

Minimizing the Legal Risks of Using Online Social Networks

By Lawrence Savell

The explosion of online social networking shows little sign of slowing. For example, Facebook (as accessed on June 15, 2010) reports that it alone has more than 400 million active users, 50 percent of whom log onto the site on any given day. Facebook states that its average user has 130 online "friends," and that such a user creates 70 pieces of content (Web links, news stories, blog posts, notes, photographs, etc.) each month. And the use of such resources is not tethered to a desktop PC: Facebook relates that more than 100 million active users currently access the system through their mobile devices.

Such remarkable growth brings challenges for the operators of social networking sites. The news media is replete with reports of alleged transgressions, most notably in the context of issues regarding the privacy rights of users. But what about the potential legal liabilities of the hundreds of millions of individuals and entities that post content and otherwise contribute to social networking sites? As was the case in the early days of e-mail, the inherent informality of the medium may cause some to believe that there is greater latitude to say or do things than in more formal contexts, but that is a trap. The reality is that those who join social networking sites and disseminate information and materials run the risk of being held responsible to others as a "publisher" and for a broad range of claims based on traditional legal principles.

This article provides a brief checklist of some of the salient legal issues that those who use social networking sites must consider, with the goal of increasing familiarity with and sensitivity to these issues so that preventive steps can be taken before a problem develops. Although this article focuses on U.S. law, the global reach of the Internet (Facebook reports that about 70 percent of its users are outside the United States) means that the laws of many

jurisdictions may potentially apply, which, among other things, may not be as protective of certain relevant rights as our laws are, and may not provide the liability defenses and privileges that our laws do.

Are you violating anyone's copyright? If you are posting content -- text, images, audio, video, etc. -- that you did not create or do not own, or for which you have not been granted a license or other permission to use by the creator/owner in circumstances where these would be required, you are probably infringing on someone's copyright. An exception applies if your posting qualifies as a "fair use," a fact-specific determination relating to those contexts in which one may use or reference copyrighted material in a reasonable manner without the owner's consent. Common situations in which fair use may be found include criticism, education and parody.

Are you violating anyone's trademark rights? If you are using another's trademark, you may be liable for infringement where the owner can establish that your use of its mark or a mark similar to it will likely cause consumer confusion as to the source of the material. There may also be potential liability if the owner can establish that your conduct diluted the strength/value of the owner's trademark.

Are you invading anyone's personal privacy? Depending on the jurisdiction, one or more of the traditional types of privacy protection may apply. These include: use (appropriation) of a person's name, portrait or picture for advertising or commercial purposes without prior written consent; public disclosure of private and embarrassing facts; and statements portraying one in a false light (similar to libel). Other privacy proscriptions may be established by particular legislation (for example those protecting children).

Are you breaching any confidentiality agreements or professional obligations? Lawyers, doctors, advisers and others in businesses in which they receive client/patient confidences must make sure they maintain such confidentiality.

Possible sanctions may include termination of employment, loss of professional license, potential significant civil liability (such as in the context of trade secret dissemination), or even criminal liability.

Are you defaming anyone? Generally speaking, a defamatory statement is a false and disparaging statement about another which causes injury to reputation (or in some cases causes emotional distress). It is a communication which exposes persons to hatred, ridicule (more than a simple joke or satire/exaggeration), or contempt, lowers them in the esteem of others, causes them to be shunned or injures them in their business or calling. Sometimes a person depicted in a photograph may claim that the juxtaposition of the picture with text conveying a negative connotation creates an implicit defamatory assertion. Bear in mind that not just people can be defamed -- so can businesses and even products (disparagement). Truth is, of course, a complete defense to such a claim. Statements may be protected if they truly constitute only opinions and are not capable of being proven either true or false. However, calling something an opinion does not make it so, and words like "I think" or "I believe" do not necessarily assure protection for what follows, as a statement may be actionable to the extent it implies a false assertion of fact.

Are you running afoul of advertising restrictions? To the extent that your social networking efforts may be viewed in whole or part as an advertisement, you must make sure you comply with all applicable advertising, "deceptive practice," and "unfair competition" laws and regulations. These may include the FTC's recent guides which may in certain circumstances require bloggers or other "word-of-mouth" marketers who receive payments or free products or services from the seller to review a product or service to disclose that fact.

Are you violating applicable regulatory requirements? If your business is in a heavily regulated industry, be mindful of violating

applicable proscriptions. If your business is a publicly traded entity that is subject to SEC regulations, make sure that your efforts do not run afoul of rules such as those regarding public statements.

Have you made promises to others on your page? If you make representations or promises to others on your page, make sure you keep them, to avoid potential liability for claims such as misrepresentation or breach of contract.

Have you read and do you understand the social networking site's terms/conditions of use? It is critical to review and consider carefully the nature and scope of applicable site use terms/conditions prior to entering into such agreements. Conduct in violation of those provisions could result in termination of your user status or civil liability. In addition, such terms/conditions may significantly impact your privacy and intellectual property rights, as they may include, for example, granting the site owner the right to use any information provided or content posted in any way the site owner desires in perpetuity, or even conveying ownership of such information or material which you would otherwise retain -- things you may not want to do.

Have you incorporated qualified language and appropriate disclaimers? You may obtain some insulation from certain claims by appropriately qualifying language or posting disclaimers of liability. Qualifying language (with less-than-absolute words like "may") may reduce certain liability risks somewhat, but that does not always carry the day. Similarly, disclaimers are not perfect or Ironclad, and the degree to which courts uphold them is not absolute.

Are you regularly monitoring your page/profile? Regularly monitoring your online presence is critical, allowing you to detect promptly if your page or profile has been hijacked or modified by another without permission, if messages you did not create but which are attributed to you have been posted, etc.

Have you checked your insurance policies? Review your insurance policies to determine if the types of potential risks described in this article are covered. Consider obtaining additional coverage if they are

not, such as third-party media liability coverage for infringement and liability costs associated with Internet publishing.

Social networking sites, with the confluence of rapidly developing technology and communication capabilities, expose users to a broad range of potential legal liability. Moreover, certain statutory provisions that may provide critical insulation to site operators against third-party claims such as defamation or copyright infringement may not be available by their terms to site users. Obviously, consultation with counsel experienced in these matters provides the best protection. This article provides a brief and introductory overview of some of the primary legal considerations that should be taken into account by personal and business users of social networking sites. In other words, OMG LOL: Our Modest Guidelines (hopefully will help) Lessen Online-networking Litigation.

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