

# ***“You Posted WHAT on Facebook?”***

***DWT CLE Series  
February 7, 2011***

# Social Media is Pervasive

- More than 1 in 3 Americans have Facebook Pages
- Facebook is the 3rd Largest Country
- Twitter has roughly 45 Million Users
- MySpace still has roughly 110 Million Users
- Social Media is more than just Facebook, Twitter, and MySpace; it's Yelp! Amazon.com, YouTube, Wikipedia, chat rooms, blog comments, MMORPGs, etc.

# Changes Wrought By Technology and Social Media

- Curation Succeeds Distribution
- The Echo Chamber Effect
- Physical Presence Not Necessary
- Democratization of Creativity (Cognitive Surplus?)
- Rise of Collaboration (Presumption of Collaboration?)
- Decline of Respect for “Experts” (Empty Suit Theory?)
- What is the Role of Privacy in Life
- The Tyranny of the Network Effect
- New Non-Legal Remedies (Does Brand Trump Liability?)

# So?????

- In one way or another we all live a public life.
- We are untethered to a specific physical space, but tethered to our technology (and the Internet)
- We all have personal brands that must be maintained
- We all believe we have something to say or share
- Social media currency is reputation and earned expertise, not title, or affiliation

# Why Are You Here?

- Why are you concerned about social media?
  - Want to leverage your brand?
  - Concerned about your customers?
  - Concerned about your employees?
  - Concerned about legal liability or brand liability?

# Social Media Liability

- Not as scary as you think
- Important to categorize the risk because the risks are assessed differently in each category
  - First Party Liability, i.e. liability for what you do
  - Agency/Respondeat Superior Liability, i.e. liability for your employees and agents
  - Secondary Liability, i.e. liability for your customers and users
  - International

# First Party Liability

- Social Media is subject to the same rules as any other medium, i.e. a speaker is liable for the consequences of one's actions on social networking sites.
- For instance:
  - At least five or six lawsuits have resulted from negative reviews on Yelp!
  - Tony LaRussa sued Twitter over false Twitter account
  - Courtney Love, Kim Kardashian, et. al. sued for defamation over Twitter postings.

# Categories of First Party Risk

- Defamation
- Infringement; Trade Secrets
- Contests
- False Advertising
- Inappropriate Business Practices
- Invasion of Privacy
- Harassment
- Overall Damage to Brand
- Violation of Regulation
- Litigation Hold; SEC Restrictions, etc.



# Copyright/Trademark Infringement

- Just because something is on a social media site does not mean that there is an implied license; Photographers, in particular, actively look for uses on social media sites (see, e.g. AFP v. Morel).
- Not everyone views a “viral hit” as valuable
- Check the Terms of Service, particularly if you want to use something for commercial purposes
- Don’t forget about rights of publicity, e.g. employee videos
- Clearances need to be precise, i.e. what is mobile?

# Employment Issues

- 7% of employers reject candidates based on information discovered using social media
- More than a third say they do look at candidates' social media profiles during recruiting
- Are you monitoring off duty activity and making termination decisions?
- NLRB Case re firing employee for employee post on Facebook (NLRB believes that FB is the new water cooler)
- Does consulting social media create a disparate treatment issue?
- Student expulsions seem to be different

# Liability for Third Party Agents

- General rules of agency apply, but how do you determine what is and what is not part of the scope of employment (e.g. customer service communities)
- Delfino v. Agilent: Employer not liable for use by employee of employer's computer outside scope of employment to commit torts);
- Maypark v. Securitas: Misconduct not foreseeable so no negligent training; merely providing Internet access does not constitute negligent supervision
- Generally no liability for providing Internet access or facilities where students could engage in inappropriate behavior (see, e.g. DC v. Harvard-Westlake School)
- Still unclear of scope of liability for an employer for its institutional knowledge

# But

- Very little secondary liability for social media platforms.
- But be prepared for the potential for significant PR and other headaches (e.g. Portland Press Herald)
- Liability Categories:
  - Secondary Liability for Third Party Torts
  - Contributory or Vicarious Liability for Third Party Infringement
  - Linking Liability
  - Liability for Bad Acts of Agents and Employees
  - Privacy Obligations (Primarily International)

# The Web 1.0 Era of Publisher Liability

- At the advent of the Internet, Congress enacted a series of laws to facilitate the growth of the Internet
- Congress recognized that one of the unique opportunities that the Internet provided was to offer interactivity and it enacted laws to encourage companies to experiment with this interactivity
- This has led to E-Bay, Blogging, Social Networking, Search Engines, etc.
- Please note that this relates only to publisher liability, not the author's liability (none of these laws is a blanket right to defame or infringe)

# The Web 2.0 Era of Publisher Liability

- The era of User Generated Content (or “UGC”) and Social Media has created a new class of content creators who don’t have history or education of most producers and creators
- Higher value content is being infringed so there is more at stake for the content owner
- Content owners have tried to learn from Napster, et. al. and they want to protect their own communities and content services
- Content owners have also learned that they don’t want it to get out of control
- As a result, more lawsuits...

# Summary of Defamation Law

- Traditional defamation law provides that a publisher has liability for publication of any substantially false statement that concerns a living and identifiable person that causes damage and for which the publisher is at fault
- Liability is imposed on traditional publishers for republishing a defamatory statement, even if that statement is made by a third party.

# Summary of Section 230 Law

- 47 USC 230 states that “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 statute defines an “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” (The AOL definition)
- Section 230 also protects a user from taking reasonable actions to filter content from end users, including filtering for pornography and Spam (see, e.g. Kaspersky; but see eBay coin collecting certification case)
- Specifically excludes federal intellectual property (but, perhaps, not state), federal criminal law, and certain other statutes



# What Does This Mean?

- Through a series of cases, it is clear that this means essentially that no party is responsible for the speech of a third party (See, e.g. Blumenthal; Carafano; the Amazon comments cases) or any other tortious activities taken by third parties (e.g. Doe v. MySpace)
- No liability for screening content, editing content for form or length, imposing behavioral controls, etc.
- Liability can be created where a website selects postings and revises them in a way that indicates that website owner is endorsing the statements (See, e.g. Teva Pharmaceuticals; Hy Cite); or shells are involved, i.e. joint acts
- Liability can be created where the website solicits illegal behavior (e.g. Roommates);
- Liability may be created for additional representations or promises (Barnes).
- Leads to profoundly counterintuitive results which leads to repeated lawsuits

# Summary of DMCA Safe Harbor

- “DMCA” typically refers to either the notice and take-down safe harbor (s. 512) or the anti-circumvention clause (s.1201)
- Section 512(c) provides that a website will not be contributorily infringing for content residing on its system at the direction of users provided:
  - It follows the notice and takedown procedure
  - It does not have actual knowledge that the material is infringing
  - In the absence of actual knowledge, it is not aware of facts or circumstances from which infringing activity is apparent
  - It does not receive a financial benefit directly attributable to the infringing activity
  - It registers with the Copyright Office (**Don’t forget this!**)
- This only creates a safe harbor. Failure to meet the safe harbor does not create copyright liability.
- Note that this only applies to copyright (you’re on your own for trademark – although cease and desist letters are effectively notice and takedown, but see the anti-counterfeiting cases).
- All case results, so far, have been pro-defense

# What Does This Mean?

- If you establish a reasonable process and are responsible, you're unlikely to have liability, i.e. be the "clean hands" party (e.g. Veoh)
- The "actual knowledge" component requires actual knowledge of a specific infringement, not actual knowledge that there is infringement on the platform (e.g. YouTube)
- Failure to fall within safe harbor does not mean there is infringement
- There are duties placed on the content owners to consider fair use before sending take down notices (e.g. Dancing Baby case)
- Obligation to filter?
- What about "application store" operators
- Be careful about taking ownership of submitted content

# Summary of Linking Liability

- Generally no liability for linking (Ticketmaster v. Tickets.com is still the controlling case).
- Courts have only imposed liability for linking in very rare circumstances.
  - Flaunting a court order (Lighthouse; Reimeredes)
  - Child Porn
  - International
- Cases have expressly permitted in-line linking to videos
- Leeching, i.e. websites that solely exist to link to infringing content have been held to be illegal.

# Trademark Issues

- Section 230 explicitly excludes intellectual property statutes
- There is no DMCA equivalent for trademark law; i.e. no “safe harbor” for trademark infringements
- This means that an entity can be liable for third party trademark infringement See Earthlink v. Gucci (holding Earthlink liable for hosting counterfeiting website); Louis Vuitton v. Akanoc; Gucci has also sued payment processors
- Tiffany v. eBay, May 2008
  - eBay not liable for contributory infringement
  - Burden on trademark owner to police website
  - Standard not reasonable anticipation of infringement, but whether website continued to supply its services to sellers when it knew or had reason to know of infringement by these sellers
  - Law requires specific knowledge, not generalized knowledge
- But See, Tiffany v. eBay in France

# Notice and Takedown Processes

- Notices must be provided with specificity and particularity; it is not sufficient to merely send a letter to a platform
- Platforms must take the content down “expeditiously”  
This doesn’t have a specific timeframe attached to it
- Platforms must have effective back end processes; it’s not sufficient to merely have the proper notice in the terms of service
- Be careful of “promissory estoppel” issues, i.e. creating liability where there wasn’t liability before
- Be consistent in applying your policies

# Privacy

- No comprehensive privacy law in the United States
- Tradition in the United States is that the data collector, not the data subject owns and controls the data
- And with consent, all things are possible...

# So, What's the Problem?

- Consumer Backlash; Unpredictable Consumers
- Privacy Policies; Privacy Defaults
- FTC Action; Consumer Protection Issues
- Invasion of Privacy Claims
- Discovery Issues (Do Your Privacy Settings Matter? Rule of relevancy seems to apply)
- International Issues
- Special Issues
  - Corporate Issues and Establishing Corporate Policies
  - Kids
  - Location Based Services



# Of Course, No Law Will Protect You Against Stupidity

- Innumerable examples of consequences for disclosure of private information through social media (Australian clerk; Montana police officer)
- No privacy law prohibits receivers of private information from taking actions based on a user's lack of discretion
- But...NLRA claim; German rumblings; Privacy Settings

# Social Media Policy Issues

- What is the Purpose? (Leveraging Social Media; Guiding Employee Use; Control of Official Blogs?)
- How Does it Fit With Company Goals and Values?
- The policy should be realistic
- What Sort of Oversight is Appropriate?
- Handling Anonymity
- Differentiating Between Employee Activity and Private Activity
- How Do You Manage Your Best Employees (maybe harder than the opposite)
- The Four Horsemen of Social Media: Breach of Confidentiality, Defamation, “False and Misleading”, and Infringement
- How Are You Going to Handle Unexpected Hits?

# Building a Social Media Policy

- Identify Relevant Company Policies (e.g. litigation holds; “quiet periods”, etc.)
- Make sure it’s not overly broad
- Identify acceptable behavior
- Remind users about copyright and trademark obligations
- Remind users to differentiate between “official” and “unofficial” participation
- Have a policy regarding potential “flame wars.”
- Outline review and takedown processes
- The company should disclose any monitoring that it does
- Allow or block access to social media websites?
- Extent to which company equipment and networks can be used to access social media websites?

# Future?

- How will Web 3.0 (the Semantic Web, Apps, and targeted advertising change the analysis?)
- Wikis + Integrated Blog comments (Who is the speaker? Who owns the content on an open platform?)
- Rights of Publicity in “Tagging”
- Extension of protections to mobile platforms?
- Impact of microexhibition on copyright protections (What is personal use?)
- Impact of content owners shift of strategy on risks for businesses
- Are there filtering obligations? What about geofiltering obligations?
- Does social media sharing impact jurisdictional issues
- Fan Fiction, Mash-Ups and UGC Videos (Redefining Fair Use?)
- “Alter Ego” Liability; Defeating Section 230 through proof that third party actors were acting on behalf of website
- Will there be consequences from Douglas case and other “click-through” cases? (9<sup>th</sup> Circuit case on enforceability of changes to terms and conditions)

Kraig L. Marini Baker  
[kraigbaker@dwt.com](mailto:kraigbaker@dwt.com)  
2067578007

