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DERECHO Y REDES SOCIALES



 **microjuris.com**
Inteligencia Jurídica

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- Derecho e Internet
- Estructura de las redes sociales
- Régimen Jurídico Básico: TOS
- Manejo de Datos y Privacidad
- Responsabilidad del Usuario de Redes Sociales
- Responsabilidad de Plataformas de Redes Sociales por actos de Usuarios

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Introducción

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1. Derecho e Internet

Derecho e Internet



Derecho e Internet



Derecho e Internet

“Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather...”

John Perry Barlow

A Declaration of the Independence of Cyberspace (1996)

Derecho e Internet

○ ¿Excepcional?

○ ¿Inmune?

MEGAUPLOAD



This domain name associated with the website Megaupload.com has been seized pursuant to an order issued by a U.S. District Court.

A federal grand jury has indicted several individuals and entities allegedly involved in the operation of Megaupload.com and related websites charging them with the following federal crimes:

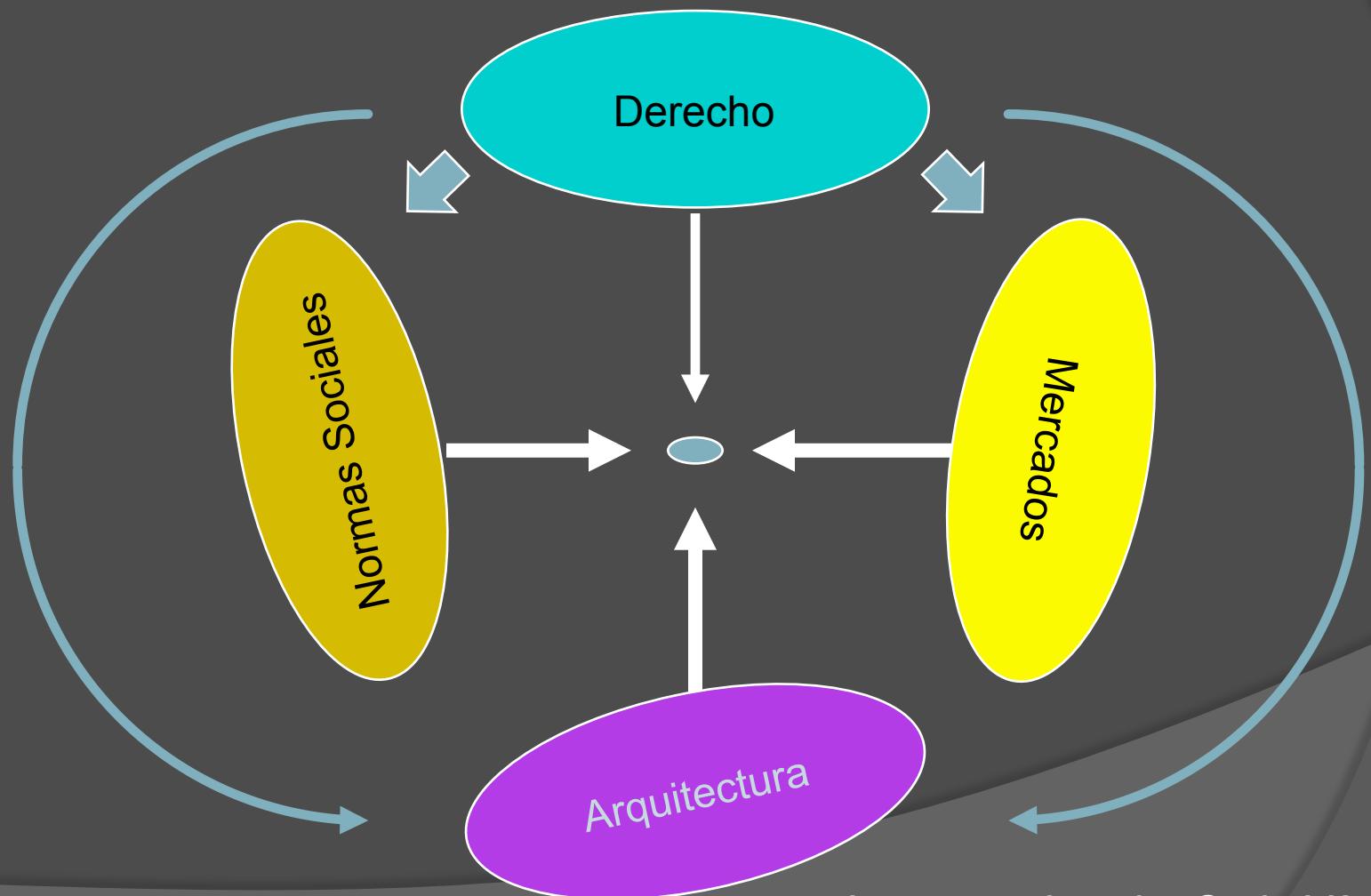
Conspiracy to Commit Racketeering (18 U.S.C. § 1962(d)), Conspiracy to Commit Copyright Infringement (18 U.S.C. § 371), Conspiracy to Commit Money Laundering (18 U.S.C. § 1956(h)), and Criminal Copyright Infringement (18 U.S.C. §§ 2, 2319; 17 U.S.C. § 506).

Intermediarios:

Porteros y Chaperones

- intermediarios de conexión, como los Proveedores de Servicio de Internet, artefactos móviles
- intermediarios de información, como los motores de búsqueda, plataformas de redes sociales
- intermediarios financieros, como tarjetas de crédito y PayPal, entre otros.
 - Hiram A. Meléndez Juarbe, *Intermediarios y libertad de expresión: apuntes para una conversación*, Centro de Estudios en Libertad de Expresión y Acceso a Información, Universidad de Palermo, Buenos Aires, 2011

Intermediarios: Porteros y Chaperones



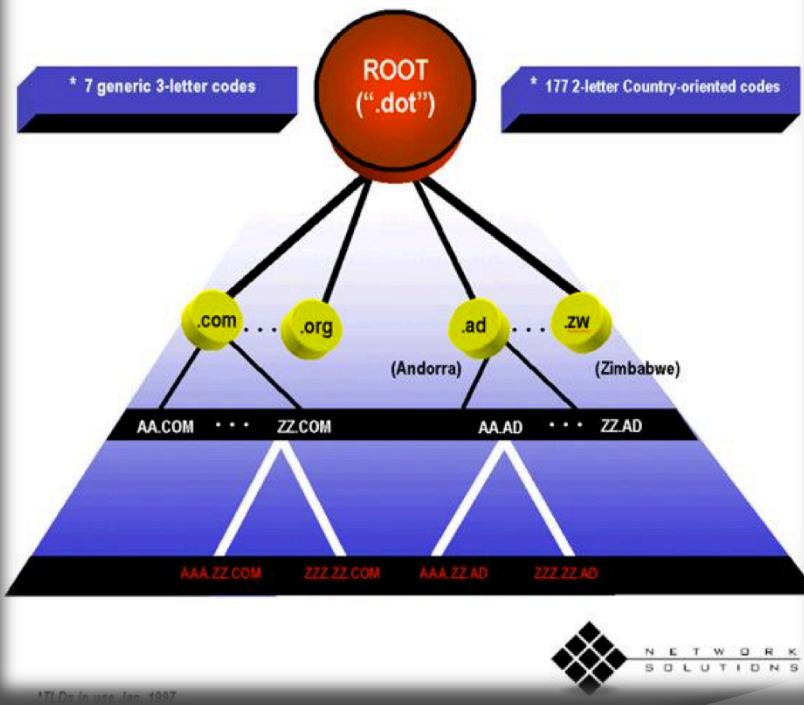
Lawrence Lessig, Code V2.0

DNS / ICANN

Domain Name System (DNS) Hierarchical Structure

Chart Five

What is DNS? An arbitrary, hierarchical naming convention, primarily based on geographical designations.



* TLDs in use Jan. 1997



ICANN / UDRP

You are required to submit to a mandatory administrative proceeding in the event that a third party (a "complainant") asserts to the applicable Provider, in compliance with the Rules of Procedure, that

- (i) your domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and
- (ii) you have no rights or legitimate interests in respect of the domain name; and
- (iii) your domain name has been registered and is being used in bad faith...

ICANN / UDRP

b. Evidence of Registration and Use in Bad Faith...

- (i) circumstances indicating that you have registered or you have acquired the domain name primarily for the purpose of selling, renting, ...
- (ii) you have registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that you have engaged in a pattern of such conduct; or
- (iii) you have registered the domain name primarily for the purpose of disrupting the business of a competitor; or
- (iv) by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your web site or other on-line location, by creating a likelihood of ...

3 aspectos prácticos:

i. Jurisdicción

Zippo Mfr. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997)

"At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. ... At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. ... The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site. ..."

3 aspectos prácticos:

i. Jurisdicción

Bancroft & Masters, Inc. v. Augusta Nat. Inc,
223 F.3d 1082 (9th Cir 2000)

“Express aiming is a concept that in the jurisdictional context hardly defines itself. From the available cases, we deduce that the requirement is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.”

3 aspectos prácticos:

i. Jurisdicción

Trans-Oceanic Life Ins. Co. v. Oracle Corp., KLCE200700021, 30 de marzo 2007, 2007 WL 1655784

“mientras el Tribunal Supremo no paute otra cosa, no estamos en posición de resolver que la venta de productos a través del Internet sea suficiente base para establecer contactos mínimos”.

Trans-Oceanic Life Ins. Co. v. Oracle Corp., 2012 TSPR 34, 24 de febrero de 2012 (“determinamos que el Tribunal de Apelaciones erró al negarse a resolver la controversia señalada debido a que esta Curia aún no ha pautado la normativa aplicable al asunto particular ”)

Ver además, Goodyear Dunlop Tires Operations, S.A. v. Brown, No. 10-76, ___ US __, Junio 2011) (“A court may assert general jurisdiction over foreign sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so “continuous and systematic” as to render them essentially at home in the forum State”)

3 aspectos prácticos:

ii. Anonimato

“Protections for anonymous speech are vital to democratic discourse. Allowing dissenters to shield their identities frees them to express critical minority views . . . Anonymity is a shield from the tyranny of the majority. . . . It thus exemplifies the purpose behind the Bill of Rights and of the First Amendment in particular: to protect unpopular individuals from retaliation . . . at the hand of an intolerant society.”

McIntyre v. Ohio Elections Commission,
514 U.S. 334 (1995).

3 aspectos prácticos:

ii. Anonimato



3 aspectos prácticos:

ii. Anonimato

“The Court will consider four factors in determining whether the subpoena should issue. These are whether:

- the subpoena seeking the information was issued in good faith and not for any improper purpose,
- the information sought relates to a core claim or defense,
- the identifying information is directly and materially relevant to that claim or defense, and
- information sufficient to establish or to disprove that claim or defense is unavailable from any other source.”

Doe v 2themart.com, 140 FSupp2d 1088 (WD Wash 2001)

3 aspectos prácticos:

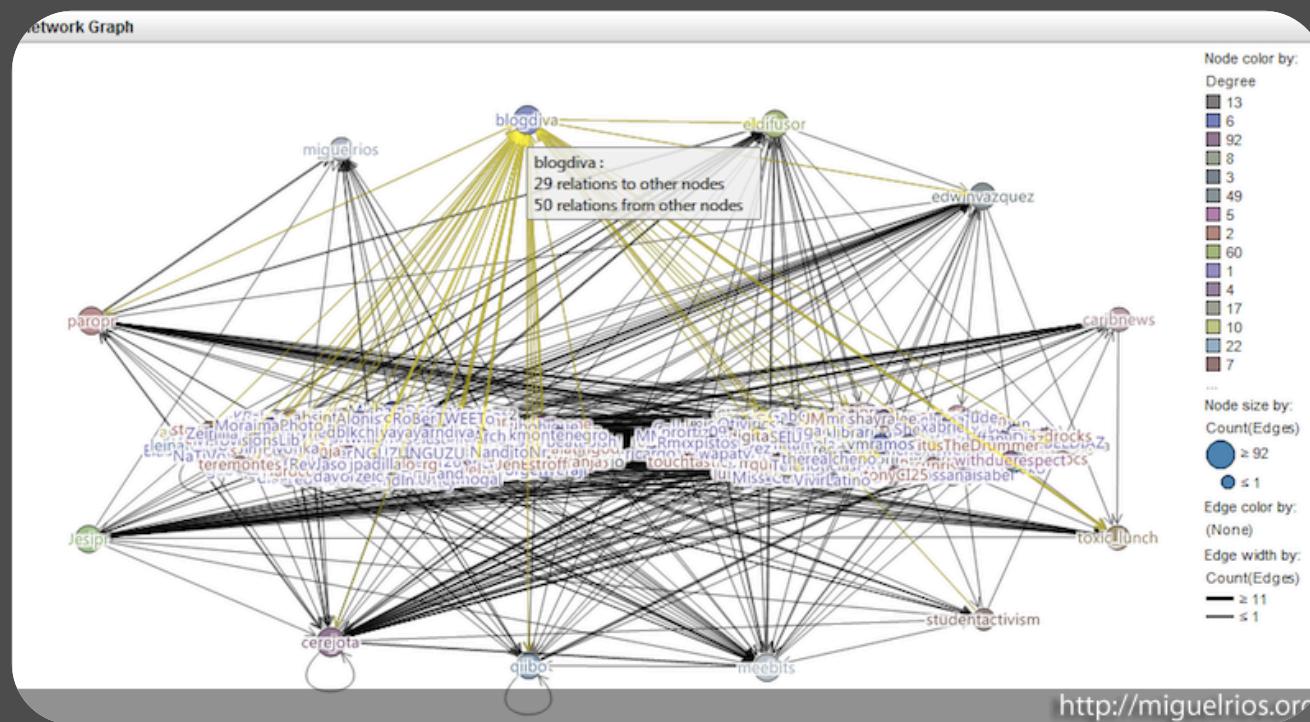
iii. Intermediarios



2. Redes Sociales

Redes sociales

En general: estudio de relaciones, interacciones y conexiones entre individuos, grupos (y objetos).



Análisis uso de Twitter durante Paro de 15 de octubre 2009. www.miguelrios.org
<http://cualestuplan.blogspot.com/2009/10/analisis-de-tweets-en-paro-nacional.html>

Plataforma de Redes sociales

Tecnología que promueve la creación de redes sociales en línea (o la continuación de preexistentes), facilitando la conexión, comunicación en interacción entre individuos, grupos y entidades.

General

- Facebook
- Twitter
- Badoo
- Xing
- Pinterest

Educativo/

- ## Académico
- Academia
 - SSRN
 - Miuniversid
ad.tv

Política

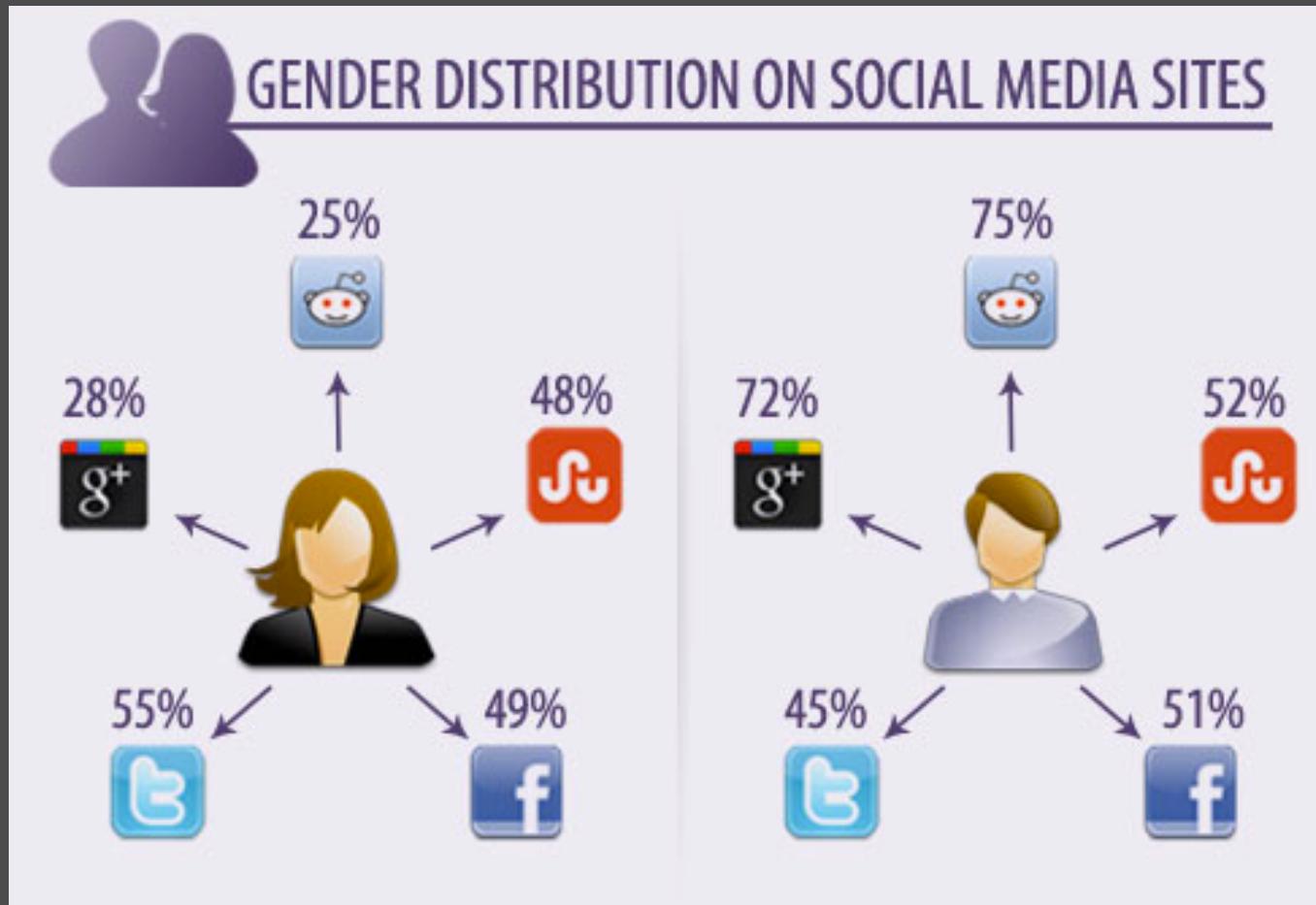
- Moveon
- Avaaz
- AccessNow

Relaciones

- EHarmony
- Match.com
- Okcupid

Etc...

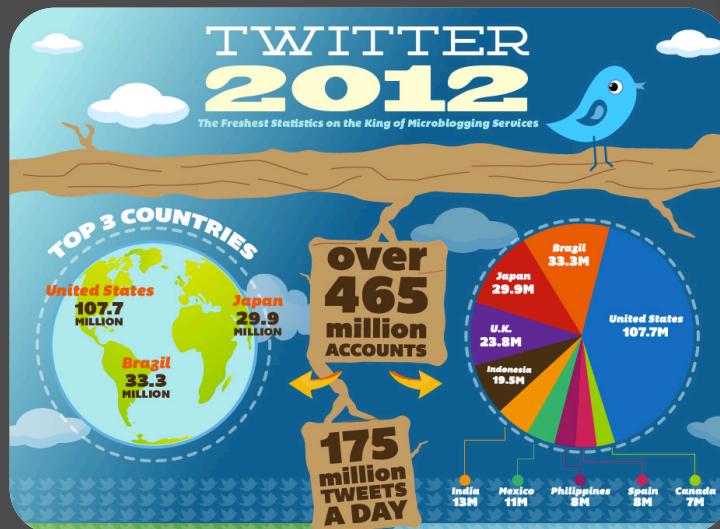
Plataforma de Redes sociales



Statistics of top 5 Social Media

http://www.mediabistro.com/alltwitter/social-media-key-statistics_b19061

Plataforma de Redes sociales



<http://infographiclabs.com/>

<http://www.business2community.com/>

Plataforma de Redes sociales



Statistics of top 5 Social Media

http://www.mediabistro.com/alltwitter/social-media-key-statistics_b19061

Plataforma de Redes sociales

De acuerdo con Internet World Stats:

- Usuarios Internet PR: 1,698,301 (Dic 2011)
- Usuarios Facebook PR: 1,361,020 (Dic 2011)

* <http://www.internetworldstats.com/stats10.htm#spanish>

De acuerdo con estudio comisionado por Badoo:

- 39% estadounidenses dedican más tiempo socializando en redes sociales que fuera de ellas.

* <http://www.marketwatch.com/story/generation-lonely-39-percent-of-americans-spend-more-time-socializing-online-than-face-to-face-2012-04-25>

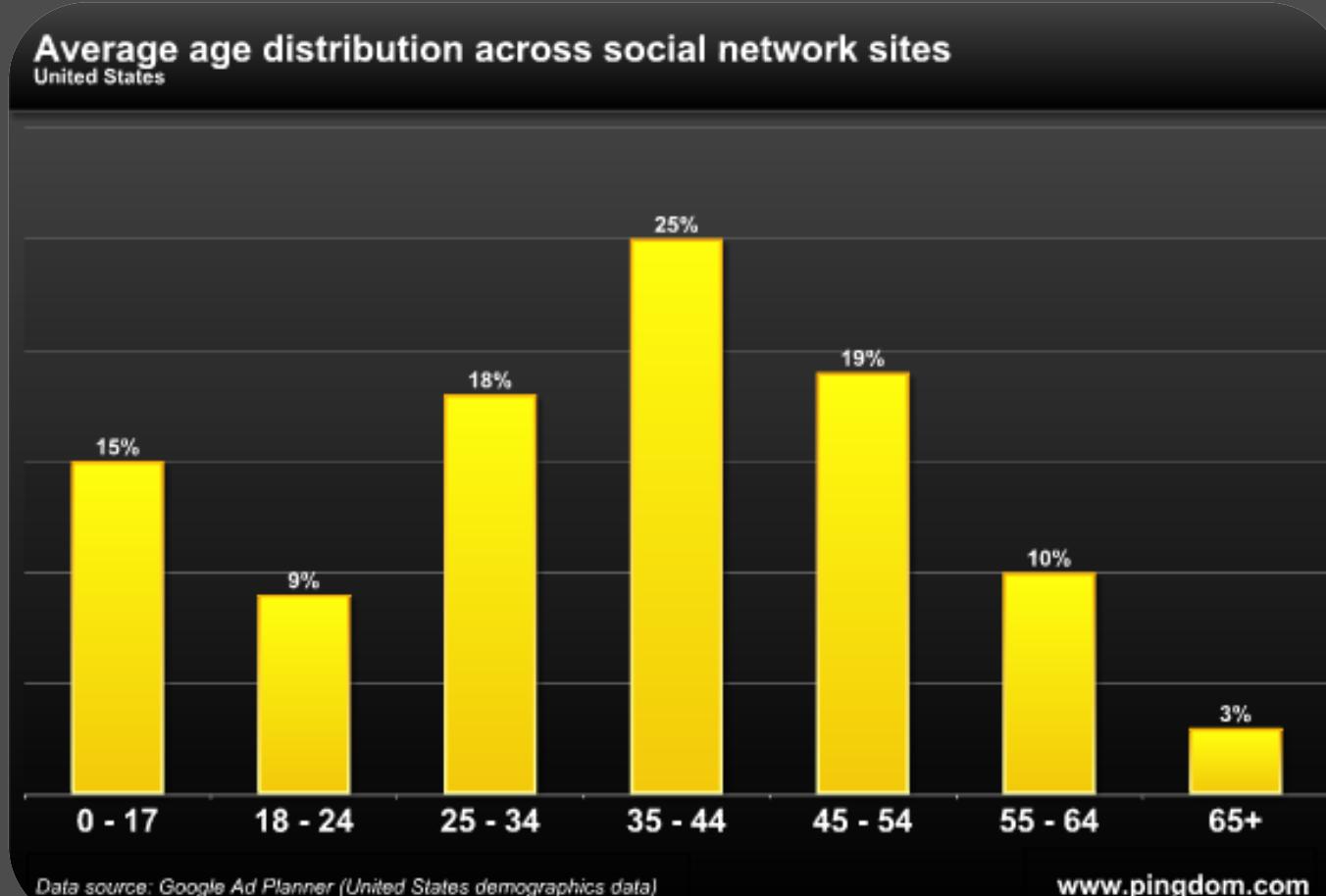
Plataforma de Redes sociales

Digital Natives

“These kids are different. They study, work, write, and interact with each other in ways that are very different from the ways that you did growing up. They read blogs rather than newspapers. They often meet each other online before they meet in person. They probably don’t even know what a library card looks like, much less have one; and if they do, they’ve probably never used it. They get their music online—often for free, illegally—rather than buying it in record stores. They’re more likely to send an instant message (IM) than to pick up the telephone to arrange a date later in the afternoon. They adopt and pal around with virtual Neopets online instead of pound puppies. And they’re connected to one another by a common culture. Major aspects of their lives—social interactions, friendships, civic activities—are mediated by digital technologies. And they’ve never known any other way of life.”

Palfrey & Gasser, Born Digital: Understanding the First Generation of Digital Natives (2008)

Plataforma de Redes sociales



(este es el ordenamiento de páginas web en Alemania) Fuente: Google Ad Planner

www.mobgning.com

0 - 17

18 - 24

25 - 34

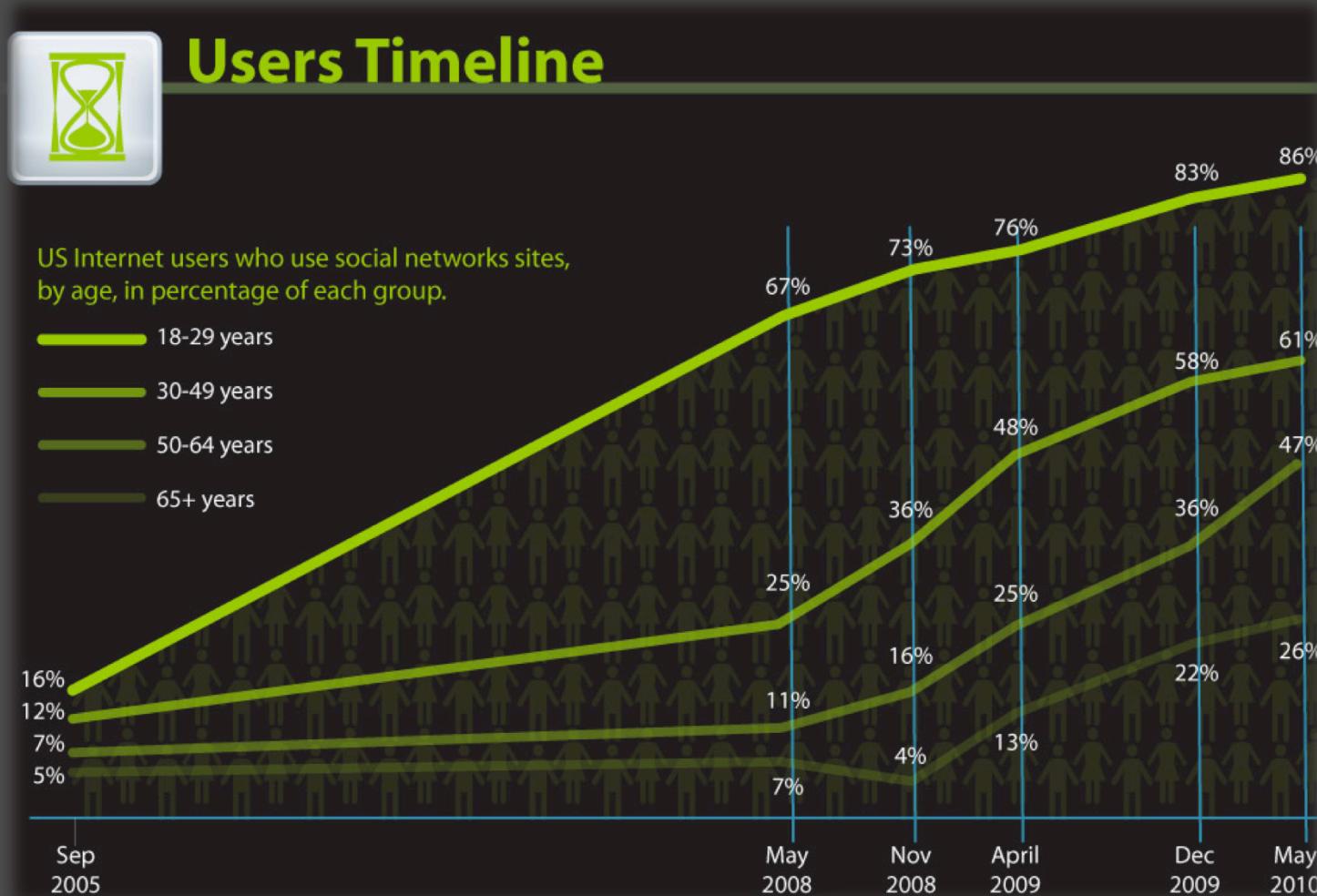
35 - 44

45 - 54

55 - 64

65+

Plataforma de Redes sociales



Plataforma de Redes sociales

- Democracia Semiótica
- Producción de Contenido de forma distribuida y granular
 - Apropiación y re-uso creativo de Contenido

Plataforma de Redes sociales

○ Redes Sociales como Negocios Híbridos:

“These commercial initiatives emerge, in part, thanks to a measure of disintermediation in human interaction observable in a digitally connected world; the democratization and cheapening of computing power; the irreversible fact that distribution of digital works is virtually costless; the distributed and granular nature of online creativity; and the fact that digital technologies allow communities of users to emerge imposing their creative energies into the works they acquire. It is not a world of passive consumers but, more broadly, a world of active users engaged creatively adding value to the works and to the communities they belong to. Spillovers of digital creative works are not necessarily used more efficiently if they are controlled by a single entity or person. In a digitally connected world, sometimes positive externalities of intangible works are better left to the hands of users who are capable of adding value through their use, which can—in turn—form the basis for creative businesses.”

Hiram A. Meléndez Juarbe, Creative Copyright for Creative Business,
1 UPR Business L. J. 137 (2010).

3. Régimen Jurídico Básico

Régimen Jurídico Básico

- El “Terms and Conditions” como régimen contractual

Régimen Jurídico Básico

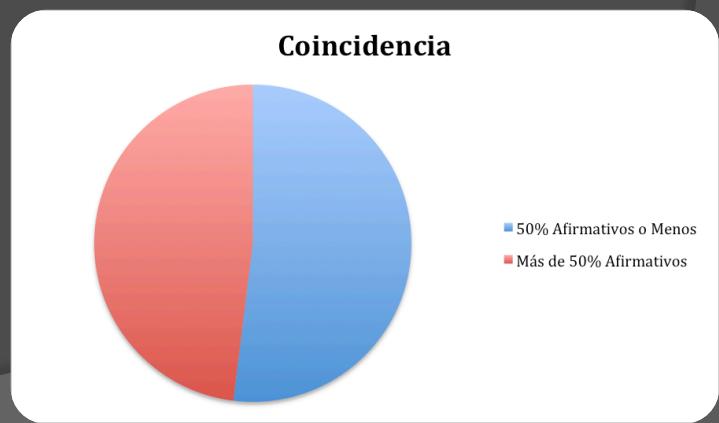
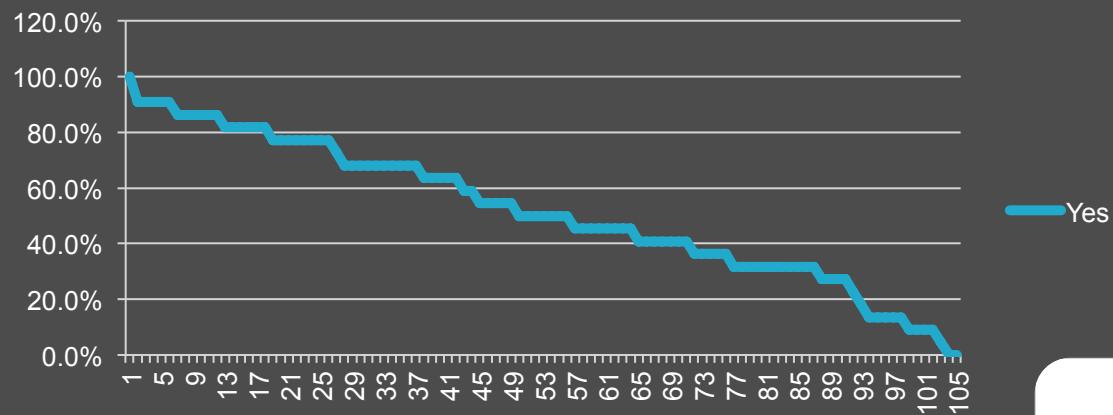
- ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996)

“The back of the ticket states that the patron promises not to record the concert; to attend is to agree. A theater that detects a violation will confiscate the tape and escort the violator to the exit. One could arrange things so that every concertgoer signs this promise before forking over the money, but that cumbersome way of doing things not only would lengthen queues and raise prices but also would scotch the sale of tickets by phone or electronic data service.”

Régimen Jurídico Básico

Estudio Preliminar (Inédito) de 22 documentos de Términos y Condiciones en Redes Sociales (tipo Facebook) y Páginas de Alojamiento de Vídeos por Usuarios (tipo Youtube) (CNPIS): Escuela de Derecho de la Universidad de Puerto Rico —Noviembre de 2011 (<http://cyberclinicpr.org/>)

Por ciento de Resultados Afirmativos



RESULTADOS CON MÁS DE 50% AFIRMATIVOS			
	Yes	ABS	OPP
1. Service provider has the right to amend TOS without prior notice	81.8%	9.1%	9.1%
3. Services may be terminated without prior notice to user	86.4%	4.5%	9.1%
6. Age restriction for access	90.9%	4.5%	4.5%
1. User is responsible for unauthorized use of account	72.7%	27.3%	0.0%
1. No false identification	54.5%	40.9%	4.5%
2. No impersonation	63.6%	27.3%	9.1%
1. OSP can remove material without prior notice	77.3%	18.2%	4.5%
2. Responsibility over content rests on the author of such content	81.8%	18.2%	0.0%
5. Service provider does not supervise nor controls content	59.1%	27.3%	13.6%
a. Errors or omissions regarding content	86.4%	13.6%	0.0%
b. Damages or losses resulting from use of content	81.8%	18.2%	0.0%
d. Copyright infringement by users	86.4%	13.6%	0.0%
f. Accidental deletion of material	54.5%	45.5%	0.0%
h. Any spread of viruses, worms, etc	54.5%	45.5%	0.0%
i. Illegal content	68.2%	31.8%	0.0%
k. Interruption of service	68.2%	31.8%	0.0%
1. User agrees to the use and recollection of the information provided	68.2%	31.8%	0.0%
3. Password requirement	90.9%	9.1%	0.0%
a. Cookies	90.9%	9.1%	0.0%
c. Request info from user	68.2%	27.3%	4.5%
a. Personal	90.9%	9.1%	0.0%
b. IP address	90.9%	9.1%	0.0%
d. Browser	81.8%	18.2%	0.0%
a. OSP offering of products and services	68.2%	31.8%	0.0%
b. Third party offering of products and services	68.2%	22.7%	9.1%
d. Customize experience	63.6%	36.4%	0.0%
1. No unlawful content	100.0%	0.0%	0.0%
2. No defamation/libel/slander	77.3%	22.7%	0.0%
3. No incitement to violence	68.2%	31.8%	0.0%
4. No obscenity	77.3%	22.7%	0.0%
1. No indecency/pornography	86.4%	13.6%	0.0%
3. No hate speech	77.3%	22.7%	0.0%
4. No abuse of others	81.8%	18.2%	0.0%
5. No threat to person/property	81.8%	18.2%	0.0%
8. Content does not infringe intellectual property rights of third party	86.4%	13.6%	0.0%
9. Content does not infringe personal privacy rights	68.2%	31.8%	0.0%
3. User is the owner of all content and information posted	68.2%	18.2%	13.6%
4. Uses allowed by User to OSP:			
a. Reproduction	68.2%	27.3%	4.5%
b. Distribution	77.3%	22.7%	0.0%
c. Derivative works	63.6%	31.8%	4.5%
d. Display	63.6%	31.8%	4.5%
e. Perform	54.5%	40.9%	4.5%
g. Royalty free	54.5%	45.5%	0.0%
7. User can't copy or distribute Intellectual Property owned by the OSP	77.3%	9.1%	13.6%
8. OSP terminates service or account for "repeat infringers"	59.1%	36.4%	4.5%
9. Owners of copyrighted content may file a notice	86.4%	13.6%	0.0%
10. OSP provides information about what such notification must include	77.3%	22.7%	0.0%
12. OSP provides a clear physical or email address to file such notification	77.3%	18.2%	4.5%
13. OSP indicates it has a "Designated DMCA Agent"	63.6%	27.3%	9.1%

RESULTADOS CON 50% AFIRMATIVOS O MENOS			
	Yes	ABS	OPP
2. Service provider will notify user of amendments	45.5%	9.1%	45.5%
4. Access termination requires repeat TOS violation	9.1%	40.9%	50.0%
5. Service termination can be temporary	50.0%	45.5%	4.5%
7. Dispute resolution process	45.5%	40.9%	13.6%
3. No use of vulgarity in screen names	40.9%	59.1%	0.0%
3. Website indemnified against damage to user	50.0%	40.9%	9.1%
4. User is liable for damage to service provider	40.9%	59.1%	0.0%
OSP is not responsible for:			
c. Failure or delay in removal of material	27.3%	72.7%	0.0%
e. OSP content or links	45.5%	54.5%	0.0%
g. Loss due to unauthorized account use	50.0%	50.0%	0.0%
j. Other user content restrictions	31.8%	68.2%	0.0%
Privacy- User options			
a. General opt-out	31.8%	59.1%	9.1%
b. Opt-out option for communications from the services	45.5%	45.5%	9.1%
c. Detailed consent to uses	18.2%	68.2%	13.6%
Data Collection Techniques			
b. Web beacons	40.9%	59.1%	0.0%
d. User must update information	36.4%	59.1%	4.5%
Type of Information Collected			
c. Computer use	45.5%	54.5%	0.0%
Use of Information Collected:			
c. No sale of personal information	40.9%	59.1%	0.0%
e. User security	50.0%	50.0%	0.0%
f. Data sharing partners	36.4%	63.6%	0.0%
g. Cooperating with government	36.4%	59.1%	4.5%
7. User content may be seen by third parties at other websites	45.5%	45.5%	9.1%
Other Content Restrictions			
2. No profanity	40.9%	59.1%	0.0%
6. User may not post advertisements	50.0%	36.4%	13.6%
7. User may post commercial content	31.8%	31.8%	36.4%
10. Content is not contrary to moral standards	40.9%	59.1%	0.0%
Uses allowed to User of content submitted by others			
a. Reproduction	31.8%	40.9%	27.3%
b. Distribution	27.3%	45.5%	27.3%
c. Derivative works	27.3%	45.5%	27.3%
d. Display	31.8%	45.5%	22.7%
e. Perform	31.8%	45.5%	22.7%
f. Other	22.7%	68.2%	9.1%
License given by User to all Users			
a. Perpetual	0.0%	77.3%	22.7%
b. Exclusive	9.1%	50.0%	40.9%
c. Commercial	13.6%	68.2%	18.2%
d. Personal Use / Non Commercial	36.4%	54.5%	9.1%
e. Transferable	9.1%	68.2%	22.7%
f. Sub-license	4.5%	77.3%	18.2%
g. Royalty free	13.6%	68.2%	18.2%
h. Other	13.6%	81.8%	4.5%
Uses allowed by User to OSP:			
f. Other	45.5%	50.0%	4.5%
License given by User to Website			
a. Perpetual	31.8%	50.0%	18.2%
b. Exclusive	0.0%	36.4%	63.6%
c. Commercial	13.6%	86.4%	0.0%
d. Personal Use / Non Commercial	13.6%	86.4%	0.0%
e. Transferable	36.4%	63.6%	0.0%
f. Sub-license	31.8%	68.2%	0.0%
h. Other	45.5%	54.5%	0.0%
6. Licenses terminate upon deletion or removal of such material	31.8%	63.6%	4.5%
DMCA			
11. OSP provides legal authority for such notification requirement	31.8%	68.2%	0.0%
14. Misuse of notification procedure might result in legal liability	50.0%	50.0%	0.0%
15. Upon notification by content owner, OSP will take down material	50.0%	50.0%	0.0%
16. Upon notification by content owner, service will be suspended/terminated	27.3%	72.7%	0.0%
17. After being notified by copyright owner, user may file a counter notification	40.9%	59.1%	0.0%
18. Upon receiving counter notification, OSP may reinstate content	31.8%	68.2%	0.0%
19. OSP indicates that it will report all DMCA notices to chillingeffects.org	9.1%	77.3%	13.6%

Aspectos Comunes a TOS

- Privacidad
- Propiedad Intelectual (titularidad)
- Seguridad
- Identidad
- Reglas de Uso y Comportamiento
- Derechos de Terceros
- Reglas para developers
- Otros términos

4. Datos Privados

Manejo de Datos Privados

- Derecho a la Intimidad en Estados Unidos
 - Constitución, Whalen v. Roe, 429 U.S. 589 (1977)
 - Reglamentación fragmentada
 - Tort
 - Apropiación de imagen
 - “False light”
 - Divulgación de hechos privados
 - Intromisión con áreas íntimas, secretas (“intrusion upon seclusion”)

Manejo de Datos Privados

- Derecho a la Intimidad en Estados Unidos
 - El Criterio de Expectativa de Intimidad
 - Hiram Meléndez Juarbe, Lo público de lo público: un argumento que no debe estar disponible, <http://derechoalderecho.org/2012/04/05/publicodelopublic/>, 5 de abril de 2012
 - Opinión Concurrente de la Jueza Sonia Sotomayor en United States v. Jones, 565 U. S. ____ (2012)

Manejo de Datos Privados

- Prácticas de Recopilación de Datos Privados
 - Cookies
 - Data Aggregation / Profiling
 - Advertisement Networks
 - Behavioral Targetting
 - Ad Exchange

Manejo de Datos Privados

- Prácticas de Recopilación de Datos Privados



The screenshot shows a web browser displaying the website elnuevodia.com. The page features a banner for "mami" and "claro" advertising a package deal of Internet + Telefonía starting at \$19.99 per month with speeds up to 50 MEGA. Below the banner, there's a navigation bar with links for "NOTICIAS", "FOTOS Y VÍDEOS", and "GREEN APPLE". A sidebar on the right lists various tracking and social media partners: 24/7 Real Media, Brightcove, Certifica Metric, DoubleClick, Facebook Connect, Facebook Social Plugins, Google Analytics, and Twitter Button. The bottom of the screen shows a dark navigation bar with icons for back, forward, search, and social media sharing.

Manejo de Datos Privados

- Constitución Federal, n/a
- Legislación, n/a
- Alcance limitado del Tort
 - Apropiación de imagen, “False light”, Divulgación de hechos privados, Intromisión con áreas íntimas, secretas (“intrusion upon seclusion”)
 - Dwyer v American Express, 652 NE2d 1351 (III App. 1995)
 - Venta por tarjeta de crédito de Profiles de clientes
 - n/a “intrusion upon seclusion”
 - n/a “apropiación de imagen”
 - Remsburg v Docusearch, 816 A2d 1001 (NH 2003)
 - Venta de información privada (incluyendo lugar de trabajo), condujo a asesinato de mujer
 - n/a “intrusion upon seclusion”
 - n/a “apropiación de imagen”

Manejo de Datos Privados

Reglamentación Administrativa

- Privacy Policy y el Federal Trade Commission
- “We collect information:
 - When you register an account to become a LinkedIn user (“User”), such as your name, e-mail, employer, country, and a password.
 - When you view and interact with LinkedIn pages, features, and functionality, including LinkedIn mobile applications, software (like adding to your profile, participating in Groups, uploading contacts, etc.), and platform technology (like “Share on LinkedIn” buttons or third party applications). We also collect your IP address, browser type, operating system, mobile carrier, and your ISP, and receive the URLs of sites from which you arrive or leave the LinkedIn website, or sites that have embedded LinkedIn platform technology.
 - Through cookies and other technologies that allow us to recognize you, customize your experience, and serve advertisements both on and off LinkedIn.”



Manejo de Datos Privados

○ Privacy Policy y el Federal Trade Commission



- “LinkedIn takes the privacy of our Users very seriously, and we do not sell, rent, or otherwise provide your personally identifiable information to third parties, except as described in this policy. We will also not share other personal information not published to your profile or generated through engagement with other LinkedIn services (Groups, Answers, Company Pages, etc.) without your explicit consent...”
- We may provide aggregated anonymous data about the usage of the Services to third parties for purposes that we deem, in our sole discretion, to be appropriate, including to prospective advertisers on LinkedIn.”

Datos Privados y el FTC

- Federal Trade Commission Act (FTC Act) (15 USC 45)
 - “unfair or deceptive acts or practices in or affecting commerce.”
- DACO (3 L.P.R.A. sec. 341e)
 - “Reglamentar y fiscalizar los anuncios y las prácticas engañosas en el comercio, incluyendo la facultad de fiscalizar los reclamos sobre la calidad y demás cualidades de los productos y servicios, realizados a través de los distintos medios de comunicación, así como requerir de los anunciantes evidencia de la veracidad de los reclamos realizados”.

Datos Privados y el FTC

- Federal Trade Commission Act (FTC Act) (15 USC 45)
 - In the Matter of Vision I Properties, 2005 WL 1274741 (FTC 2005)
 - “PRIVACY POLICY: It's simple. We don't sell, trade, or lend any information on our customers or visitors to anyone.”
 - “Respondent began renting to third parties for marketing purposes consumers' personal information collected through shopping cart”
 - “IT IS ORDERED that Respondent ... shall not make, expressly or by implication, any false or misleading representation regarding the collection, use, or disclosure of personally identifiable information...”

Datos Privados y el FTC

- Federal Trade Commission Act (FTC Act) (15 USC 45) (Acuerdos recientes)
 - In the Matter Facebook, Inc, 092 3184 (FTC 2011)
 - In the Matter of Google, Inc, 102 3136 (FTC 2011) (Google Buzz)
 - In the Matter of Myspace, LLC, 102 3058 (FTC 2012) (Friend Id) (Acuerdo del 8 de mayo de 2012)

Datos Privados y el FTC

- Federal Trade Commission Act (FTC Act) (15 USC 45)

The screenshot shows a news article from The New York Times Business Day. The top navigation bar includes links for HOME PAGE, TODAY'S PAPER, VIDEO, and MOST POPULAR, along with an Edition selection for U.S. / Global. The main headline is "Business Day" in large, bold letters. Below it is the specific article title, "F.T.C. and White House Push for Online Privacy Laws". The byline reads "By EDWARD WYATT" and "Published: May 9, 2012". The article text discusses the Obama administration's push for online privacy legislation, mentioning the Federal Trade Commission (FTC) and its chairman, Jon Leibowitz. A sidebar on the right provides sharing options for Facebook, Twitter, Google+, Email, Share, Print, and Reprints. At the bottom left, there is a thumbnail image with a link to "Enlarge This Image".

HOME PAGE | TODAY'S PAPER | VIDEO | MOST POPULAR | Edition: U.S. / Global

The New York Times

Business Day

F.T.C. and White House Push for Online Privacy Laws

By EDWARD WYATT
Published: May 9, 2012

WASHINGTON — The Obama administration and the nation's chief privacy regulator pressed Congress on Wednesday to enact online privacy legislation, saying new laws would level the playing field between companies that already had privacy policies and those that lacked them, and thus escape regulatory oversight.

Enlarge This Image

Jon Leibowitz, chairman of the Federal Trade Commission, which enforces limited Internet privacy laws,

SHARE

PRINT

REPRINTS

Datos Privados en PR

Protección Constitucional

- Su aplicación contra personas privadas
- Su futuro incierto
- Arroyo v. Rattan, 117 D.P.R. 35 (1986)
- P.R.T.C. v Martínez, 114 D.P.R. 328 (1983)
- U.T.I.E.R. v A.E.E., 99 T.S.P.R. 155

Predomina el paradigma de lo “público de lo público”

Ejemplo: Controversia reciente sobre acceso a listas electorales en primarias

Hiram Meléndez Juarbe, La Constitución en Ceros y Unos: Un Acercamiento Digital al Derecho a la Intimidad y la Seguridad Pública, 77 Rev. Jur. UPR 45 (2008)

Datos Privados en PR

- Vega Rodríguez v. Telefónica de Puerto Rico, 2002 T.S.P.R. 50
 - Incide sobre regulación y supervisión en contexto laboral re: uso de tecnología (y redes sociales) en el empleo (público y privado)
 - Potencial efecto sobre plataformas de redes sociales

Notificación:

- “(a) el tipo de vigilancia a utilizarse;
- (b) la naturaleza de los datos a obtenerse;
- (c) la frecuencia con que habrá de usarse el medio de vigilancia;
- (d) sus especificaciones técnicas;
- (e) lugar donde se instalará el sistema de vigilancia;
- (f) localización del equipo de monitoreo;
- (g) el grupo de empleados que ha de ser observado; y
- (h) el mecanismo administrativo disponible para canalizar las quejas de los empleados sobre el particular.

Además, la empresa deberá tener una política clara y adecuada sobre el uso, disposición y acceso a la información recopilada, la cual se le informará a los empleados.

Por último, como regla general, no se deberá instalar un sistema de videograbación de empleados en áreas en las cuales por su naturaleza, el empleado tenga una marcada expectativa de intimidad tales como los baños, duchas y vestidores (locker rooms).”

Datos Privados en PR

Protección Constitucional

- Constitucionalización de “Fair Information Practices”
 - Vega Rodríguez v. Telefónica de Puerto Rico, 2002 T.S.P.R. 50
- Pero...
 - Futuro incierto de “factura más ancha”
 - Hiram Melendez Juarbe, Rechazo a tratamiento médico y derecho a la intimidad: ¿suicidio asistido de la factura más ancha?, http://derechoalderecho.org/2010/01/28/tratamiento_medico/, 28 de enero de 2008
 - Lozada Tirado v Tirado Flecha, 2010 TSPR 9, 27 de enero de 2010
- ¿Rol de DACO?
 - Frente a Plataformas de Redes Sociales

4. Responsabilidad del Usuario

○ Daños a la reputación y privacidad de terceros, en general

- Art II, sec. 8, Const. ELA
 - “Toda persona tiene derecho a protección de ley contra ataques abusivos a su honra, a su reputación y a su vida privada o familiar.”
- Causa de acción privada
 - 31 LPRA 1802
 - Arroyo v. Rattan, 117 D.P.R. 35 (1986)

- Difamación y Primera Enmienda
 - Los criterios de malicia real y negligencia:
 - Figuras Públicas y privadas
 - New York Times Co. v. Sullivan, 376 U.S. 254 (1964)

- Protección contra ataques abusivos a la honra
 - Colón v Romero Barceló, 112 DPR 573 (1982)
 - Bonilla Medina v PNP, 140 DPR 294 (1996)

- Derechos de Propia Imagen

- Ley Núm. 139 de 13 de julio de 2011

“Cualquier persona natural o jurídica que utilice la imagen de otra persona con fines o propósitos comerciales, mercantiles o publicitarios, sin el consentimiento previo de ésta, de la persona que posea una licencia sobre tal imagen, de los herederos en caso de haber fallecido o del agente autorizado de uno de éstos, responderá por los daños causados.”

- Derechos de Propia Imagen
 - Ley Núm. 139 de 13 de julio de 2011

Remedios: Injunction y Daños:

“En el evento de no obtenerse el consentimiento requerido en esta Ley, la persona afectada podrá presentar una acción para detener la utilización de dicha imagen y para recobrar los daños causados, incluyendo regalías dejadas de devengar o cualquier pérdida económica resultante de la violación del derecho aquí establecido”

Extensión:

25 años después de la muerte

- ◎ Derechos de Propia Imagen
 - Ley Núm. 139 de 13 de julio de 2011

Excepciones:

- *“Cuando se utilice la imagen de una persona en cualquier medio como parte de un reportaje noticioso, expresión política, transmisión de evento deportivo o artístico, o una presentación que tenga un interés público legítimo, y en donde no sea utilizada con propósitos comerciales o publicitarios.”*
- ...sátira o parodia, en donde el propósito principal del uso de la imagen no sea uno comercial o publicitario.
- propósitos de crítica o comentario, académicos o investigativos, siempre que dicha utilización no constituya una explotación encubierta de la imagen protegida.
- Cuando se utilice la imagen de una persona accesoria.

○ Derechos de Propia Imagen

- Vigoreaux Lorenzana v. Quizno's Sub, Inc 2008 T.S.P.R. 38 (“para los que se quedaron con las ganas”)
 - relevancia de fines comerciales, figura central, valor comercial de imagen es esencial (vs valor de intimidad)
 - Cf. Bonilla v PNP, 140 DPR 294 (1996) (figura accesoria, en público, fines políticos)

○ Frente al Patrono

Público:

- Hernández Estrella v. Junta, 147 D.P.R. 840 (1999)
 - Interés público: “Expresiones que tienen que ver con asuntos sobre los cuales la información es pertinente o necesaria para que los miembros de la sociedad tomen decisiones informadas sobre el funcionamiento de su gobierno, ameritan el más alto grado de protección conforme la [libertad de expresión]”
 - “No es de interés público, cuando la expresión versa sobre disputas y quejas individuales del personal, irrelevantes para la evaluación, por parte del público del desempeño de las agencias gubernamentales.”
 - “es menester sopesar los intereses del empleado como ciudadano particular en expresarse libremente sobre dichos asuntos, y el del Estado en promover la mejor eficiencia y productividad en el servicio de educación pública.”

○ Frente al Patrono

Privado:

- Ley 80, 30 de mayo de 1976, 29 L.P.R.A. § 185b

“Se entenderá por justa causa para el despido de un empleado de un establecimiento

- Que el obrero siga un patrón de conducta impropia o desordenada....
- Violación reiterada por el empleado de las reglas y reglamentos razonables establecidas para el funcionamiento del establecimiento siempre que copia escrita de los mismos se haya suministrado oportunamente al empleado.
- No se considerará despido por justa causa aquel que se hace por mero capricho del patrono o sin razón relacionada con el buen y normal funcionamiento del establecimiento.”

○ Frente al Patrono

Privado:

- **Almodóvar Marchany v. GP Industries, 153 D.P.R. 223 (2001)**
 - Lista de ejemplos que constituyen Justa Causa no es taxativa
 - Patrono “tiene derecho a evaluar a su personal, a base de los valores morales y de orden público prevalecientes en Puerto Rico, de conocimiento general en nuestra sociedad, cuando el cumplimiento o violación de éstos puede mantener o alterar el buen y normal funcionamiento de la empresa.”
 - Aunque los reglamentos de la empresa constituyen un acuerdo con empleado y su incumplimiento podría dar base al despido justificado, “es justificado el despido en primera o única ofensa, aunque ella no haya sido prevista en las reglas y los reglamentos de la empresa, por aquella falta cuya intensidad de agravio así lo requiera, para proteger el normal y buen funcionamiento de la empresa”.

○ Frente al Patrono

Privado:

National Labor Relations Board, Office of the General Counsel, Report of the Acting General Counsel Concerning Social Media Cases, Jan 24, 2012, OM 12-31

- “Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees.”
- “An employee’s comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees.”

<https://www.nlrb.gov/news/acting-general-counsel-issues-second-social-media-report>

National Labor Relations Board, Office of the General Counsel, Report of the Acting General Counsel Concerning Social Media Cases, Jan 24, 2012, OM 12-31

Políticas invalidadas por el NLRB por excesivamente amplias:

- “Making disparaging comments about the company through any media, including online blogs, other electronic media or through the media”
- “employees should generally avoid identifying themselves as the Employer’s employees, unless there was a legitimate business need to do so or when discussing terms and conditions of employment in an appropriate manner”
- “policy prohibits employees from using social media to engage in unprofessional communication that could negatively impact the Employer’s reputation or interfere with the Employer’s mission or unprofessional/inappropriate communication regarding members of the Employer’s community.”
- “prohibited employees from disclosing or communicating information of a confidential, sensitive, or non-public information concerning the company on or through company property to anyone outside the company without prior approval of senior management or the law department.”
- “prohibited use of the company’s name or service marks outside the course of business without prior approval of the law department.”
- “publishing any representation about the company without prior approval by senior management and the law department.”

◎ Frente al Patrono

Privado:

The screenshot shows a Facebook privacy note. The title is "Protecting Your Passwords and Your Privacy" by Facebook and Privacy on Friday, March 23, 2012 at 8:32am. The note discusses the increasing concern over employers or others gaining inappropriate access to people's Facebook profiles or private information. It emphasizes the importance of password security and the tools available on Facebook to control who sees your information. The note also addresses the issue of employers asking for passwords, noting it can lead to legal liability and potential discrimination claims. It concludes by stating that employers should not ask for passwords and that Facebook has policies in place to handle such requests.

Protecting Your Passwords and Your Privacy
by Facebook and Privacy on Friday, March 23, 2012 at 8:32am ·

In recent months, we've seen a distressing increase in reports of employers or others seeking to gain inappropriate access to people's Facebook profiles or private information. This practice undermines the privacy expectations and the security of both the user and the user's friends. It also potentially exposes the employer who seeks this access to unanticipated legal liability.

The most alarming of these practices is the reported incidents of employers asking prospective or actual employees to reveal their passwords. If you are a Facebook user, you should never have to share your password, let anyone access your account, or do anything that might jeopardize the security of your account or violate the privacy of your friends. We have worked really hard at Facebook to give you the tools to control who sees your information.

As a user, you shouldn't be forced to share your private information and communications just to get a job. And as the friend of a user, you shouldn't have to worry that your private information or communications will be revealed to someone you don't know and didn't intend to share with just because that user is looking for a job. That's why we've made it a violation of Facebook's Statement of Rights and Responsibilities to share or solicit a Facebook password.

We don't think employers should be asking prospective employees to provide their passwords because we don't think it's the right thing to do. But it also may cause problems for the employers that they are not anticipating. For example, if an employer sees on Facebook that someone is a member of a protected group (e.g. over a certain age, etc.) that employer may open themselves up to claims of discrimination if they don't hire that person.

Employers also may not have the proper policies and training for reviewers to handle

https://www.facebook.com/note.php?note_id=326598317390057

○ Frente al Patrono

Privado:

Protección de Secretos de Negocios:

Ley para la Protección de Secretos Comerciales e Industriales de Puerto Rico, Ley Núm. 80 del año 2011

Artículo 3. – Secreto Comercial

“Se considera un Secreto Comercial, o Secreto Industrial toda información:

a) de la cual se deriva un valor económico independiente, ya sea un valor actual o un valor potencial, o una ventaja comercial, debido a que tal información no es de conocimiento común o accesible por medios apropiados por aquellas personas que pueden obtener un beneficio pecuniario del uso o divulgación de dicha información; y;

b) que ha sido objeto de medidas razonables de seguridad, según las circunstancias, para mantener su confidencialidad.

Será también parte del Secreto Comercial toda información generada, utilizada o resultante de los intentos fallidos realizados en el proceso de desarrollar el mismo.”

◎ Derechos de Autor

ABC del derecho de autor

- Base Constitucional

Art. I, § 8 de la Constitución de los Estados Unidos dispone “Congress shall have power... to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries...”.

◎ Derechos de Autor

ABC del derecho de autor

Obras susceptibles de protección

17 U.S.C. § 102.

“original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device”.

Requisitos para la protección

1. Fijación
2. Originalidad
3. Autoría

◎ Derechos de Autor

ABC del derecho de autor

Work for hire:

“(1) a work prepared by an employee within the scope of his or her employment; or
(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.”

◎ Derechos de Autor

ABC del derecho de autor

◎ Derechos

- reproducción de la obra;
- preparación de un trabajo derivado basado en el trabajo original;
- distribución de copias o grabaciones del trabajo al público;
- realización de una interpretación pública (“public performance”) del trabajo;
- exhibición pública del trabajo.

◎ Tipos de obras

- trabajos literarios;
- trabajos musicales;
- trabajos dramáticos;
- pantomimas y coreografías;
- trabajos pictóricos, gráficos y esculturales;
- películas y otros trabajos audiovisuales;
- grabaciones de sonidos; y
- trabajos arquitectónicos.

◎ Derechos de Autor

ABC del derecho de autor

◎ Límites y Excepciones:

- Duración
- Fair Use
- La dicotomía Idea/Expresión
- Los Hechos

◎ Derechos Morales

- Visual Artists Rights Act (VARA):
- Ley de Derechos de Autor de Puerto Rico, Ley núm. 55 de 2012

○ Derecho de Marcas

ABC del derecho de marcas

Aspectos Básicos del Derecho de Marcas, el Lanham Act y la Ley de Marcas de Puerto Rico, Ley Núm. 169 del año 2009, según enmendada

- Objetivos del Sistema de Marcas: la protección al consumidor y el flujo de bienes y servicios en el mercado.
- Marcas susceptibles de protección
 - El amplio concepto de lo que constituye una “marca”
 - La imagen o estilo comercial (“Trade Dress”) y el límite de la Funcionalidad---Trade Dress de una página de internet: el concepto del “look and feel”
 - Blue Nile, Inc. v. Ice.com, Inc., 478 F. Supp. 2d 1240 (W.D. Wash., 2007)

○ Derecho de Marcas

ABC del derecho de marcas

Groupon®

Destacados Travel Todas las ofertas Ingresar Registro

San Juan ▾ Suscríbete +

Invita a tus amigos y gana USD \$10

\$23 en vez de \$225 por ajuste quiropráctico + evaluación clínica y nutricional en Salud Quiropráctica (90% off)

\$23 Comprar

Referencia Beneficio Ahorras
\$225 90% \$202

Este Groupon expira en 07:32:01

Más de 40 comprados

✓ Groupon activo!

Destacados Letra chica

- El ajuste se realiza desde el cuello hasta el área de la espalda baja.
- Incluye terapia eléctrica ultrasónica para disminuir inflamaciones y mejorar la tolerancia al dolor.
- Todos los procedimientos se realizan en una sola sesión de 60 minutos.
- Se recomienda usar ropa suave y sin prendas metálicas.
- Se recomienda no comer 2 horas antes de la terapia.
- Se recomienda no beber alcohol ni fumar 24 horas antes de la terapia.
- Válido para personas de todas las edades. Menores deben ser acompañados por sus padres o un adulto.
- Aplica solo para pacientes nuevos.
- No requiere plan médico.
- Cancelaciones con mínimo 24 horas.
- Otros.

Hoy en Travel

Costa Rica: 7 noches para dos + aventura en la montaña + aéreos San Juan • \$1,899 Ver más

Costa Rica: 7 noches para dos + aventura en la montaña + aéreos San Juan • \$1,899 Ver más

Otros Groupones hoy

Masaje sueco + reflexología + piedras calientes a domicilio 68% off San Juan • \$32 \$100 Ver más

Masaje sueco + reflexología + piedras calientes a domicilio 68% off San Juan • \$32 \$100 Ver más

Vacunación para perros y gatos a domicilio para toda la isla 65% off San Juan • \$35 \$100 Ver más

Vacunación para perros y gatos a domicilio para toda la isla 65% off San Juan • \$35 \$100 Ver más

○ Derecho de Marcas

ABC del derecho de marcas

The screenshot shows a web browser displaying the website <http://www.ofertadeldia.com/puerto-rico-ofertas/oferta/Casa-Azul...>. The page is titled "Certificado de \$30 para consumir en menú abierto". The main header features the "OFERTA DEL DIA .com" logo with "UN PRODUCIDO DE SHOPPR" underneath. A navigation bar includes links for "OFERTA EN DETALLE", "OFERTAS RECIENTES", "CÓMO FUNCIONA", and "CONTACTO". On the right, there's a "SIGN UP | MI CUENTA" button, an email input field, and a "ENVIAR" button. A promotional message "¡Descubre como ganar Créditos de Ofertas!" is displayed next to a logo featuring a dollar sign inside a speech bubble.

The main content area displays three promotional offers:

- Papa John's:** 1 Pizza Grande + 2 Papa Sides + Padrino de Pepsi por \$18.00. Original value: \$38.00. Discount: 53%.
- Membresía de 3 Meses + 6 Clases de Spinning:** \$90.00. Original value: \$270.00. Discount: 67%.
- Mantenimiento de acondicionador de aire:** \$40.00. Original value: \$80.00. Discount: 50%.

Below these offers, a section for "Casa Azul Cocina Mexicana, San Patricio" is shown, advertising a "Certificado de \$30 para consumir en menú abierto". It includes a price of \$15.00, a value of \$30.00, an amount saved of \$15.00, and a discount of 50%. A timer indicates 03:17:17:46 left. Below this, it says "2 Compradas" and "Esta Oferta está activada! Si la compras, es tuya!".

A large image of several colorful cocktails (blue, yellow, red) is prominently displayed in the center of the page. Social sharing buttons for Facebook, Twitter, Google+, and Email are located at the bottom of the main content area. A footer banner at the bottom right encourages users to "OfertaDelDia.com en Facebook".

○ Derecho de Marcas

ABC del derecho de marcas

The screenshot shows the Groopanda website interface. At the top, there's a navigation bar with links for 'Acceder Mi Cuenta' (Log in), '¡Regístrate para Comprar!' (Register to Buy), and a 'Conéctate' (Connect) button. The main header features the Groopanda logo, which includes a cartoon panda holding shopping bags. Below the header, there are tabs for 'OFERTAS' (Offers), 'GROOPERS', and 'CONÓCENOS' (Get to know us). A large promotional banner in the center highlights a deal: 'Hoy en Groopanda... Paga \$19 en vez de \$40 por un Surtido Marullo (Calamares, Camarones, Buñuelos de Bacalao y Masitas de Pescado) + un Surtido Criollo (Masitas de Pollo, Queso Frito, Sorullos de Maíz y Bolitas de Amarillos) + 4 Medallas ó 2 Sangrías @ Marullo Bar & Tapas (La Placita, Santurce)'. To the left of this banner is a green button with '\$19' and a 'COMPRAR!' (Buy!) button. To the right, there are social sharing icons for Facebook, Twitter, and Email, and a call-to-action '¡Comparte y Gana \$5!' (Share and Win \$5!). Below the main banner, there's a logo for 'Marullo BAR & TAPAS' with images of food items like fried calamari, shrimp, and wings. To the right, there's another section titled 'Más Groopandas' (More Groopandas) featuring an image of a woman in a bikini and text about Nova Derm laser hair removal services.

Acceder Mi Cuenta | ¡Regístrate para Comprar!

Conéctate

GROOPANDA®

OFERTAS GROOPERS CONÓCENOS

Hoy en Groopanda... Paga \$19 en vez de \$40 por un Surtido Marullo (Calamares, Camarones, Buñuelos de Bacalao y Masitas de Pescado) + un Surtido Criollo (Masitas de Pollo, Queso Frito, Sorullos de Maíz y Bolitas de Amarillos) + 4 Medallas ó 2 Sangrías @ Marullo Bar & Tapas (La Placita, Santurce)

\$19 | COMPRAR!

\$21 DESCUENTO | \$40 VALOR | 53% AHORROS

¡Regala esta Oferta!

Marullo BAR & TAPAS

Más Groopandas

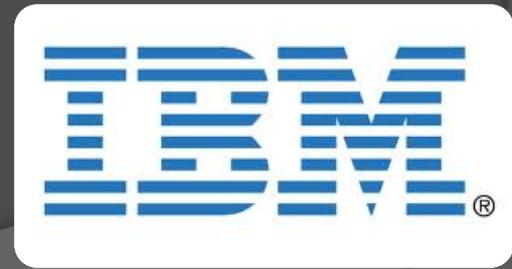
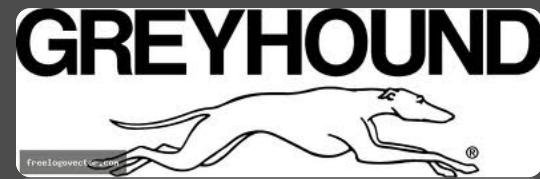
3 sesiones de depilación con láser en el bikini line por sólo \$99 en vez de \$450 @ Nova Derm

○ Derecho de Marcas

ABC del derecho de marcas

○ Requisitos para la protección

- Arbitrarias
- Sugestivas
- Descriptivas (SM)
- Genéricas



○ Derecho de Marcas

ABC del derecho de marcas

- El concepto del “Secondary Meaning” o “significación secundaria”
- El rol central del consumidor y la Probabilidad de Confusión
- Blurring y Tarnishment, marcas famosas
- Fair Use

5. Responsabilidad de la Plataforma por actos del Usuario

Responsabilidad de Plataforma por expresiones de terceros

El Common Law:

La responsabilidad de publicadores y distribuidores por difamación.

- Cubby v. CompuServe, 776 FSupp 135 (1991) (no responsable por falta de “conocimiento”)
- Stratton v Prodigy, 1995 WL 323710 (NY Supreme Court) (control editorial le expuso a responsabilidad)

Responsabilidad de Plataforma por expresiones de terceros

La Intervención Estatutaria

Sección 230 del Communications Decency Act

“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider”

“The term “information content provider” means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”

Responsabilidad de Plataforma por expresiones de terceros

Zeran v. AOL, 129 F3d 327 (1997)

“Congress' purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.”

Responsabilidad de Plataforma por expresiones de terceros

Blumenthal v. Drudge, 992 FSupp 44 (1998)

“Any attempt to distinguish between “publisher” liability and notice-based "distributor" liability and to argue that Section 230 was only intended to immunize the former would be unavailing. Congress made no distinction between publishers and distributors in providing immunity from liability. While it appears to this Court that AOL in this case has taken advantage of all the benefits conferred by Congress in the Communications Decency Act, and then some, without accepting any of the burdens that Congress intended, the statutory language is clear: AOL is immune from suit, and the Court therefore must grant its motion for summary judgment.”

Responsabilidad de Plataforma por expresiones de terceros

Fair Housing Council of San Fernando Valley v. Roommates.com, 521 F3d 1157 (9th Cir 2008)

"Here, we must determine whether Roommate has immunity under the CDA because Councils have at least a plausible claim that Roommate violated state and federal law by merely posing the questions. We need not decide whether any of Roommate's questions actually violate the Fair Housing Act or California law, or whether they are protected by the First Amendment or other constitutional guarantees; we leave those issues for the district court on remand. Rather, we examine the scope of plaintiffs' substantive claims only insofar as necessary to determine whether section 230 immunity applies. However, we note that asking questions certainly can violate the Fair Housing Act and analogous laws in the physical world. For example, a real estate broker may not inquire as to the race of a prospective buyer, and an employer may not inquire as to the religion of a prospective employee. If such questions are unlawful when posed face-to-face or by telephone, they don't magically become lawful when asked electronically online. The Communications Decency Act was not meant to create a lawless no-man's-land on the Internet."

Responsabilidad (e inmunidad condicionada) de la Plataforma de Redes Sociales por violación de Derechos de Autor

Cinco premisas del common law y el régimen convencional

1. Responsabilidad vicaria:

- “the right and ability to supervise the infringing activity and also has a direct financial interest in the activity”. Fonovisa v. Cherry Auction, 76 F.3d 259 (9th Cir. 1996) (sobre el requisito de beneficio económico para responsabilidad vicaria)
 - Dance hall cases vs landlord / tenant
 - Pulguero

2. Responsabilidad secundaria en modalidad de “contributory infringement”,

- “directly contributes to another’s infringement”. En general, “one who with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer”. Gershwin Publishing Corp. v. Columbia, 443 F. 2d 1159 (2d Cir. 1971). Perfect 10 v. Amazon, 508 F.3d 1146 (9th Cir 2007)

3. Safe Harbor Tecnológico: Sony v Universal Studios, 464 US 417 (1984) (VCR, DVR)

- “the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.”

4. La diferencia entre tecnología y servicio

- A&M Records v. Napster, 239 F3d. 1004 (9th Cir. 2001)

5. Inducement

- MGM v. Grokster, 125 S.Ct. 2764 (2005) ”The inducement rule, instead, premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.”

Responsabilidad de Plataforma por actos de terceros

La Intervención Estatutaria: Sección 512 del Digital Millennium Copyright Act 1996

Inmunidad Condicionada a Intermediarios

DMCA § 512

Distingue entre:

- a) Transitory Digital Network Communications
- b) System Caching
- c) Information Residing on Systems or Networks at Direction of Users

Responsabilidad de Plataforma por actos de terceros

§512(i)

Obligaciones generales para ganar la inmunidad

Accommodation of technology.

- (A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; and
- (B) accommodates and does not interfere with standard technical measures.

c) Information Residing on Systems or Networks at Direction of Users.—

(1) In general. — A service provider shall not be liable for monetary relief, ... if the service provider

(A)

- (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
- (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
- (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B)

does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C)

upon **notification** of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

Notice & Take Down

(3) Elements of **notification**. —

- (A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:
 - (i) A physical or electronic signature...
 - (ii) Identification of the copyrighted work claimed to have been infringed, ...
 - (iii) Identification of the material that is claimed to be infringing ...
 - (iv) Information reasonably sufficient to permit the service provider to contact the complaining party, ...
 - (v) A statement that the complaining party has a good faith belief that use of the material ... is not authorized by the copyright owner...
 - (vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

Notice & Take Down

(3) Elements of **notification**. —

Cont...

(B)

- (i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.
- (ii) In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A)

Notice & Take Down

Counter Notification

- (A) takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material;
- (B) upon receipt of a counter notification ... promptly provides the person who provided the [original] notification ... with a copy of the counter notification, and informs that person that it will replace the removed material or cease disabling access to it in 10 business days; and
- (C) replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification under subsection (c)(1)(C) that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.

Notice & Take Down

- Según un estudio, 30% de los requerimientos para retirar contenido son solicitudes basadas en reclamos legales débiles.
- Muy pocos usuarios aprovechan el procedimiento de respuesta
 - Urban, Jennifer, «Efficient Process or “Chilling Effects”? Takedown Notices under Section 512 of the Digital Millennium Copyright Act, en *Santa Clara Comp. & High Tech L. Journal*, 22 (2006), p. 621
- En dos estudios separados, en 2007 y 2008, unos investigadores introdujeron «usuarios» con direcciones IP de la Universidad de Washington, tales como impresoras, en redes Bit-Torrent para monitorear el tráfico. Aun cuando esos “usuarios” no descargaron archivos, más de 400 notificaciones fueron recibidas.
 - Piatek, Michael, Tadayoshi Kohno y Arvind Krishnamurthy, «Challenges and Directions for Monitoring P2p File Sharing Networks -or- Why My Printer Received a DMCA Takedown Notice Why My Printer Received a DMCA Takedown Notice», en *University of Washington Technical Report, uw-CSE-08-06-01*

Notice & Take Down

(f) Misrepresentations. - Any person who knowingly materially misrepresents under this section —

1. that material or activity is infringing, or
2. that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

Notice & Take Down

Perfect 10 v. CCBill, 481 F.3d 751 (9th Cir. 2007)

- “reasonably implemented policy”= “working notification system” + “does not actively prevent copyright owners from collecting information”
- “facts or circumstances” (i.e., “red flag provision”) = Plataforma no tiene obligación afirmativa de buscar material ilegalmente distribuido (aun cuando clientes tienen domain names: stolencelebritypics.com, illegal.net)

Notice & Take Down

Perfect 10 v Visa, 494 F.3d 788 (9th Cir. 2007) (secondary liability visa / master card)

- Contributory: No “material contribution... because infringement of Perfect 10’s copyright can occur without using Defendant’s payment system”
- No inducement
- No vicarious (no “right and ability to control”): “the credit card companies cannot stop any of the third party websites from reproducing, displaying, and distributing unauthorized copies of Perfect 10’s images because that infringing conduct takes place on the third party websites”

Notice & Take Down

UMG Recordings, Inc. v. Shelter Capital Partners LLC, 667 F.3d 1022 (9th Cir. 2011)
(20 de diciembre de 2011) (VEOH)

1- “at the direction of a user”

- 512 no limitado a web hosts tradicionales.
- 512 aplica aun cuando Veoh formatea el archivo automáticamente al subirse, siempre que no sea pre seleccionado por Veoh.

2- “Actual knowledge” / “aware of facts or circumstances”

- Actual knowledge = specific knowledge of infringing material (no generalizado) + failure to expeditiously remove material (via notice and takedown). Policing burden on CR owner.
- Facts or circumstances = general knowledge n/a red flag.

3- “direct financial benefit and right and ability to control such activity”

- DMCA requiere “Something more” que responsabilidad vicaria en common law
- “a service provider must be aware of specific infringing material to have ability to control that infringing activity... Only then would its failure to exercise its ability to control deny it a safe harbor”
- To “expeditiously remove” implies some “right and ability to control”
- Por tanto, “R & A to C requires control over specific infringing material provider knows about.”

Viacom v. Youtube, 10-3342-cv (2nd Cir, 5 de abril de 2012)

1- “Actual knowledge” / “aware of facts or circumstances”

- Actual knowledge = specific knowledge of infringing material (no generalizado) + failure to expeditiously remove material (via notice and takedown). Policing burden on CR owner.
- Facts or circumstances: general knowledge n/a red flag. Necesita “specific and identifiable infringement”
- Pero son diferentes:

“The difference between actual and red flag knowledge is thus not between specific and generalized knowledge, but instead between a subjective and an objective standard. In other words, the actual knowledge provision turns on whether the provider actually or “subjectively” knew of specific infringement, while the red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement “objectively” obvious to a reasonable person.”

(devuelto a instancia para aplicar tests)

Viacom v. Youtube, 10-3342-cv (2nd Cir, 5 de abril de 2012) (Anejo 184)

2- “Willful blindness”, nueva teoría disponible para eliminar responsabilidad bajo 512=

- “conscious avoidance amounting to knowledge where the person was aware of a high probability of the fact in dispute and consciously avoided confirming that fact”

3- “Direct financial benefit and right and ability to control such activity”

- Rechaza Veoh pues ese test duplica “contributory liability” al añadir requisito de conocimiento, (VEOH=“a service provider must be aware of specific infringing material to have ability to control that infringing activity... Only then would its failure to exercise its ability to control deny it a safe harbor”), eliminaría la Vicaria del 512.
- Pero DMCA requiere “Something more” que “right and ability to control” en responsabilidad vicaria del common law. Ese “algo más” implica ejercer influencia sustancial sobre la actividad de los usuarios y su contenido (inducir o instruir en la actividad que general la violación)

El Derecho de marcas y la responsabilidad de la Plataforma por actos de terceros

Inwood Labs, 456 US 844 (1982)

“Even if a manufacturer does not directly control others in the chain of distribution, it can be held responsible for their infringing activities under certain circumstances. Thus, if a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorially responsible for any harm done as a result of the deceit.

El Derecho de marcas y la responsabilidad de la Plataforma por actos de terceros

Tiffany Inc. v. eBay Inc., 600 F.3d 93 (2d Cir. 2010),

- Responsabilidad secundaria, Inwood
- Willful blindness

El Derecho de Marcas y la Publicidad Digital

El litigio de Rosetta Stone v Google, Civ No 10-2007, Cuarto Circuito, 9 de abril de 2012

The screenshot shows a Google search results page with the following details:

Search Query: abogados propiedad intelectual

Search Type: Search

Results: About 9,550,000 results (0.30 seconds)

Left Sidebar (Filters):

- Everything
- Images
- Maps
- Videos
- News
- Shopping
- More

Top Result (Ad):

Abogado Patentes PR | es.vrlawpr.com
www.es.vrlawpr.com/
Propiedad Intelectual, Copyrights, Marcas, Patentes, Licencia Software

Second Result:

¿Necesita abogado? - Casos Estatales y Federales
www.abogadozambrana.com/
Consultas - 787-786-4001

Third Result:

Propiedad Intelectual-UAM | uam.es
www.uam.es/propiedadintelectual
Propiedad Intelectual e Industrial VII Edición del Máster (2012-2013)
↳ Invierte en tu futuro profesional - Contacta con nosotros - Alto nivel de empleo

Tip: Search for English results only. You can specify your search language in Preferences

Fourth Result:

Abogados Propiedad Intelectual
www.elabogado.com/propiedad-intelectual/ - Translate this page
Directorio de abogados de Propiedad Intelectual. Despachos de abogados expertos en Propiedad Intelectual.

Search results powered by Google

Derecho y Redes Sociales

- Derecho e Internet
- Estructura de las redes sociales
- Régimen Jurídico Básico: TOS
- Manejo de Datos y Privacidad
- Responsabilidad del Usuario de Redes Sociales
- Responsabilidad de Plataformas de Redes Sociales por actos de Usuarios



Gracias

www.melendezjuarbe.com