Social Media Law Update

Posted at 3:45 PM on March 9, 2011 by Sheppard Mullin

Why Social Media Activity May Mean Updating Your Insurance Coverage

By Michelle Sherman

It is now cliché to say that social media activity by companies is growing exponentially. Companies, hospitals, non-profits, the armed services, insurance companies…. every type of entity can be found on social networking sites with Facebook fan pages and Twitter accounts. The marketing opportunities for companies continue to manifest themselves with directed marketing campaigns, discounts on Foursquare and other location based networking sites, and data mining to analyze social networking activities.

What is not keeping pace with this exponential growth appears to be companies making sure their social media activity is covered by their current insurance policies. An informal survey was conducted in late February 2011 of 700 executives from large companies and associations. Of the people surveyed, only 49 said that they had checked to see if their commercial general liability (CGL) insurance policies cover social media related risks. This number is not that surprising. The majority of companies are still in the process of implementing social media policies, and communicating them to their employees. An even larger number of companies need to update their document retention policies to address their social media activity.

Whether or not an insurance policy will provide coverage or a duty to defend depends on the facts of a particular case. However, companies can do something to increase their chances of being protected. First, companies can identify the ways in which they have a greater risk of being sued for doing business on social networking sites and Web 2.0. These claims include: (1) Invasion of privacy; (2) Privacy breaches through the leaking of credit card or other personal information (*e.g.* hacking, unauthorized internal access or inadvertent disclosure); (3) Copyright and trademark liability as it relates to online text, videos, cartoons, photographs; and (4) Defamation.

Second, insurance companies in the last several years have been adding coverage for Web 2.0 and social media activity, including cyber liability, Internet; e-commerce, network security, media and invasion of privacy. In addition, some CGL policies issued after 2001 include coverage for "personal and advertising injury" offenses committed "through the Internet or

similar electronic means of communication," with coverage for any part of the world in which the injury or damage takes place. Thus, there are policies worth exploring with an experienced broker.

Third, companies can reduce their exposure to claims, and make it easier to get coverage by having a social media policy in place. Underwriters are looking at whether or not companies have a social media policy, and whether the policy is being communicated to all employees. Because the law is evolving in this area, it is recommended to have any social media policy reviewed by experienced legal counsel. Having an overbroad social media policy can cause the company to be sued. The National Labor Relations Board (NLRB) recently settled an action it filed against American Medical Response of Connecticut in connection with a social media policy that was alleged to be overbroad in that it violated Section 7 of the National Labor Relations Act by seeking to preclude employees from complaining about their wages, hours, and working conditions on social networking sites. As part of the settlement, American Medical Response agreed to amend its policy. The law continues to evolve in this area so it makes sense to involve legal counsel in the drafting of your company policy.

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