

The Legal Aspects of Using Social Media: How to Avoid the Pitfalls and Capitalize on the Opportunities

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Agenda

- Brief Summary of How Organizations Are Leveraging On-line Social Media
 - What is On-line Social Media
 - Current Trends/Potential Benefits from Using Social Media
- Legal Issues – “Similar Issues, New Platforms”
 - (1) Entity Use of On-line Social Media Platforms
 - Tax, Defamation, IP, Advertising, Privacy, CCA Specific, and more
 - (2) Employee Use of On-line Social Media
 - Workplace Environment, Recruiting/Hiring, Privacy, Developing Policy



Social Media – Everywhere

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Online Social Networking Usage: Statistics

- Facebook: More than 500 million active users
 - People spend over 700 billion minutes per month on Facebook
- Twitter: Over 160 million users
- LinkedIn: Over 85 million users
- Over 77 million Americans visit blogs; over 346 million blog readers worldwide
- Not just the Internet...we've gone mobile. Between Jan. 2009 and Jan. 2010:
 - 30% of smartphone users accessed social networks via mobile browsers — up from 22.5% in 2009.
 - Social networking sites accessed via mobile browsers rose to 11.1% — up from 6.5% in 2009.
 - Facebook mobile browser usage was up 112%
 - Twitter usage via mobile browsers up 347%



Potential Benefits of On-line Social Media

- (1) On-line Member Networks
- (2) Real-time Customer Service
- (3) Interactive Contests or Promotions
- (4) Collaborative Educational Opportunities
- (5) Virtual Campaigns
- (6) Advertising



Regulation: “Alphabet Soup”

- IRS
- Common Law (e.g., Defamation)
- FTC – Federal Trade Commission
- FCC – Federal Communications Commission
- Regulators:
 - Federal
 - State

Everybody’s getting into the act....



Tax – Exemption Issues



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.



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
- “Qualified sponsorship payments” are excepted from the definition of UBI - neither gets nor expects any return benefit other than:
 - Goods or services, or other benefits, the total value of which does not exceed two percent of the sponsorship payment; or
 - Recognition, i.e., use or acknowledgment of the sponsor’s name, logo, or product lines in connection with the nonprofit’s activities



Section 501(q) and the CAT

- CCA Credit Counseling and Code Section 501(q)
- Core Analysis Tool and Social Media – All the same factors apply



Common Law Regulation of Use of Social Media



Social Media and 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.
 - Whole Foods former CEO wrote anonymously in YAHOO Finance Forums criticizing rival Wild Oats Markets before Whole Foods purchase of the company (FTC and SEC investigations ensued)



Social Media - Imposters

- Tony LaRussa sued Twitter over an unauthorized page that made light of drunk driving and two cardinal pitchers who died (the case settled and the user name was disabled)

The image shows a screenshot of a Twitter profile for a user named TonyLaRussa. The profile bio reads: "Hey there! TonyLaRussa is using Twitter is a free service that lets you keep through the exchange of quick, frequent question: What are you doing? Join today! TonyLaRussa's updates." Below the bio is a "Join today!" button and a link for users already on Twitter. The profile picture is a small headshot of a man. The bio includes a list of bullet points: "Name Tony La Russa", "Location Tossing Pujols' salad", "Web http://madd.org", and "Bio Parodies are fun for everyone." There are 0 following and 4 followers. The tweet history shows three tweets, the first of which is a parody of a drunk driving incident involving a pitcher. A court document is overlaid on the right side of the screenshot, titled "COMPLAINT FOR TRADEMARK INFRINGEMENT, FALSE DESIGNATION OF ORIGIN, TRADEMARK DILUTION, CYBERSQUATTING, MISAPPROPRIATION OF NAME AND MISAPPROPRIATION OF LIKENESS" filed in the County of San Francisco. The plaintiff is Anthony La Russa and the defendant is Twitter, Inc.



How to Avoid - Defamation

- 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 Trade Secrets and Confidentiality
 - Consider Available Screening Capabilities for Third-party Hosts



Intellectual Property Issues



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



Social Media and 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

- 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, and Legal Proceedings
 - Consider Available Registrations, such as for Trademark, Domain name, or User Name



Use of Social Media and Advertising



FTC Standards for Social Media

- Much of the federal regulation of social media thus far has been out of the Federal Trade Commission
- The FTC applies the same standards to social media that it applies to all advertising, e.g.,
 - General advertising
 - Rev'd Guides for Endorsements and Testimonials (including Blogging/Word of Mouth Marketing)
 - CAN-SPAM/Email Marketing
 - Privacy
 - Children's Advertising/COPPA



Address Endorsements And Testimonials

- 2009 → FTC revised its Endorsement Guides to include social media
- No false advertising or misleading sales pitches
- Bloggers or “word of mouth” (or other social media) marketers who receive money or in-kind payments, including product samples, must disclose relationship
- Employees – if discussing organization’s products or services → disclose relationship
 - Note: Fundamental tension
- Adopt policy and procedures to make sure bloggers disclose relationship & monitor compliance



Self-Regulatory Guidelines on Endorsements and Testimonials

- Word of Mouth Marketing Association (WOMMA)
Guide to Disclosure in Social Media Marketing
 - Best practices for clear and prominent disclosure of material connections by advertisers, marketers and bloggers
 - Based on FTC’s revised Endorsements and Testimonials Guides
 - Examples:
 - For product review in blog or comment “I received [product or amount] from [company] to review [product]”
 - For hashtag: #spon; #samp; #paid



Other Sources of Industry Self-Regulation

- Council of Better Business Bureaus (BBB), a non-profit industry group: provides best-known general self-regulatory process for advertising; administers codes and hears challenges under several programs:
 - National Advertising Division (NAD) (hears competitor and NAD-initiated challenges to advertising)
 - Decisions appealed to National Advertising Review Board (NARB)
 - Children’s Advertising Review Unit (CARU)
 - Electronic Retailing Self-Regulatory Program (ERSP)
 - With Electronic Retailing Association (ERA)
- Word of Mouth Marketing Association (WOMMA)(Guide to Disclosures in Social Media Marketing)
- Digital Advertising Alliance – includes BBB and:
 - Interactive Advertising Bureau (also has Social Media Best Practices)
 - Direct Marketing Association (also Social Media Council; Guidelines for Ethical Business Practice)
 - Association of National Advertisers (ANA)
 - American Association of Advertising Agencies (4 A’s)
 - Network Advertising Initiative (NAI)
 - American Advertising Federation (AAF)
- Also: Mobile Marketing Association (Guidelines for Cross-Carrier Mobile Content Programs); CTIA – The Wireless Association (CTIA guidelines; primarily address duties of wireless carriers with respect to location based marketing, etc.)



Social Media and 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



Social Media and Privacy Considerations



Privacy and Data Security in Social Media

- Social Media raises privacy issues at more than one level, and regulators from more than one arena are interested:
 - FTC and other federal agencies
 - States
 - Self-regulatory groups
- Collecting consumer data?
 - Marketers must adhere to the promises that made to consumers regarding privacy and data protection
 - Regulators have brought deception cases against marketers that misrepresented their use of personal information or the security of data
 - Marketers must implement and reasonable and appropriate measures to protect personal data
 - Regulators have brought enforcement actions against marketers for failing to implement reasonable data security measures



General Overview of U.S. Privacy Laws

- Legal right to privacy evolved during the 20th century (“right to be left alone”—Brandeis)
- Impact of electronic data and storage on debate:
 - Digital information is easy and inexpensive to gather, store, analyze, transmit, and reuse
 - Increased Internet use increases data access and exponentially expands privacy risks
- Current regime is a mix of federal and state laws
- Industry has tried to work with government/adopt self-regulatory principles
 - Government regulation can be slow
 - Industry is technologically nimble



Major Federal Privacy Statutes

- Federal Trade Commission Act (General Applicability)
 - Section 5 of the Act prohibits “deceptive and “unfair” practices such as using customer personal information in a manner inconsistent with posted privacy policy
 - Used against Twitter in 2010 after lapses in security that allowed hackers to gain administrative control of Twitter on two occasions and send phony tweets from nine user accounts, including the account of then-President-elect Obama. Hackers also reset user passwords and accessed nonpublic information
 - FTC issued report on Dec. 1, 2010:
 - Companies should adopt a “privacy by design” approach by building privacy protections into everyday business practices
 - Consumers should be presented, in a clear manner, with choice about collection and sharing of their data
 - Recommends a “Do Not Track” mechanism for consumers to opt out of collection of information about consumer’s Internet activity for targeted ads (behavioral advertising) or other purposes;
 - Recommends allowing consumers “reasonable access” to collected data
- Gramm-Leach-Bliley (applies to financial institutions)
- Fair Credit Reporting Act (reasonable procedures to prevent unauthorized access to consumer reports)
- Health Insurance Portability and Accountability Act (health information)(DHHS)
- The Cable Act
- The Electronic Privacy Act/Stored Communications Act



State Privacy Laws

- MA Identity Theft Protection Rules, 201 CMR 17:00 (eff. March 2010)
 - Requires businesses or entities storing or transmitting personal information of a MA resident to create a written security plan detailing how information will be protected from theft/loss.
 - Risk-Based Approach: regulations indicate a business should consider its size, nature, and kinds of records it maintains when developing a plan.

- MS Security Breach Law (signed April 7, 2010; eff. July 1, 2011)
 - 46 states + DC now have data security breach notification laws (AL, KY, NM, and SD do not)



Privacy and Behavioral Advertising

- Department of Commerce - Task Force issues green paper, *Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework*. Main recommendations:
 - Adoption of a comprehensive set of standards to protect consumer privacy
 - Recognize expanding interoperability between U.S. and international data privacy frameworks
 - Adherence to voluntary industry codes of conduct
 - Creation of a new privacy policy office within DOC to focus on commercial data privacy
 - Set a national standard for notifications of security breaches
- Federal Trade Commission
- Self Regulatory Approaches



Privacy - Avoiding Future Problems

- Implement appropriate terms and conditions and policies; keep them up to date. E.g.,
 - Social media
 - DMCA takedown
 - Blogger policy
 - Privacy/data security policy
 - Document retention
- Make appropriate disclosures, whether required by law or aimed to protect from liability for third-party content
- Know and use self-regulatory groups and third party terms of use to your advantage (Facebook, Twitter, etc.)
- Secure trademark rights and register user names
- Monitor employee and third party activity (UGC, bloggers) – third parties can do this for you
- Address consumer complaints promptly
- Keep track of new developments



Use of Social Media Privacy

- Limit on Collection and Publishing of Personally Identifiable Information
 - Consider Use of Privacy Notices Describing Data Collection
 - Remember Disclosure and Consent Requirements
 - Be Mindful of Privacy Policies of 3rd Party Platforms



Children's Advertising



- The Children's Online Privacy Protection Act (COPPA) and Rule give parents control over what information is collected from their children online.
- Rule applies to *operators* of commercial websites and online services that are *directed to children under 13* and that collect *personally identifiable information* (PII) from them.



Employee Use of Social Media



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)
- Risks:
 - Attribution to Entity
 - Release of Confidential Information
 - Malware/Bypassing I.T. Security
 - Lack of Control
 - Harassment
 - Loss of or Damage to Proprietary Rights



Employee Use of Social Media Workplace Environment Issues

"the fact that the electronic bulletin board may be located outside of the workplace... does not mean that an employer may have no duty to correct offsite harassment by co-employees. Conduct that takes place outside of the workplace has a tendency to permeate the workplace."

Blakey v. Continental Airlines, 751 A.2d 538, 549 (NJ 2000)



Employee Use of Social Media Recruiting/ Hiring

- Can you Investigate/Contact Potential Employees Using Social Media?
 - YES, but...
 - (1) Make Sure Employees Cannot Claim Employment Discrimination on Prohibited Factor
 - (2) Use Social Networking sites in Systematic and Controllable Manner
 - (3) Privacy Concerns
 - (4) Consider Non-Compete Obligations
 - TEKsystems, Inc., an IT Staffing firm, sued 3 former employees and new employer over alleged violations of non-compete, non-solicitations, and non-disclosure agreements the employees entered into with TEKsystems. Lawsuit is pending and focuses on communications made using LINKEDIN.



Entity and Employee Use of Social Media Developing Policy

- Operator Policies Provide Limited Protection, Although They Offer Some Enforcement Mechanisms
- But, Don't Ignore 3rd Party Policies or CCA Specific Regulation
- Involve Multi-disciplinary Team (HR, Legal, Marketing, and Executive)
- How will Organization Manage its Presence (Internally & Externally)
- Try to Maintain Consistent Approach Across Platforms & Networks
- How will IP or Privacy be Protected – BRAND MANAGEMENT
- Consider Level of Monitoring
- Consider Shelf-Life of Archived Content
- Consider (Internal & External) Collaborative Efforts Involving Social Media
- Outline Best Practices for Publishing Material on Social Media
- Avoid Use of Inappropriate Online Names/Identifiers
- Identify Limits on Acceptable Use of Company Resources
- How will Advertising Remain Truthful & Legal
- Communicate Policy



QUESTIONS AND DISCUSSION

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