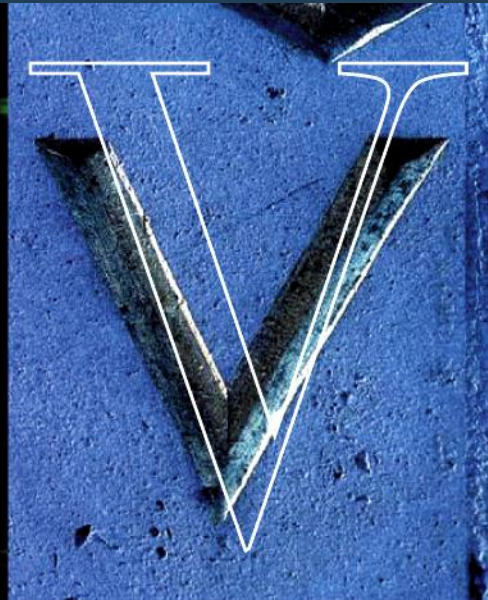
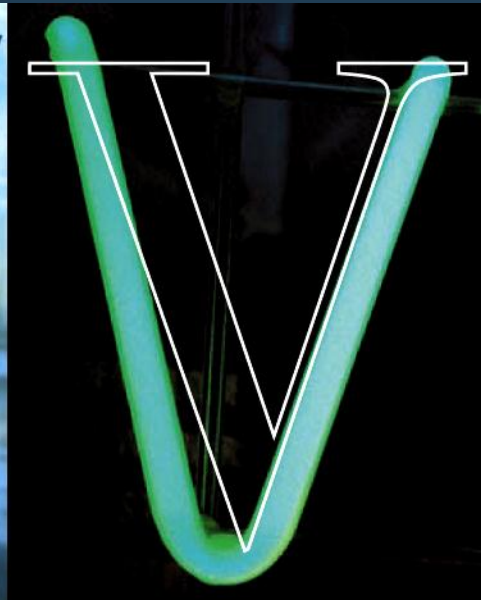
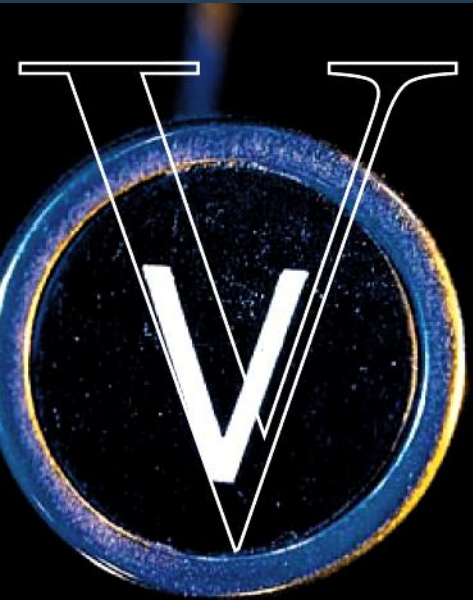


VENABLE[®]_{LLP}

The Legal Aspects of Social Media: What Every Association Needs to Know Venable LLP

June 24, 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



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 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 cardinals 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 portrait of a man. The bio text is a parody of a drunk driving warning. To the right of the profile, there is a list of bio details: Name Tony La Russa, Location Tossing Pujols' salad, Web http://madd.org, and Bio Parodies are fun for everyone. Below the bio details are statistics for following and followers, and a link to an RSS feed. Overlaid on the right side of the screenshot is a legal document from the County of San Francisco, Case No. CGC-09-488. The document identifies Anthony La Russa as the Plaintiff and Twitter, Inc., and DOES 1-23, inclusive, as Defendants. The document lists causes of action including Copyright Infringement, False Designation of Origin, Trademark Dilution, Cybersquatting, Misappropriation of Likeness, and False Light.



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

- All Product or Service Claims on Social Media are Advertising
- 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
- “Green” claims are area of particular interest to both FTC and USDA
- Cross-over to FDA Regulation
 - Unsubstantiated representations



Entity Use of Social Media *Promotions and Contests*

- Sweepstakes and Contests are Popular but Heavily Regulated
 - New Facebook rules, Special Considerations for Twitter
 - User Generated Content Promotions Require Special Consideration of IP issues, Defamation, Obscenity, etc.
- *Quizno's v. Subway TV Ad Challenge*: UGC Promotion that Asked Viewers to Make an Ad Showing why Quizno's Subs were Superior to Subway's (www.meatornomeat.com).
 - Subway Sued for False Advertising.
 - Key question was whether Quizno's was Protected from Liability for Content of Consumer-Created ads under S. 230 of Communications Decency Act; Parties Settled after Judge Refused Summary Judgment.



Entity Use of Social Media *Antitrust*

- Can't participate in inter-company pricing info.
- Fully applies to social media.
 - related example, Whole Foods CEO Mackey's message board posts
- Penalties for (1) Corporation, (2) Individual, and (3) Association.



Entity Use of Social Media *Antitrust*

- How to Avoid
 - Require Agreement to or, at Minimum, Acknowledgement of Rules Prohibiting discussions of:
 - Market Allocation,
 - Margins,
 - Inventory levels,
 - Statements that could be Seen as Encouraging Boycott of Vendor or Supplier
 - Monitoring and Enforcement



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
 - Banners
 - Hyperlinks
 - Online Periodicals
 - Virtual Trade Shows
 - Online Auctions



Entity Use of Social Media *Tax Issues*

- Lobbying / Political Activity
 - Limits on amount of political activity for tax-exempt entities
 - 501(c)(3)
 - Limited to “Insubstantial” Activities Attempting to Influence Legislation
 - ABSOLUTELY Prohibited from Campaign Intervention
 - 501(c)(4)
 - Primary Activity Cannot be campaign Intervention



Entity Use of Social Media *Tax Issues*

- Lobbying / Political Activity
 - If Making 501(h) Election, Subject to Certain Financial Limits

 - Considerations
 - Hyperlinks
 - Third Party Comment
 - Disclosure/Disclaimers



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 3rd 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 *Limitations*

- Limits on investigative powers of employers
 - Certain Jurisdictions Prohibit Adverse Employer Action for Off-duty Activities
 - Fair Credit Reporting Act Limits



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
- 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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