

New York Law Journal

GC New York

WWW.NYLJ.COM

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VOLUME 243—NO. 46

THURSDAY, MARCH 11, 2010

SOCIAL NETWORKING

Becoming Social: Issues in Creating Networking Sites



BIGSTOCK/NYLJ

It's official—social networking has become the most popular online activity for most Internet users. Twitter's traffic has increased multifold over the last year. Facebook had more than 100 million visitors in December 2009. In fact, according to Nielsen's latest survey, Facebook is now the most popular home page over Google, Yahoo! and others.¹ Even more fascinating is the fact that mobile net use has skyrocketed. When you see someone using their mobile phone, it is much more likely they are using it for social networking purposes than for an old-fashioned voice call.

As a result of this trend, companies that were long content to have a Web site consisting of nothing more than an online brochure are now actively exploring creating Web sites with social media capabilities. Before implementing social media capabilities (e.g., hosting user-generated content, giving users the ability to share content with other members of the Web site community), though, the company should weigh the business justification for doing so, because the legal issues involved can be tricky.



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Once the decision is made to plow ahead, certain basic legal issues need to be addressed, one of which—the focus of this article—is the potential liability of the Web site host for the actions and statements of users. Note also that this article will focus on the issue from the perspective of hosting the company's own Web site social media functionality, and not a company's interaction with third-party social media sites such as Facebook and Twitter (although many lessons set forth below can be used when hosting a Facebook page or Twitter account).

Whether to Start a Site

Implementing a Web site with social media functionality brings with it potentially significant liability. Protecting your company requires (or should require) a significant amount of time and effort by the business

people driving the effort and the legal team. Given the amount of time, effort, and legal expense involved, the first question a typical brick and mortar company should ask before plunging into the social networking world is what it hopes to gain. One answer, of course, is increased sales. But for many companies it may be simply greater brand awareness.

Bear in mind, however, that hosting social media almost by definition means losing a certain amount of control over what is published on the Web site. Negative comments invariably come with positive ones—many companies have a hard time accepting criticism to begin with, which would only be exacerbated by the fact that the company itself would be the publisher of the negative comment. Some may think that it would be better to not enter the fray at all than to do so unwilling to accept the strong likelihood that you will end up publishing derogatory comments about your own company and/or its products. Editing or cutting out negative comments is possible, but such editorial control may bring cries of censorship from your own customers. It is this legal, public relations, and philosophical minefield that must be navigated when a company considers joining the social media club.

Basic Hosting Issues

Once a company determines that business reasons justify it, several key issues must be

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considered: (1) limiting your liability as the host or publisher of a social network, (2) creating a coherent privacy policy that is implemented as written, (3) educating your own employees about how to administer the social network, and (4) protecting intellectual property rights.

Many companies enter into the social network arena without adequately considering all of these issues and are subsequently blindsided when the “unanticipated” issues occur. Of course, they were only unanticipated because the company failed to do its homework. The reality is that the legal fees associated with evaluating these issues are not inexpensive and often represent an initial investment of at least five figures.

A review of all four of these themes is beyond the scope of this article, which will focus almost entirely on the question of avoiding liability for statements posted on your site.

Publisher Liability

As the host of a Web site, your company is the publisher of all content hosted at the site, including user-generated content. If someone makes a defamatory statement on your site about a celebrity, under traditional theories of defamation law, as the publisher of the statement, you could be liable (vicariously or contributorily) for defamation. Similarly, if someone uploads a copyrighted work to your Web site, as the publisher, you could potentially, under traditional theories, be liable as the publisher of those copyrighted works.

Federal law, however, provides legal “safe harbor” immunities from liability for tort and copyright claims based on user-generated content for companies that host and engage in social media activities, provided certain criteria are met. Specifically, immunity from tort claims (most commonly speech-based claims like slander and libel, but also claims such as invasion of privacy, misappropriation, and others) is provided by §230 of Title 47 of the U.S. Code,² which was passed as part of the Communications Decency Act of 1996 (CDA). Immunity from copyright claims is provided by §512 of the Digital Millennium Copyright Act³ (DMCA).

Section 230 of the CDA. The common law of the United States traditionally provides that the publisher of a tortious statement by another

is subject to the same potential liability as the actual speaker of the tortious statement. The CDA was passed in order to make clear that hosts of third-party content should be viewed as mere distributors of content (like a library) and not as publishers, provided that the host did not engage in active control or willful ignorance of wrongful statements posted on its site by others. However, this immunity applies only to claims based on state law and expressly does not apply to criminal charges or claims arising out of federal law including trademark, copyright, and patent law.⁴

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Since the passage of the CDA, courts have consistently held that exercising traditional editorial functions over user-generated content, such as deciding whether to publish, remove, or even edit material, is generally immunized under §230. The analysis of particular activities, however, gets more difficult the more the Web site host “interacts” with the user’s statement, such as altering its content, editing its meaning, or even altering similar statements while not altering others.

The thrust of the coverage of immunity, though, is that it is quite broad—as long as the Web site host does not appear to adopt the wrongful statement as its own, or change the meaning of a user comment or statement, generally the immunity will apply. The key is to avoid an argument that the company’s interaction with the third party’s problematic content or statement rendered the comment as one that was spoken by, adopted, or arguably can be attributed to, the Web site host.

Generally, §230 of the CDA will provide immunity in a number of situations. Courts have consistently held that pre-screening content prior to publication is immunized activity, even if the content turns out to

be defamatory or otherwise tortious. After publication, the general rule is that as long as a Web site host does not change the substance or meaning of a statement, it may actively edit the content and maintain §230 immunity. That said, it is difficult in practice to carry out any editing without running a risk of an argument that the meaning was changed, or that the comment was adopted by the host via the edit, so editing should be done in limited circumstances only, if at all. A site may also select particular content for publication, and even pay a third party to create or submit content, without losing immunity, as long as the original writer was not an employee or agent of the site host.

As for soliciting or encouraging users to submit particular content, there is a difference between providing a forum for consumers to provide comments within a social network environment and specifically requesting or inviting user comments about a specific topic or in a specific manner. Generally, soliciting or requesting content or comments from users is acceptable, and a Web site operator maintains its immunity in most instances.

Do not, however, solicit or encourage the submission of illegal content, or design the Web site to require users to input illegal content. The primary example of a Web site operator that faced liability when soliciting or requesting information is where a roommate-finding Web site service included drop down menus for users to specify characteristics such as race, sex, and sexual orientation to assist their users in their search for a roommate. By providing such drop down menus, the court found that the Web site host may have engaged in discriminatory activity.⁵

In sum, the immunity provisions of the CDA are quite strong. As long as the Web site host does not appear to be the speaker of the wrongful statement, the immunities are generally preserved.

Section 512 of the DMCA. The DMCA was enacted to address specific issues created by the proliferation of the Internet, namely, that traditional copyright law could render the act of transmitting or displaying a copy of an infringing work over the Internet an act of infringement, and render service providers and Web site hosts liable for material transmitted through their services. Examples of situations where the DMCA would

be applicable, as opposed to §230 of the CDA, include, e.g.: A user copies and pastes the entirety of a copyrighted article from a magazine to the company's Web site; or a user posts a video of himself using a copyrighted popular song or even just playing such a song in the background.

The DMCA creates a safe harbor from liability for sites to avoid liability for copyright infringement provided they follow the statutory procedures outlined below. Just as with the CDA, though, the DMCA's safe harbor immunities apply to third-party content, not to content posted by the company, and a company is not protected from copyright infringement claims based on its own infringing actions.

The safe harbor provided for under §512 of the DMCA outlines the necessary requirements to avoid liability for either permitting access to copyrighted works uploaded by others, or permitting access to copyrighted works by linking or allowing others to link to those works. In order to avoid liability, the Web site host must:

- a. Designate a copyright agent with the U.S. Copyright office to receive DMCA takedown notices;
- b. Adopt, implement, and communicate to the public a copyright infringement policy and "notice and takedown" procedures;
- c. Promptly remove infringing content after notice;
- d. Have no actual or effective knowledge that the material in question is infringing; and
- e. Not directly financially benefit from publishing the material.

Of course, the host must respond promptly to take down requests, typically within 48 hours, and should not prevent copyright owners from collecting the information they need to send a proper takedown notice. Moreover, a company should not tolerate repeat offenders, even blocking their access to the site if necessary.

Copyright Infringement for Publisher Content. It is important to note that the DMCA does not apply to any content that you, as the host, post. Some of the most difficult questions arise with respect to links placed by the host to third-party Web sites. The question in part depends on what technology is used. While the specifics are beyond the scope of this

article, the potential for infringement can decrease or increase depending on whether the link you have is a passive link that takes the user to the actual Web site of a third party or a link that frames that information within your Web site.

But even if the information is framed within your Web site, a different conclusion might be reached depending on whether technologically your site retrieves that information from the third-party host each time that link is hit or if your site actually caches (i.e., copies) that content on its server and then uses the cached copy each time the link is hit. In the latter situation, unless you have an argument that your use of the content is fair use, that copying will constitute infringement.

Secondary Liability

One of the most complicated areas at the moment is defining when a company is secondarily liable for copyright infringement. The standards for establishing secondary liability vary depending on whether the plaintiff is relying on a theory of contributory infringement or vicarious liability. Contributory infringement requires the active inducement or encouragement of infringement. Vicarious liability falls on a third party that profited from the infringement while declining to exercise a right to stop or limit it.⁶

In *Perfect 10 Inc. v. Amazon.com*,⁷ the U.S. Court of Appeals for the Ninth Circuit held that Google could be contributorily liable for framing an image in the search results and making those results available to third parties if the plaintiff could show that Google was aware of the infringement, could have taken simple steps to prevent the images from being used by third parties, and failed to take such steps. However, the Ninth Circuit concluded that there was no possibility of vicarious liability because Google did not control the use of that content by the direct infringer and did not obtain any financial benefit from the use of this information.

The *Perfect 10* decision has been the target of much discussion, in large part because it did not provide clear guidance on what is necessary to prove "knowledge of the infringement" and the boundaries for determining when a company profits from particular content. For instance, the Ninth Circuit was not persuaded by the

argument that while Google may not be paid for using these thumbnail sketches, its ability to search for images was certainly a draw, especially when it is remembered that when it started no other search engine has yet figured out how to provide this service.

The bottom line is that there are no easy answers and some of those answers may depend on whether the company is likely to fight this battle in the Ninth Circuit or another circuit. It is precisely for these reasons that careful review by knowledgeable counsel is critical before embarking on any social networking project.

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1. Social Networking Watch, http://www.socialnetworkingwatch.com/all_social_networking_statistics.
2. 47 USC §230.
3. 17 USC §512.
4. 47 USC §230(e).
5. *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008).
6. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).
7. *Perfect 10 Inc. v. Amazon.com*, 508 F.3d 1146 (9th Cir. 2007).a