this idea of fostering "you-ness," Mead admits there's more to giant origami than just the final product: "what I love about origami is its transient nature – creating something and releasing it into the world, knowing it will fade away. It's a personal meditation on acceptance and release." On that note, Mead's art is both solitary and social. He remembers setting up in Boulder's Pearl Street Mall, a familiar stomping ground in Colorado, where he would "just start folding. It was a great way to talk to people, offer a glimpse into the artistic process, and provide a sneak peek of the next big project," Mead recalls.

While he enjoys talking with and meeting different spectators, Mead also finds inspiration from fellow artists—especially, as Mead points out, since the art has advanced significantly in the last 20 years. Technology has transformed origami in unprecedented ways, a selling point for Mead. "There's an entirely new level of complexity! New designers are developing and mastering new techniques," he says. To stay current with modern trends, Mead joined a local maker space that serves as a communal workshop, with access to anything from laser cutters, to 3D printers, CNC routers, and more. Mead says of the maker space, "it's where you turn ideas into product. The space provides the inspiration and tools necessary to get there."

Even as Mead grasps new resources to make leaps and bounds in origami art, he reminds me that it's not about being an expert. Rather, in the same spirit he approached law school, he finds it motivating to be around like-minded beginners. "Regardless of what we did before, we are all novices here," Mead says. "It's refreshing to be a novice again." As he continues, Mead emphasizes the value of peers to collaborate with and to support on this professional journey. This concept ties closely with artistry. Mead elaborates, "creativity is not an innate skill. It's learned, like anything else; it's only a question of whether you choose to cultivate it or not."

Rumor Mill with Dean Erwin

By Susan Erwin
Senior Assistant Dean

Happy October!

Before going into this month's rumor, can I just put in a plug for the last edition of the Rumor Mill? Own It! Own your behavior at the Halloween Bar Review! Own your appropriate and modest costume! Own your reputation . . . . (see below)

Dear Rumor Mill,

Just a couple of months after raising our hands and pledging to be ethical and honest, we had SBA class rep elections. I've heard rumors about students who were stealing treats and other tools of bribery from each other and co-opting them for their own campaign. They were also defacing each other's campaign material. Can they get expelled for this dishonest behavior?

Thanks for the note. I have a couple of responses.

First, I will check in with the SBA leadership and see if they were aware of these issues. We think it's important that student organizations be run by the students. You can't learn to be Lawyers who Lead if you never get to be in charge. We have a graduate who is now legal counsel at a local startup, who used to come back every year and talk to our students about his experiences as a new lawyer. Jeff would share how in his first job interviews, when asked to talk about his experience, he could share stories about how he resolved conflicts between students, how he organized large ski trips and community service experiences and how he motivated students to get involved. He talked about how, in his first few years on the job, he relied on the lessons learned as a leader of students to make daily decisions. This is all good stuff. If things go well, you learn something. If things go badly, you probably learn more. If people lie and cheat, you learn a lot about them as individuals. So, since this is an SBA issue, we would leave it to them to figure out what to do.

This issue also opens up the opportunity for me to say again that your reputation starts now. Stealing someone's cupcakes and passing them off as one's own may seem minor, but maybe it's a glimpse into what a person thinks is funny or acceptable. Maybe people are a little more careful around the cupcake thief - - who's to say that your twinkies won't be next?!? What if the poster defacer is in court one day and the opposing counsel is the victim of the graffiti in question? As a lawyer, your career will be made or broken based on your reputation. Protect it! OWN IT!

And the last thing I will say on this topic is please be kind to each other. We are a community. Like it or not, these are your people. Be nice to your people. We all have our own challenges and problems. Real life happens and it can be a real beast. Law school doesn't always leave you a lot of free time to deal with everything else in the world. At least here at the law school, your people understand what you are going through. At least here, we should understand that sometimes our classmates could use a little bit of understanding or support or just a little bit of kindness. We support each other at SCU. We don't steal from each other, we don't undercut each other. We need to respect and care for each other. Please be nice to your people.

If you or someone you know needs help, please walk them up to see us in Student Services or walk them over to Cowell Health Center to make an appointment with a counselor. Talk to a professor. Talk to your people. And remember . . . we are your people.

Heard any rumors lately? If so, send me an email – serwin@scu.edu

Cuba: Open For Business, But Beware

By Jodi Benassi
IP Editor

At some point in the not too distant future, the U.S. will end its embargo against Cuba and the two countries will establish "normalized" relations once again. It's inevitable. Since the joint announcement by the U.S. and Cuba last December, there has been heightened interest in commercial, cultural, and educational opportunities between the two nations. U.S. corporations are filing for trademarks in Cuba and multi-national hotel chains are setting up shop on the Malecón. Where you stay, where you eat, and what you buy will all change in Cuba within the next five years, but what you watch and read while you are there, will assuredly remain in the hands of the state.

Cuba's recent foreign investment framework, outlined in Decree Law No. 118, offers insight into the way Cuba's government sees its future. Decree 118 allows foreign corporations to establish businesses in Cuba, subject to approval by the Council of State and Council of Ministers. The new law states that foreign investment may be authorized in all sectors, except for healthcare services, education services, and the armed forces. Although Decree 118 doesn't expressly exclude the media industry, it doesn't need to because it's implied that any private media ownership is preempted by the Constitucion De La Republica De Cuba.

The general rule of property law in Cuba is that the state owns all property, real or personal, or as the Constitucion says, all property is "socialist state property which is the property of the entire people." As we see with most laws, the general rule is subject to a number of exceptions. The Constitucion allows for private ownership rights of intellectual property; private companies as a separate entity from the person; and personal dwellings, with the right to inherit a home or farm. The Constitucion further allows for ownership of small farms and cooperatives, but no land leases or mortgages on such lands, or any acts which permit a lien on the land or grant to private individuals the right to a small farmer's land.

According to Article 53 of the Constitucion, the press, radio, television, the film industry and other mass media are state property and cannot, in any case, ever become private. The Article goes on to say that this ensures the exclusive use of the media for society's interests, which translated means, within the objectives of the State.

Cuban media is tightly controlled by the government and all journalists must abide by the limitations on speech or face penalties of up to three years in prison. This notably includes any statements against the government and perceived insults of government officials. According to Reporters Without Borders, Cuba is the only country within the Americas not to allow independent press. The Cuban authorities also control the coverage provided by foreign journalists by cherry-picking who gets accreditation and by expelling those whose reporting is regarded as overly negative.

Concentration of media ownership, by an exclusive few, limits diversity of viewpoints. Without heterogeneity, news becomes so processed that it's lost all of its nutritional value. While the new economic reforms will create many new business opportunities, Cuba is fully committed to remaining a communist state when it comes to any broadcast media. Cuba is quickly changing and it's a future is unfolding in many exciting ways, but private media is unfortunately not one of them.

All Hail The Ride Share King

By Stephanie Britt
Staff Writer

On September 9th, New York Supreme Court Justice Allan Weiss ruled that the electronic-hails utilized by rideshare apps such as Uber and Lyft are legal despite NY Taxi's claims that they create unfair competition. This ruling has effectively rendered the $10 billion industry behind taxi's gold medallions worthless. Justice Allan Weiss wrote that, "Any expectation that the medallion would function as a shield against the rapid technological advances of the modern world would not have been reasonable, in this day and age, even with public utilities, investors must always be wary of new forms of competition arising from technological developments." While it is refreshing to see that the country still upholds the values of a free-market economy, it also brings to question many other issues regarding the surge in rideshare programs. It is argued that permitting e-hails rather than the iconic whistle to hail a cab simply acknowledges that the industry must adapt to recent technologies, however, there are considerable consequences that are not being addressed by the courts.

It is both impressive and ironic that current ride-share apps have utilized the development of technology to provide transportation services without owning a single car. The fact that companies such as Uber and Lyft can provide transportation without any of the traditional overhead costs of purchasing a vehicle, imposing background checks on drivers, or the recurring costs of maintaining the vehicles leads to a business model that is highly profitable. Despite the minimal risk that the companies face in their investment in the ride-share sector, there is also the question of whether the free-market approach toward these services recklessly disregards the rights that employees and clients should be entitled to. Does the protection of free-market ideals ultimately lead to the exploitation of the drivers? In addition, does the increased accessibility into the ride-share market result in passengers putting themselves at greater risk each time they get into a car for the sake of saving a few dollars?

I asked an Ethiopian taxi driver what he thought about the recent surge of apps such as Uber and Lyft and whether he was considering trading in his taxi medallion for the pink moustache. He laughed at the idea, "It is not worth it. I came to this country in order to work and find a better life. With Uber and Lyft, you never know whom you're going to pick-up, but with taxis, the medallion provides the protection you need in case of an incident. Any kind of profit is not enough to lose that kind of protection." The overhead costs of taxi companies pay for the necessary costs in providing insurance for the vehicles. When I got into my Uber driver's Toyota Camry, I asked him whether Uber helped to pay for maintenance costs. He shrugged, "No, no, I have to pay those costs myself. I pray I don't break down because I need to work." It is clear from this that the benefits of driving for ride-share programs are popular among customers for the affordability, but that the risks for drivers are too great to be profitable in the long-term.

As a student without a car, cheap ride-share programs are incredibly convenient for me, but the fact is that you never know whose car you're boarding. Getting into a car with a stranger certainly puts up some red flags. A recent Lyft driver and I bonded over our favorite Persian restaurants during the ride and at the end of the ride he offered me his number to go grab Kabob's for lunch. As well intentioned as I hope the gesture to be, I realized that there is a significant risk for passengers that choose to get into the vehicles from companies that do not account for the security of their passengers. My concern with New York's ruling in favor of e-hails is that the convenience and anonymity provided by ride-share apps caters towards reckless business practices.

Brian Krebs Gives Keynote At Privacy. Security. Risk. Conference

By Brent Tuttle
Editor-in-Chief

The IAPP's annual Privacy. Security. Risk. conference brought together a wide array of leading figures and institutions from the privacy sphere. With workshops, training, and conference sessions on topics such as EU Data Protection regulation, cloud security, and big data management, attendees were afforded an insight to what the fields' leading minds are doing to ensure privacy and security evolve as best as they can.

Among the highlights from this four-day conference was Brian Krebs' keynote speech.

Krebs, a former Washington Post reporter, now runs his own site www.krebsonsecurity.com that focuses mostly on investigative cybercrime. He quickly rose to fame when his poking and prodding around the underbelly of the web led him to break the Target data breach that made the headlines in 2013. Today he is arguably the leading source for breaking news and information relating to cybercrime and data breaches.

When he took the stage at the conference, Krebs stated that agreed to do the talk because he said it forced him to confront privacy issues that had been staring him in the face for years. As he sees it, consumer privacy is a myth, except for those who are very rich or paranoid. He believes it is worth striving for, but illusive nonetheless.

Krebs also believes that society can't have good privacy without good security. If you can't ensure information is secure, how do you know it's still private? The biggest question he asked of the audience was whether we can have better security without compromising our privacy.

Krebs went on to illustrate his points by highlighting how difficult and expensive location privacy is. For example, if you take out a mortgage in your name, it's virtually impossible to keep your address private. It will be recorded in countless publicly searchable databases.

He also noted that even if you manage to keep your physical address off the books, in order to keep your everyday location private, you have to give up using a cell phone. To prove this point he referenced Bruce Schneider's book, Data and Goliath, which he urged the audience to read, but cautioned that readers would likely not be able to sleep for several nights after doing so. To Krebs, cell phones are privacy handcuffs because they constantly broadcast our current location to anybody who has the ability or wherewithal to obtain this information.

In addition, Krebs used his knowledge of the dark web to illustrate that your credit file, your purchasing history, and health information are readily available to identity thieves, private investigators, and basically anybody who knows how to find this information.

Krebs also stated that our overwhelming reliance on static identifiers is the single biggest threat to privacy and security today. Using the IRS as an example, he presented a recent scenario where 330,000 people were victims of tax identity fraud. The victims' information was obtained directly from the IRS website using the site's "Get Transcript" feature. This allows anyone to get an individual's previous tax returns using information such as date of birth, SSN and address. In addition, the site also required that the purported taxpayer answer knowledge-based authentication questions such as previous addresses, previous employers, or information relating to the worth of your house. The problem with these knowledge-based authenticators is that much of the information is readily available or easily deduced from sites such as LinkedIn, Facebook and Zillow. To date, the IRS admits that the fraudsters tried to steal roughly 660,000 taxpayer identities, meaning that through the static identifiers and knowledge based authenticators, they were successful in about 50% of their attempted heists. Because of this, Krebs considers these security authenticators a "joke."

However, he also stressed that these "knowledge-based" questions are the keys to accessing to services that are crucial to individuals' identities, credit reports, and retirement benefits. As a result of knowledge-based authenticators, Krebs believes that many protections for consumers actually backfire. The systems society relies upon to authenticate credentials are antiquated because all of this information is easily accessible on the web.

While Krebs was clear about his beliefs on information privacy, he concluded his speech by providing a few resources for those interested in attempting to protect their own. Here they are: Tor, Mullvad.net (VPN), DuckDuckGo (Browser), Ghostery (ad tracking blocker), GPG + Thunderbird (Email), Wickr (Mobile IM), Signal (iPhone call/text encryption), RedPhone (Android call/text encryption).

Office Hours Unwound

Michelle Oberman
Katharine & George Alexander Professor of Law

Areas of Specialization:
Health Law

Education:
-J.D., University of Michigan Law School
-M.P.H., University of Michigan School of Public Health
-B.A., Cornell University

1. When was the last time you left the country? Where did you go and why?

Last summer I spent a month working in El Salvador. It was my ninth visit in five years. I go, in part, because I'm writing a book about abortion and the law. Their law completely bans abortion, and given how we in the U.S. are embroiled in war over how the law should regulate abortion, it is interesting to see how the law does, and does not, work. I also go because of the volunteer work I get to do there. When I go, I stay in a village called Suchitoto. I live and work at the Peace Center for the Arts, a community center built and run by a U.S. born nun, Sister Peggy O'Neill. She's lived there for 35 years now. The Center is an oasis. On any given day, you might find: a chorus of trombones playing Ode to Joy; a convocation of the town's teachers, organizing to petition the government for school supplies; or two muscular young men teaching Zumba to middle-aged women who've worked all day selling vegetables at the local market. I volunteer in the classrooms, making art or playing with the kids.

2. What was the most valuable course you took in law school and why?

After being cautioned against it by many classmates, who warned that the class was too hard and the professor hated middle-class students (whatever that means), I took Health Law. It paved the path to my life's work, which is at the intersection of health and law. My professor approached the subject by attending to the "forest" while insisting that we understand each tree at the most fundamental level. Even when class was confusing, it was the first time I didn't feel lost.

3. Who is your favorite character from literature and/or film?

Professor McGonagall from *Harry Potter*.

4. What is your top source (news / journal / legal blog / other) for keeping current with the law?

I still make a habit of reading the *New York Times* with my morning coffee and listening to NPR on my commute, but for keeping up with the law, I subscribe to various news feeds. Health law issues arise in a host of legal settings: politics, public health policy, ethics, business law, regulatory affairs, etc. I can't read everything and have a life. Clipping services have made things a whole lot more manageable.

5. What was your favorite job you had while in law school?

I served as a clerk to the in-house counsel at University of Michigan Medical Center. It was just me and two lawyers. I got to do everything from helping roll out new laws (e.g. telling a room of surgeons they'd need to start informing their breast cancer patients about a list of alternatives to mastectomies) to taking phone calls from risk management (e.g. a nurse just gave the patient the wrong dose of a medication. Do we need to tell?). The lawyers were wise and pragmatic, and they taught me how to listen.

6. What is your go to restaurant in the Bay Area?

I love eating and cooking. These days, my family and I are into "Hello Fresh." It's one of the delivery services that gives you a box with ingredients and instructions. Mindless, stress free cooking. Turn on the music and follow directions. We fight a bit about the directions part of it, as I'm not a strict constructionist when it comes to recipes.

7. What is your favorite show on Netflix, HBOGO, etc.?

I'm an Orange is the New Black junkie. It's the most honest and accessible take on radical feminism I've ever seen or read.

8. What is your favorite sports team? If no team, then do you admire a particular athlete and why?

Love the Giants. I love baseball in general, and I love the scrappy way the Giants play it—or at least played it last year--as a team, rather than as a superstar (or two or three) plus the other guys.

9. What do you consider to be the most important development in your field over the last 5 years?

This is too easy: The Affordable Care Act, (a.k.a. Obamacare) is the most significant legal development not only in health law, but in law, generally, since the 1960s. Built on our fragmented, complex and imperfect health care system, it is necessarily flawed. However, even in its first 5 years, it has already succeeded in increasing access to care for millions of Americans, while at the same time enhancing quality and reducing costs.

10.How do you unwind?

In the pool. I swim until I'm no longer distracted by my jabbering thoughts. It doesn't take all that long, and it always makes me feel better.

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1. When was the last time you left the country? Where did you go and why?

The last time I was out of the country was a trip to Mexico City. I had just settled a case, and took advantage of a window of free time. I went for the restaurants and the museums, neither of which disappointed.

2. What was the most valuable course you took in law school and why?

My practice is devoted to patent litigation, so obviously my courses on patents and patent litigation were very important. Also, a seminar course that I took from Thomas McCarthy, the trademark guru, was very influential towards my thinking about intellectual property law. Lastly, ethics. You would be surprised at how often ethical issues come up during a person's everyday practice.

3. Who is your favorite character from literature and/or film?

Deckard, played by Harrison Ford, in the movie Blade Runner. I'm a sucker for any good science fiction movie.

4. What is your top source (news / journal / legal blog / other) for keeping current with the law?

Every morning I read from a clipping service called Docket Navigator, which reports on recent District Court cases. I attend a number of different law seminars and MCLE programs throughout the year. I also belong to the San Francisco Bay Area Intellectual Property American Inn of Court, and we put on educational programs every month.

Surprisingly, I also use Facebook. I'm Facebook friends with some thought leaders in my industry, like Mark Lemley, and they regularly post on new developments in intellectual property law . . . and cat videos.

5. What was your favorite job you had while in law school?

I interned with the San Francisco Public Defender's Office. It provided me with valuable insight into how our criminal justice system worked, which has stayed with me and influenced my thinking about the criminal justice system and social issues in general.

6. What is your go to restaurant in the Bay Area?

They are all in San Francisco, where I live. Rich Table is a favorite. I like Zuni Cafe and NOPA too.

7. What is your favorite show on Netflix, HBOGO, etc.?

My favorites are The Walking Dead and the first season of True Detective (the second season really didn't deliver, right?). Also, The Fall, starting Gillian Anderson (from The X-Files), is excellent.

8. What is your favorite sports team? If no team, then do you admire a particular athlete and why?

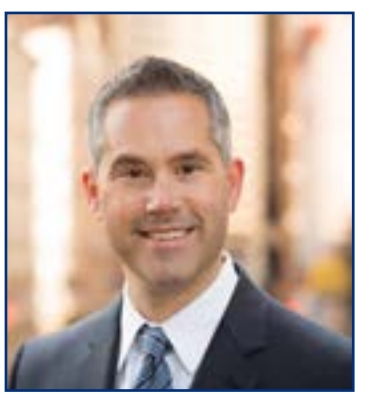
Oh, I have nothing for you here. I don't watch sports. Let's talk about favorite musical groups.... like The White Stripes, TV on the Radio, The Roots, Florence and The Machine, and London Grammar.

9. What do you consider to be the most important development in your field over the last 5 years?

As said, my practice is devoted to patent litigation. There've been a number of recent Supreme Court cases that have really shaking things up. Most notably, the *Alice* decision has basically killed a large number of software patents. A huge amount of value was removed from the software industry based on a single Supreme Court decision.

10. How do you unwind?

I unwind through physical activity, mostly yoga, biking, etc. A glass of good red wine also doesn't hurt.



Brian Mitchell
Founder of Mitchell + Company and Professor of Law

Areas of Specialization:
Intellectual property litigation with an emphasis on patent, trademark, and copyright issues for technology clients

Education:
-J.D., University of San Francisco, School of Law
-B.S., California State University, Sacramento

Privacy Crimes Continued...

or revenge in carrying out such heinous acts. He noted that cyber exploitation is a serious nationwide epidemic and that California law expressly prohibits this conduct under California Penal Code, section 647. To tackle this problem, the Office is collaborating with the private sector. Mr. Suvor reported that Google, Facebook, Twitter, Reddit, and others have since adopted policies that will help victims combat cyber exploitation.

Following Mr. Suvor's keynote, Irina Raicu, Director of Internet Ethics at the Markkula Center for Applied Ethics, moderated a panel titled "What is a Privacy Crime?" The well-rounded group of panelists consisted of Hanni Fakhoury, Senior Staff Attorney from the Electronic Frontier Foundation, Tom Flattery, Santa Clara County's Deputy District Attorney, and Susan Freiwald, a Professor at the University of San Francisco, School of Law.

Ms. Freiwald opened the panel by acknowledging how hard it is to define a privacy crime. Privacy interests are amorphous. To some, privacy is the right to be left alone. Others seek privacy in their communications, privacy in their autonomy, but depending on the individual, privacy expectations and concerns will vary. However, she drew a sharp distinction in differentiating privacy crimes from torts, because in this respect, the State has an interest in punishing an individual for privacy crimes.

Ms. Freiwald also urged the audience that it is important to proceed with caution when defining privacy crimes. For example, Freiwald stressed the consideration of due process. We must ensure that legislation specifies conduct so that people have notice of what exactly is illegal, what the appropriate level of culpability is, whether a privacy crime must be subjectively or objectively harmful, and what defenses may be available to those accused. Furthermore, she noted that protecting some from privacy crimes could also conflict with the First Amendment. In this respect, she urged that we find a proper balance between protecting an individual's privacy while leaving room for freedom of speech and freedom of the press.

The co-panelists echoed Ms. Freiwald's concerns and statements. Deputy District Attorney Tom Flattery shed light on how the Penal Code helps protect privacy, but also recognized that there are gaps that it does not address. While the Penal Code combats matters where one individual does something to harm another individual, it does not address matters Mr. Flattery referred to as "commercial surveillance," where private companies use deceptive terms of service to invasively collect data on their users.

Mr. Flattery went into detail about the common use of the California Penal Code to deal with privacy crimes. Specifically, section 502 contains anti-hacking provisions that differentiate criminal activity by what an individual does with the data after gaining unauthorized access. For example, if someone merely gained unauthorized access to a social media or email account and did nothing with this data, that person would be subject to Penal Code § 502(c)(7), though first offense is only considered an infraction, in the same vein as a speeding or parking ticket. However, if the individual used the information, then Penal Code § 502(c)(2) elevates the charge to a misdemeanor or felony. Mr. Flattery encouraged the audience to think about what the term "use" means in the context of the Code. Does this code section only apply when an individual uses the information to obtain financial gain, or does sharing this data with a group of friends also constitute a "use"? Mr. Flattery stated that these questions don't really have "good clean answers," which leaves citizens without a bright-line rule in a context that will become increasingly more important over time.

Another area of concern Mr. Flattery highlighted was the increasing theft of medical IDs and electronic medical records. In these instances, people will go in to a hospital or medical treatment facility and assume the identity of someone else to obtain free healthcare services under a stolen alias. However, as medical records increasingly become electronic, when the victim of this crime comes into the hospital with a legitimate medical emergency, his or her electronic medical record is full of inaccurate medical information. In these cases, the identity theft can be life threatening, as a patient's record can correctly document that someone under their name received a particular medication two weeks prior, when in fact the actual person is fatally allergic to such treatment.

Mr. Fakhoury brought a unique perspective to the debate, but one that all the panelists were somewhat in agreeance on. His takeaway was that when defining and addressing privacy crimes, we "need to chill out a little bit and think these things through." Rather than adding more legislation, he stressed that we should examine whether or not the current California Penal Code sections could be used to address the problem. Mr. Fakhoury believes that the current penal code could fix at least some of the new problems society is facing with "privacy crimes." For example, addressing Mr. Flattery's previous remarks about medical ID theft, Mr. Fakhoury noted that the general identity theft statute is an applicable statutory remedy, so he questioned why we would need another law to handle this problem. Mr. Fahkoury also emphasized the potential issues of adding an abundance of new and unnecessary legislation. New bills could be drafted sloppily or poorly and include ambiguous language that is left for courts to interpret, thereby covering more conduct than was originally intended.

Christine Garcia-Sen, Erica Johnstone, Vishal Bathija, and Ingo Brauer Photo: Eric Goldman

Not entirely against new legislation, Mr. Fakhoury urged support for CalECPA, aka SB-178, which was signed by the Governor late last week. This new law provides citizens with privacy protections against law enforcement. Mr. Fakhoury distinguished this piece of legislation from others that might be quick to criminalize privacy crimes, as he believes it provides law enforcement with tools to get sensitive digital information, but it also protects the public by requiring law enforcement to get a search warrant beforehand.

Seth Flagsberg, Ellen Kreitzberg, Deborah Hernandez, and Judge Shelyna V. Brown Photo: Eric Goldman

Santa Clara County's Supervising District Attorney Christine Garcia-Sen moderated the next panel, "What's Being Done to Enforce Laws Addressing Privacy Crimes?" Attorney Ingo Brauer, Santa Clara County Deputy District Attorney Vishal Bathija, and Erica Johnstone of Ridder, Costa & Johnstone LLP all participated in an hour-long talk that discussed the obstacles and successes practitioners are facing in enforcing privacy crimes.

Mr. Bathijal highlighted the fact that frequently victims are so embarrassed by these privacy crimes that they are hesitant to shed more light on the humiliating moments with court proceedings and enforcement. He used an example of a sexual assault case where an underage female was exchanging sexually explicit photos with another person. Prior to the case going to trial, the victim realized that the details of her sexual assault would be heard by the jury. Understandably, she vocally expressed her concerns that she didn't want other people to know that she had been subject to this sexually deviant conduct with the offender.

Erica Johnstone was quick to point out that a huge difficulty in litigating "revenge porn" or "cyber exploitation," is the expense of doing so. Many firms cannot accept clients without a retainer fee of $10,000. If the case goes to court, a plaintiff can easily accrue a bill of $25,000, and if the party wants to litigate to get a judgment, the legal bill can easily exceed $100,000. This creates a barrier whereby most victims of cyber exploitation cannot afford to hire a civil litigator. Ms. Johnstone shared her experience of working for pennies on the dollar in order to help victims of these crimes, but stressed how time- and labor-intensive the work was.

Ms. Johnstone also pointed out the flawed rationale in using copyright law to combat revenge porn. Unless the victim is also the person who took the picture, the victim has no copyright in the photo. In addition, the non-consensual content often goes viral so quickly that it is impossible to employ copyright takedown notices to effectively tackle this problem. She described one case where a client and her mother spent 500 hours sending Digital Millennium Copyright Act takedown notices to websites. She also spoke on the issue of search results still displaying content that had been taken down, but was pleased to announce that Google and Bing! had altered their practices. These updated policies allow a victim to go straight to search engines and provide them with all URLs where the revenge porn is located, at which point the search engines will automatically de-list all of the links from their query results. Ms. Johnstone also applauded California prosecutors in their enforcement of revenge porn cases and said they were "setting a high bar" that other states have yet to match.

As a defense attorney, Ingo Brauer expressed his frustration with the Stored Communications Act, a law that safeguards digital content. He noted that while prosecutors are able to obtain digital content information under the SCA, the law does not provide the same access for all parties, for example defense and civil attorneys. Mr. Brauer stressed that in order for our society to ensure due process, digital content information must be available to both prosecutors and defense attorneys. Failure to provide equal access to digital content information could result in wrongful prosecutions and miscarriages of justice.

All three panelists were also adamant about educating others and raising awareness surrounding privacy crimes. In many instances, victims of revenge porn and other similar offenses are not aware of the remedies available to them or are simply too embarrassed to come forward. However, they noted that California offers more legal solutions than most states, both civilly and criminally. Their hope is that as the discussion surrounding privacy crimes becomes more commonplace, the protections afforded to victims will be utilized as well.

The conference closed out with the panel "Balancing Privacy Interests in the Criminal Justice System." Santa Clara Superior Court Judge Shelyna V. Brown, SCU Assistant Clinical Professor of Law Seth Flagsberg, and Deputy District Attorney Deborah Hernandez all participated on the panel moderated by SCU Law Professor Ellen Kreitzberg.

This area presents a particularly sensitive field as both victims and the accused are entitled to certain privacy rights within the legal system, yet prioritizing or balancing these interests is difficult. For example, Judge Brown stated in a hypothetical sexual assault case where the defense sought psychological records of the victim, she would want to know if the records would have any relevance to the actual defense. She stressed that the privacy rights of the victim must be fairly weighed against the defendant's right to fully cross-examine and confront his or her accusers. And even if the information is relevant, she noted that often times you must decide whether all of it should be released and whether the information should be released under seal.

Overall, the Privacy Crimes conference served as an excellent resource for those interested in this expanding field. EFF Senior Staff Attorney Hanni Fakhoury stated, "This was a really well put together event. You have a real diversity of speakers and diversity of perspectives. I think what's most encouraging is to have representatives from the District Attorney's Office and the Attorney General's Office, not only laying out how they see these issues, but being in an audience to hear civil libertarians and defense attorneys discuss their concerns. Having...very robust pictures, I think it's great for the University and it's great for the public interest as a whole to hear the competing viewpoints."

FTC Sues Alleged Snake Oil Enterprise, Roca Labs

By Hannah Yang
Business Editor

What would you do if you purchased something relatively expensive, were dissatisfied with it, could not return it, and could not share your product feedback or reviews with other customers? This is exactly the scenario that Roca Labs' customers found themselves in, and the FTC is not happy. Roca Labs took their unfair and fraudulent claims and practices even further by attempting to censor any customer's expression of dissatisfaction with their products, therefore creating a misleading and skewed body of testimonials and reviews.

Roca Labs' weight loss formula claims to be an effective alternative to gastric bypass surgery. The company sells its products exclusively online, and targets its online advertisements at people who search for gastric bypass, or bariatric surgery, and other weight loss procedures. Considering the multi-faceted challenges of weight loss and general health and wellness, skepticism about Roca Labs products is plentiful. However, Roca Labs' revenue is at least $20 million according to the FTC Complaint against the company, which at the very least implies that there were buyers of the product.

Perhaps unsurprisingly, this case represents the first time the FTC has alleged that the use of these gag clauses is unfair, and thus a violation of Section 5 of the FTC Act. It is an error that we each hope will never result in major consequences, especially given the repeated advice that echoes in these halls. 'Read before you sign' or 'If it's too good to be true, then it probably is' are widely known and widely espoused, but there are few among us who can say that they have taken the time to read the fine print. The knowledge that there are legal consequences upon the breach of a contract at least provides incentive to review a document before affixing a signature. Unfortunately, the purchase agreement for Roca Lab's "formula" included a "gag" or non-disparagement clause, a clause that prevents the customer from making any negative remarks about the company, product, or their experience. According to the complaint, Roca Labs has allegedly threatened to sue individuals and used other intimidation tactics to enforce these gag clauses.

Consumer reviews, both positive and negative, are expected when a company puts product to market. It is a part of the process, where such feedback notifies the merchant of areas where improvement may be made to the product or service, and also informs other buyers. It is an important and necessary function of the market, and ultimately leads to advances in technologies and new ideas.

The challenge of weight loss is physical, mental and emotional – and in this arena, there are no short cuts. Unfortunately, when a product is offered that purports to provide such a short cut, the siren's call is often irresistible to those who badly desire results. The FTC recognizing the troubling greed that operates in these spaces, works to curb the misleading and fraudulent business practices that lead consumers to fall victim to these schemes, demonstrated by the efforts undertaken here. A temporary restraining order has been granted against Roca Labs, with the hearing to show cause scheduled for later this month.

A Motivator and Refresher: Serial Podcast

By Kerry Duncan
Staff Writer

Almost a year ago, one of the most popular podcasts of all time was released: "Serial." A spin-off of "This American Life," the production focused on the murder of high school senior, Hae Min Lee, and the arrest of Adnan Syed, her former boyfriend. The podcast followed its creator, Sarah Koenig, as she investigated and searched for the truth of what happened to the popular Korean American senior at Woodlawn High School in Baltimore County, Maryland in January 1999. The questions of the case come from the discrepancies, the confusion, and the lack of information that lead to the life in prison conviction for seventeen-year-old Pakistani American Muslim, Adnan. Issues involving legal representation, prejudice, and investigation are also probed in the twelve episodes.

The impact of this production was felt internationally. The fastest podcast to reach 5 million downloads in iTunes history, the series has a huge following that had fans independently investigating and sharing ideas all over the internet. "Serial" was awarded a Peabody for news, a first for a podcast, and an IDFA DocLab Award for Storytelling in 2014. Sarah Koenig was also named one of Time's 100 Most Influential Pioneers for her work on the series.

An example of investigative journalism, Serial highlights some of the major differences between how law students can be trained to perceive situations versus how the general public sees it. Instead of accepting facts as they were given, each point was contested by the producers. This is something that can be absent in our casebooks. As law students, we do not usually fight the "hypo" or the facts. We more often focus on the questions of law. The removal of skepticism toward what happened and even emotion is something that can help us in our profession to focus on legal questions that we must answer. On the other hand, the lay person that can be our clients and our witnesses in the future, focuses on the "facts." This makes "Serial" a good reminder on how the outside world can approach situations differently than a law student or lawyer might. It can also serve as a reminder to some of us why we wanted to be lawyers in the first place: to right a wrong, give closure to a family, defend the innocent. In the tangle of our textbooks and outlines, a reminder of the impact of what we do can be a blessing and motivator.

Not only was the general public enthralled, the legal field took notice. The interest that was provoked led to numerous legal blogs discussing the case, as well as another podcast, "Undisclosed: The State v. Adnan Syed." Led by three lawyers, Rabia Chaudry, Colin Miller, and Susan Simpson, this podcast focuses instead on the legal arguments and defenses. It shines a different shade of light on the same case through the viewpoints of a family friend to the Syed family, an evidence professor, and a legal blogger for LL2. These viewpoints might be more familiar to our law school classrooms. The array of legal opinions on the same set of facts is a good reminder that there is not only one answer. Analysis remains king, a comforting thought as finals loom in the future.

At the end of it all, what we learn here in law school matters. Learning and seeing how the general public can view a series of events compared to how more legal focused minds can work, will only help us. Getting a helping hand of motivation from the importance of what we can do in the future through podcasts like "Serial" and "Undisclosed," never hurts.

PETA Goes Bananas, Sues On Behalf of Monkey That Took Selfie

By Angela Habibi
Staff Writer

On September 22, 2015, People for the Ethical Treatment of Animals ("PETA") filed a lawsuit against British nature photographer David Slater on behalf of a Sulawesi crested macaque monkey named Naruto. While Slater was on the Indonesian island of Sulawesi in 2011, Naruto swiped his camera and took a series of photos of himself. Slater used the San Francisco-based self-publishing company Blurb to publish a book called "Wildlife Personalities," which included the 'Monkey Selfies'. As such, PETA claims Naruto owns a copyright in the now famous monkey selfies.

In order to represent Naruto, PETA is utilizing Federal Rule of Civil Procedure 17(c)(2), which reads in pertinent part that a minor who does not have a duly appointed representative may sue by a Next Friend. Further, according to the Complaint, PETA seeks a court order allowing all proceeds from the "sale, licensing, and other commercial uses of the Monkey Selfies…to be used solely for the benefit of Naruto, his family and his community, including the preservation of their habitat."

In the U.S. a valid copyright requires an original work of authorship fixed in a tangible medium of expression. The Complaint here alleges that Naruto "authored the Monkey Selfies by his own independent, autonomous actions in examining and manipulating Slater's unattended camera." PETA attorney Jeffrey Kerr states that "copyright law is clear: it's not the person who owns the camera, it's the being who took the photograph" that should be granted the copyright. Thus, Kerr argues that Naruto owns the photos he took in the Indonesian jungle.

Can an animal be an author for the purposes of the U.S. Copyright Act?

The U.S. Copyright Office has been explicit in stating that animals may not be authors for the purposes of the Copyright Act and the Office's Compendium states that it will not register works produced by "nature, animals, or plants." To elaborate further, the Compendium states, "to qualify as a work of 'authorship' a work must be created by a human being [and] works that do not satisfy this requirement are not copyrightable."

Photo Credit: David Slater (or Naruto?)/ Wikimedia Commons

Kerr has said that the Copyright Office policy "is only an opinion [however] and that the U.S. Copyright Act itself does not contain language limiting copyrights to humans." In fact, Kerr states that the "act grants copyright to authors of original works with no limit on species." Because the plaintiff in this case is an animal, and the Copyright Office is not a legislative body, or a court of law, having the question of whether a monkey may obtain a copyright before a judge raises interesting "administrative law questions, such as deference to the Copyright Office."

While the claim of authorship by species other than homo sapiens may be novel, "authorship" under the Copyright Act, 17 U.S.C. § 101 et seq., is sufficiently broad so as to permit the protections of the law to extend to any original work, including those created by Naruto.

Slater admitted in his book that "the recognition that animals have personality and should be granted rights to dignity and property would be a great thing." Despite this however, he has countered PETA's claims by stating that he was granted copyright protection for the photos in the UK and believes that the British copyright obtained by his company, Wildlife Personalities, Ltd., should be honored worldwide. Slater also argues that he was the *intellect* behind the photos because Naruto only pressed a button on a camera that Slater set up on his tripod.

Ultimately, although PETA's cause is noble in seeking to assist animals that are critically endangered with proceeds from Naruto's photographs, there is likely a *better way* to support the Sulawesi macaque population "than trying to set up a legal precedent where people have to try to get a monkey to sign a release form before they can post his selfie" anywhere.

U.S. And China Ink Illusory Agreement on Cyber Espionage

By Lisa Nordbakk
Staff Writer

"Protect your PC with virus protection." "Antivirus Total Protection Instant Download." "Get the best real-time security for your PC." Do these compelling declarations sound familiar to you? Anti-virus and malware protection software providers such as McAfee, Bitedefender and Kaspersky are routinely offering their award-winning software to computer users. They promise to protect your passwords, e-mails, documents, and selfies from the modern-day burglars: the hackers. By simply following a few steps, they imply protection from criminals of cyberspace. This must mean that you are safe from treacherous Trojan horses, menacing malware, and vicious viruses, right? Disappointingly, this is not the case. As the Imperva study revealed, the average detection rate of viruses lies at an abysmal 5%.

Most consumer anti-virus software can be downloaded for free, so at least corporations spending millions on cybersecurity are not as affected by this technological fragility, right? Cyber-defense teams working 24/7, with the support of first-rate corporate Anti-Virus Protection software such as Cisco, FireEye, and Palo Alto Networks must not be as penetrable by hackers, right? Wrong on both counts. Verizon's 2013 Data Breach Investigations Report revealed that 62 % of the intrusions against a business took at least two months to detect. A similar study conducted by Trustwave Holdings revealed that the average time of virus detection by top-trained corporate E-crime units was 210 days. So, best case scenario would give hackers two months to freely rummage through the corporate network; unfettered time to explore secrets, financial systems, and client data.

In the corporate world, the current cyber-combat places hackers on one side and corporate security teams on the other, the latter unfortunately being the losing side. Hackers have replaced rival companies' approach of reverse-engineering technology and then replicating it with a shortcut: stealing blueprints, plans, and designs, and then simply duplicating the idea. The theft of American intellectual property is estimated to cause annual losses of $300 billion. Shockingly, the majority of this extortion can be attributed to one nation in particular: more than 50 % of the losses of theft have the fingerprints of Chinese hackers on them. This equals the value of America's total exports to Asia.

A Peace Treaty to End the Cyber War?

At the recent White House Summit, in response to this alarming trend, President Barack Obama and Chinese President Xi Jinping have reached a first of a kind cybersecurity agreement. At a joint press conference, Obama announced, "a common understanding" about the issue, and also discretely took the opportunity to declare that the U.S. did not engage in cyber espionage. Xi named the agreement an "important consensus" on the issue of cyber crime, noting that "confrontation and fiction are not the right choice" for the two nations. The agreement pledges to have both sides investigate malicious cyber activity within their nations "in a manner consistent with their respective national laws and relevant international obligations." Further, according to the fact sheet, the two leaders conceded to keep the victim nation updated "as appropriate" during such processes. To the extent of bi-annual meetings, where top-level officials in charge of the investigation will report on the progress, the victim country will not be involved in any of the investigations.

Truce or Empty Promise?

As promising and forward-thinking as this agreement sounds, does it fall short of implementation, and therefore, just like malware protection software, does not offer a lasting solution to the issue of absolute cybersecurity? The fundamental problem of not having a functioning solution to tracking cyber attacks still prevails. Furthermore, it is left to the Chinese government to prosecute the perpetrators at their will. Therefore, the agreement, as idealistic as it sounds, does not guarantee any real investigation by Chinese authorities into the theft of IP or trade secrets. If there is no meaningful punishment, this agreement will likely fail to deter cyber criminals from continuing their illicit activities. Nevertheless, if the cyber attacks coming from China remain or even increase, the U.S. will be in a much better position to respond to these attacks and demand action from the Chinese authorities. Only time will tell if the Chinese government will put effective action where their rhetoric is.

The Time Has Come to Regulate Daily Fantasy Sports

By Benjamin Schwartz
Staff Writer

A new form of fantasy sports is taking the country by storm. If you are a sports fan and are unfamiliar with the boom in Daily Fantasy Sports (DFS) by now, you are definitely in the minority. DFS are popular online games in which people can compete against others by earning points based on the actual statistical performance of professional athletes. In the past, the norm in fantasy sports was that contests would last entire seasons before a winner was declared, and contestants typically only played for bragging rights among friends, and perhaps a marginal monetary prize. In stark contrast to this traditional practice of fantasy sports, DFS offers an accelerated version of fantasy sports where players can collect on a substantial amount of winnings in a single day against complete strangers. This recent surge in popularity of DFS is negatively impacting the average sports fan's experience watching the game.

Fanduel and DraftKings are the two companies that essentially dominate the unregulated multi-billion dollar industry that is Daily Fantasy Sports. These particular websites are able to generate so much revenue because they take up to 10% of entered contestants wagers. Entry fees for contests range from $0.25 to $10,000, and the payout for these contests depends on the entry fee as well as the number of people in a given contest.

If you have tuned in to ESPN, or watched any NFL game broadcast for that matter, it is almost certain that you have seen commercials enticing viewers to enter DFS contests. According to iSpot.tv, an analytics service that tracks televised advertising campaigns, DraftKings and FanDuel have combined to spend approximately $205.9 million on ads airing nationally across both network and cable since the beginning of 2015. This absurd amount of spending in advertising accounts for 40,283 national airings of DraftKings ads and 21,545 national airing of FanDuel ads.

A big reason for DraftKings and FanEuel's massive success over the past couple of years is attributed to the simple fact that fantasy sports are incredibly fun, and easy to play. Just think how much fun it is to watch your favorite team play, especially when they are winning, and now they could be winning you money. This is the wide-reaching appeal that DFS provides to its users. For example, let's pose the hypothetical that you are a San Francisco 49ers fan. While the 49ers aren't looking very promising this year, using DFS, you now have the ability to create your own team of players on any given Sunday across the entire NFL to compete against other DFS users. Almost immediately you have newfound interest in more than one matchup that day.

An even more appealing aspect of DFS contests is the opportunity to win real money. Remember that Cleveland Browns matchup against the Minnesota Vikings that was essentially meaningless to you only a day earlier? It now has you completely engaged and at the edge of your seat, screaming at the TV for Adrian Peterson to get the ball to punch it in to the end zone at the goal line. Moreover, DFS contests completely change a fan's thought process when watching these games. The Vikings could be getting stomped out 42-14, but that doesn't particularly matter to you because you're only rooting for the guy on your team, not the Vikings.

High profile athletes, like New England Patriots Tight End Rob Gronkowski, have stated that they welcome the emergence and high popularity of daily fantasy sports. The players generally love it. While they are not allowed to participate in DFS leagues for monetary gain, it provides athletes with massive exposure to fans outside their team's market, as well as an opportunity to increase the value of their brand without any additional cost to them.

DFS contests are certainly fun to play, but at what cost are they affecting the old-school fans that don't participate in fantasy sports and simply want to watch for the love of the game? The real problem that comes hand-in-hand with the emergence of DFS is that fantasy sports and actual sports are no longer mutually exclusive in the media. During broadcasts of games, instead of providing analysis and statistics on a scoring play, an announcer will simply say things like, "well, Deandre Hopkins owners must be happy with this performance" or "Andre Johnson owners are kicking themselves right now if he's racking up points on their bench." ESPN even hosts segments in their programming specifically targeting audiences of fantasy sports, instead of devoting that broadcast time to reporting stories around major sports leagues.

Also, those aforementioned combined 61,828 DFS commercials can get extremely annoying. Nearly all DFS commercials feature random people claiming to have won hundreds of thousands, or even millions of dollars on these DFS sites, and all the while playing it off incredibly casually like any fan could be as successful. "I won $400,000 in a day sitting on my couch! Just enter promo code "BEER" to play!" The advertisements are extremely misleading as to the actual success rate that is often experienced playing DFS, and featuring huge winners on these commercials should pose the question of how DFS leagues are even legal to play.

While it might seem obvious to the general public that DFS contests are clear examples of sports gambling, the government has determined otherwise. In 2006, the Bush administration passed the Unlawful Internet Gambling Enforcement Act, which labeled fantasy sports as a game of skill rather than a game of chance, and is therefore not a form of gambling. While it remains to be true in the government's eyes that betting on the games is a matter of chance and luck, legislation has distinguished that betting on the individual players in the games via fantasy sports tools is a matter of skill only. As of today, the majority of states (with the exception of five) allow you to play DFS, so long as you prove that you are over the age of 18 by simply checking off a box.

The aspect of legality and lack of regulation surrounding DFS has recently taken the spotlight in the media. On October 5, the New York Times broke a story that reported the occurrence of actions similar to insider trading taking place at both DraftKings and FanDuel. While these companies do not allow their employees to enter contests on their own sites, as a result of the unfair advantage they gain by having access to different data that gives them a huge leg up over other entrants competing, employees were still allowed to enter contests on their competitor's sites. This poses a huge problem in the form of an unfair advantage because the two sites use an identical algorithmic model to structure their contests. The DraftKings employee, a midlevel manager, was able to win $350,000 off a single $25 entry in a contest on its rival site FanDuel. Public outrage claims that by having access to data and information other entrants did not have available to them, employees of these sites were given a distinct advantage before the contests even began. A study later revealed that DFS employees could make up approximately 0.3% of the $2 billion in winnings on the site, which would account for nearly $6 million of the websites' total payouts.

The result of this report has certainly impacted the DFS industry as a whole. Leading sponsor ESPN has claimed that while it will continue to allow advertisements on the channel, it will no longer include individual segments on their shows that are sponsored by these DFS sites. New York's Attorney General has recently opened an inquiry regarding the regulation and legality of DFS, and it would not be surprising to see other States' representatives follow suit. One Manhattan user of DFS has went as far as to file a class-action lawsuit against DraftKings and Fanduel, accusing these sites of negligence, fraud and false advertising.

If you take nothing else from this article and decide to take part in DFS anyway, please keep in mind, you are not good enough to win money playing daily fantasy sports. While there is no excuse for the corruption that has taken place at both leading DFS sites DraftKings and Fanduel, and the need for regulation in DFS is unquestionable at this point in time, the fact remains that DFS employees still only made up 0.3% of the winnings. The other 99% of the money won is largely allocated to DFS "sharks". These sharks are essentially professional fantasy sports players who devote huge sums of money, entering thousands of contests daily, to prey on new inexperienced users.

Understandably, DFS is still an incredibly fun product to a passionate sports fan, and is therefore very appealing to play. If you can't resist your fandom and decide that you need to play, the best advice one can give to you is to enter a simple head-to-head matchup against one of your friends who is on the same level of skill as you, and not a shark who devotes his life to the world of fantasy sports. Lastly, enjoy the waning days of unregulated DFS, because there exists a lingering feeling that many states, and perhaps Congress, will soon weigh in with some of their ideas for regulation of the DFS industry.

Passwords Provide More Legal Protection Than Biometrics

By Jason Peterson
Staff Writer

Imagine you were arrested and the police believed there was incriminating evidence on your cell phone. If the police have a warrant, can they force you to divulge your password and unlock the phone? What if your phone is protected with fingerprint authentication? While the latest phones have the ability to be unlocked with a swipe of a finger, this technology is less secure under the law than a standard password.

The Fifth Amendment to the U.S. Constitution protects individuals from self-incrimination and states that no person "shall be compelled in any criminal case to be a witness against himself." Courts have interpreted the Fifth Amendment to protect individuals from disclosing incriminating evidence that is of a "testimonial or communicative nature." In 2011, the U.S. Court of Appeals for the Eleventh Circuit held in *In re Grand Jury Subpoena Duces Tecum* that the government could not compel the password to unlock an encrypted hard drive, even though they possessed a valid warrant, because the password would reveal the "contents of the [defendant's] mind" and is protected under the Fifth Amendment. This decision came after a lower court sent defendant to jail for contempt after refusing to provide his password.

Three weeks ago in *SEC v. Huang*, a federal trial court held that an employee was not required to give up the password to his company-issued smart phone. The employee was fired from Capital One, after which the SEC launched an investigation for insider trading and tried to obtain access to the data on his cell phone. Though defendant returned the phone to Capital One, the judge ruled he was not required to disclose the phone's password. Although there is debate in the legal community as to whether this was the correct ruling, it shows the hesitancy of courts to make defendants

reveal their passwords. (Why the I.T. team at Capital One let an employee set their own password and did not have a backdoor into a company-owned asset is beyond me.)

If passwords are getting so much protection, shouldn't the exact same rules apply to fingerprint passwords? When Apple released the iPhone 5s in late 2013 the use of a fingerprint to unlock and decrypt data became mainstream. People who never before used a password decided to take the more convenient route and protect their data using the swipe of a finger. The courts have held in the past that physical evidence, including blood samples, standing in a police lineup, and fingerprints are not be covered under the right against self-incrimination and may generally be compelled incident to arrest or with a warrant. These rules date back to the mid-1960's, but should they still apply given that fingerprints have become the new version of typed passwords?

The trial court in the state of Virginia asked this question in November of 2014 when paramedic David Baust was charged with strangling his girlfriend in their bedroom. Prosecutors wanted defendant to unlock his cell phone using either his password or fingerprint as the state believed it contained video evidence of their confrontation. The court denied the motion to compel defendant's password, but granted the motion to compel his fingerprints. The court reasoned that since a fingerprint was not contained solely within the confines of defendant's mind, it was more like a physical key and could be compelled with a warrant.

The reasoning of the Virginia court falls in line with the established law on physical evidence, but has the law fallen out of line with technology, or are technology companies putting our data security at risk at the cost of convenience? Even if you are not a criminal, consider using more than just biometric protection to keep your data safe from the prying eyes of the government.