On-line Social Networking: Legal Risks for Businesses
Identifying and Minimizing Liabilities in Company and Employee Misuse

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What are we talking about?

- Information posted or sent over the Internet
- Usually (but not always) using Web protocols
- Where the entity housing (disseminating) the information is not the creator of the information
Examples

• Social Networks
  • Friendster, MySpace, Facebook
  • Plaxo, LinkedIn

• Blogs
  • Lots of them (100+mm)
  • RSS Feeds
More Examples

- Consumer Generated Media (CGM)
  - YouTube, Vimeo, Sharkle, Google Video
  - Commercial CGM
    - JinglesForPringles.com, tbs.sharkle.com
- Message Boards (Internet forums)
  - The Whole Earth L’ectronic Link (The Well)
- Internet Relay Chat (IRC)
  - EFNet
- Electronic mailing lists
  - Listserv (L-Soft, Int’l), Yahoo Groups, MSN Groups
- Podcasts
  - PodcastingNews.com
Still More Examples

• Mashups
  • Google MyMaps

• Wikis
  • Wikipedia, Jurispedia.org

• Instant Messaging
  • AIM, Google, Yahoo, Meebo

• Photo sharing
  • Flickr, Photobucket
Even More…

- Classified Adds
  - Craigslist

- Community-based popularity websites, social bookmarking, user-generated taxonomy (folksonomy)
  - Digg, Reddit, del.icio.us

- Community-based news websites
  - Slashdot, Groklaw

- Massively Multiplayer Online Role-Playing Games (MMORPG) and Virtual Worlds
  - World of Warcraft, Everquest, Second Life
“Social Networking” Sites

An initial set of founders sends out messages inviting members of their own personal networks to join. The process repeats itself, growing the total number of members and links.

The first social networking website was Classmates.com, which began in 1995. It is currently estimated that there are currently at least 200 social networking sites, including MySpace, Facebook and many others.
What is a “blog”?

“An online personal journal with reflections, comments, and often hyperlinks provided by the writer.” Merriam-Webster’s Collegiate Dictionary (11th ed. 2005).
“Blog” Speak

- Blog: A website that contains an online personal journal with reflections, comments, and often hyperlinks provided by the author
- Blogging: Authoring, maintaining or editing content to an existing blog
- Postings: New entries to a blog
- Blogosphere: The aggregate of all internet blogs
- Cybersmearing: Using the Internet to disparage or defame another party
- Doocing: Firing an employee because he or she wrote a blog containing material distasteful to the employer
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Legal Risks

Employment Issues
The Potential Value to Employers:

• Positive/Increased Communication Among Employees

“Blogging is a new platform for companies and individuals to communicate on key issues, trends, corporate strategies and more. It is also becoming controversial, since anybody can create a blog in minutes. There’s always a risk of negative views posted in contrast to the blog’s original purpose. While the risks have companies and communicators developing strong policies and parameters around blogging, there are several ways to leverage this new communication vehicle.” – Carrie Mamantov, Dallas/IABC Technology Director
The Potential Value to Employers:

- Use in threatened and/or ongoing litigation
- Use of company blogs to recruit employees
  - Post recruiting information, solicit applications, reach job-seekers around the world
  - Enables potential applicants to gain a sense of the company and gauge whether they would be a good fit
  - Lets potential applicants “hear” from company employees
- Use of external blogs/social networks to “mine” applicants
  - Industry-specific blogs, discussion forums, newsgroups, listservs
The Potential Value to Employers (cont’d)

- Use of external blogs/social networking sites to vet applicants
  - Can give clues to an applicant’s analytical skills, communication skills, tact, and general maturity
  - Can provide insight as to how others feel about the applicant
Potential Problems For Employers

• Possible disclosure of confidential information
  • Restricted sites – the Stored Communications Act (18 U.S.C. §§ 2701-2711)
    — to access, requires authorization from authorized user who has personally accessed the site (*Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002))
  • Sites may allow potential employers to discover “protected” information (e.g. age, marital status, familial status, religious affiliation, etc.)
  • Applicants’ use of “lawful” products may be protected by state anti-discrimination laws

• Solution
  — have non-decision maker conduct search and filter out information related to protected characteristics before passing along to hiring manager
Potential Problems For Employers (cont’d)

- Possible liability for torts committed by employee including defamation of company employees, customers, or competitors, invasion of privacy, negligence, etc. (“cybersmearing”)
  - Employers have no duty to monitor comments made on electronic bulletin board, but do have a duty to stop co-employee harassment “in settings that are related to the workplace” if they know or have reason to know such harassment is taking place (*Blakely v. Cont’l Airlines, Inc.*, 751 A.2d 538 (N.J. 2000))
  - Employers may have defamation cause-of-action against former employees for information posted on blogs (*Varian Med. Sys., Inc. v. Delfino*, 6 Cal. Rptr. 3d 325 (Cal. Ct. App. 2003), *rev’d on other grounds*, 106 P.3d 958 (Cal. 2005))
Potential Problems For Employers (cont’d)

- Possible liability for harassment or discrimination claims
- Possible intellectual property infringement
- Possible dissemination of trade secrets or company confidential or proprietary information
To What Extent Can Employers Monitor This Conduct?

Limitations on monitoring off-duty conduct:

• Privacy issues
• Laws restricting such monitoring
Legal Restrictions on Workplace Monitoring

- Common law protections against invasion of privacy
- Constitutional protections: First and Fourth Amendment claims
Electronic Communications Privacy Act

- Permits monitoring of oral and electronic communications as long as you can show a legitimate business purpose
- Monitoring also permitted with employee consent
- “Stored communications” are exempt
Other Considerations

- State laws
  - Five states (CA, CO, CT, NY, ND) have enacted “lifestyle” statutes prohibiting discrimination of lawful, off-duty conduct
  - However, with regard to public communications, employees may owe employers an implied duty of loyalty (*Marsh v. Delta Air Lines, Inc.*, 952 F. Supp 1458 (D. Colo. 1997))

- OSHA

- False Claims Act

- Privacy issues
Practical restrictions on monitoring

- Your corporate culture and employee relations
- Your shareholders
- The public
To What Extent Should Employers Monitor Blogs/Social Networking Sites?

Risks of NOT monitoring:
• Workplace harassment claims
• Defamation claims
• Third-party tort claims
Risks of Terminating/Disciplining Employees for Blogging/Social Networking

• Whistleblowing
• NLRA Section 7 Rights
• First Amendment Rights
    — Employee sued school district for being reassigned because of contents of her blog “whatitslikeontheinside.blogspot.com”
    — Held that content of blog by public employee protected only if it meets the “public concern” test
    — 9th Circuit factors to determine “public concern”:
      • does the speech impair discipline or control?
      • does the speech disrupt co-worker relations?
      • does the speech erode close working relationships?
      • does the speech interfere with the speaker’s performance?
      • does the speech obstruct routine office operations?
• Violation of other state or federal anti-retaliation laws
Title VII

“It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”
Title VII

In addition to protecting the filing of formal charges of discrimination, Title VII also protects informal protests of discriminatory practices, “including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges.” *Sumner v. United States Postal Serv.*, 899 F.2d 203, 209 (2d Cir.1990).
Section 7 of the National Labor Relations Act provides that employees “shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .”

Section 8 of the NLRA makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7] . . .” or “to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter . . . .”
Other Federal Statutes

Similar provisions are found in the:

- ADA — 42 USC § 12203
- ADEA — 29 USC § 623(d)
- ERISA — 29 USC § 1140
- FLSA — 29 USC § 215(a)(3)
- FMLA — 29 USC § 2615
- Sarbanes-Oxley — 18 USC §§ 2510-2522; 2701-2711
Non-Legal Risks

- Impact on Employee Morale
- Adverse Publicity
Google Employee Fired For Blog On Google’s Blogger Service

Mark Jen, hired by Google as an associate product manager in Google's AdSense advertising unit, simultaneously started a blog on the company’s blogger service to chronicle his experiences as a Google employee. His blog included some criticisms of Google. Google asked him to remove information it considered sensitive. Mr. Jen was discharged just 11 days after he started. (PCWorld.com, Feb. 16, 2005.)

* His story was covered by PCWorld and CNNMoney, among others.
Ellen Simonetti, an eight-year employee of Delta, started a blog on which she posted information about her daily activities, thoughts, and feelings. The site also included photos of Simonetti in her uniform, but did not state she was a Delta employee. Delta terminated her in October 2004 for “inappropriate photographs” of her in uniform. She filed a sexual discrimination charge with the EEOC, claiming that male flight attendants had similar blogs but were not disciplined. Simonetti’s case is pending before the U.S. District Court for the Northern District of Georgia, but was stayed in October 2005 pending Delta’s bankruptcy proceedings.
Practical Advice:

- Implement Policies
- Train Employees
- Comply While Conducting Investigations and Imposing Discipline
Do Your Policies Include the Latest Technologies (both yours and theirs)?

- E-mail and the Internet
- Instant Messaging
- Intranets
- Weblogs or “Blogs”
- Social Network Sites
- Global Positioning Systems
- Handheld wireless devices (Blackberries, Palm Pilots)
- Cellular Phones/Camera Phones
- Laptops
Essential Policy Elements

- All business systems and Company-issued equipment and data belong to the Company.

  Practice Note: Include the data and work product authored, created and/or stored on your systems

- State that all business systems and Company-issued equipment must be used for appropriate and lawful business purposes only.

  Practice Note: Be realistic: Are blanket prohibitions on personal use both necessary and achievable?
Essential Policy Elements

• Determine What Constitutes “Appropriate Business Use” and Incorporate Guidance Into Your Policies.

Practice Notes:
• Is sensitive or confidential information marked and treated as such?
• Are your employees downloading and distributing copyrighted materials?
• Are e-mails being used to discuss sensitive employment issues?
• Extend your “No Solicitation” policy to e-mails and intranets.
Essential Policy Elements

• Inform employees that e-mail and Internet usage will be monitored and employees should have no expectation of privacy.

  Practice Note: Be sure to include Company-issued laptops, PDAs and Cellular Phones. Because these are portable devices and are routinely taken home, employees are more apt to form expectations of privacy.

• Include the right to inspect and confiscate any hardware devices issued to or used by employees.

  Practice Note: Include confiscation by third parties, such as law enforcement agencies, pursuant to criminal and civil investigations.
Essential Policy Elements

- Warn employees of the consequences of policy violations.
- Obtain a signed acknowledgement of employee receipt of the policy.
Essential Policy Elements - Blogging

- Prohibit non-work-related blogging while at work or using company equipment
- Create policies regarding employee blogging at home that carefully balance company and employee interests, without being perceived as onerous or overreaching
- Incorporate and reference other company policies, including anti-harassment and discrimination policies, intellectual property and works-for-hire, trade secrets, and reference any nondisclosure/confidentiality agreements separate from the employee handbook
- Caution against unlawful conduct such as invasion of privacy, violations of security laws, defamation, etc.
- Address restrictions and prohibitions regarding use of the company name, logo, uniform, or identification with the company, as well as disclaimers that views expressed do not express views or opinion of the company
- Provide a central source, such as HR, for reporting (and responding to) allegations of inappropriate blogging
- Avoid speech that adversely impacts the company’s reputation and/or business
- Spell out consequences of policy violations
Educating Employees

- Employees should make clear that views expressed are personal opinion.
- Encourage employees to reflect carefully before posting.
- Warn employees that postings can potentially be discovered by others and possibly broadcast to millions.
Educating Employees

- Warn employees that making comments about coworkers could be defamatory and could invade their privacy.
- Warn employees about disclosing confidential or proprietary information.
- Remind employees to respect the company and each other.
- Provide employees guidelines of what the company considers appropriate versus inappropriate content for webposting.
- Provide employees with a centralized contact for any questions concerning information they would like to post.
Comply With Your Policies in Using Technology to Investigate Employee Conduct and Impose Discipline

- Keep in mind: when investigating an employee complaint or an incident of individual or corporate misconduct, courts/outside agencies/juries examine 3 factors:
  - Did the Company act in good faith and in compliance with the law
  - Was the investigation reasonable – under the circumstances
  - When the Company acted – did it have an objective basis for the action taken
Legal Risks

Intellectual Property Issues
Assess: Apply to You or Your Clients?

- Solicit *or Allow* Content From Consumers
  - Contests, Hosting
  - Reviews, Comments, Chat, Bulletin Boards
  - Advertisements
  - Testimonials
- Sponsor or Comment to Blogs
- Participate in Social Networks or Virtual Worlds
- All of the Above *About* You or Your Client
Intellectual Property Issues

- Business Applications on Social Networks
- Liability and How to Avoid It
- Protecting Intellectual Property
- Privacy – Online Information Collection and Usage
OSNs – Not Just "Social"

- Business-oriented OSNs – still small, but growing fast
  - E.g., LinkedIn (25MM members), ZeroDegrees, Ryze, LegalForce, Ecademy, Yorz

- Reaching new audiences – marketing & recruiting
  - Companies with Facebook profiles, groups, or pages: Ticketmaster, Ernst & Young, McDonalds, Oracle, Sodexho
  - There's even a "Facebook Marketing Bible"
  - More and more companies using Myspace to create interactive relationship with consumers and potential employees

- Selling products, increasing visibility & name recognition
  - Entrepreneurs & small businesses
OSNs – More Than "Networking"

- Typical – personal networking, marketing, and business generation
- Also includes any online community sharing common interest and providing for interactivity/participation
  - Amazon.com; cars.com; MeasuredUp.com
  - Quiznos; Doritos SuperBowl "You Make It, We Air It"
  - YouTube, Vuze, Imeem
  - Yelp.com, Angie's List, Craigslist
  - Wikipedia
  - LATimes.com; BBC.com
  - Your company or client?
Issues for Businesses

- Avoiding liability
  - Infringement (copyright, trademark)
  - Unfair competition/false advertising
  - Right of Publicity
  - Defamation

- Protecting intellectual property
  - Infringement (copyright, trademark)
  - Dilution, trade libel, false advertising
  - Reputation/goodwill
Avoiding Liability

Copyright Infringement (music, photos, film, video)
- Lawsuits Against YouTube, Google, eBay, Amazon.com, BestBuy, etc.

Trademark Infringement
- Logos, Names

False Advertising, Unfair Competition
- Quiznos case

Right of Publicity (name or likeness)

Defamation
Contributory Infringement: knowledge (intent) of infringement + inducement to infringe or material contribution to infringement.
  - Right Screening May Impute Knowledge
  - But Probably Requires Direct Relationship to Infringing Act

Vicarious Liability: right and ability to control infringing activity + direct financial benefit
  - Right to Screen May Impute Control
  - Indirect Commercial Benefit May Well Be Enough
  - Rare Unless Also Contributtorily Liable
Tools and Protections

- Digital Millennium Copyright Act
- Communications Decency Act
- Ten Point Plan
Digital Millennium Copyright Act

• Safe harbor from damages for third party copyright infringement

• General overview of steps to get protection:
  • Takedown policy
  • Have a Designated Agent registered with the U.S. Copyright Office to receive notifications of claimed infringement.
  • Upon proper DMCA notice, act expeditiously to remove the material.

• Process can help with trademark inf. as well

• Not always applicable
  • If financial benefit
  • Actual knowledge/aware of facts about infringement
Communications Decency Act

- **What Protection It Provides:** Immunizes providers or users of interactive computer services “From any cause of action that would make them liable for publishing information provided by a third-party user of the service.”
  - Defamation, Libel and Slander
  - Tort Liability
  - Right of Publicity?
  - False Advertising?
- CDA Protection does not apply to claims of intellectual property infringement (statutory exemption):
  - Copyright
  - Trademark
Ten-Point Protection Plan

1. Create Protective Terms and Secure Consumer’s Agreement in a Binding Manner
2. Screen Content, But Don’t Edit, and Enforce Restrictions
3. Implement Screening Technologies as Applicable
4. Secure Written Releases Where Possible
5. Pass Off Risk to Third Parties
6. Take Advantage of Statutory Protections
7. Use Disclaimers
8. Provide Cleared Elements
9. Identify How You Plan to Use in the Future the Content Submitted
10. Be Upfront With Consumers
Protecting Intellectual Property

- **Use of Your Copyrighted Material Without Permission**
  - reprinting material in blogs or news forums (AP suit)
  - fair use

- **Use of Your Trademarks**
  - virtual knockoffs under your mark in online virtual worlds (“Second Life”) – Nike, Apple, Gucci, Rolex, Gap
  - failure to enforce could result in dilution, loss of registration

- **Defamation, Trade Libel – ads, blog commentary**
  - blogs as the “new media” – should be treated the same as traditional media?
  - defamation and trade libel suits increasingly frequent.
  - issues with anonymity
Monitoring Web 2.0

- Google alerts
- Attributor
  - web-wide content tracking
  - content + crawl, match
- Attentio
- Serph; TrackUr: buzz tracking
- Technorati: searches blogs and tagged social media (e.g. Myspace)
Legal Risks

Best Practices
Internal Policies

1. Set Clear, Comprehensive and Reasonable Policies
2. Monitor Compliance with Policies
3. Update Policies as Law and Technologies Evolve
4. Enforce Policies Fairly and Uniformly
Organizational Documents

1. Employment Agreements
2. Employee Manuals and Policies
3. Employee Confidential Information and Inventions Agreements
4. Consulting Agreements
External Policies

1. Terms of Use/Privacy Policies
2. Disclaimers
3. Content Licenses, Waivers and Assignments
4. Partnerships and Other Business Agreements
Legal/Privacy Considerations

Every Business has Very Different Risks and Opportunities

No “Out of the Box” Solutions