

10 Safe Harbor Steps for Providers of Internet Access to the Public

Our nation's voracious desire for connectivity at all times has led to an abundance of wireless hotspots at businesses and other locations accessible to the general public. This proliferation, in turn, has led to our ability to access everything available on the Internet, including information and digital data that is protected by laws such as copyright.

If you are a provider of one of these wireless hotspots, you need to know how to protect yourself in the event an Internet user violates someone else's intellectual property rights.

10 Steps to Peace of Mind for Internet Providers

Here are 10 steps you as a wireless hotspot provider can take to make sure your business or entity falls within the



broad protections of the federal Digital Millennium Copyright Act (DMCA), which provides some safe harbors for service providers.

Step 1: Most importantly, take the time to understand how your entity is providing or will provide Internet service to someone using your hotspot. Will your entity sim-

ply provide routing functions for the user? Will you filter content? Filtering could change which type of protection, if any, your entity qualifies for and, for government entities, also raises significant potential First Amendment issues beyond the scope of this article.

Step 2: Establish an acceptable use policy, which should include "take down" pro-

cedures for material accessed in violation of law and "put back" procedures that are consistent with DMCA guidelines.

Step 3: Develop a so-called "clickwrap" agreement for users to agree to before accessing the Internet. Don't worry—it doesn't have to be draconian or 17 pages long; it does have to provide your entity with basic protections that are fairly easy to include.

Step 4: Notify users that they are subject to the acceptable use policy and must agree to the terms and consequences of such use. This is done primarily through the click-wrap agreement.

Step 5: Establish and review procedures to reasonably monitor use of the Internet service.

Step 6: Understand what you must do in the

SEE 10 STEPS ON PAGE 2

The Future of Alternative Energy

Gust Rosenfeld's environmental practice section provides a full range of services to our clients in all aspects of environmental law, but what is sometimes referred to as "alternative energy," "renewable energy," or "going green" is receiving more interest than all other areas combined.

The reasons for that interest are easy to understand. The U.S. imports about two-thirds of all the oil we use in this country. The price of oil continues to rise and is a contributor to the economic difficul-



ties the citizens of our country have been experiencing. In addition, the burning of fossil fuels is cited by the United Nation's International Panel on Climate Change (IPCC) as the leading cause of global warming. In its Fourth Assessment Report the IPCC stated that if global temperatures increase by 3.50° C, model projections suggest extinction of 40% to 70% of species assessed.

SEE ENERGY ON PAGE 3

PERSONAL NOTES

Peter Collins, Jr., served on the Board of the Seventh Annual College of Trial Advocacy and demonstrated the correct technique for cross examination of a plaintiff. Partners **Melanie G. McBride** and **Charles W. Wirken** also served on the faculty. Peter also gave a presentation at the Arizona State Bar Convention on Assistance to Returning Veterans.

Robert D. Haws and **Susan P. Segal** presented at the Arizona School Boards Association 2011 School Law Conference in September.

John L. Hay is a member of subcommittees of the Business Law Section of the State Bar of Arizona that are drafting a new law for limited liability companies, a new law relating to mergers, domestications and conversions of entities, and updating the corporate laws in Arizona.

Mingyi Kang spoke at the National Association of Realtors midyear conference on Building an International Real Estate Business with Asia.

Christopher M. McNichol and **Kent E. Cammack** presented at the Arizona Trustees Association annual conference again this year. The title was "Show Me the Injunction (or Note), & Other Current Issues." Chris is a regular lecturer at the Arizona School of Real Estate & Business. He recently presented on Leases, Receiverships and Foreclosure.

Christina M. Noyes spoke at the International Franchise Association in Washington, D.C., on Franchise Disclosure, Exemption and Registration Issues in Challenging Economic Times.

Fred H. Rosenfeld was named Arizona Municipal Lawyer of the Year 2011 by The Best Lawyers in America®. He has been listed in Best Lawyers® for more than 25 years. Fred was recently recognized by the Arizona State Bar Association for 50 years of membership.

Madeleine W. Wanslee attended the annual Ninth Circuit Judicial Conference in Carlsbad, California, in August where she was elected Vice-Chair of the Ninth Circuit Lawyer Representatives. Madeleine coordinated an educational program for all bankruptcy judges and attorneys attending the conference. She was also a presenter at the State Bar Convention held during the summer.

Karl H. Widell was admitted as a member of the Bar of the Supreme Court of the United States on April 25, 2011.

Charles W. Wirken is serving as Treasurer of the State Bar of Arizona Client Protection Fund.

The **TUCSON OFFICE** of Gust Rosenfeld P.L.C. hosted seven international lawyers, all of whom are graduate students (LL.M.) at the James E. Rogers College of Law at the University of Arizona. The seven are in a cultural exchange program discussing American legal systems and comparing them to those in the students' home countries.

The countries represented by the graduate students are: China, India, Tajikistan, Mexico, Jordan and Estonia. Lawyers, paralegals and staff all attended, resulting in a very rich discussion. The lawyers then met individually with the students and responded to the students' questions about American jurisprudence and about Gust Rosenfeld and its practice.

10 STEPS

FROM PAGE 1

event you receive actual notice of suspected infringing activity. This usually comes in the form of a letter from an attorney representing a film or music association. Your entity also may become aware of the circumstances that prompted such notice, so establish clear procedures to address this situation, as well.

Step 7: Seek advice from a qualified professional to properly—and promptly—respond to the notice letter. Don't panic! Your entity probably doesn't need to shut down the whole system.

Step 8: Establish procedures for a) notifying any alleged infringing users of the alleged infringement and b) deploying any take down measures.

Step 9: Follow your procedures.

Step 10: Prepare and send a response letter to the person/organization alleging infringement.

By following these steps, you will most likely qualify for safe harbor protection—shielding you and your organization from liability for alleged copyright infringement by users of your wireless service.

Endnote: For government providers of wireless hotspots in particular, the tension between free speech rights and limitations placed on access to information is of great importance and should be addressed, but is simply beyond the scope of this article.

If you have any questions about how to implement any of these suggestions, please contact Eric McGlothlin or Chris Schmaltz.

Eric McGlothlin | 602.257.7453 | emcglathlin@gustlaw.com
Eric practices in the area of public law and public finance.

Christopher A. Schmaltz | 602.257.7480 | cschmaltz@gustlaw.com
Chris practices in the area of public law.

WHAT'S A MERS?

What is involved with roughly 65 million mortgage loans in the country, more than 60% of all mortgages nationwide?

It's MERS, short for the Mortgage Electronic Registration Systems, a private registry created in the early 1990s by several large players in the real estate mortgage loan industry. The intent behind this national data record-keeper was to simplify and track mortgage loan ownership and servicing rights. Most loans in the MERS system are residential.

MERS does not make or service loans. It does not process mortgage payments. Rather, it functions more as a nominee or proxy for the lenders and servicers. By maintaining an electronic commerce system, MERS eliminates much of the paperwork associated with the sale, transfer and release of mortgage loans, which in turn facilitates the structuring of loan pools sold to investors, including mortgage-backed securities, which may themselves be traded.

In general terms, when a loan is sold from one lender to the next, typically the original promissory note would be endorsed to the new lender, and then also an assignment of the mortgage (or, in Arizona, the deed of trust) would be recorded in the applicable state land records (in Arizona, the County Recorder).

However, with MERS designated as the nominee in the original loan transaction, no subsequent assignments to lenders in the MERS system need to be recorded in the state real property records—at least not until there is a specific need, such as starting a foreclosure action upon loan default. Instead, each loan transfer is noted and tracked electronically by MERS among its members. Besides streamlining the record-keeping, this structure avoids the cost of recording fees each time a loan is transferred.

MERS has attracted more focused attention in the last few years. Court cases and an ongoing federal and state investigation and settlement negotiation involving the nation's largest banks and servicers have dealt with the exact nature of MERS' interest in the mortgages. This includes the interplay and possible divergence between the identified holder of the promissory note (the debt) and the identified assignee of the mortgage (the lien) in the state land records, as well as the servicing and foreclosure paperwork which has run through the MERS system. So stay tuned.

*Christopher M. McNichol | 602.257.7496 | mcnichol@gustlaw.com
Chris practices in the area of real estate transactions and litigation.*

Energy

FROM PAGE 1

To cut back on our reliance on foreign oil and to find cleaner energy alternatives, solar, wind, geothermal, biofuels, hydroelectric, hydrogen, and nuclear power all are in some form of development and use. Unfortunately, it costs more to generate energy from any of those technologies than it does if we burn fossil fuels.

In 2009, the U.S. Energy Information Administration (EIA) studied the cost for various types of electricity producing plants to produce one megawatt of electricity at 2008 prices. The EIA found that natural gas is the cheapest way to generate electricity, averaging \$80 to produce one megawatt of electricity. Coal is the next cheapest, at \$100. Nuclear, biomass, geothermal, and hydro power all cost \$115-\$120. Wind power costs \$150-\$190, depending on whether it is on-shore or off-shore. Solar was the most expensive, coming in at \$250-\$400, depending on the technology used.

Are Americans ready to commit to higher costs of electricity to reduce our greenhouse gas emissions and to cut down on our reliance on foreign oil? Last March, Salt River Project took a random sample survey of its residential customers and found that the customers believe climate change is a serious problem that warrants action now.

The customers overwhelmingly support alternative energy, especially solar, and are willing to pay extra to convert to alternative energy sources. But on average, customers were willing to pay less than \$5 per month extra for alternative energy. That represents about a 3.5% increase in the average electric bill. Arizona State University conducted a similar study for Arizona Public Service (APS) in May 2011 and found that, "Typically, respondents were

willing to pay, approximately, an additional \$6 per month."

It is easy to see there is a large gap between what rate payers in Arizona are willing to pay and what EIA estimates the cost will be for clean energy.

In spite of the cost, the clean energy sector has grown because of government intervention. The federal government and many states have been offering grants, loan guarantees and tax incentives to offset the cost of clean energy development, and clean energy standards have been adopted requiring utilities to use more renewable energy.

In Arizona, those rules require most electric utilities to provide an increasing percentage of electricity from renewable energy sources, culminating in the requirement that 15% of the electricity come from renewable sources by 2025. APS currently generates 3% of its electricity from renewable sources.

However, continued support of renewable energy by governments is in doubt. In the U.S. House of Representatives, the Republican budget unveiled on April 5 included a 70% reduction in clean-energy programs. Across the country, rate payers are filing law suits to stop the construction of major renewable energy projects because of the rate increases they face if the projects are built.

Our country's ongoing economic difficulties, combined with the budget deficits facing Congress, make government support, and hence the future of alternative energy, anything but secure.

*Martin T. Jones | 602.257.7674 | mjones@gustlaw.com
Marty practices in the areas of environmental, real estate and land use law.*

“Who Let the Dogs Out?”

On April 25, 2011, Governor Jan Brewer signed into law “Fabian’s Law” (HB 2137). Fabian’s Law was advocated by a Glendale couple whose miniature poodle was killed by a pit bull that escaped from a neighbor’s backyard.

Prior to its enactment, owners of aggressive dogs could not be held criminally liable if their dog injured or killed another animal. Now, under A.R.S. § 11-1014.01, a person who owns or is responsible for the care of an aggressive dog must take reasonable care to: (1) prohibit the dog from escaping a residence or enclosed area; and (2) control the dog in a manner that prevents the dog from biting or attacking a person or domestic animal at all times while the dog is off of the owner’s property. If an aggressive dog escapes a residence or enclosed area, the owner or responsible caretaker may be found guilty of a class 3 misdemeanor.

If an aggressive dog bites or attacks a person or domestic animal, the owner or responsible caretaker may be found guilty of a class 1 misdemeanor.

Pursuant to the statute, “aggressive dog” means any dog that has bitten a person or domestic animal without provocation or that has a known history of attacking persons or

domestic animals without provocation. Under Fabian’s Law, a dog gets only one free bite toward another animal before the dog is considered aggressive and its owner or caretaker held liable.

*Remy Halpern | 602.257.7471 | rhalpern@gustlaw.com
Remy practices in the areas of taxation, trust and estate matters.*



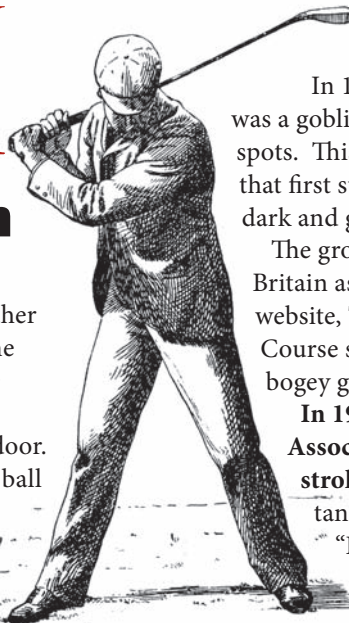
ET·Y·MOL·O·GY COR·NER

The Bogey Man Cometh

On a summer day in Maine in 1958, I went with my father to a local golf course to play my first official round. On the first tee, I promptly toed the ball, driving it at a 90 degree angle directly in the door of the starter’s shack. The ball ricocheted off the inside walls, as golfers dashed out the door. After making apologies, my father returned with my golf ball and said, “You lie two” – my first lesson in keeping score.

For the next several years, it was my goal to play “bogey” golf. To me, that score was my par, or the number of strokes I hoped it would take me to play a course. I didn’t know the origins of the terms “bogey” or “par,” but my use of the terms wasn’t too far from their intended meanings.

Originally, there was no standardized measure for the number of strokes a golfer should take on a hole. In 1890, a scoring system adopted by The Great Yarmouth and Caister Golf Club in Norfolk, England, established the number of strokes a good golfer should take on each hole. This was known as the “ground score.” One early player under the new scoring system is reported to have exclaimed during the match that



the invisible opponent (the ground score) was “a regular Bogey-Man.”

In 16th century Scottish, a “bogey man” was a goblin or specter that haunts dark, gloomy spots. This now makes perfect sense to me, as that first summer my golf ball haunted many dark and gloomy spots in the Maine woods.

The ground score became known in Great Britain as the “bogey score.” On its current website, The Great Yarmouth and Caister Golf Course still describes itself as “the home of bogey golf.”

In 1911, the United States Golf

Association established a set number of strokes to be taken on holes of given distances. The number of strokes was called “Par” (from the Latin meaning “equal”). For instance, holes ranging up to 225 yards were “Par 3,” while holes from 225 yards to 425 yards were “Par 4.”

As golfers improved, scores went down, but the British did not change their scoring system. As a result, good golfers were scoring below bogey. The Bogey Man was beaten and, in the United States, one stroke over par became known as a bogey.

*Richard B. Hood | 602.257.7470 | rhood@gustlaw.com
Rick, our etymologist, practices in the areas of commercial law and commercial litigation.*

GUST
ROSENFELD

NEW FACES



Jody A. Corrales

Ms. Corrales focuses her practice on bankruptcy and creditors' rights, as well as general civil litigation. She is licensed to practice in federal and state courts, and has extensive experience in bankruptcy law. Prior to joining Gust Rosenfeld, Ms. Corrales worked for the nation's largest consumer bankruptcy firm and was the managing attorney for all of the firm's Arizona offices. In that capacity, she enjoyed an active caseload in both the Phoenix and Tucson divisions of the bankruptcy court, having filed more than 1,000 consumer bankruptcy cases. Ms. Corrales is a member of the Arizona Bankruptcy American Inn of Court.



Kimberly M. McIntier

Ms. McIntier primarily focuses her practice on public law with an emphasis on contracts, code enforcement, public finance and procurement law. Her experience also includes drafting ordinances, resolutions, and contracts for cities, towns and governmental agencies.

Before joining Gust Rosenfeld, Ms. McIntier clerked at Division One of the Arizona Court of Appeals, where she researched various civil and criminal appellate issues, including government procurement procedures, and drafted decisions for review by the judicial panel.



Remy M. Halpern

Ms. Halpern focuses her practice on taxation, trust and estate matters, including estate and gift taxation, income taxation, trust administration and probate. She represents individuals, families and business entities with varying size and complexity of estate and tax planning matters. Her practice includes the preparation of estate plans, premarital agreements, complex trusts and business entity formation.

Ms. Halpern received her LL.M. in taxation from the University of Washington School of Law where she focused her studies on estate and gift taxation.



Justin M. Scorza

Mr. Scorza practices in the areas of civil litigation and dispute resolution, focusing primarily on insurance defense, commercial law, foreclosure, and real estate.

Mr. Scorza earned his J.D. in 2011 from the Sandra Day O'Connor College of Law at Arizona State University, where he earned the highest distinction available for pro bono service, and was a repeat Pedrick Scholar. He also participated extensively in the school's moot court and clinical practice programs. He received his undergraduate degree in Economics, magna cum laude, from the W.P. Carey School of Business at Arizona State University in 2008.



Nicholle Harris

Ms. Harris primarily focuses her practice on municipal law with an emphasis on code enforcement, contracts, procurement law, public bidding and open meeting law.

Before joining Gust Rosenfeld, Ms. Harris worked at the Arizona Attorney General's Office in the Public Advocacy Division, where she served as the Youth Tobacco Attorney for the Arizona Department of Health Services.

THE BEST LAWYERS IN AMERICA

We are pleased to announce that almost 25% of our lawyers are listed in the 2012 Edition of *The Best Lawyers in America*®. In addition, **Fred Rosenfeld** was named by *The Best Lawyers in America*® as Arizona's 2011 Lawyer of the Year in Municipal Law.

Their names and practice areas are as follows:

Tim Barton	Litigation-Real Estate	Scott Ruby	Corporate Law; Public Finance Law
Tom Chauncey	Corporate Law	Richard Segal	Antitrust Law; Commercial Litigation; Litigation-Construction
Peter Collins, Jr.	Insurance Law; Personal Injury Litigation	Madeleine Wanslee	Bankruptcy and Creditor Debtor Rights/ Insolvency and Reorganization Law
Robert Haws	Education Law; Labor and Employment Law	Richard Whitney	Trusts and Estates
John Hay	Franchise Law	Charles Wirken	Franchise Law; Appellate Practice
Keith Hoskins	Public Finance Law		
Gerald Jacobs	Real Estate Law		
James Kaucher	Professional Malpractice Law		
Christina Noyes	Franchise Law		
Sean O'Brien	Bankruptcy and Creditor Debtor Rights/ Insolvency and Reorganization Law		
Fred Rosenfeld	Corporate Law; Municipal Law; Public Finance Law		

Selection to *The Best Lawyers in America*® is based on peer-review surveys of other lawyers. No fee or purchase is required to be listed. Our listings have increased almost every year, starting with the first edition more than 25 years ago, which included **Fred Rosenfeld, Richard Segal** and **Richard Whitney**.

PHOENIX OFFICE

One E. Washington St., Ste. 1600
Phoenix, Arizona 85004-2553
Telephone: 602.257.7422
Facsimile: 602.254.4878

TUCSON OFFICE

One S. Church Ave., Ste. 1900
Tucson, Arizona 85701-1627
Telephone: 520.628.7070
Facsimile: 520.624.3849

This newsletter is published twice a year by the law firm of Gust Rosenfeld P.L.C. as a service to our clients and friends. It is intended to provide general information only, not advice on specific legal questions. Portions may be reproduced with attribution. For change of address, additional copies, or a complimentary subscription, contact our receptionist. We invite your comments. FALL 2011, ISSUE NO. 60 © 2011 Gust Rosenfeld P.L.C. www.gustlaw.com

GUST
ROSENFELD

ATTORNEYS SINCE 1921 P.L.C.

ONE E. WASHINGTON ST., SUITE 1600
PHOENIX, ARIZONA 85004-2553

RETURN SERVICE REQUESTED

PRSR STD
U.S. POSTAGE
PAID
Phoenix, AZ
Permit No. 2659