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Social Media: New and Emerging Risks

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AGENDA

- SOCIAL MEDIA
- COMMERCIAL USE
- EXPOSURES
- LEGAL & REGULATORY
- RISK MANAGEMENT
- RISK TRANSFER



What is Social Media?

- Blogging
- Tweeting
- Message boards
- Chat rooms
- User groups
- Photo / video sharing
- Web 2.0
- Virtual worlds
- *Social media are media for social interaction, using highly accessible and scalable publishing techniques. Social media uses web-based technologies to turn communication into interactive dialogues*.*

*Wikipedia

Social Media by the Numbers

- Unprecedented growth & adoption
- Facebook now has over 500M active users, surpassing Google as most trafficked site
- **79 percent** of the largest 100 companies in the *Fortune* Global 500 index are using at least one of the most popular social media platforms: Twitter, Facebook, LinkedIn, Foursquare, YouTube or corporate blogs*
- **65 percent** of the largest 100 international companies have active accounts on **Twitter***
- **54 percent** have a **Facebook** fan page*
- **50 percent** have a **YouTube** channel, and one-third (33 percent) have corporate blogs*

*Burson-Marsteller Evidence-Based Communications: The Global Social Media Check-up

Utility of Social Marketing

Primary Social Media Objective of US Marketers, July 2010

% of respondents



Note: n=369; numbers may not add up to 100% due to rounding
Source: Direct Marketing Association (DMA) and COLLOQUY, "Deploying Social Media to Cultivate Customer Loyalty: A Benchmarking Study," provided to eMarketer, Aug 27, 2010

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www.eMarketer.com



Company Use of Social Media

- Sales & marketing
- Customer communication/support/feedback
- Product development
- Recruiting/hiring practices
- Competitor intelligence
- Investment considerations
- Fundraising
- Litigation support/evidence gathering

Exposures & Risk Management



Advertising & Personal Injury

- Libel, slander, defamation & product disparagement
- Invasion of privacy, rights of publicity, misappropriation of a likeness
- False advertising, deceptive trade practices, copyright & trademark infringement



Bodily Injury/Property Damage

- Cyber stalking
- Cyber bullying
- Home invasions



Network Security

- Denial of service attacks
- Unauthorized access to confidential information
 - EX. Facebook in Privacy Breach
 - Many of the most popular applications, or "apps," on site have been transmitting identifying information—in effect, providing access to people's names and, in some cases, their friends' names—to dozens of advertising and Internet tracking companies
- Malware and virus transmission

EX. Twitter virus attack highlights key risk of social media**

- Affected users were redirected to porn and other third party sites, and they also spread the virus to accounts of their followers—those linked to them on Twitter.

*Wall Street Journal, 10/18/10

**Business Insurance: 9/27/10

Brand Management

- Everybody's a critic!
 - EX. Yelp
- Employees posting confidential information
 - EX. WikiLeaks
- Consumers chattering about as yet unidentified problems
 - EX. Toyota
- Detractors starting rumors EX. *“Scamberry” Decas Cranberry launched this campaign against Ocean Spray, its direct competitor, in or about 2009, and has used a variety of tactics and media for its campaign, including widely distributed letters and emails, internet blogs and websites, Facebook accounts, YouTube videos and Twitter postings.*
- Private agendas (stock price manipulation, criminal intent)
- Exposing environmental, safety, financial information, personal information, whistle blowing EX. *Gamestop Whistleblower Shows Power of Social Media*

Employment Practices

- Harassment
- Unlawful termination
- Risks of doing a background check on the internet
- Does your company have an intranet or other company-sponsored forum where employees may post comments?
- *Pietrylo v. Hillstone Restaurant Group* (2009)
 - MySpace page created by employees
 - Plaintiff claimed the termination violated federal and state statutes that prohibit “knowing” and “unauthorized access” to stored electronic information; violations of privacy rights; and unlawful termination
 - Verdict for plaintiff – violation of federal Stored Communications Act
 - Damages for plaintiff were nominal, but plaintiff’s counsel applied for and will likely receive close to \$125,000 in attorney fees



Legal & Regulatory



Legal Considerations

- Section 230 of the Communications Decency Act, providers of internet services are basically immune from liability for the content of material created by third persons and posted on that internet service.
- Multiple cases holding that Facebook, for instance, would not be responsible for the content of the millions of Facebook pages.
- Exception: *K&J Towing v. Kurtz* in Michigan — is testing the extension of that immunity.



Legal Considerations

- In a recent New York trial court in *Romano v. Steelcase* relevant information on Facebook and other social media is generally discoverable
- Territory: many foreign jurisdictions conventional notions of civil liberties and First Amendment defenses may not apply, making it all the more difficult to mount a defense.

Federal Trade Commission Developments

- FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising
 - Advertiser liability for false or unsubstantiated statements made through endorsements
 - Advertiser liability for failure to fully disclose material connection between them and the endorser that might materially affect the weight or credibility of the endorsement (e.g., advertiser providing endorser with free products, employee of advertiser, etc.)
 - Endorser liability for statements made in the course of their endorsements (e.g., bloggers)



Behavioral Advertising

- ***Sears Holding Co.***(June 2009)
 - FTC alleged that disclosures regarding downloadable online tracking software were inadequate
 - Software monitored consumers' online sessions and collected information including online bank statements, drug prescription records, and video rental records



Risk Management



Define and Publish a Social Media Policy

- Social media represents a powerful tool for marketing and client service, and is fast becoming an essential element of corporate communications. Rather than engage in a futile battle to halt the advance of new technology, organizations should seek to educate their workforce on the appropriate use of electronic media.
- A unique challenge in crafting a social media policy is that attempts to control blogging and tweeting by employees may conflict with the right of employees to engage in protected speech.
 - Implementing restrictions on the use of social media may lessen an organization's media liability exposure, but simultaneously increase exposure to employment practices liability.



Specimen Guidelines

- **The purpose of Company Facebook site**
- **Speak for yourself, not the company**
- **Protect confidential information**
- **Respect others and the law**
- **Use social media sparingly while at work**

Sample Guidelines

- personal e-mail addresses only may be used on social media websites;
- discourage anonymous posts – according to the Media Law Resource Center, a fair portion of claims brought involve defamation from anonymous posts with damages awarded ranging from \$25,000 to \$11.3 million;
- prohibit the unauthorized use of company logos or trademarks;
- advise colleagues not to disclose client information on-line;
- direct employees to strictly write in the first-person and include disclaimers such that readers are advised that content reflects their own views as opposed to their employer's views;
- accurately disclose affiliations, such as ownership interests, that may indicate a bias in terms of the content in question;
- refrain from publishing derogatory comments when discussing colleagues, competitors or vendors; and
- cite to all sources to avoid accusations of infringement of the intellectual property rights of others.



Overall Recommendations

- Monitor social media
- Consider all disciplines / areas affected by social media
- Review company procedures and revise or establish new policies as needed
- Make sure company policies are consistent and integrated
- Train marketing, customer service, human resources, investor relations, employees and others who handle company's social media
- Take into account business considerations
- Incorporate social media into crisis management plan

Risk Transfer



Commercial General Liability

- Commercial general liability policies typically provide coverage for personal and advertising injury perils, such as libel, invasion of privacy, and copyright infringement, but only in limited circumstances.
- Intellectual property is excluded under most newer versions of the CGL, except for limited coverage for copyright in “advertisements,” which is strictly defined.
- Website content is generally not covered, unless the content is considered “advertising,” which may be construed narrowly



Social Media Perils vs. CGL

- AI/PI coverage has been shrinking
- Limited to narrowly defined “advertising”
- Trademark infringement has been excluded
- Limited internet coverage
- Confusing/ambiguous coverage terms
- Coverage litigation costs millions



Enterprise Media – Gap Filler

- Advertising and Intellectual Property coverage designed for “non-media” companies
 - Libel/Slander
 - Invasion of privacy
 - Infliction of emotional distress
 - Copyright infringement
 - Trademark infringement
- Covers company communications *in all forms*
- Covers Databases and Software



Specimen Wording

- **Content** means communicative material of any kind or nature whatsoever (including but not limited to words, pictures, sounds, images, graphics, code and data), *regardless of the method or medium of communication of such material* (including but not limited to print, broadcast, digital and electronic communication, and software) or the purpose for which the communication is intended (including but not limited to news, advertising, information, entertainment, corporate communications and art).



Other Solutions

- **Security & Privacy Coverage**

- **Employment Practices Liability**
 - Extension for social media



Overall Recommendations

- Identify exposures associated with Social Media activities and perform gap analysis of current policies:
 - ✓ General Liability
 - ✓ Employment Practices Liability
 - ✓ Media Liability (as applicable)
 - ✓ Security & Privacy Liability (as applicable)



Summary

- Understand current social media activities
- Identify unique risks
- Implement & review social media policy
- Coverage and gap analysis
- Consider affirmative coverage solutions

THANK YOU!



Social Media: New and Emerging Risks

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