Social Media & Interactive Website Liability Guide

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Introduction

"Social media" is essentially a broad term that covers all Internet interactive forums where users generate the content and share information. **Social networking sites** (i.e. Facebook and Twitter), **blogs**, streaming, photo and video **sharing sites**, **podcasts** (i.e. audio and video files), **wikis** (i.e. websites that allow people to add content to or edit the information, such as "Wikipedia") and other online forums are all considered as social media. Of course, most people think of Facebook or Twitter or other social networking forums as social media. But, in terms of your business, any forum or platform you operate or advertise upon that allows user generated content can cause the same laundry list of problems.

There are some unique concerns presented with using social media to promote and grow your business or products you promote. First, if you have employees, confidentiality and privacy concerns exist and pose a real concern in the social media landscape. Liability for violating certain laws also is the other big concern. **Basically, operating a blog to promote your Internet business, having social network pages (i.e. "fan pages") and statements and endorsements by employees and affiliates on social networking and other sites are the main activities that may land your business in trouble.** You should understand each of these specific areas of liability if you do plan on operating a blog or other online forum. Passive blog operators face some common issues as well and I discuss these under the common umbrella of social media.

I. Social Media Liability

The obvious importance and value in utilizing social media to help any business grow cannot be understated. But, there are some pretty serious drawbacks with using any of the popular social media forums. The most serious concerns facing any business using social media is confidentiality, reputation control and privacy concerns. If you have employees, this can be especially problematic. These same concerns can apply to your affiliates and independent marketers as well.

A. Basic Social Media Concerns

Here are the most basic categories of concerns you or your business need to address if you use social media and have any employees, affiliates, marketers, independent sales reps, etc.

Confidentiality- Employees might reveal confidential or proprietary information in a blog post or product review, or maybe even in a personal Facebook post. Employees may also talk about clients of your business or other sensitive and confidential matters, such as business practices, new developments pending mergers, etc.

Business Reputation- An employee who posts discriminatory or negative comments on his public Facebook page or Twitter account regarding your business or other employees, clients, etc. (or even about themselves with embarrassing and classless posts) can cause nothing but trouble for your business;

Sponsored Endorsements- Any "sponsored endorsement" made by an employee, affiliate, independent sales representative, product reviewer, etc. can potentially land your business in hot water! Employees are considered to be "sponsored endorsers" by the Federal Trade Commission ("FTC") and can subject you to legal liability by promoting the company's services or products without disclosing the employment relationship. If your employee mentions your company in a review of any type of comment about a product or service, he or she should also include a disclaimer stating that any opinions expressed are the employee's own and not the company's. The 2009 revised FTC guidelines apply to all Internet "new media", including blogs and chat rooms and social networking sites. **Like any other web platform, the same advertising rules apply regarding deception and endorsements to all social media.**

Your affiliates, marketers, product reviewers, resellers, etc. also cannot make any misleading or unsubstantiated claims about any of your products or services. Both the sponsored endorsers and the advertiser (your business) will be liable for any misleading or untrue statements or claims. (Note: if you're an affiliate, this means you better be careful not to simply regurgitate anything the advertiser tells you about the product or service. You will be liable for the statement if it's untrue or deceptive!). Affiliates and marketers must disclose any material connection with any advertiser (as discussed in detail in our FTC Sponsored Endorsements Legal Guide). The revised FTC Guides specify that the post of any endorser who receives cash or in-kind payment to review a product is considered as a sponsored endorsement. **This presents yet another concern, primarily with your employees since they will undoubtedly spend a lot of time on social networks.**

B. Adopting Social Media Policies

If you have employees or use any type of third party marketers or affiliates, you should adopt

a **written social media policy.** The social media policy should clearly state company expectations with regard to social media use. The best practice for your affiliates and independent sales reps is to incorporate the policy in your third party affiliate and independent agreements. If you have employees, talk to your business and employment attorney about the best practices regarding using social media policies and how to implement them.

One of the problems with employee social media use is that the individual's actions may be legally protected under state and federal laws. Understanding the laws of the state where your employees reside is critical.

Some **practical and basic guidelines** you should include in any social media policy are listed below. I use the term “employees” to refer to employees, affiliates and all other sponsored endorsers.

-Employment Rules and Company Code of Conduct

Require that employees always follow the terms of their employment agreement, employee handbook or other company code of conduct at all times when using social media (obviously this just applies to employees).

-Broad Use Statement

You should state that the policy applies to all forms of social media, including multi-media (videos, posts or audio recordings), social networking sites, blogs, podcasts, sharing sites and wikis and covers both professional and personal use.

-Confidentiality

Employees should not disclose any information that is confidential or proprietary to the company or to any third party. What if you have a new product or software application in development that you want to keep confidential? What about financial and other non-public information? There are a million reasons to post rules prohibiting disclosure of confidential or proprietary information on social media sites. The best practice is to define what comprises “confidential” and proprietary information and other trade secrets similar to a non-disclosure agreement and restrict disclosure. This restriction should include personal use and use on company owned sites.

-Endorsements & Affiliation

If an employee comments on any aspect of the company's business they must clearly identify themselves as an employee and include a disclaimer. Employees should neither claim nor imply that they are speaking on the company's behalf unless they are expressly authorized to do so. For example, you should require

each employee to use the language "any views expressed are personal opinions and do not necessarily reflect the views or opinions of ABC Corp."

-Advertising Liability

All sponsored endorsers must not make any misleading or deceptive ads or claims about your products. All content must be accurate and truthful. Since you are just as responsible as any sponsored endorser would be, you need to have a clear policy on what deceptive advertising is and restrict such claims. In fact, any employee you allow to post or promote on behalf of your business really should truly understand what is deceptive under FTC and state consumer protection laws.

-Intellectual Property & Brand Dilution

Restrict your employees from including any company logos or trademarks on their own personal blogs or Facebook pages unless permission is granted. Similarly, they should not be allowed to upload or paste these marks onto any other interactive forum.

-Liability

All posts and content uploaded onto any corporate blog, fan page or integrated into promotional multi-media application (i.e. a company podcast) must not violate copyright, privacy laws or be defamatory.

-Require Approval

You should require that each of your employees seek and obtain approval before posting or adding content to any corporate blogs, Facebook fan pages, Twitter accounts, etc., and have a system in place to monitor and remove this content at all times.

-Posts Restrictions

While state employment laws vary and may protect your employees right to free speech, you should still reserve the right to request that the employee avoid discussing certain subjects, withdraw certain posts, remove inappropriate comments and generally restrict the employee from posting any type of comments or videos that would tarnish the reputation of your business. However, generally speaking, complaints related to working conditions are protected. Also, under the National Labor Relations Act ("NLRA"), an employee cannot be fired based upon "protected, concerted activity" that relates to the terms and conditions of his or her employment or that involves coming together with other employees in issues relating to employment.

However, inappropriate remarks about the public do not relate to working conditions and are therefore not protected. In the context of social media, the National Labor Relations Board has issued an Advice Memorandum stating, for example, that firing an employee for inappropriate Twitter comments did not violate the NLRA. In this example, the fired employee was a reporter who made inappropriate and insensitive remarks about certain crime victims via Twitter.

Remember, you should always monitor the content on your company-owned social media pages and other outlets to ensure legal compliance. Ultimately, complying with the law is up to you!

II. Blogs & Interactive Website Liability

Operating a blog or other interactive website presents quite a few legal concerns. Avoiding liability for contributory copyright infringement and other intellectual property claims, defamation, trade libel and false light claims are among the main concerns. The two most important laws all interactive website operators must know about **is the Digital Millennium Copyright Act** and Section 230 **of the Communications Decency Act.**

A. Copyright Infringement & The Digital Millennium Copyright Act

Contributory copyright infringement occurs when an individual or business knowingly induces, causes, or materially contributes to the infringing conduct of another. The essential elements of this claim are knowledge of and participation in the infringement. **Cases involving contributory copyright infringement have involved blog and message board operators which allow users to upload and download infringing content**. The owners of copyrighted material have sued these websites for allowing the posting of infringing content by others. In these cases, the copyright owner must establish that the operator knew of the infringing activities and must otherwise satisfy the elements of contributory copyright infringement.

Although the Communications Decency Act does not cover intellectual property claims, under the Digital Millennium Copyright Act, website operators generally are not liable for third party

user content that infringes on a copyright. Unless the copyright owner notifies the operator and the operator fails to promptly remove the infringing content, this holds generally true. The DMCA removes liability for copyright infringement from passive service provider websites that allow users to post content, as long as the site has the proper notice in place, including a procedure for notifying the website operator of any infringing material. The blog or interactive website operators need to file the **DMCA Registration Form** with the U.S. Copyright office as well. The site operators must also not receive any financial benefits directly linked or attributable to the infringing activity.

The Digital Millennium Copyright Act ("DMCA") is something you must be familiar with if you operate a blog, chat room or interactive website. The law has two basic functions. First, it protects certain **"service providers"** (i.e. Internet service providers, email providers, search engines, online auction sites, host providers, chat rooms, interactive websites, news providers, etc.) from **liability for copyright infringement**. As I explain more below, if you fall under the definition of a service provider, you generally will be immune from liability for copyright infringement by your website users. However, there are limitations against service provider liability, which is another purpose of the DMCA.

The second function of this law is to provide copyright owners with a mechanism to enforce their rights without having to directly sue the infringing party. The DMCA allows copyright owners to notify and demand that service providers take down infringing content contained in any medium hosted by the provider. This allows the copyright holder with a mechanism to try and stop the infringement other than by making a demand and dealing directly with the actual infringing party. This greatly increases the likelihood of stopping the infringement since the service provider may be obligated to act.

The DMCA does not apply to companies located outside the jurisdiction of the United States, however.

Lesson: If you allow website visitors to post any kind of content, it is absolutely critical that you have some type of User Content Policy and a properly drafted DMCA policy on your website. You must also implement the necessary DMCA notice procedures and file a DMCA Registration Form with the Copyright Office. Also, don't encourage the posting or uploading of any infringing content. Protect yourself with a solid disclaimer and policy regarding all posts and uploads and remove any infringing content that you know about promptly after receiving notice.

1. How Does the DMCA Protect "Service Providers?"

A **service provider** falls under one of the defined exemptions under the Act. If exempt, the provider will be shielded from any monetary damages and would receive a limited shield against any injunction (a court order stopping the illegal activity).

Here are the four categories of activities that a service provider must fall under to be

exempt from liability:

• **Transitory communications-** a provider that only transmits, routs or provides connections for material coming through a given system (i.e. ISP‟s). Any data that is transmitted by the provider must be done so by an automatic, technical process **without the ability by the provider to select or edit the material or data**. So, if the service provider is able to choose what material is shown to some extent, or modify the content, the exemption will not be available. Most service providers don‟t fall under this narrowly defined category.

• **System caching**- temporary storage of unmodified data made available by some third party on a system or network controlled or operated by or for the service provider, done in the form of "caching". This is used on some networks to increase network performance or to reduce network congestion (i.e. Google‟s Web cache).

• **Storage of content** at the direction of a user of material residing on a system or network controlled or operated by or for the service provider (i.e. hosting websites or forums allowing users to post content). Under the "storage" exemption, the provider may be exempt if it does not have knowledge of an infringement (or is not aware of facts or circumstances from which infringing activity might be apparent) and does not have the right and ability to control the infringing activity. If the provider does have the right to control activity, the provider cannot receive a financial benefit directly attributable to that infringing activity.

• **Information location tools** such as search engines, directories, indexes, etc. Under this exemption, in order to qualify the provider must lack the requisite knowledge or ability to control the material, or cannot receive financial benefit from the infringing activity if it does have the right to control the content. It must also take down any infringing materials immediately upon notification.

Under Section 512 of the Act, most service providers must designate an agent to receive notice of any infringement claims and register the agent's contact information with the U.S. Copyright Office (a DMCA Registration). Service providers must also include this information on their website along with complying with the 'Notice-and-Takedown' requirements of the Act. This means if you operate an interactive website that allows users to submit or post content, you need to designate an agent to receive this notice and provide the contact information to the Copyright Office. This also means that upon notification of any claimed infringement, you must promptly remove, or disable access to, the material in question. Service providers also need to include a 'Counter-Notice and Putback' mechanism to restore access to any material when a counter-notice contesting the infringement claim is received. Finally, all service providers must also accommodate and not interfere with standard technical measures used by copyright owners to identify or protect copyrighted works.

All service providers must include a DMCA Policy on their website. Among other items, this policy should state your website's intent to comply with the DMCA Notice and Takedown

requirements, provide agent contact information and should provide a mechanism for Counter-Notice and Putback, as required under the Act. It should also set forth a policy for the termination of repeat infringers. Service providers should make this policy available on a separate page by using a prominent link labeled "DMCA Policy" and the policy should be included in the website terms of use.

2. Giving Proper Notice under the DMCA

If you hold copyrights to any works and you discover your rights are being infringed upon, you have the right under the DMCA to send a notice to the service provider. This means you can demand the removal or the blocking of all infringing material directly from the host, or the operators of any mailing list, blog or chat room operator, etc. **If this notice is proper, the service provider will be legally required to take down or block any infringing materials.**

Your notice must comply with the specific requirements of the DMCA to be effective. Any notice must be a written communication provided to the designated agent of a service provider. Any service provider must promptly comply with any legitimate request from the copyright holder in order to remain exempt from copyright infringement liability. The ISP will also not be liable to the person who posted any infringing material that is taken down or blocked, subject to certain rules under the Act. The alleged infringer can file a counter notice under the DMCA and the service provider must re-post the infringing material.

B. Defamation, Trade Libel & False Light Claims

Defamation is easily the most prevalent legal concern associated with the bloggers and their posts. **Both the blog operators and the bloggers that post comments may be liable.** Defamation is any false statement of fact that is harmful to someone's reputation and published "with fault," meaning as a result of negligence or malice. Libel is simply written defamation and slander is oral defamation. Slander can be made via oral comments to another, or also by comments broadcast over the radio or television. Until the recent development of "podcasts" and other types of online videos, such as those featured on YouTube, defamation on the Internet was largely deemed to be Libel.

Usually, anyone who repeats someone else's statements is just as responsible for their defamatory content as the original speaker if they knew, or had reason to know, of the defamation. But, the law protects Internet "intermediaries" who merely "provide or republish speech by others." **The weight of legal authority has held that the Communications Decency Act shields a website owner from liability for publishing any defamatory statements.**

Bloggers themselves, and in some cases interactive website operators, may also be liable for what is known as "**Trade Libel**", and for "**False light"** claims. Trade libel is defamation, but against the goods or services of a company or business. The elements of this type of

defamation claim do not differ from defamation against persons.

Additionally, some states allow people to sue for damages that arise when others place them in a false light. Information that is presented in a "false light" is information portrayed as factual, but creates a false impression about someone. As an example, publishing a photograph of someone in an article about sexual abuse may place that person in a false light because it may create the reasonable impression that the depicted person(s) are victims (or perpetrators) of sexual abuse. False light claims are subject to the same constitutional protections discussed above.

C. Communications Decency Act Immunity

Generally speaking, the posters of defamatory statements will be liable for defamation while website operators are protected. The Communications Decency Act of 1996 protects blog owners. It states that it "precludes courts from entertaining claims that would place a computer service provider in a publisher's role." No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

Most courts have held that through these provisions interactive services of all types, including blogs, forums, and listservs, are granted immunity from tort liability so long as the information is provided by a third party. The Act also provides that "[n]o cause of action may be brought and no liability may be imposed under any state or local law that is inconsistent with this section." The US Supreme Court has ruled that blogs are similar to news groups, stating "in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals and organizations engaged in the same activities."

Social media and other interactive websites, including businesses posting subpages within those interactive websites allowing the general public to post comments, photos and other media to the page are not expressly covered as a "service provider." The First Amendment (U.S. Constitution) and state laws, such as California's anti-SLAPP statute, may provide some protection, but the law isn't well developed as of yet.

D. Claims Covered & Specific Practices

The Act excludes coverage of criminal liability and intellectual property law. **In other words, there is no immunity for criminal acts, contributory copyright infringement and trademark infringement and similar intellectual property claims. But, the courts have applied immunity to bar claims of defamation or speech-based torts, such as invasion of privacy and misappropriation.** The courts interpreting the Act have disagreed whether state-law intellectual property claims (or similar claims such as the right of publicity) are also barred under the Act. There is never immunity for the creator(s) of any infringing or defamatory content.

But, if you are an operator of an interactive website, certain activities may categorize your site as more than just a passive service provider. Many website forums interact in a variety of ways with the content generated on their site for a many reasons.

The **Communications Decency Act provides immunity** for the following actions:

- **Screening objectionable content;**

- **Correcting, editing, or removing content.** Courts have consistently held that exercising normal editorial functions over user-submitted content, such as deciding whether to publish, remove, or edit material, is immunized under the Communications Decency Act. Doing more than these basic functions will increase the odds your website isn't immune under the Act;

- **Selecting content allowable for publication;**

- **Soliciting or encouraging users to submit content;**

- **Paying a third party to create content.** However, this doesn't apply if the creator is one of your employees;

- **Providing forms or drop-down boxes to facilitate users generating content.** Most courts have held that a website will not lose immunity if it facilitates the submission of user content through neutral forms and drop-downs. However, a few court decisions have not honored immunity for "mixed content" that is created by both the operator of the interactive service and a third party through significant editing of content or the shaping of content by submission forms and drop-downs;

- **Leaving content up after you have been notified that the material is defamatory.** The Communications Decency Act does not require that you remove content from your site after you have been notified that that material is defamatory;

The following activities may cause you to lose immunity under the Act:

- **Editing content to the point that you materially alter its meaning.** If you edit content created by a third-party to the point that you alter the meaning of the content, you may lose immunity. For instance, changing an otherwise non-defamatory statement into a defamatory statement, you will likely lose your immunity.

- **Engaging with users through drop-down forms to create discriminatory content.**

EXAMPLE: *Fair Housing Council of San Fernando Valley v. Roommates.com (2008)* presents concerns to interactive website operators. The 9th Circuit Appellate Court held that Roommates.com was not immune from claims under the Fair Housing Act and related state laws because it **"created or developed" the forms and answer choices that those seeking to use the service had to fill out.** For example, anyone seeking a roommate had to provide information such as whether they were “male” or “female,” and who else lived with them. All prospective users had to make selections from a drop-down menu to indicating the sexual orientation and gender of who they were willing to live with.

The problem for future interactive websites is that the court found that the roomates.com created or developed information on its website in two ways: *i) by creating the questions that users answered when creating their profiles; and ii) by channeling or filtering the profiles according to the answers.* Channeling information to users and providing search capabilities was viewed as adding an additional layer of information ("meta-information”). This decision is not in line with case law precedent, however. No other court has yet to place these limitations on immunity granted under the Communications Decency Act.

E. Guidelines for Interactive Website Operators:

- Require your visitors to **register with your website.** There are many advantages gained from registration from a legal standpoint for any website. But, this is especially important if you allow users to post or upload any type of content;

- Adopt a **User Content Policy** that sets forth use restrictions regarding the liability your users could incur for any posts or content they upload to your website. Before you allow your users to post or upload anything, you should make them agree to the terms of this policy and governing their website use in general. A simple click on an ‘I Agree’ button or a check in a box next to “I Agree” text is fine. **The terms of this policy should be made known to the user during the registration process,** before they actually complete registration;

- State that you will remove any user generated content if you feel it may

be offensive, defamatory, infringes on a copyright or trademark, is lewd or that you can remove any post for any reason you should determine (at your sole discretion);

- You should include a specific disclaimer that indicates that the website operators do not "approve or endorse" or are affiliated with any posts made or content uploaded onto the website;

- Include some mechanism in your website user agreement and/or through a User Content Policy to review all posts or any uploaded content so you can screen and block (or remove) harmful or offensive content;

- ***Do not*** participate in discussion threads on your blog or chat room unless it is absolutely necessary for support or administrative reasons;

- All product reviewers/endorsers are responsible for disclosing a material connection with distributors, agents and manufacturers when they have previously received similar products or services from a specific commercial entity (or from multiple entities) and when they are likely to receive such products in the future;

- Bloggers who are considered to be sponsored endorsers cannot make any untrue, misleading or deceptive statements within the meaning of the FTC Act or state deception laws;

- Be careful if you allow users to submit information via drop-down forms or multiple-choice questionnaires. As the **roomates.com** case demonstrates, you may be liable under the Communications Decency Act;

- Include a DMCA Policy and a Trademark Policy on a separate page and in your website terms of use. You can use a link labeled "DMCA Policy" or "DMCA Notice" or "DMCA/Trademark Policy" placed somewhere prominently on each page.

Have additional questions about social media or website liability?

Contact Phil Nicolosi Law at (815)314-0022 or email us at info@philnicolosilaw.com. Visit our website at www.philnicolosilaw.com

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Philip A. Nicolosi III is a 1998 graduate of the University of Iowa and received his J.D. in 2002 from Northern Illinois University College of Law. Currently, Mr. Nicolosi focuses his practice in the areas of business law, Internet law, including Internet marketing law, and with financial and real estate transactions. Mr. Nicolosi represents the third generation of attorneys from his family, proudly carrying on the tradition begun by his grandfather, Philip A. Nicolosi Sr., in 1948.

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