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## Online Social Media and Nonprofits: Navigating the Legal Pitfalls

Association of Corporation Counsel  
Nonprofit Organizations Committee  
Webcast  
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# Agenda for Today

- Brief Summary of How Nonprofits Are Leveraging Online Social Media
  - What Is Online Social Media
  - Current Trends/Potential Benefits from Using Social Media
  
- Legal Issues – “Similar Issues, New Platforms”
  - (1) Participation; Community; Interaction
  - (2) Entity Use of Online Social Media Platforms
    - Defamation, IP, Privacy, Advertising, Promotions
  - (3) Employee Use of Online Social Media
    - Workplace Environment, Recruiting/Hiring, Privacy, Developing Policy



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

# What Is Online 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
- (4) Chat rooms, forums, user reviews – Ebay, Amazon, Craigslist



# Potential Benefits of Online Social Media

- (1) Online Member Networks
- (2) Real-time Customer Service
- (3) Interactive Contests or Promotions
- (4) Collaborative Educational Opportunities
- (5) Virtual Campaigns
- (6) Advertising
- (7) Now Ubiquitous

**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
  - 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
- Posting consumer reviews can lead to defamation claim if reviews contain false statements of fact. Wong v. Jing (Cal. App. Ct. Nov. 9, 2010)
- 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).
  - 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)
- 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 *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 users already on Twitter. The profile picture is a small headshot 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." The profile shows 0 following and 4 followers. The tweet history includes three tweets, the first of which is a parody of a famous sports quote: "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." A lawsuit document is overlaid on the right side of the screenshot. The document is from the County of San Francisco, Case No. C6C-09-488, and is titled "COMPLAINT FOR TRADEMARK INFRINGEMENT, FALSIFICATION OF TRADEMARK DESIGNATION OF ORIGIN, TRADEMARK DILUTION, CYBERSQUATTING, MISAPPROPRIATION OF NAME AND MISAPPROPRIATION OF LIKENESS". The plaintiff is ANTHONY LA RUSSA and the defendants are TWITTER, INC., a Delaware corporation, and DOES 1-25, inclusive.



## 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 *IP Issues*

- 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.
    - Oneok (a natural gas company) sued Twitter over a misappropriated user name.
    - Hasbro v. RJ Software over a Facebook version of its game Scrabulous, which had more than 500,000 users.
  - 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.**
  - Who Owns Work on Social Media?
  - Work-made-for-hire doctrine, Written Assignments of Rights with employees and contractors.
  - Be careful with using 3<sup>rd</sup> party content. Incorporating unauthorized 3<sup>rd</sup> party content into page or site can lead to claim for infringement. Corbix Corp. v. Starr (N.D. Ohio Sept. 2, 2009).
  - 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.
  
- **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.



## 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
  - Truth
  - 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 *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 3<sup>rd</sup> Party Platforms.



## Employee Use of Social Media *Recruiting/ Hiring*



- Q: Can you investigate/contact potential employees using social media?
- A: Yes, but...
  - Make sure that applicants/employees cannot claim discrimination based on legally protected characteristic
  - Use social networking sites in systematic and controllable manner
    - Only use if have legitimate access
  - Privacy concerns
  - 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 focused on communications made using LinkedIn and resulted in a settlement with a stipulated injunction.



# Employee Use of Social Media *Workplace Environment Issues*



- Use is likely inevitable
- So avoid “head in sand” approach and educate
  - Historically, employers tried to control risk by denying access
- Develop, implement, and monitor social media policy
  - Address 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
- Consider Web and technology accessibility for people with disabilities



## 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 *Developing Policy*

- How will nonprofit manage its presence (internally & externally)
- Try to maintain consistent approach across platforms & networks
  - Operator policies provide limited protection (are for the operator), although they offer some enforcement mechanisms
  - Don't ignore 3<sup>rd</sup> party policies
- Be clear and organization-specific. Tailor to fit, don't use generic template.
- Be consistent with other organization policies and procedures (and require compliance with them)
- Focus on conduct – both do's and don'ts
- Distinguish between business use and personal use
- Consider shelf-life of archived content
- Consider level of monitoring
- Involve multi-disciplinary team (HR, Legal, Marketing, and Executive)
  - Create a reporting procedure
  - Establish a compliance framework and designate a compliance officer
- Use appropriate disclaimers
- Communicate policy (notice & training)



## Employee Use of Social Media *Policy Contents*

- Protect corporate identity, confidential information and trade secrets, and privacy
  - For CI and trade secrets – dovetail with any restrictive covenant language
- Business use of social media
  - Consider (internal & external) collaborative efforts
  - Outline best practices for publishing material on social media
  - Limit apparent authority (i.e., individuals who have authority to speak on organization's behalf)
  - How will advertising remain truthful
- Identify limits on acceptable use of company resources
- Prohibit disparaging/false information
  - References/recommendations?
- Prevent unlawful conduct and require compliance with all applicable laws
- Consider labor law concerns
  - Discuss wage, hours, and working conditions with co-workers at work or anyone while not at work



## 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 & discipline for a tweet



# Questions?



## contact information

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