



# **Web 2.0: Legal Issues of Social Networking and Media Platforms**

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## **Content Leader:**

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October 12, 2009

### The Legal Aspects of Online Social Networks: An Overview for Associations

Related Topic Area(s): Antitrust and Trade Regulation, Copyrights and Trademarks, Electronic Communications

Online social networking sites, such as the popular offerings provided by MYSPACE, FACEBOOK, TWITTER, and LINKEDIN, present a variety of new ways for trade and professional associations to connect and interact with their membership and the community at-large. As shown by recent studies suggesting a rapid increase in utilization of social networking sites by associations of all stripes and sizes, an online networking site can offer opportunities and rewards due to the ease with which an association can rapidly spread or easily target a message or communication. But, incorporating the use of social media and online networking sites into an association's larger communication, membership or marketing strategies raises a number of potential legal risks and liability issues for the association. With advance planning with respect to setting up and managing a page or site within an online social network or using a social network to communicate, however, these risks can be made more manageable. The following is a non-exhaustive list of legal tips and issues to consider in connection with using social networking sites or social media either to create/manage content or to send or sponsor content. The following tips also can be considered with respect to the types of policies and guidelines to implement with members and others that connect, or wish to connect, with an association through an online social networking site.

**It's More Public than You Think.** There remains a considerable disconnect between the extent of information believed to be shared on a social networking site and the reality of what is not only available for display or review but what is being preserved for future display and use. An association therefore should always be careful about what it posts or sends and assume that greater (not less) publication or disclosure is possible.

**Avoid Use of Material Obtained without Permission and Provide Proper Attribution for Content Taken from Other Sources.** Given the ease with which content and material can be obtained or posted online, even within social networking sites, avoiding copyright infringement will always remain a significant concern for an association with respect to its online activities. An association therefore should use caution in connection with posting content that is not procured by or provided to it with permission. With respect to any licensed material, an association also should remember to abide by any license terms and ensure that the right to use extends to electronic formats (or otherwise modify its license forms/permission to secure such rights). In addition, an association should always comply with any applicable requirements regarding attribution or notice when posting content to its own page or site or using content in any communication within an online social network. Also, it is important for an association not to rely on notions of "fair use" as a defense for its activities. Fair use of either copyrightable works or trademarks is available under the law, but it is a very limited doctrine. Excessive confidence in this principle is a risky course of action for any association.

**Be Careful with Allowing Others to Post Content.** When setting up or managing a page or site within an online social network that will allow for or enable the posting of content by a third party, such as a member, such content functionality can create situations that give rise to liability for copyright infringement, torts or defamation. Accordingly, an association should avoid encouragement or promotion of unauthorized use or copying of third-party content and, where possible, seek the consent of the author, owner, or subject before reproduction or use. This advice can apply with respect to the actual posting of content as well as to acts that give rise to availability, such as storing content for further re-distribution or display. Also, an association should be especially careful with negative content that identifies a particular person or entity or with the insertion of additional commentary to

content created by unaffiliated authors; as such acts can create publisher responsibility and liability. In addition, with this type of functionality, an association should have a take-down policy that does not tolerate repeat offenders.

**Know Your Identity and Role.** Social media and networking sites can make it easy for another user to masquerade as or act seemingly on behalf of an association. Such copycat sites, pages or activities may even be in furtherance of an association's goals or mission. However, as such sites are not controlled by the association itself, it is therefore important to clarify and announce the association's role in the content distribution, display and publication process. This is especially true with respect to declaring what constitutes the official page, site or communication of the association within an online network and distinguishing from unaffiliated pages, sites or communications. When an association encourages other users to use its name, connect to its page/site, post supporting information, or generate communications in line with the association's objectives, it is much safer for the association to function as much as possible as a passive operator, conduit or distributor, as opposed to an author or editor that has played a role in the creation or development of information that was actually posted or sent by another user. When a publication or author role is either intended or unavoidable for the association, an association should always monitor its interactions and communications with other users and ensure that it can verify its own messages or posted material in order to distinguish it from messages or material from other sources and for which the association will not wish to claim responsibility.

**Pattern Behavior to Take Advantage of Potential Immunity.** Certain immunities may be available to an association for particular instances when copyright infringement, tortious conduct, or defamation occurs. Although each of the following laws predates the advent of online social networking, the Digital Millennium Copyright Act of 1998 ("DMCA") lays out certain safe harbors for "Internet service providers" that could provide protection from copyright infringement claims and the Communications Decency Act of 1996 ("CDA") offers safe harbor protection for providers or users of interactive computer services from civil liability for defamation, invasion of privacy, negligence, and trespass claims. In both cases, however, the immunity is only available for liability resulting from the publication of information provided by a third party. Accordingly, and in order to try to claim immunity, steps must be taken by an association to remain a mere content conduit rather than a provider or creator of the information posted. The more editorial or publishing control taken, the less likely the protections under the DMCA or CDA will be available. Moreover, to qualify for the DMCA, infringing material must be taken down by the association (to the extent controllable) when duly notified by the copyright owner.

**Consider Hyperlinks to Third-Party Sites.** Linking is commonplace within every online social network. An association should therefore clarify its role with respect to and disclaim responsibility for any third-party site or page that it cannot control. Although mere linking may not suffice to find copyright or trademark liability, an association also should avoid directing other users to exploit any content or materials available on a third-party site or page. Moreover, an association should never frame, deep link to, or incorporate any third-party content without permission when it links to other sites or pages.

**Don't Misuse Trademarks.** Third-party trademarks should be used by an association in its online social media with permission when possible and with extra caution when use is in a commercial context, with respect to products or services, or in connection with campaigns, sponsorships or endorsements. Use by an association of third-party logos or stylized versions of trademarks is also more problematic in comparison to plain-text versions. Moreover, an association should never promote unauthorized or unlawful use of third-party trademarks, use third-party trademarks in user or account names, or use third-party trademarks as keywords or for search optimization (to the extent page design is possible).

**Be Careful with Sweepstakes.** An association should always seek legal counsel before implementing an online sweepstakes or contest through an online social network; especially if a prize having cash value will be awarded. There are numerous state laws and regulations that govern online contests, lotteries and sweepstakes. Accordingly, for any promotion involving a sweepstakes or contest, an association should consider the scope of permissible participants (by state), include terms and conditions for any contest or sweepstakes, and carefully consider the implementation of fees or charges for entry. An association also should understand that certain prize or reward practices can constitute illegal gambling.

**Watch What You Say When You Market.** It goes without saying that even within an online social network, which can seem closed or without rules at times, an association should avoid passing along false or misleading information. Moreover, an association should be careful with respect to any practice that is really advertising in disguise. For example, certain social networking techniques, such as blogging about an association or its activities, can in fact be treated as advertising when there is content posted regarding a product or service. Recent FTC guidance on blogging indicates that the FTC may penalize bloggers who make an endorsement of a product or service without disclosing the material connections with the seller of the product or service (such as being compensated by the seller). Please [click here](#) to view our article on the subject. Any and all promotional campaigns by an association within an online social network should therefore be controlled and monitored in the same fashion as with other media or formats. Moreover, an association's promotional campaign should not be left simply to the complete discretion of unaffiliated entities or users even though the viral nature of social networks is a part of its advantages.

**Don't Ignore the Rights of Privacy or Publicity.** An association should remain mindful of publishing information concerning individuals that may not be generally known or available to the public. Moreover, an association should remember that privacy considerations, particularly with respect to children under the age of 13, still apply to social networking sites. If personal data collection is desired or anticipated by an association, then it should consider posting a privacy notice describing the data collection and use practices. The foregoing also should apply to the tracking of online consumer activities, which has received increased scrutiny by government agencies and officials, notwithstanding the more public nature of conduct within online social networks.

**Be Careful when Sending Unsolicited Communications.** E-mail and other forms of viral campaigns, particularly for commercial messages, can remain subject to laws governing unsolicited e-mail, such as the CAN-SPAM Act of 2003, notwithstanding their use inside of a social networking site. An association should therefore always consider whether the recipient has provided consent to the receipt of any communications and obtain such consent where and when possible for commercial messages. At a minimum, always consider using opt-out notices for commercial messages.

**Monitor Blogs and Other Instant Communication Forums.** Unlike other forms of communication that undergo more careful scrutiny, the frequency with which blogs and other instant communication tools, such as TWITTER, can be updated can increase the exposure for an association to liability for any displayed or discussed content, due to less control over the posted information. If a blog will be utilized by an association, whether by its own employees or by other users, then it should be governed by clear internal or external policies regarding its content and use in order to manage the association's responsibility and potential liability. A clear take-down policy also should exist.

**Protect Your Intellectual Property and Use Proprietary Notices.** An association should remain aware of any new content, trademarks, domain names, or methods created with respect to social media so that available intellectual property protection and registration can be considered and sought. An association also should reserve rights in its intellectual property used or displayed online and monitor use of its intellectual property by other users. With most social networks, copying is not only the sincerest form of flattery but also is the easiest way for intellectual property rights to be infringed or diluted. To assist with protecting intellectual property rights, an association should consider use of a ™ ® and/or © symbol in connection with more prominent placements of its intellectual property and otherwise provide notices and conditions for any use of its intellectual property by other users within an online social network.

**Guard against Antitrust Risks.** Social networking sites and related media can make it easy for members to let their guard down and share information that could lead to a violation of the antitrust laws. An association should therefore ensure that it applies and enforces its existing antitrust policies with respect to social networking sites. To that end, an association should remind members that they may not communicate via association-sponsored social networking to make an anti-competitive agreement or even to share competitively-sensitive information if members would be otherwise prohibited from sharing this type of information directly between each other. In addition, an association should caution members against making comments that could be seen as an attempt to rally others to engage in a boycott of a supplier, customer or competitor. Notwithstanding the appearance within an electronic environment, these types of anti-competitive actions can result in an association being accused of serving as a conduit for sharing information that violates antitrust laws.

To further minimize antitrust risk, an association should consider conspicuously posting on its social networking pages/sites its antitrust guidelines, including procedures for reporting potential violations, to remind all visitors of their responsibilities to comply with the antitrust laws.

**Don't Ignore Employer/Employee Considerations.** For better or worse, social networking sites and media create many opportunities for the rights of an association and an individual, as well as an association as an employer of its individual employees, to intersect and overlap. Consequently, careful consideration should be given to balancing the social and business possibilities of using social networking sites or media. In particular, an association should define its role as well as the expectations it has for its employees' responsibilities and behavior when they are using social networking sites or media for association business purposes. An association also should clearly define for itself and its employees when an act is taken on its behalf or on behalf of the individual (for personal reasons) within an online social network or on social media. Moreover, as most social media are largely comprised of copyrightable works, an association should carefully consider the scope of the work-made-for-hire doctrine and the use of written assignment of rights agreements with individual authors, particularly non-employees (both volunteers and paid vendors/consultants), in order to ensure ownership of material that should be owned by the association. Free speech rights relating to an individual's activities within an online social network also can impact these considerations. In general, there is more and more blurring of personal and business conduct during the day; only careful consideration and policies will help manage this situation.

**Develop Policies for Social Networking and Media.** An association should develop internal and external policies and agreements to address the risks described above. With respect to preparing this document, an association should remain mindful of the fact that the terms of service provided by social network providers are primarily for the benefit of the social network providers and not the association as a user. In particular, an association should consider the implementation of a policy statement and contractual provisions that address responsibility, indemnity, limitation of liability, disclaimers, antitrust compliance, and intellectual property use and ownership.

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For more information, please visit: <http://www.venable.com/a-checklist-for-social-media-legal-notice-and-policies-11-20-2009/>

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## ARCHIVES

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### A Checklist for Social Media Legal Notices and Policies

Related Topic Area(s): Antitrust and Trade Regulation, Copyrights and Trademarks, Electronic Communications

Online social networking sites, such as the popular offerings provided by FACEBOOK, TWITTER, LINKEDIN, and MYSPACE present a variety of new ways for trade and professional associations to connect and interact with their membership and the community at-large. But, incorporating the use of social media and online networking sites into an association's larger communication, membership or marketing strategies raises a number of potential legal risks and liability issues for the association. With advance planning, however, these risks can be made more manageable. An association should therefore develop internal and external policies and agreements to address these risks. The following is a non-exhaustive list of provisions to consider in connection with preparing a policy, agreement or legal notice for use with members and others that connect, or wish to connect, with an association through an online social networking site or in connection with a more formal terms of service or legal notice for a page, site or blog on a social networking site.

**Responsibility for Use.** Include a provision requiring the end user to acknowledge that the association is not responsible for third-party conduct.

**End-User Conduct.** Include a provision requiring the end user to abide by applicable laws and any on-line terms or conditions and to take responsibility for the end user's own actions.

**License Grant.** Include a pre-emptive license grant given to end users for any use of the association's content, materials or other intellectual property. Specifically, when an association encourages other users to use its name, connect to its page/site, post supporting information, or generate communications in line with the association's objectives, such use should be dictated by permission or guidelines for permissible use.

**Protect Intellectual Property and Use Proprietary Notices.** Include a provision to reserve rights in the association's intellectual property used or displayed online and add a proprietary notice for copyrightable works and trademarks.

**Postings.** Include a provision that prohibits the unauthorized use or copying of third-party content as well as the posting of any unlawful or objectionable content.

**Take-Down Policy.** With interactive forum functionality, associations should have a take-down policy for removal of any defamatory, infringing or incorrect content.

**Clarify Role.** Include a provision to clarify the association's role in the content distribution, display and publication process. This is especially true with respect to declaring what constitutes the official page, site or communication of the association within an online network and distinguishing from unaffiliated pages, sites or communications.

**General Disclaimer and Limitation on Liability.** Include a general disclaimer of any warranties the association will not offer and a contractual limitation on the association's liability.

**Linking Policy.** Include a specific disclaimer for interaction with third-party sites.

**Privacy Policy.** Include a cross-reference to an association's privacy policy.

**Be Careful with Sweepstakes.** For any promotion involving a sweepstakes or contest, the association should include a provision(s) setting forth the scope of permissible participants (by state) and terms and conditions for any contest or sweepstakes.

**Guard against Antitrust Risks.** Include a provision regarding the enforcement of existing antitrust policies as well as a reminder not to communicate via association-sponsored social networking to make an anti-competitive agreement (such as price-fixing or market allocation), share competitively-sensitive information, or disparage vendors, suppliers or other members.

**Governing Law.** Claim a governing law for enforcement of the association's rights.

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For more information, please visit: <http://www.venable.com/the-legal-aspects-of-online-social-networks-an-overview-for-associations-10-12-2009/>