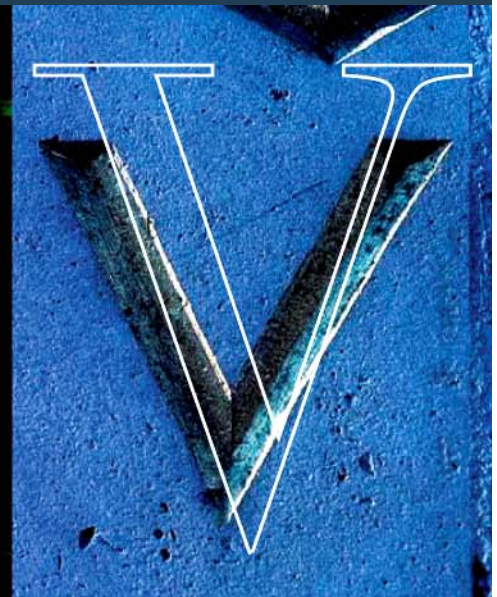
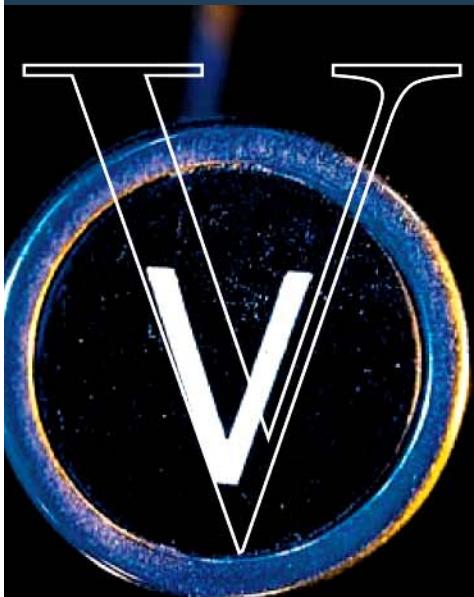


# VENABLE<sup>®</sup><sub>LLP</sub>

## Cyberspace Risk: What You Don't Know Could Hurt You

George E. Constantine  
Lisa M. Hix  
Venable, LLP  
Washington, DC

November 3, 2010



## Seminar Overview

- **Legal Issues – “Similar Issues, New Platforms”**
  - (1) Organization’s Online Presence**
  - (2) Trademark/Copyright**
  - (3) Tax-Exemption**
  - (4) Workplace Environment**



- **Tools of the Trade** (e.g., Facebook, LinkedIn, Twitter, MySpace, Friendster, Skype, YouTube, Blogs, Instant Messaging, etc.)



# Organizational Online Presence

- Defamation
- Confidentiality
- Intellectual Property
- Contributory Infringement



Watch the world premiere of the YouTube Symphony Orchestra's "Internet Symphony" mashu

## Disgusting Dominos People



0:44 / 2:28   

★★★★★ 7,053 ratings

930,390 views

 Favorite  Share  Playlists  Flag

[MySpace](#)

[Facebook](#)

[Twitter](#)

[\(more share options\)](#)

▶ Also Watching Now (3)



# Organizational Online Presence

## 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



## Defamation

- 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



## Limiting Apparent Authority and Protecting Organizational Identity

- The policy should make clear that directors, members and employees **may not**:
  - Use the organization's name in the online identity (e.g. username, "handle", or screen name)
  - Claim or imply authorization to speak as an organization representative (e.g., blogs, comments)
  - Use the organization's intellectual property, logos, trademarks, and copyrights in any manner unless authorized





# Privacy, Confidentiality and Disparaging Information

## ■ Privacy/Confidentiality

– Policy should include guidance that directors, members and employees engaging in social networking and blogging for either personal or professional reasons may not:

- Write about, post pictures of, or otherwise refer to any employee, member, vendor, supplier, business partner, or competitor without his or her permission



## Preventing Unlawful Harassment And Discrimination

- Policy should emphasize that director, employees and members may not:
  - Post material that is **abusive, offensive, insulting, humiliating, obscene, profane or otherwise inappropriate** regarding the organization, its employees, members, exhibitors, business partners, competitors, etc.
  - Post material that **may be construed** as discrimination or harassment based on race, ethnicity, color, national origin, religion, sex, sexual orientation, age, disability, or any other legally protected characteristic.



## Limiting Liability for Defamation, Infringement

- 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 Confidentiality
  - Consider Available Screening Capabilities for Third-party Hosts



# Intellectual Property



## Intellectual Property 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



# Intellectual Property

- Be mindful of Copyright Ownership. Online presence is primarily about the content.
  - Who owns work online?
  - Work-made-for-hire doctrine, written assignments of rights, licenses



# Intellectual Property

- 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,
  - Consider Available Registrations, such as for Trademark, Domain name, or User Name



## 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.





# Organization Online Presence

## 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



## 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

- 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.



## 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).



## 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**



## Lobbying and Political Activity Policies

- 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 campaign intervention
  - 501(c)(4) Organizations – Primary activity cannot be campaign intervention



# Workplace Environment



## 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)





## 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 (4<sup>th</sup> 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**



## 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



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