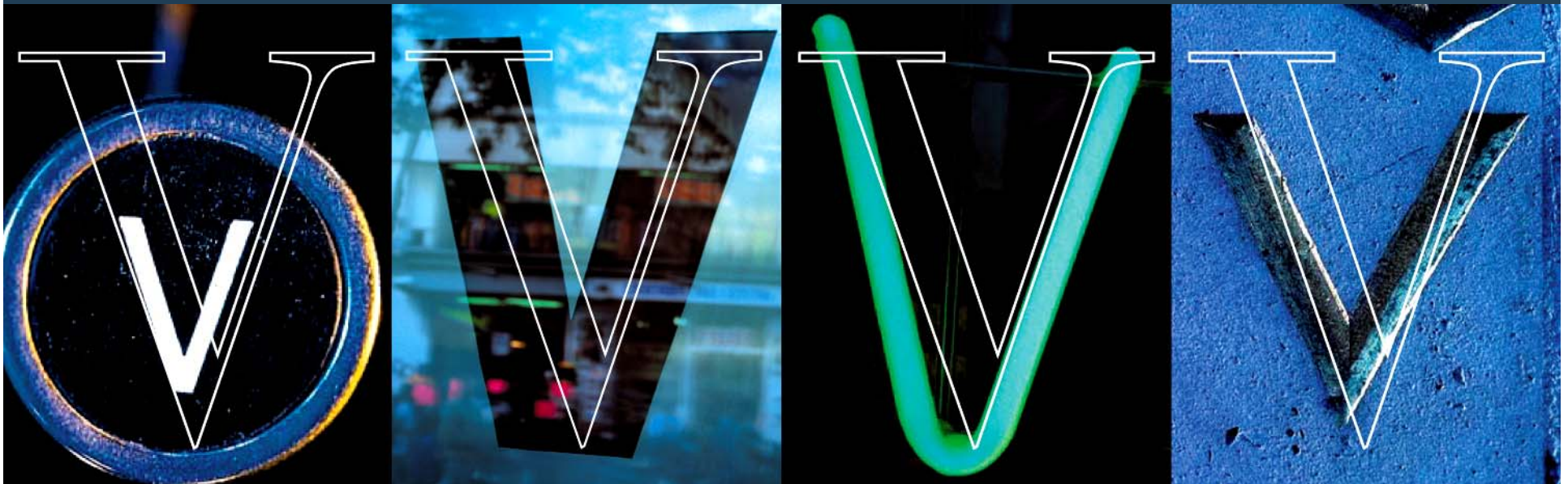


# VENABLE<sup>®</sup><sub>LLP</sub>

## Avoiding Legal Pitfalls when Using On-line Social Media

August 4, 2010



## Agenda For Today

- 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
    - Defamation, IP, Privacy, Advertising, Antitrust, Tax
  - (2) Employee Use of On-line Social Media
    - Workplace Environment, Recruiting/Hiring, Privacy, Developing Policy



\*Certain images used in PowerPoint are for research purposes only.

# What is On-line Social Media?



- (1) *social networks* – Facebook, Myspace, LinkedIn
- (2) *media repositories* – Youtube, Flickr, Picasa, Vimeo
- (3) *blogs and microblogs* – Twitter
- (4) *wikis* – Wikipedia, Medpedia, Sidewiki



## 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

**I checked my  
cupboards  
for recalled  
products!**

[www.fda.gov](http://www.fda.gov) or  
1-800-CDC-INFO



(CDC campaign badge)



## Entity Use of Social Media *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)





# Entity Use of 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 mobile users. The profile picture is a small black and white photo of a man. The bio lists several 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 bio also includes a list of three tweets: "Lost 2 out of 3, but we made it out of Chicago without one drunk driving incident or dead pitcher... I'd call that an 1-55 series. 8:01 PM Apr 19th from web", "Fortunately, Ian Snell sucks now... when Molina and Duncan Jr. go deep off of you it's time to look yourself in the mirror, have an ice-cream. 3:33 PM Apr 8th from web", and "drinking a cold Zima and wishing fucking Hancock was alive, I bet he could've gotten Jack Wilson out. 4:13 PM Apr 7th from web". A lawsuit document is overlaid on the right side of the profile, titled "ANTHONY LA RUSSA, Plaintiff, vs. TWITTER, INC., a Delaware corporation, and DOES 1-25, inclusive, Defendants." The lawsuit is filed in the County of San Francisco, No. C6C-09-488, and lists causes of action including "COMPLAINT FOR TRADE INFRINGEMENT, FALSIFICATION OF TRADEMARK, TRADEMARK DILUTION, CYBERSQUATTING, MISAPPROPRIATION OF NAME AND MISAPPROPRIATION OF LIKENESS".



## Entity Use of Social Media *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



## 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
  
- 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



## Entity Use of Social Media *Misleading Advertising*

- Third-Party Statements/Deceptive Endorsements
  - All Product or Service Claims on Social Media are Advertising
- Requires Disclosure of Connection
  - Whether the Speaker is (1) Acting Independently or (2) Acting on Behalf of the Advertiser (or its agent).
- FTC Guidelines – Testimonials/Commenting
  - Specifically Include Social Media and Network Marketing
  - Applies when (1) “Endorsement” and (2) “connection”
  - Potential for Blogger and Entity Liability
  - Entity Doesn’t Have to Request Endorsement



## 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
- “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



## 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.
  
- 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).



## Entity Use of Social Media *Compliance*

- You're required to register in states where you solicit
- In many states, the mere existence of a "Donate Now" button triggers your registration requirement
- Put a disclaimer on your donation page.
  - Say that you only accept donations from the list of states where registered.
  - Remove the other states from your pull down menu, or only accept the right state names in an input field.
- Can lead to fines - The Secretary of State in Georgia fined a nonprofit \$25,000 for noncompliance with the state's registration statutes.



## Entity 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 3<sup>rd</sup> Party Platforms



## 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.





## Employee Use of Social Media *Developing Policy*

- Operator Policies Provide Limited Protection, Although They Offer Some Enforcement Mechanisms
- But, Don't Ignore 3<sup>rd</sup> Party Policies
- Involve Multi-disciplinary Team (HR, Legal, Marketing, and Executive)
- How will Association Manage its Presence (Internally & Externally)
- Try to Maintain Consistent Approach Across Platforms & Networks
- How will IP or Privacy be Protected
- 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?



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