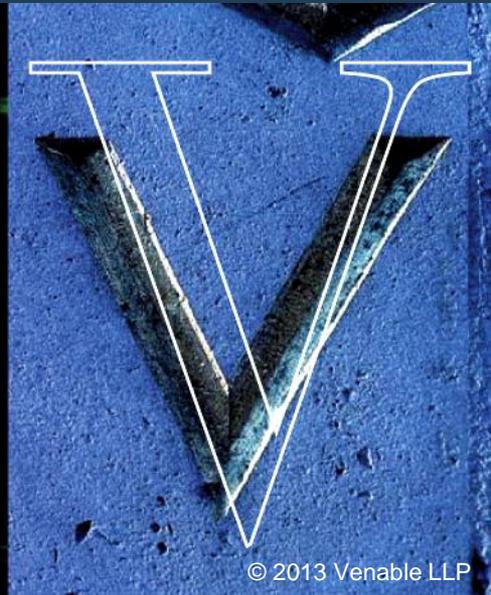
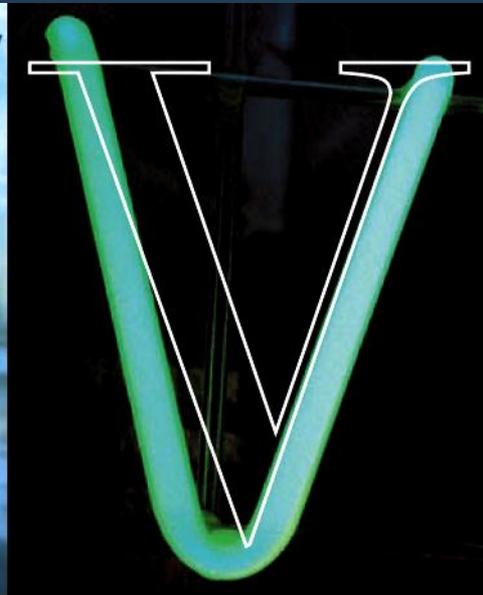
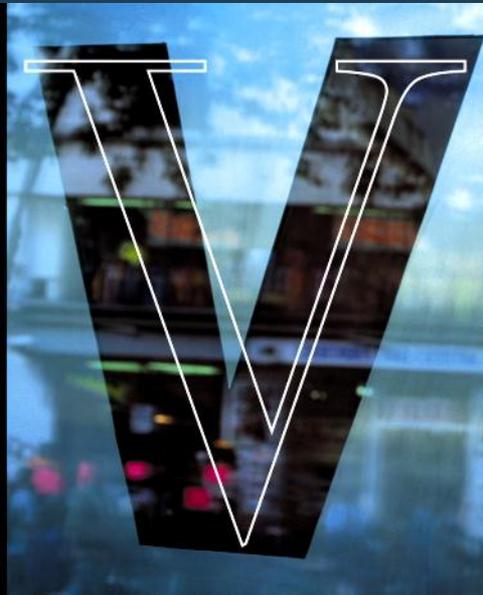
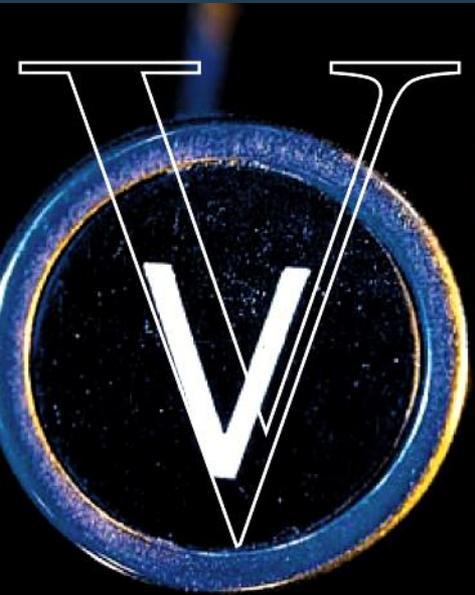




***Building and Protecting Your Association's Brand
in Social Media: Managing the Legal Pitfalls***

ASAE's Annual Association Law Symposium
September 27, 2013

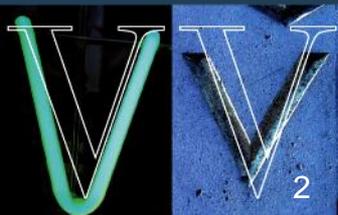
Jeffrey S. Tenenbaum, Esq., Partner and Chair of Nonprofit Organizations Practice
A.J. Zottola, Esq., Partner in Technology Transactions & Outsourcing Group
Venable LLP



Social Media – Everywhere



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How Does Social Media Work for You?

- Promotion + advertising
- Cultivate a brand
- Community building
- Fundraising
- Recruitment

The best returns appear to come from diversifying across networks rather than focusing solely on the latest “it” platform?

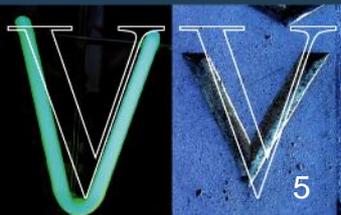


When Social Media Works against You

- **Defamation**
- **Others' intellectual property rights**
 - Copyright
 - Trademark
 - Right of publicity/privacy
- **Your intellectual property**
 - Monitoring/enforcement
 - Contractors and work-for-hire
- **Advertising/disclosures**

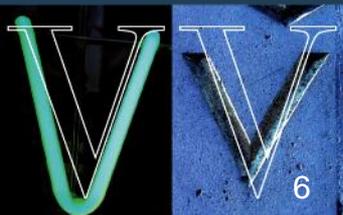


Laws – Evolving

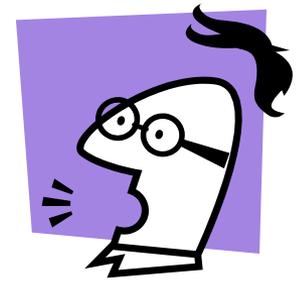


Defamation

- **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**

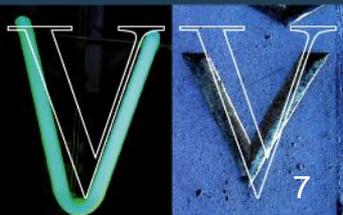


Defamation

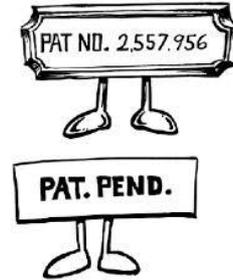


- **How to Avoid?**

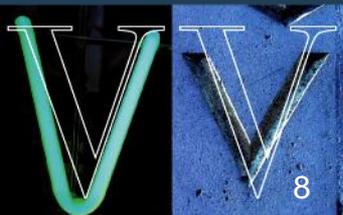
- Federal Communications Decency Act of 1996 - § 230
 - Pattern behavior. Essentially, there is different treatment online.
 - Only possible with information or content published or provided by another person.
 - Immunity for interactive computer service if (a) voluntary, good faith action to restrict 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.



Intellectual Property: The Basics



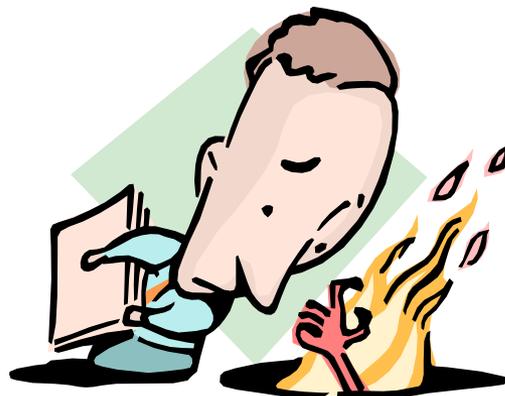
- **Copyright**
 - Protects creative expression fixed in any tangible or electronic medium, e.g., words, designs, audio visual content, music.
- **Trademark**
 - Trademarks protect against consumer confusion by protecting indicators of source, including company name, any logos, brands, product names, trade dress.
- **Patent**
 - Protects inventive concepts.



Why Does IP Ownership Matter?

- Only an IP owner intrinsically has the right to stop others' unauthorized use of that IP.
- Only an IP owner has the right to profit from others' authorized use of that IP.
- In some cases, others' unauthorized use of your IP may dilute the strength of your IP, e.g., trademarks.

Even the best intentions can be spoiled!!



Network Operator Rules for IP: Consider this before You Post

- Instagram

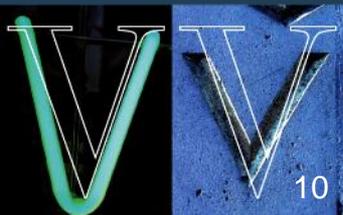
“[Y]ou agree that a business or other entity **may pay us to display your username, likeness, photos** (along with any associated metadata), and/or actions you take, in connection with paid or sponsored content or promotions, **without any compensation to you.**” (Dec. 19, 2012 TOU [RIP Dec. 21, 2012])

- Facebook

“You grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license **to use any IP content that you post on or in connection with Facebook** (IP License).”

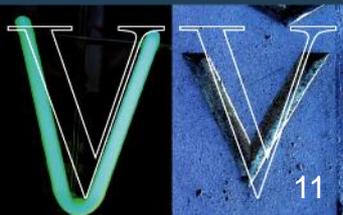
- Twitter

“You agree that this license includes the right for Twitter to provide, promote, and improve the Services and to make Content submitted to or through the **Services available to other companies, organizations or individuals** who partner with Twitter for the **syndication, broadcast, distribution or publication of such Content on other media and services**, subject to our terms and conditions for such Content use.”



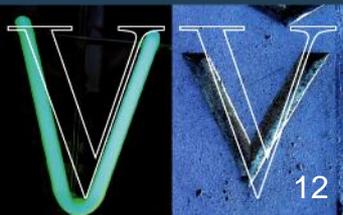
Trademarks

- **Trademark issues are always possible when using third-party marks.**
- **Safest course: Seek permission.**
- **Don't be an imposter.**
- **Fair use in trademark context is limited: Descriptive, nominative, and parody.**
- **Be especially careful in commercial context. Commercial activities can include advertising, donation, membership, event, and program planning. (All social media?)**
- **Don't assume "Fair Use" because of non-profit or tax-exempt status.**
- **Avoid using others' trademarks or in search terms, domain names, or user names.**
 - No DMCA-like immunity for trademark use, but many implement similar policies.



Copyrights

- **Social media is essentially about the content and further communication and interaction between persons online.**
- **Know the network operator rules of the road on re-posting, tweeting, pinning, etc., content created by another.**
- **Legal framework.**
 - Possible low level of creativity for copyright protection. What about a tweet?
 - Copyright protection is automatic upon creation.
 - Exclusive rights: reproduction, distribution, public display, and public performance.
- **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? Pattern behavior to take advantage of Sec. 512(c) Safe Harbor Provision.**
 - Optional “safe harbor” for online service providers engaged in ... storage at the direction of a user.
 - Must have: repeat infringer policy, no actual or “red flag” knowledge, or if knowledge, expeditious removal; no direct financial benefit + right and ability to control; takedown response; registered DMCA agent.



The Pinterest Question: “But, What about Fair Use?”



- (1) The purpose and nature of the use;**
- (2) The nature of the copyrighted work;**
- (3) The amount and substantiality of the portion used; and**
- (4) The effect of the use upon the potential market for or value of the copyrighted work.**

“Our goal at Pinterest is to help people discover the things they love. Driving traffic to original content sources is fundamental to that goal.”

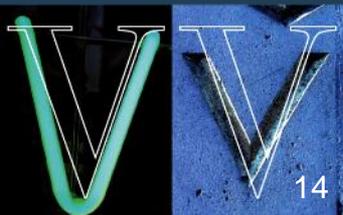
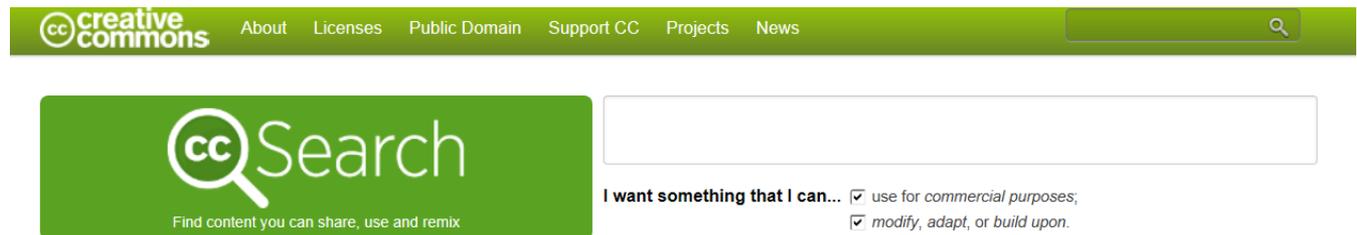
– Pinterest.com



Argh, so many Copyright Rules.

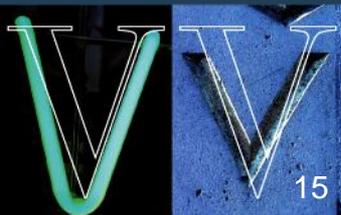
(Nope. Just 3.)

- **Establish a DMCA policy that provides an e-mail address for complaints**
 - Make sure someone checks it regularly.
- **If you did not draw it, film it, shoot it, or write it, do not post it without permission.**
- **Find great, licensed content at CreativeCommons!**
 - Stop using Google Images to create content. Please.



The Quiet Rights: Publicity and Invasion of Privacy

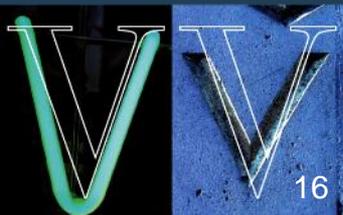
- **Publicity: celebrities/privacy: the “hoi polloi.”**
- **Triggered by commercial use, broadly interpreted.**
- **Applies to uses on social media.**
- **Layered underneath copyright protection.**
- **Always get written releases from photo subjects, even if you have copyright permission to use the photo.**
- **(We’ll talk about personal privacy and related trade practice later.)**



Trade Secret



- **Information kept secret to create advantage or which has value from not being known generally.**
- **Unauthorized disclosure increases with social media usage.**
 - Larger audience.
 - More opportunities for leakage through accounts, mobile devices, and communication.
- **Are social media contacts a trade secret?**
- **Is the account employer owned? Who owns the social media account?**
- **Consider commitments or protections in vendor contracts and whether social media is covered.**

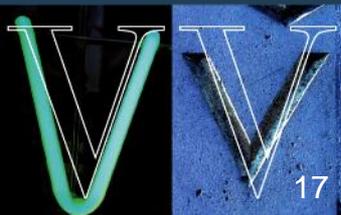


Protecting Your IP on Social Media

- Register, register, register (IP, Search, and Account).
- Monitor use by others and enforce rights via policy statements, DMCA, demand letters, and legal proceedings.
 - BUT, be mindful that on social media, cease and desists go VIRAL! [World Nutella Day vs. Jack Daniels cover].



- Balance IP protection with reputation protection. Many times, it's an innocent infringer.
- Appropriate use of symbols – ©, ®, ™
- And, perhaps most importantly...



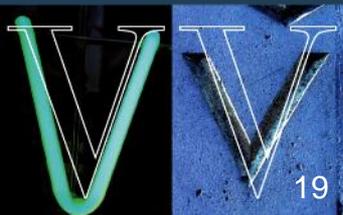
Obtaining Ownership of IP

- **General rule: organizations own IP created by their employees, but not their contractors.**
 - BUT, employment status is not always clear and must be within the scope of employment.
- **Fix: all independent contractors and volunteers should sign a written work-made-for-hire agreement and copyright assignment.**
- **A “work made for hire” is a work [that fits into one of nine enumerated categories and] . . . “if the parties expressly agree in . . . [writing] that the work shall be considered a work made for hire.”**



Misleading Advertising

- **In 2012, Nielsen reported that 46% of online consumers use social media when making a purchase decision.**
- **Advertising or promotion that misrepresents nature, characteristic, or origin of good or service.**
- **All product or service claims on social media are considered advertising.**
- **Third-party statements/deceptive endorsements in promotional activities. Potential for risk.**
 - Statement(s) that consumers believe reflects opinion of speaker rather than advertiser.
 - Potential for blogger and entity liability.
 - Entity doesn't have to request endorsement.
- **Issues Online → Not new issues, but new applications.**
- **March 2013: FTC releases “dot com Disclosures: How to Make Effective Disclosures in Digital Advertising.”**
 - All product or service claims on social media are advertising.
 - Clear and conspicuous disclosure in cases of “connection” or “endorsement.”
- **Potential for blogger and entity liability.**
 - Requires disclosure of connection.
 - Whether the speaker is (1) acting independently (blogger) or (2) acting on behalf of the advertiser (or its agent).



Privacy



- **Protection of personal privacy, i.e., personally identifiable information.**
- **Increased scrutiny on online data collection through mobile apps and online social networks.**
- **Limitations on collection and publishing of personally identifiable information.**
 - Consider use of privacy notices describing data collection.
 - You must have a privacy notice with a mobile app.
 - Remember disclosure and consent requirements.
 - Be mindful of privacy policies of third-party platforms.
 - Be consistent with general website policy if potential for overlapping data use.



Limit Apparent Authority and Protect Corporate Identity



- **Limit individuals who have authority to speak on entity's behalf and then prohibit all others from claiming or implying authorization to speak on entity's behalf.**
 - Create process for gaining authorization to speak on entity's behalf.
- **Prohibit unauthorized individuals from using entity's intellectual property, logos, trademarks, and copyrights in any way or manner.**
- **Prohibit employees and members from using entity's name in any online identity (e.g., username, screen name).**



Considerations for Developing Social Media Policy

- **Be clear.**
- **Tailor to fit; don't use generic template.**
- **Focus on planned online activities, both do's and don'ts. How will entity manage its presence (internally and externally). Try to maintain consistent approach across platforms and networks.**
- **Distinguish between business use and personal use.**
- **Don't ignore third-party social media network operator policies. Network operator policies provide limited protection, although they offer some enforcement mechanisms.**
- **Involve multi-disciplinary team (HR, legal, marketing, and executive).**
- **Be consistent with other organizational policies and procedures (and require compliance with them).**
- **Consider level of monitoring.**
- **Consider shelf-life of archived content.**
- **Use appropriate disclaimers.**
- **Communicate policy (notice and training).**



Catch-all Disclaimer

- **Nothing in this policy is intended to interfere with or restrain any employee's exercise of his or her rights under Section 7 of the National Labor Relations Act.**



Questions?

Jeffrey S. Tenenbaum, Esq.

jstenenbaum@Venable.com

t 202.344.8138

A.J. Zottola, Esq.

ajzottola@Venable.com

t 202.344.8546

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