



**New York Society of Association
Executives (NYSAE)
Law Special Interest Group (SIG)**

**Social Media Legal Risks for
Nonprofits:**

**How to Successfully
Navigate the Pitfalls**

June 25, 2013

12:15 PM

Venable LLP

1270 Avenue of the Americas

New York, NY 10020

Panelists:

Krista S. Coons, Esq.

Brian J. Turoff, Esq.

Presentation

Social Media Legal Risks for Nonprofits: How to Successfully Navigate the Pitfalls

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How Does Social Media Work For You?

- Promotion + advertising
- Cultivate a brand
- Interactive contests or promotions
- Community-building
- Fundraising (Yes, really!)
- Recruitment

*The best returns appear to come from
diversifying – what's the new "it" platform?*



When Social Media Works Against You

- Other's intellectual property rights
 - Copyright
 - Trademark
 - Right of publicity/privacy
- Your intellectual property
 - Monitoring/enforcement
 - Contractors & work-for-Hire
- Defamation
- Advertising/disclosures



Others' IP: The Basics



- Copyright
 - Protects the tangible expression, e.g., words, designs, audio visual content, music
- Trademark
 - Protects against consumer confusion by protecting indicators of source, including company name, any logos, brands, product names, trade dress
- Patent
 - Protects inventive concepts



Others' IP: Copyright

- Rules of the road on re-posting, tweeting, pinning, etc., content created by another.
- Legal framework
 - Low level of creativity for copyright protection (what about a tweet?)
 - Copyright protection is automatic
 - Exclusive rights: reproduction, distribution, public display, public performance
 - Will the DMCA protect you?
 - 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?”*

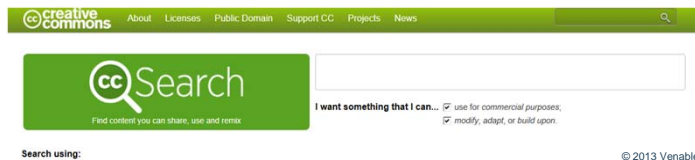
- (1) The purpose and nature of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use upon the potential market for or value of the copyrighted work.
- *“Our goal at Pinterest is to help people discover the things they love. Driving traffic to original content sources is fundamental to that goal.”*
 - Pinterest.com



Argh, so many rules.

(Nope. Just 3.)

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



Others' IP: Trademarks

- Safest Course: seek permission.
- Don't be an imposter
- Fair use in trademark context: descriptive, nominative, parody
- Be especially careful in commercial context (all social media?)
- Avoid using others' trademarks or in search terms, domain names, or user names
 - Oneok (a natural gas company) sued Twitter over a misappropriated user name
 - No DMCA-like immunity for trademark use, but many implement similar policies



The Quiet Rights: Publicity and Privacy

- Publicity: celebrities/privacy: hoi polloi
- Triggered by commercial use, broadly interpreted
- Applies to uses on social media
- Layered underneath copyright protection
 - “*Dump your pen friend*”: Virgin Mobile Aus, Flickr, Creative Commons and the case of Alison Chang
- Always getting written releases from photo's subjects, even if you have copyright permission to use the photo



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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!!



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Protecting Your IP on Social Media

- Register, register, register
- Monitor use by others and enforce rights via takedown notices and cease and desists....
 - BUT, be mindful that on social media, cease and desists go VIRAL!



- Appropriate use of symbols

And, perhaps most importantly...



Protecting Your 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.”



Protecting Your IP: Contractors and Work-Made-for-Hire

- General rule: organizations own IP created by their employees, but not their contractors
 - BUT, employment status 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.”

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Defamation

- What it is: (1) a falsehood; (2) that is published; (3) with fault or negligence; and (4) injury.
- When might this arise?
 - Offensive, negative user comments (*hello, Amy's Baking Co.*)
 - Criticism, outlandish insults (*hello, Courtney Love!*)
 - Companies injured by anonymous speakers online can use discovery to learn the identities. *Quixtar, Inc. v. Signature Mgm't Team, LLC*
- Defense: Communications Decency Act may protect you from liability for what others post



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Advertising

- In 2012, Neilson reported that **46%** of online consumers **use social media** when making a purchase decision
- 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



Social Media Issues in the Workplace

The Question

To what extent, or in what ways, can an employer restrict or otherwise involve itself in its employees' use of social media?



3 Issues

1. Drafting and implementing social media policies.
2. Using social media content/postings as the basis for personnel decisions.
3. Employer access to employees' social media accounts/Ownership of social media account.



Example: Common Social Media Policy

The Company regards Social Media -- whether blogs, wikis, Facebook, LinkedIn, chat forums, or social and professional networks -- as a form of communication. When the company wishes to communicate publicly, it has well-established means of doing so. You may not make disparaging or defamatory comments about the company or its employees, whether using social media or otherwise. Accordingly, when using social media, no one should be disrespectful or use profanity or any other language which may injure the image or reputation of the company.



National Labor Relations Act

- Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ... (29 U.S.C. §157)
- Sec. 8(a)(1). Interference with Section 7 Rights. Under Section 8(a)(1), an employer may not “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.” (29 U.S.C. §158) Any prohibited interference by an employer with the rights of employees to organize, to form, join, or assist a labor organization, to bargain collectively, to engage in other concerted activities for mutual aid or protection, or to refrain from any or all of these activities, constitutes a violation of Section 8(a)(1).



Common Social Media Policy: The Truth

- The Company regards Social Media -- whether blogs, wikis, Facebook, LinkedIn, chat forums, or social and professional networks -- as a form of communication. When the company wishes to communicate publicly, it has well-established means of doing so. You may not make **disparaging or defamatory comments about the company or its employees**, whether using social media or otherwise. Accordingly, when using social media, **no one should be disrespectful** or use profanity or **any other language or comments which may injure the image or reputation of the company.**

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Considerations in Drafting a Social Media Policy

- Be clear and SPECIFIC
- Tailor to fit; don't use generic template.
- Focus on specific conduct, both do's and don'ts
- Distinguish between business use and personal use
- Consider level of monitoring
- Be consistent with other organizational policies and procedures (and require compliance with them)
- Involve multi-disciplinary enforcement/monitoring 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)

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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.



“Lydia Cruz, a co-worker, feels that we don’t help our clients enough at [the Company]. I about had it! My fellow co-workers, how do u feel?”

Hispanics United of Buffalo, Inc. and Carlos Ortiz,
359 NLRB No. 37 (December 14, 2012)

NLRB Decision

“Cole-Rivera’s Facebook communication with her fellow employees, immediately after learning that Cruz-Moore planned to complain about her coworkers to [her supervisor], had the clear “mutual aid” objective of preparing her coworkers for a group defense to those complaints ... [W]e find that the Facebook comments here fall well within the Act’s protection. The Board has long held that **Section 7 protects employee discussions about their job performance** ... [These] five employees were clearly engaged in protected activity in mutual aid of each other’s defense to those criticisms.”

Hispanics United of Buffalo, Inc. and Carlos Ortiz,
359 NLRB No. 37, *11, *12 (December 14, 2012)



States with Laws Prohibiting Employers from Asking for Social Media Password Information

Maryland	Utah
Illinois	Arkansas
California	Colorado
Michigan	Washington

And coming soon ...

- New Jersey
- Federal Law: H.R. 537 – **Social Networking Online Protection Act** – To prohibit employers and certain other entities from requiring or requesting that employees and certain other individuals provide a user name, password, or other means for accessing a personal account of any social networking website.

Questions?

Krista S. Coons, Esq.
kscoons@Venable.com
t 212.503.0552

Brian J. Turoff, Esq.
bjturoff@Venable.com
t 212.503.0557

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Speaker Biographies



Brian J. Turoff

Of Counsel

New York, NY Office

T 212.503.0557 F 212.307.5598

bturoff@Venable.com

AREAS OF PRACTICE

Labor and Employment
Employee Benefits and Executive Compensation
Litigation
Commercial Litigation

INDUSTRIES

New Media, Media and Entertainment

BAR ADMISSIONS

New York

EDUCATION

J.D., Georgetown University Law Center, 2002

Georgetown Journal of Law and Policy in International Business

B.A., *magna cum laude*, Binghamton University, 1999

MEMBERSHIPS

New York State Bar Association

Brian Turoff represents companies in all aspects of labor and employment law. He advises and litigates on behalf of such clients in matters including employment discrimination, sexual harassment prevention and defense, compliance with payroll and other compensation-related laws, lawful hiring, disciplinary and termination practices, and the enforcement of restrictive covenants, such as non-compete and non-solicitation agreements. Mr. Turoff is also active in the traditional labor sector, representing clients in connection with collective bargaining, union/management relations, grievance arbitrations, the interpretation of collective bargaining agreements, and union organizing and elections.

Mr. Turoff represents companies of all sizes in a wide range of industries, including the real estate, technology, finance, venue management, healthcare, entertainment, fitness and hospitality industries. He is a seasoned practitioner with experience in civil and administrative litigation and arbitration, as well as day-to-day client counseling. Mr. Turoff regularly handles matters, including audits and investigations, before government agencies such as the National Labor Relations Board (NLRB), Department of Labor and EEOC, in addition to various courts and other administrative and arbitral bodies. He routinely advises companies regarding compliance with employment-related laws, as well as strategies aimed at avoiding employment-related disputes.

HONORS

Recipient, CALI Award for Philosophy of Law
Recipient, Empire State Counsel Pro Bono Award

PUBLICATIONS

- June 25, 2013, Social Media Legal Risks for Nonprofits: How to Successfully Navigate the Pitfalls

SPEAKING ENGAGEMENTS

- June 25, 2013, "Social Media Legal Risks for Nonprofits: How to Successfully Navigate the Pitfalls" for a New York Society of Association Executives Law SIG Luncheon



Krista S. Coons

Associate

New York, NY Office

T 212.503.0552 F 212.307.5598

kscoons@Venable.com

AREAS OF PRACTICE

Corporate
 Technology Transactions and Outsourcing
 Copyrights and Licensing
 Intellectual Property
 Intellectual Property Litigation
 Brand Protection
 Trademarks and Brand Protection
 Domain Names and Cyber Protection

BAR ADMISSIONS

New York
 California

EDUCATION

J.D., *cum laude*, American University, Washington College of Law, 2006

Editor-in-Chief, *American University Journal of Gender, Social Policy & the Law*

B.A., Political Science and History, UCLA, 2000

MEMBERSHIPS

American Bar Association, Intellectual Property Section
 Copyright Society of the U.S.A.
 California Bar and New York Bar, Intellectual Property Section

Krista Sirola Coons is a member of Venable's Technology Transactions and Outsourcing Practice Group. Ms. Coons focuses her practice on the protection and enhancement of intellectual property rights and technology assets. She structures and negotiates various intellectual property and technology agreements, including marketing, distribution, technology licensing, outsourcing, software development and hosting agreements. She also has experience in negotiating entertainment-based transactions, including content distribution/licensing, celebrity endorsement, live performance, music publishing and programming deals. Ms. Coons also assists clients with the development and acquisition of intellectual property and the management of worldwide intellectual property portfolios.

In addition, Ms. Coons's practice includes intellectual property counseling and litigation. She counsels clients on range of intellectual property issues, including registration, clearance, rights of publicity, trade secrets, domain name registration and use, website terms of use, use of social media, and data protection and privacy. She has experience litigating intellectual property disputes concerning issues such as trademark prosecution and infringement, copyright infringement and the Digital Millennium Copyright Act (DMCA).

PUBLICATIONS

- June 25, 2013, Social Media Legal Risks for Nonprofits: How to Successfully Navigate the Pitfalls
- April 9, 2013, So You Want to Create an App?: Important Legal Considerations for Nonprofits
- March 28, 2013, *Kirtsaeng v. John Wiley & Sons, Inc.*: Supreme Court Holds that the First Sale Doctrine Applies Regardless of Where a Work is Manufactured, IP Buzz
- February 26, 2013, *Kirtsaeng v. John Wiley & Sons, Inc.*: A Brief History of a Long-Anticipated Case, IP Buzz

SPEAKING ENGAGEMENTS

- June 25, 2013, "Social Media Legal Risks for Nonprofits: How to Successfully Navigate the Pitfalls" for a New York Society of Association Executives Law SIG Luncheon
- April 9, 2013, Legal Quick Hit: "So You Want to Create an App?: Important Legal Considerations for Nonprofits" for the Association of Corporate Counsel's Nonprofit Organizations Committee