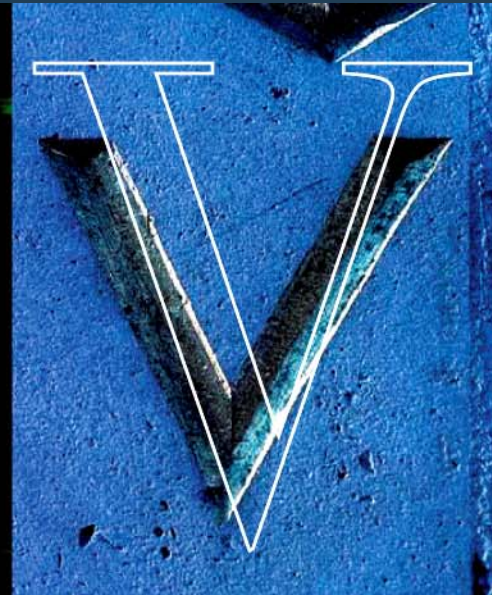
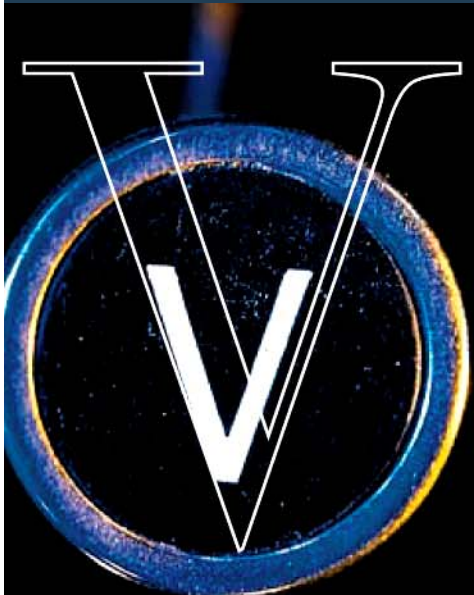


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Legal Aspects of Social Networking and Online Media Platforms

Lisa M. Hix

September 21, 2010



Watch the world premiere of the YouTube Symphony Orchestra's "Internet Symphony" mashu

Disgusting Dominos People



0:44 / 2:28

★★★★★ 7,053 ratings

930,390 views

Favorite Share Playlists Flag

MySpace

Facebook

Twitter

(more share options)

Also Watching Now (3)



- **Tools of the Trade** (i.e. Facebook, LinkedIn, Twitter, MySpace, Friendster, Skype, YouTube, Blogs, Instant Messaging, etc.)



Seminar Overview

- **Why you should be concerned about social media**
- **Best practices** for drafting and implementing a social media policy
- **Legal Issues – “Similar Issues, New Platforms”**
 - (1) **Association Use of On-line Social Media Platforms**
- Defamation, IP, Privacy, Advertising, Antitrust, Tax
 - (2) **Member/Employee Conduct**
 - (3) **Workplace Environment, Recruiting/Hiring, Privacy, Developing Policy**



Hosting Liability

- Defamation
- Confidentiality
- Industry-Specific
 - Antitrust
 - Professional Ethics
- Contributory Infringement



Entity Use of Social Media Defamation

- Defamation - Act of harming reputation of another through false statements to a third party
 - *@abonnnen had a public Tweet and 20 followers: “Who said sleeping in a moldy apartment was bad for you? Horizon realty thinks it’s ok.”*
 - *Horizon sued for defamation, although case was ultimately dismissed.*
- Comments made by others can be attributed to the organization
 - Cisco and former Cisco lawyer were sued for defamation after it was revealed that the lawyer was the author of an infamous blog. Case settled.



Privacy, Confidentiality and Disparaging Information

■ Privacy/Confidentiality

- Members and Employees engaging in social networking and blogging for either personal or professional reasons may not:
 - Write about, post pictures of, or otherwise refer to any employee, member, vendor, supplier, business partner, or competitor without his or her permission (i.e. **Michigan nurse**)

■ Disparaging or False Information

- Give a professional reference to a co-worker, former co-worker, client, vendor, customer or any other individual or company without first contacting human resources or appropriate company official (i.e. **Recommendations on Social Media**)



Protecting Confidential Information And Trade Secrets

- Policy should prohibit employees and members from disclosing:
 - Pricing, other antitrust hot issues
 - Clients, customers, partners, or suppliers by name
 - Association's confidential information and trade secrets
 - Information regarding Association's clients, affiliates, partnerships



Preventing Unlawful Harassment And Discrimination

- Policy should emphasize that employees and members may not:
 - Post material that is **abusive, offensive, insulting, humiliating, obscene, profane or otherwise inappropriate** regarding the Association, its employees, members, exhibitors, business partners, competitors, etc.
 - Post material that **may be construed** as discrimination or harassment based on race, ethnicity, color, national origin, religion, sex, sexual orientation, age, disability, or any other legally protected characteristic.



Professional and Ethical Concerns

- Violation of industry standards or licensure issues; e.g., medical, financial or legal worlds
- Violation of the attorney-client or work product privileges
- Unauthorized practice of law or medicine



Limiting Liability for Defamation, Infringement

- How to Avoid
 - Federal Communications Decency Act - § 230
 - Utilize Disclaimers and Terms of Use
 - Enforce a Take Down Policy
 - Refrain from Commenting on Third-Party Posts
 - Remain Mindful of Confidentiality
 - Consider Available Screening Capabilities for Third-party Hosts



Association Use of Social Media Protection of Identity/Imposters

The screenshot shows a Twitter profile for 'easyjetservice'. The profile name is 'Easyjet Passenger', location is 'UK', and bio is 'Frequent Budget Airline Traveller'. The profile has 323 following and 377 followers. The main tweet reads: 'the german budget carriers seem to be able to offer good service and cheap pricing - how or why?' dated 1:01 PM Jun 2nd from web. Below it are two replies: 'everyone seems to love to hate ryanair too. They could just add all the costs on and make everyone so much happier, i don't get it.' dated 1:00 PM Jun 2nd from web, and 'wondering how to spend my £50 remaining from my easyjet voucher that they gave me to spend instead of paying my money back.' dated 12:59 PM Jun 2nd from web. A reply to the second tweet says 'The carrier being easyjet.'



Limiting Apparent Authority and Protecting Corporate Identity

- The policy should make clear that members and employees **may not**:
 - Use the Association's name in the online identity (e.g. username, "handle", or screen name)
 - Claim or imply authorization to speak as an Association representative (i.e. blogs, comments)
 - Use the Association's intellectual property, logos, trademarks, and copyrights in any manner



Protecting your Association's Reputation

What were they thinking? Real life examples

- **Dominos Pizza's YouTube Disaster**
- **KFC sinks with MySpace bath tub photos**
- **The Virgin Atlantic Airlines Facegroup**
 - 13 cabin crew members fired after sharing candid impressions of their employer and Virgin's airplanes
 - Insulting Virgin Atlantic passengers on Facebook
- **The Delta Airlines, Inc. Blog**
 - From "Queen of Sky: Diary of a Dysfunctional Flight Attendant" to "Diary of a Fired Flight Attendant."
 - "Racy" photos and commentary on blog



Online Association Activities



Entity Use of Social Media IP Issues

- Avoid Trademark Misuse
 - Seek Permission
 - Be Especially Careful in Commercial Context
 - Avoid Using Other's Trademarks in Search Terms, Domain names, or User Names
 - Oneok (a natural gas company) sued Twitter over a misappropriated user name
 - Hasbro vs. RJ Software over a Facebook version of its game Scrabulous, which had more than 500,000 users



Entity Use of Social Media IP Issues

- Be Mindful of Copyright Ownership. Social Media is Primarily About the Content.
 - Who Owns Work on Social Media?
 - Work-made-for-hire doctrine, Written Assignments of Rights



Entity Use of Social Media IP Issues

- Protecting Own Intellectual Property Rights
 - Monitor for Misuse
 - Balance IP Protection with Reputation Protection
 - Many Times, it's an Innocent Infringer
 - Use Clear Placement of Appropriate Symbols
 - ©, ®, ™
 - Enforce with Policy Statements, DMCA, Demand Letters,
 - Consider Available Registrations, such as for Trademark, Domain name, or User Name



Entity Use of Social Media Promotions and Contests

- Sweepstakes and Contests are Popular but Heavily Regulated
 - Including terms and conditions of social media sites
 - Facebook – May Promote, But Cannot Administer (Collecting Entries, Notifying Winners) Without Prior Approval
- Requiring a Donation to Enter = Lottery Under Most State Laws
 - Payment, Chance & Prize
 - Registration is Required
- Take Away:
 - Many Contests Governed by State Law
 - Control Through Use Terms and Limits on Participation



Entity Use of Social Media Tax Issues

*"Organizations and web designers must be aware that the traditional rules with respect to prohibitions on providing particular services, treatment of **advertising income, sales activity, as well as lobbying restrictions** still apply to website activities."*

2000 EO CPE at 140.



Entity Use of Social Media Tax Issues

- Unrelated Business Income
 - (a) Trade or Business, (b) Regularly Carried on, (c) Not Substantially Related to Organizations Purpose
- Advertising Usually UBI; Qualified Sponsorship is not



Entity Use of Social Media Acknowledgment vs. Advertising

- Unlike Sponsorship Payments, Payments Received for Advertising are Characterized as UBI
- Characteristics of Advertisements Include:
 - Comparative or qualitative language
 - Price, savings or value information
 - Endorsements
 - Inducement to buy



Entity Use of Social Media Acknowledgment vs. Advertising

- Banners
 - 2000 EO CPE, the IRS stated that “a moving banner is probably more likely to be classified as an advertisement.”
 - The IRS indicated that banners are more likely than hyperlinks to be characterized as advertising.
 - Fees based on “pay-per-view” or “pay-per-click” measures are also likely to be characterized as advertisements.



Entity Use of Social Media Acknowledgment vs. Advertising

- Hyperlinks
 - A hyperlink may convert acknowledgment to advertising
 - Hyperlinks should not lead to a website that features the nonprofit's endorsement of the sponsor's products
 - Be certain that when hyperlinks are provided in exchange for payment to have written agreement (for tax and general liability reasons).
 - Exercise oversight over the location of the hyperlink (both on the relevant tax-exempt web page and on the "linked-to" page).



Multiple Tax-Exempts

- **Affiliated Organizations**
 - With multiple sites, consider different entry points
 - “Tab” for 501(c)(3) entity and any PACs
- **Possible to “attribute” activity** – important both for political and for non-charitable operations
- **Reasonable Apportionment of Site Costs**



Lobbying and Political Activity Policies

- Check sites for links added inadvertently or without authorization
 - Freedom Alliance – Lost 501(c)(3) status due to excessive lobbying, including link to partisan site
 - 501(c)(3) Organizations – ABSOLUTELY prohibited from campaign intervention
 - 501(c)(4) Organizations – Primary activity cannot be campaign intervention



Workplace Environment



Employee Use of Social Media Workplace Environment Issues

- Use is Likely Inevitable
- So, Avoid “Head in Sand” Approach and Educate
 - Historically, Organizations Tired to Control Risk by Denying Access
- Develop Social Media Policy that Addresses Permissible Use While Guarding Against Legal Risk
- Organize Team in Advance to Handle Crisis (Legal, Executive, Marketing, HR)



Reducing the Expectation Of Privacy

- The First Amendment does NOT protect an employee from being monitored, disciplined or terminated for violating a clear and reasonable social media policy
- Employees have NO absolute Constitutional right to privacy in the workplace (4th Amendment on searches and seizures does not apply)
- *But* you need a clear and reasonable policy that sets out expectations and restrictions on usage



Reducing the Expectation Of Privacy

- Policy should reduce any expectation of privacy on the Association's computers, email systems, blackberry, telephone/voicemail systems and any of the data on these systems by:
 - Making sure employees know that certain information exchanged on social networking sites can be monitored and accessed by the company
 - Expressly stating: no expectation of privacy, even with personal use and when telecommuting
 - Reserving right to remove content without notice
 - Reminding employees about privacy settings



Potential Privacy Pitfalls

- Some **states** have specific restrictions on monitoring and/or use of information
- A particular issue arises when monitoring and/or compliance is associated with **off-duty conduct**
 - For example, **posting information on Facebook from home account over the weekend**
 - **Policy needs to describe employer's interest in monitoring and regulating off-duty conduct if it presents a conflict of interest and is reasonably related to the job**



Social Media Recruiting and Hiring Considerations

- Screen candidates in uniform manner
- Get written consent from job applicants
- Use Neutral Third Party to filter protected information (non-decision maker)
- Still need a legitimate, non-discriminatory reason for employment decision based on information found on social media



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