

# Media Law Update--2018

American Horse Publications—Hunt Valley MD

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# What We'll Cover Today

- European Union-General Data Protection Regulation
- Digital Millennium Copyright Act “safe harbor”
- Section 230 of the Communications Decency Act
- Ownership of interviews
  
- And, if time allows, an update on the “Cocky” trademark litigation



# EU-GDPR—What Is It?

- European Union—General Data Protection Regulation
- Developed over six years, took effect May 25, 2018
- 11 chapters
- 99 articles
- 88 pages
- The “most important change in data privacy regulation in 20 years” (according to the people who wrote it)
- Overview: <https://www.eugdpr.org>
- Complete text: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679>



# EU-GDPR: Why Should I Care?

- ▶ Violations = **huge** administrative fines
  - ▶ Up to 20,000,000 Euros or
  - ▶ Up to 4 per cent of the organization's annual worldwide profits
  - ▶ Whichever is higher



# EU-GDPR: Am I Affected?

➤ Maybe:

- Does your publication, blog, business, or other activity have a presence in the European Union?
- Without a presence in the European Union, does your publication, blog, business, or other activity collect and process personal data of residents of the European Union?
- If YES to either question, the EU-GDPR almost certainly will affect the way you collect and process data



# EU-GDPR: Am I Affected?

- For the geographically challenged, the United States is not part of the European Union
- Only residents (and possibly citizens of the EU living outside the EU, although that's not clear) have legal recourse if their personal data is mishandled. There are no equivalent data protection regulations in the United States
- In theory, at least, the EU-GDPR will have no impact on your activity if you don't collect or process personal data from any individual in the European Union
- If this is the case, feel free to wander the halls for a few minutes



# EU-GDPR: So I'm Home Free?

- ▶ Maybe, but a caveat:
- ▶ Do you have subscribers, readers, customers, clients, website visitors, people posting comments, or people posting photographs on your site from the European Union?
- ▶ Do you require personal information in any form, for any purpose, from anyone in the European Union—an individualized log-in to post an innocuous comment, for example?
- ▶ If YES, pay attention to the EU-GDPR. It applies to any entity that collects/processes personal data from EU subjects.



# EU-GDPR: Personal Data?

- ▶ Under the EU-GDPR, “personal data” includes:
- ▶ Any information about an “identifiable natural person” who can be identified by reference to
  - ▶ Name
  - ▶ Id number
  - ▶ Location data, including address
  - ▶ Online identifier of any kind
  - ▶ Any other factors specific to the individual. These might include “cookies” that constitute personal identifiers under the EU-GDPR or any other link to a specific individual
  - ▶ Parental consent required to collect/process data from anyone under the age of 16



# EU-GDPR: Personal Data?

- Some personal data can never be collected lawfully under the EU-GDPR:
  - Racial/ethnic data
  - Political opinions
  - Religious beliefs
  - Trade union membership
  - Genetic data
  - Unique biometric data
  - Health information
  - Sexual orientation



# EU-GDPR: Individual rights

- Right to have corrections made to personal data held by an entity
  - Right to have collected data provided in a usable fashion
  - Right to have collected data deleted
  - In other words: Entities collecting and processing individual data must have mechanisms and procedures in place to ensure these rights
- 



# EU-GDPR: Rules for Processing Data

- Must be collected for specific, well-defined purposes
- Collection limited to data required for specific purpose
- Must be kept up to date
- Kept in form that prevents identification and only as long as necessary for specific purpose
- Kept secure against loss, theft, and damage
  
- In other words, you cannot collect personal and identifiable data for general and undefined purposes.



# EU-GDPR: Consent

- ▶ Compliance with EU-GDPR is based on informed consent to data collection by an individual
- ▶ Informed consent is an actual agreement between the individual and the entity collecting the data that must be:
  - ▶ Specific, informed, unambiguous, and freely given
  - ▶ Must clearly indicate acceptance of the entity's data collection process



# EU-GDPR: Consent cont'd

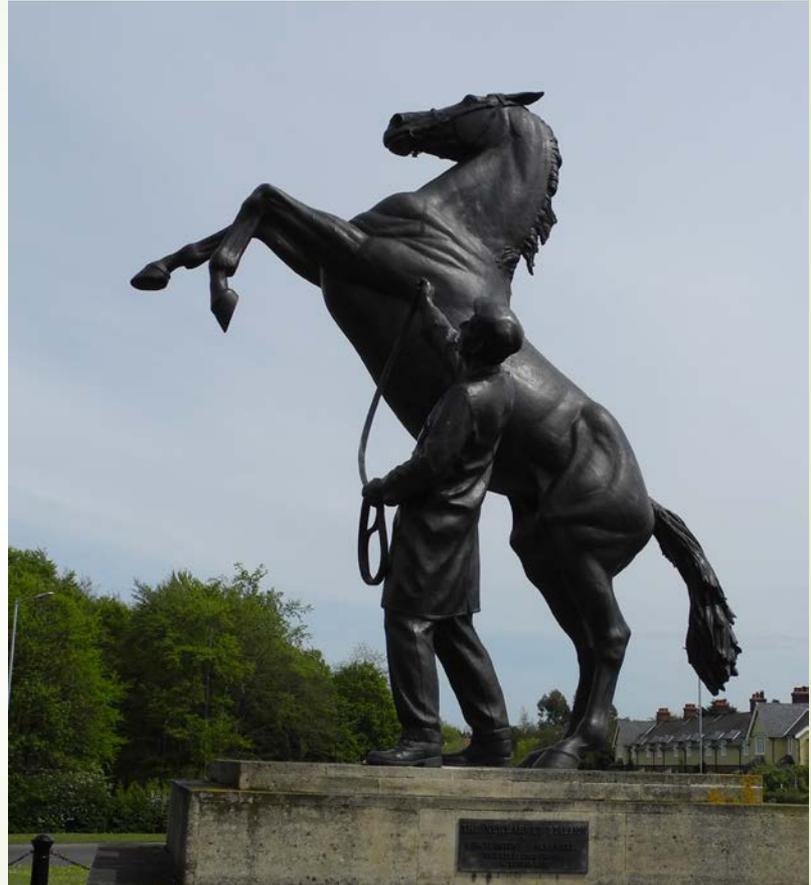
- These are not informed consent:
  - Pre-checked box that requires an individual to opt out of consent to data collection
  - Silence
  - Inactivity



# EU-GDPR: Now What?

- If the EU-GDPR applies, you should:
    - Institute a Privacy Policy that encompasses the requirements of the new Regulations
    - Understand the Privacy Policy and how it works
    - Apply the Privacy Policy
  - These tasks are not easy!
  - The *Irish Times* newspaper has a revised and compliant Privacy Policy that took effect in May 2018
  - That Privacy Policy covers 14 dense pages
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**QUESTIONS?  
About EU-  
GDPR**





# DMCA “Safe Harbor”

- Consider this scenario:
- An individual posts a comment on your website that includes several potentially defamatory comments about the care being provided to a prominent sport horse stallion at a well-known breeding and training center and a conformation photograph of the horse.
- The photographer claims that she owns the copyright to the image and files a lawsuit claiming infringement against the third-party who posted the image and against you.
- Who wins?



# DMCA “Safe Harbor”

- ▶ The bad news: as the internet service provider “publisher” of the photograph, you might be liable for copyright infringement, even though the infringing image was posted on your website by someone who doesn’t work for you.
- ▶ The good news: Section 512 of the Digital Millennium Copyright Act might protect you.
- ▶ Section 512 includes “safe harbor” provisions that shield an internet service provider from liability for infringement under some circumstances.



# DMCA “Safe Harbor”

- The “safe harbor” provisions protect internet service providers (ISP) from liability for copyright infringement by your site’s users and for providing links to infringing material from other internet sources, but only if:
  - 1. the ISP is not aware of infringing material on the site
  - 2. The ISP is not aware of any “red flags” reasonably suggesting infringement
  - 3. the ISP receives no financial benefit attributable to the infringement
  - 4. the ISP removes the infringing material in a timely manner after receiving notice



# DMCA “Safe Harbor”

The “safe harbor” applies only to ISPs that transmit or temporarily store digital information.

The “safe harbor” generally will not apply if the ISP selects, alters, or edits the content.

(The “safe harbor” provisions can be reverse engineered for guidance to writers and photographers who find their copyrighted material and images misappropriated by others.)



# DMCA “Safe Harbor”

- Other requirements:
- Designation of agent to receive notices of alleged copyright infringement (a “DMCA takedown notice”)
- Designation is mandatory and can be completed online for a fee of \$6. Prior paper registrations expired on 12/31/17.
- For more information, including FAQs, go here:
- <https://www.copyright.gov/dmca-directory/faq.html>



# DMCA “Safe Harbor”

- Other requirements:
- After designating an agent, the ISP must publish on its website (possibly in the “Terms of Service”) the procedure for dealing with claims of infringement. This procedure must include contact information for the designated agent.
- The ISP must respond to a claim of infringement by removing the material, notifying the user that the material has been removed, notifying the copyright holder if the user provides proper counter-notice, and restoration of the material if the copyright holder does not file an infringement within 10 days.



# CDA-Section 230

- Back to the scenario and ISP liability if the farm owner files a defamation lawsuit:
- The Communications Decency Act of 1996 was designed to protect children from online pornography.
- Section 230 also provides broad immunity for ISPs from claims based on any speech posted by third parties, including defamation.



# CDA-Section 230

- ▶ General rule—An ISP will not be liable for defamation and most other speech-related claims resulting from third-party postings.
- ▶ Some editing of third-party content is allowed, provided that the meaning of the original statement is not substantially (?) altered.
- ▶ Caveat: It's possible that an innocuous posting could become defamatory through ISP editing. Section 230 protection would not be available as a defense.
- ▶ Cases are very fact-specific, with no hard and fast rules about how much editing is too much. Edit at our own risk.
- ▶ Finally, Section 230 does not apply to claims of copyright infringement



# Who Owns Your Interview?

- ▶ The answer varies, depending on which court is deciding. It might be:
  - ▶ The interviewer who writes the questions and conducts the interview;
  - ▶ The person being interviewed, who provides the answers;
  - ▶ Both the interviewer and the person being interviewed;
  - ▶ Or, maybe, a third party (a videographer, for example) who actually records the interview
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# Who Owns Your Interview?

- ▶ Sorting out the “ownership” of an interview on the basis of copyright is an interesting legal question.
- ▶ In the real world, though, a better question is whether the person being interviewed has placed any restrictions on how the material can be used.
- ▶ The bottom line—keep your promises about how the interview will be used. If an interview is “off the record,” you can’t use it as attributed material.
- ▶ Memorialize any special understanding about how interview material will be used.



# Take-Away Message

- ▶ EU-GDPR is a radical shift in data protection rules. Investigate applicability and adjust your privacy policies as necessary;
- ▶ Register a DMCA agent with the US Copyright Office for “safe harbor” protection against third-party copyright infringement;
- ▶ Section 230 of the Communications Decency Act may protect you from liability for defamation claims from third-party content on your site;
- ▶ Editing third-party postings may affect DMCA & CDA effectiveness;
- ▶ Keep your promises to the people you interview.

# QUESTIONS?

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