



Online Social Media and Nonprofits: Navigating the Legal Pitfalls

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Agenda for Today



- Legal Issues – “Similar Issues, New Platforms”
 - (1) Participation; Community; Interaction
 - (2) Entity Use of Online Social Media Platforms
 - Defamation, IP, Privacy, Agency
 - (3) Entity Online Programs and Efforts
 - Promotions, Tax-Exempt Status
 - (4) Employee Use of Online Social Media
 - Workplace Environment, Recruiting/Hiring, Privacy, Developing Policy

Social Media Policies – *The End Game*



“We got blindsided by two idiots with a video camera and an awful idea. Even people who’ve been with us as loyal customers for 10, 15, 20 years, people are second-guessing their relationship with Domino’s, and that’s not fair.”

Jim McIntyre, Dominos Spokesman

Responsibility for Statements/Posts



- Important to train before incidents occur and set up clear communication guidelines for:
 - Board
 - Members
 - Employees
- Apply to:
 - Postings on organization-sponsored sites, blogs, etc.
 - Postings which could be attributed to the organization

Entity Use of Social Media *Defamation*



- Act of harming reputation of another through false statements to a third party
 - Defamation, misrepresentation, infliction of emotional distress, negligence
 - Easy to do in the real-time environment of social media
- Law still trying to catch up to new medium and technologies
- Comments made by others can be attributed to the organization
 - Use of moderator to post offending message “could” lead to liability. Cornelius v. Deluca (D. Idaho April 26, 2010).
- Companies injured in commercial settings by anonymous speakers on the Internet can use civil discovery to learn the identities of the speakers (and perhaps by more relaxed std. under the First Amendment). Quixtar, Inc. v. Signature Management Team, LLC.

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 neutral where possible.
 - Be mindful of agency or outsourced roles
 - Remain mindful of trade secrets and confidentiality
 - Consider available screening capabilities for third-party hosts

Entity Use of Social Media *Privacy*



- Limit on Collection and Publishing of Personally Identifiable Information
 - FTC enforcement still possible
 - Consider use of privacy notices describing data collection. Be truthful. Don't exaggerate available security for data.
 - Remember disclosure and consent requirements
 - Be mindful of privacy policies of third-party platforms

Intellectual Property



- Avoid Trademark Misuse
 - Seek permission
 - Be especially careful in commercial context
 - Avoid using others' trademarks or trade dress in search terms, avatars, frames, domain names, or user names.
 - No D.M.C.A.-like immunity for trademarks, but some follow similar take-down policy.

Entity Use of Social Media *IP Issues*



- Be Mindful of Copyright Ownership. Social Media Is Primarily about the Content and Its Distribution.
 - Work-made-for-hire doctrine, Written assignments of rights with independent contractors, authors, speakers, and other non-employees.
 - Be careful with using third-party content. Incorporating unauthorized third-party content into page or site can lead to claim for infringement.
 - Emergence of companies enforcing copyright for a profit – 20 year old blogger sued for \$150,000 over photo use
 - Generally don't rely on the "fair use" doctrine, which is fact sensitive. Safer to get permission.
 - Have D.M.C.A. take-down policy that allows for quick action. Sometime "real-time" content.

Entity Use of Social Media *IP Issues*



- Protecting Own Intellectual Property Rights
 - Monitor for misuse. Most operators have take-down policy.
 - Balance IP protection with reputation protection
 - Many times, it's an innocent infringer
 - Aggressive enforcement behavior could become public
 - 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, search term, or user name.
 - Be aware that many operator policies require broad license. Review terms if there is a concern. Don't assume protection of your interests.

Programs



- Promotions
- Sponsor Recognition
- Tax-Exempt Status

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

Organization Online Presence 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.

- 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

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

Acknowledgment vs. Advertising



- Hyperlinks
 - A hyperlink may convert acknowledgment to advertising
 - Hyperlinks that lead to a website that features the nonprofit's endorsement of the sponsor's products more likely to be advertising
 - 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).

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.

Multiple Tax-Exempts



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

- 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 engaging in any political campaign intervention
 - 501(c)(6) Organizations – Primary activity cannot be political campaign intervention

Employment



- Recruiting and Hiring
- Employee Use of Social Media

Workplace Environment Issues



- Use is likely inevitable
- So, avoid “head in sand” approach and educate
 - Historically, organizations tried to control risk by denying access
- Develop Policy that Addresses Permissible Use While Guarding Against Legal Risk
- Organize Team in Advance to Handle Crisis (Legal, Executive, Marketing, HR)

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 online

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 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 organization'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

Employee Use of Social Media *Discipline*



- Linked to social media policy
- Proceed with caution before taking disciplinary action for violations
- Recent cases

– AMR & Facebook firing; Reuters tweet dispute

- “AMR has agreed to revise its policy to ensure that it does not improperly restrict employees from discussing their wages, hours and working conditions with co-workers and others while not at work and that it would not discipline or discharge employees for engaging in such discussions”



Questions?



contact information



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