



presents

Online Social Networking: Legal Risks for Businesses

Identifying and Minimizing Liabilities Due to Company Use and Employee Misuse

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

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Wednesday, October 7, 2009

The conference begins at:

1 pm Eastern

12 pm Central

11 am Mountain

10 am Pacific

The audio portion of this conference will be accessible by telephone only. Please refer to the dial in instructions emailed to registrants to access the audio portion of the conference.

On-line Social Networking: Legal Risks for Businesses

Identifying and Minimizing Liabilities in Company and Employee Misuse

Presented by:

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Date: October 7, 2009

What are we talking about?

- Information posted Online
- Where the entity housing (disseminating) the information is not the creator of the information

Examples

- Social Networks
 - Facebook, Twitter, MySpace
 - Plaxo, LinkedIn
- Blogs
 - Lots of them (100+mm)
 - RSS Feeds
- Podcasts
 - PodcastingNews.com
- Consumer Generated Media (CGM)
 - YouTube, Google Video
 - Commercial CGM

Still More Examples

- Wikis
 - Wikipedia, Jurispedia.org
- Instant Messaging
 - AIM, Google, Yahoo, Meebo
- Photo sharing
 - Flickr
- Classified Adds
 - Craigslist
- Community-based popularity websites, social bookmarking, user-generated taxonomy (folksonomy)
 - Digg, Reddit, del.icio.us
- Massively Multiplayer Online Role-Playing Games (MMORPG) and Virtual Worlds
 - World of Warcraft, Second Life

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/Social Networking statistics

- 900,000 new blog posts created daily (technorati.com)
- 94 million US blog readers (2007)
- 22.6 million US bloggers (2007)
- 15% of U.S. employers have blogging policies
- Of those employers that block certain websites (65%), half restrict access to social networking sites and 18% “have concerns” about employee visits to external blogs
- 12% of employers monitor the “blogosphere” to see what is being written about them
- As many as 50% of employers use the web to vet applicants

“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

“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.

Facebook – 100 million users (2008)

MySpace - 100 million users (2008)

Twitter – 25 million monthly visitors (2009)

Employment Issues in Social Networking

Laura B. Friedel

Partner, Labor & Employment Service Group

Levenfeld Pearlstein, LLC

Employment Issues in Online Social Networking

- Pre-Employment Screening
- Employee Monitoring & Privacy Concerns
- Harassment
- Risks to Trade Secrets & Confidential Information
- Potential Liability to Third Parties

Using Social Networking Sites as Part of Pre-Employment Screening

Companies must balance the value of the information to be obtained against the potential risks involved in obtaining the information.

Using Social Networking Sites as Part of Pre-Employment Screening

Potential benefits for employers:

- See candidates in their “natural habitat”
- Evaluate professionalism and communications skills
- “Confirm” education and work background
- Observe posting/updating history
 - Content
 - During work day?

Using Social Networking Sites as Part of Pre-Employment Screening

Potential risks for employers:

- Too much information
 - Protected characteristics (age, race, religion, etc.)
 - Medical conditions
 - Union activity
 - Whistleblower activity
 - Political beliefs
 - Outside activities

- Disparate treatment claims
 - Which candidates' information
 - How information obtained is considered

Using Social Networking Sites as Part of Pre-Employment Screening

Potential risks for employers (cont.):

- Fair Credit Reporting Act claims (if third party is used)
- Violation of sites' terms of service
- Accuracy
- Defamation if information is shared

Using Social Networking Sites as Part of Pre-Employment Screening

Risks are magnified if access is gained without authorization or permission:

- Computer Fraud and Abuse Act (18 U.S.C. § 1030 et seq.) – *prohibits certain unauthorized access to computer systems and information*
- Stored Communications Act (18 U.S.C. §2701 et seq.) – *prohibits the unauthorized access of an electronic communications service or the unauthorized obtaining of an electronic communication while it is in electronic storage.*
- Electronic Communications Privacy Act (18 U.S.C. §2510 et seq.) – *prohibits the interception of electronic communications*
- Other privacy claims
 - Constitutional claims (federal and state)
 - Common law invasion of privacy claims

Using Social Networking Sites as Part of Pre-Employment Screening

Practical Tips if using social networking sites as part of pre-employment screening:

- Be consistent (who and what)
- Have a person other than the decision-maker do the search and only report relevant findings
- Document the search
- Only utilize resources you have authorization to access
- View findings in context
- Include in application a consent to review/use information available on the internet

Employee Monitoring & Privacy Concerns

The same concerns as with applicants but with added risk:

- Discriminatory response to monitoring easier to establish
 - *Simonetti v. Delta Airlines Inc.*, No. 5-cv-2321 (N.D. Ga. 2005)
- Employee relations issues
- Knowledge of protected activity
 - Statements regarding terms & conditions of employment may be protected under the National Labor Relations Act
 - Discussion of compensation or political activity may be protected by applicable law
 - Criticism of the Company may be protected “whistleblower” activity

Employee Monitoring & Privacy Concerns

Practical Tip: Make sure that your company's policy manual provides that the company may monitor internet usage, and that employees should have no expectation of privacy in any statements made on the internet.

Employee Monitoring & Privacy Concerns

***Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002)**

- Company Vice President accessed an employee's secure website using other employees' log in information (with those employee's permission), even though the site's terms prohibited access by management and prohibited authorized users from allowing others to access the site.
- The website contained disparaging comments about the company and its leadership as well as statements relating to union matters.
- The court found that Hawaiian violated the Stored Communications Act and that an exception to the Act (where permission to view is granted by a "user") did not apply because the authorized employees had not actually "used" the site themselves.
- The court also allowed Konop to move forward on his claim that Hawaiian had violated the Railway Labor Act by interfering with his organizing activities.

Employee Monitoring & Privacy Concerns

***Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F.Supp.2d 548 (S.D.N.Y. 2008)**

- Owner of company accessed emails from a former employee's personal email accounts (hotmail, gmail, etc.) using password that automatically populated and information found therein.
- Court found that the company's email policy was not broad enough to put employee on notice that personal email viewed over the company's computers may be viewed by company and that employee's leaving password on computer did not create implied consent.
- Court ruled that the access violated the Stored Communications Act and that the emails could not be used by the company in its suit against the former employee, even though they would have been discoverable otherwise.

Harassment

The recent uptick in lawsuits relating to cyber-bullying on social networking sites easily translates to workplace harassment.

- Case filed in September against 4 teens who created a fake Facebook page for another teen that contained allegedly defamatory material.
- Missouri woman faced trial in computer abuse relating to her impersonation of a teenage boy in MySpace and harassment of a 13 year old girl who committed suicide.
- A man in Birmingham, England was charged with harassing an ex-girlfriend by sending her a Facebook “friend” request, but the case was thrown out for lack of evidence.

Harassment

Employers may face liability for harassment taking place on social networking sites

- Harassment / Discrimination Claims by employees
- Harassment / Discrimination Claims by third parties

Practical Tip: Make sure that your anti-harassment policy covers conduct outside of work and on-line and that your computer use policy references your anti-harassment policy.

Risks to Trade Secrets & Confidential Information

Employees' use of Social Networking sites could put the company's trade secrets at risk in many ways, including:

- Disclosure of the company's plans (i.e. mergers/acquisitions, RIFs, research & development)
- Disclosure of the company's customer/vendor/employee lists
 - *If customers are listed as "friends" on a social networking site, are they really being kept "confidential"?*
- Post-employment use of customer, vendor and employee lists

Risks to Trade Secrets & Confidential Information

Hays Specialist Recruitment (Holdings) Ltd & Anor v Ions & Anor [2008] EWHC 745 (Ch)

- Employee used client list maintained on LinkedIn to develop customer base for competing start-up business.
- Former employer sued and employee was required to disclose his contact list so that his former employer could determine what contacts, if any, he took.

Risks to Trade Secrets & Confidential Information

Practical Tips for Protecting Trade Secrets & Confidential Information

- Discuss use of social networking sites in confidentiality and non-disclosure policies and agreements.
- Require employees who use social networking as part of their business activities to maintain separate business accounts.
- Require employees to set security settings on business accounts so that “friends” / “contacts” on are not viewable by others.
- Prohibit employees from “friend-ing” customers and vendors on personal accounts.

Employer Liability to Third Parties for Statements by Employees

An employee's posts can make the employer liable to third parties, including for:

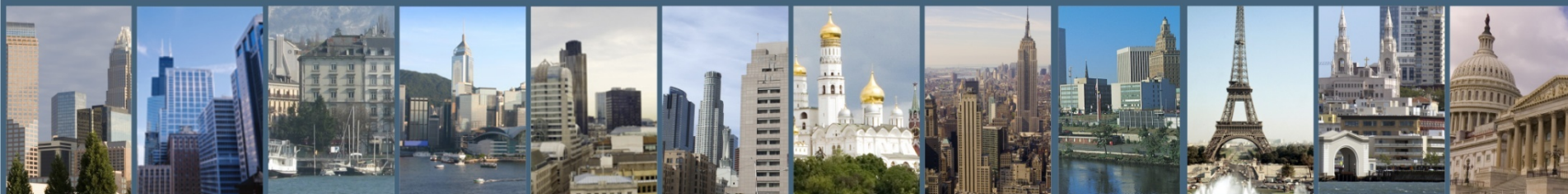
- Divulging third parties' trade secret or confidential information
- Disclosing other protected information
- Making disparaging statements about third parties
 - Defamation claims
 - Other tort claims
- Otherwise interfering with business opportunities
- Failing to stop or report illegal activity
 - *Doe v. XYZ Corp.*, 382 N.J. Super. 122 (App. Div. 2005)

Note: *The key is often whether the employee had “actual” or “apparent” authority.*

Employer Liability to Third Parties for Statements by Employees

A special note for public companies:

Public companies may face liability under securities laws if an employee discloses material nonpublic information or makes forward-looking statements, material misstatements or selective disclosures of information relating to the company's financial situation.



Intellectual Property Issues In Social Networking

Peter Perkowski
Partner, IP Litigation

Assess: Apply to You or Your Clients?

- Solicit or *Allow* Content From Customers
 - Contests, Hosting
 - Reviews, Comments, Chats, Bulletin Boards
 - Advertisements
 - Testimonials
- Sponsor or Comment to Blogs
- Participate in Social Networks or Virtual Worlds
 - Facebook page, Twitter accounts
- All of the Above *about* You or Your Client

Overview

- Business Applications of OSNs
 - Not Just Social
 - More Than Networking
- Liability and How To Avoid It
 - Potential Liability
 - Tools and Protections
 - Practical Tips
- Protecting Your Intellectual Property
 - Special Issues for OSNs
 - Monitor, Manage, Promote

OSNs: Not Just “Social”

- Business-oriented OSNs – still small, but growing fast
 - E.g., LinkedIn (42MM members), ZeroDegrees, Ryze, LegalForce
- Reaching new audiences – marketing & recruiting
 - Increasing numbers of companies with Facebook profiles
 - There’s even a "Facebook Marketing Bible"
 - More and more companies using OSNs to create interactive relationships 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, Imeem, Veoh
 - Yelp.com, Angie's List, Craigslist
 - Wikipedia
 - LATimes.com; BBC.com
 - Your company or client?

Identify: What Are The 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
 - Squatting, impersonation, passing off, counterfeit “goods”

Avoiding Liability

- Copyright Infringement (music, photos, film, video)
 - Copyright law not really designed for digital world
 - Lawsuits Against YouTube, Google, eBay, Amazon.com, Veoh, etc.
- Trademark Infringement
 - Logos, Names
- False Advertising, Unfair Competition
 - Quiznos case
- Right of Publicity (name or likeness)
 - Fantasy sports
- Defamation
 - *Barrett v. Rosenthal*, 40 Cal.4th 33, 51 Cal.Rptr.3d 55 (2006)
- Vicarious or Contributory Liability

Tools & Protections: DMCA

- 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

Tools & Protections: CDA

- 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

Tools & Protections: Practical Tips

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

Avoiding Liability – Web 2.0

- **Twitter**
 - Who's Tweeting? What are they saying?
 - A Tweet is a publication – careful what you say
 - “Lock” your Tweets
- **Facebook**
 - Privacy settings?
 - Monitor wall posts
 - “Sharing” (reposting) and linking

Protecting Your 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

Protecting Your IP – Web 2.0

- **Twitter**
 - Fraudulent impersonation – consider signing up under brand names, variations, nicknames...
 - *Practical Tips:* Report infringement, notice and takedown regime; SIGN UP, claim your trade name
- **Facebook**
 - Squatting (personal Facebook URLs)
 - Sharing, reposting, “wall” posts
- **Second Life**
 - Counterfeit goods
 - Second life multi-pronged proposal for IP protection

Monitoring Web 2.0

Practice tips: Monitor, Manage, Promote

- Google alerts; MonitorThis (aggregates 22 different search engines)
- Attributor
 - web-wide content tracking
 - content + crawl, match
- Yelp (reviews)
 - Review; respond to show that you are listening and care about customer service. *Don't write false reviews or trash competitors.*
- Trackur; Naymz (buzz tracking)
- Technorati
 - searches blogs and tagged social media (e.g. MySpace)

Legal Risks

Best Practices

Peter N. Townshend
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Setting Internal Policies

1. Understand How and Why People Use Social Media
2. Understand Unique Business Risks (i.e., HR, Intellectual Property, Securities Law)
3. Set Clear, Comprehensive and Reasonable Policies
 - Gentle Guidance on Appropriate Activities
 - Stress the Benefits of Social Networking
 - Set Parameters and Raise Awareness of Risks
4. Monitor Compliance with Policies
5. Update Policies as Law and Technologies Evolve
6. Enforce Policies Fairly and Uniformly

Sample Policy

1. General Company conduct policies apply
2. You are personally responsible for postings
3. Identify yourself clearly as Company employee when posting about Company
4. When posting About work-related issues use disclaimer (e.g. “These Postings are my own and do not reflect positions, practices or opinions of Company”)
5. Do not use Company Confidential Information
6. Respect copyright, fair use and securities laws

Sample Policy (-Continued-)

7. Do not refer to customers, clients or business partners without approval
8. Respect your audience -- Avoid obscenity, slurs, insults or conduct that would not be appropriate for work
9. Cite referenced work, do not plagiarize
10. Be aware of Company association in online social networks
11. Use proper Web protocol -- Don't pick fights, correct mistakes and don't alter posts without clear indication
12. Add value by providing worthwhile information and perspective

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
4. Partnerships and Other Business Agreements

Legal/Privacy Considerations

Every Business has Very Different
Risks and Opportunities

No “Out of the Box” Solutions