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Liability for Content Posted by Third Parties: How to Protect Your Nonprofit

Legal Quick Hit—Association of Corporate Counsel's
Nonprofit Organizations Committee

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Speakers

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So You're Hosting Content from Third Parties...

- What kinds of legal problems arise when your website hosts user-generated content?
- Can your company be held liable for unlawful material that others post on your site?
- Do you have any obligation to police user-generated content?
- Can you alter content that users post on your site? If so, how much?



Common Problems with User-Generated Content

- User posts nasty or inflammatory statements about another person, company or product on your site
- User posts another person's private information on your site
- User solicits in a discriminatory manner on your site
- User posts material on your site that infringes copyright or trademark rights



Defamation

- Restatement (Second) of Torts Sec. 559
 - Act of harming reputation of another through false statements to a third party
 - Occurs when you have (a) false or defamatory statement concerning another person, (b) communication or publication to a third party, and (c) harm to third party
- When might this arise?
 - Offensive, negative user comments
 - Criticism, outlandish insults
 - Companies injured by anonymous speakers online can use discovery to learn the identities
- Possible with social media publication, display, or posting
 - “Publisher Liability”
 - Party who publishes the defamatory statement
 - “Distributor Liability”
 - Party who repeats the defamatory statement with knowledge or reason to know its contents
- Comments made by others can be attributed to the organization



Defamation



How to Avoid?

- Federal Communications Decency Act of 1996 - § 230
 - Pattern behavior. Essentially, there is different treatment online
 - Only possible with information or content published or provided by another person
 - Immunity for interactive computer service if (a) voluntary, good faith action to restrict access or (b) enablement of technical means to restrict access. Won't be treated as publisher or distributor
- Beware of informal nature of social media networks
- Utilize disclaimers and terms of use
- Enforce a takedown policy
- Refrain from commenting on third-party posts
- Remain mindful of trade secrets and confidentiality
- Consider available screening capabilities for third-party hosts



Communications Decency Act

47 U.S.C. § 230

- “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.”
- “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”
- Protects against a wide range of claims
 - ❖ Defamation
 - ❖ Unfair competition
 - ❖ Invasion of privacy
 - ❖ Negligence
 - ❖ Breach of contract
 - ❖ Federal civil rights claims
 - ❖ State criminal claims
 - ❖ Infliction of emotional distress



Requirements for CDA Immunity

- Defendant must be a provider or user of an interactive computer service
 - E.g., traditional ISPs, website operators (including bloggers), listserv operators, social networking services, search engine operators, users of online services;
- Cause of action treats the defendant as a publisher or speaker of information; and
- Information must have been provided by another information content provider.



Limitations on CDA Immunity

- Section 230 doesn't protect against:
 - Federal criminal laws
 - State/federal electronic communications privacy laws
 - Intellectual property claims (split of authority)
 - Doesn't apply to federal claims, but immunizes against state claims. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1119 (9th Cir. 2007)
 - Doesn't apply to state or federal claims. *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 302 (D.N.H. 2008); *Atlantic Recording Corp. v. Project Playlist, Inc.*, No. 08–3922, 2009 U.S. Dist. LEXIS 24912, at *35 (S.D.N.Y. March 25, 2009)
- You can select, withdraw, or edit user content, but immunity may not apply if you significantly change or contribute to the meaning of the content



Avoiding Defamation—Best Practices

- It's OK to edit user content, but be careful not to "develop" it
- If someone threatens to sue your company for publishing content protected by Section 230, send a letter explaining that your company has immunity, which may help avoid suit. A company should work with an attorney to develop a form letter for such situations
- Even when you're not legally required to police or remove disputed content, you should adopt internal policies for addressing complaints
- Don't promise to take down content if you don't intend to do so. Follow any promises you make in your privacy policy or terms of service. *See Barnes v. Yahoo!*, No. 05-00926(9th Cir. May 7, 2009)



Copyright Issues



- Protects creative expression fixed in any tangible or electronic medium, e.g., words, designs, audiovisual content, music
- Common with social media, which is essentially about content distribution and further communication and interaction between persons online
- Legal framework
 - Possible low level of creativity for copyright protection. May include a tweet.
 - Copyright protection is automatic upon creation.
- Be mindful of copyright ownership
 - Who owns work on social media?
 - Work-made-for-hire doctrine, written assignments of rights
- Will the Digital Millennium Copyright Act protect you?



Digital Millennium Copyright Act

- Section 512 establishes a “safe harbor” for online service providers storing content at the direction of users
- Applies to user-generated content and links
- Requirements for safe harbor protection
 - No actual knowledge
 - No direct financial benefit or right to control
 - Designate a Copyright Agent at the Copyright Office
 - Adopt, follow, and post a copyright infringement policy
 - Should include DMCA takedown procedure



DMCA—Takedown Notices

- User sends a notice to provider of copyright infringement, and provider can take down the content with no liability
- Proper DMCA notices must include:
 - Signature of owner or authorized person
 - Identification of copyrighted work
 - Identification of infringing material
 - Contact info
 - Statement of good faith belief
 - Statement of accuracy and authority
- *Lenz v. Universal Music Corp.* (9th Cir.)—Owner must consider fair use doctrine before sending DMCA notice
 - Fair use—exceptions to copyright infringement for certain purposes, i.e., criticism, comment, reporting, teaching, research, parody
 - Highly contextual and fact-specific inquiry
 - Factors—purpose/character of use, nature of work, amount of work used, effect of use on market

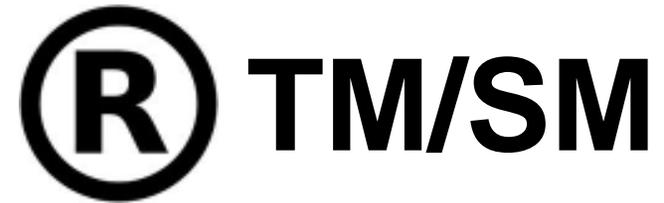


The “Quiet Rights”: Publicity and Invasion of Privacy

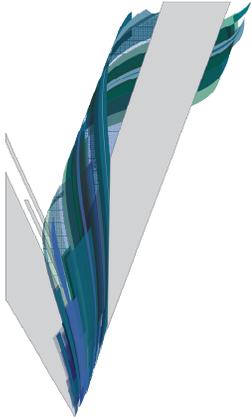
- Individual-by-state right in name, voice, or likeness
- Publicity: celebrities/privacy: the “hoi polloi.” Stronger in states with larger entertainment industry
- Triggered by commercial use, broadly interpreted
- Applies to uses on social media
- Layered underneath copyright protection
- Always get written releases from photo subjects, even if you have copyright permission to use the photo



Trademark Issues



- Trademarks protect against consumer confusion by protecting indicators of source, including company name, any logos, brands, product names, trade dress
- Trademark issues are always possible when using third-party marks
- Safest course: Get permission. Even with domain names, user names, or (sometimes) search terms
- Imposters: Unauthorized association, sponsorship, or endorsement
- Fair use in trademark context is limited: For parody or descriptive or nominative use
- Higher likelihood of an issue in commercial context. Commercial activities can include advertising, donation, membership, event, and program planning
- Don't assume "Fair Use" because of nonprofit or tax-exempt status



Questions?

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