



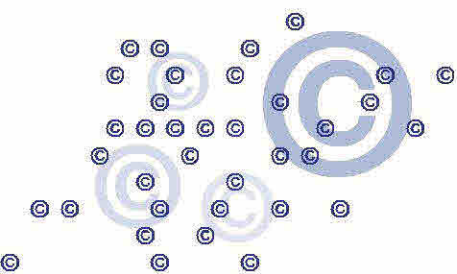
ELECTRONIC MEDIA LIABILITY – A NEW LOOK TO AN OLD PROBLEM

October 2014

Sponsored by:

OneBeacon
PROFESSIONAL INSURANCE®

ELECTRONIC MEDIA LIABILITY – A NEW LOOK TO AN OLD PROBLEM



Any company that distributes information to the public via a website or other means of electronic communication now has exposures of a traditional publisher and is subject to the same types of litigation.

Executive Summary

Media and publishing companies have long been exposed to claims arising from gathering and communicating information. Claims for copyright infringement and defamation are common in this industry. Today, however, thanks to the Internet and other new technologies, it is not just media and publishing companies that have this exposure. Any company that distributes information to the public via a website or other means of electronic communication now has exposures of a traditional publisher and is subject to the same types of litigation.

Introduction

The Internet enables the free flow of information and can help drive business growth. Organizations use websites, intranets, blogs, chat rooms, and social networking sites to enhance brand and product awareness, create customer loyalty, share ideas, and disseminate information. While these communication channels benefit organizations in many ways, they also can be a breeding ground for disagreements and expose an organization to liability.

Some disagreements concern Intellectual property (IP).¹ For many companies, as well as for writers, photographers, musicians and other creative individuals, intellectual property is their most valuable asset, and protecting their IP is of the utmost importance.

Other disagreements arise from statements that harm the reputation of an organization or an individual. Even true critical comments can spark threats of legal action, and false statements – especially if made maliciously or negligently – have the potential to result in lawsuits with multimillion dollar settlements.

Organizations of all sizes and in nearly every sector have concluded that having a website is essential.

Traditionally these risks were principally a concern of media and publishing companies. Now, thanks to the Internet, they are material exposures for almost every organization. Often, intellectual property violations and defamation result from employees' online activities on blogs and social media sites ostensibly on behalf of, but often not under the control of, an organization. As a result, media liability risks represent an increasingly challenging risk management problem for organizations.

Media-related exposures include invasion of privacy, copyright infringement, trademark infringement, false advertising and defamation (trade libel). This report focuses specifically on copyright infringement, trademark infringement, and defamation, and offers suggestions for potentially effective risk mitigation.

Corporate life online

Organizations of all sizes and in nearly every sector have concluded that having a website is essential. Some websites simply provide information about the organization, while others are far more elaborate and enable a higher level of engagement with customers, members, or the public in general. Some provide access to a wide range of information in the form of press releases, news articles or whitepapers. Others attempt to engage members or customers in various types of interactive activities and forums. A growing number contain or link to a blog where employees or other spokespersons share their views. Researchers from the University of Massachusetts Dartmouth found that 34 percent of Fortune 500 companies now have active blogs.²

Many organizations also have discovered the value of social media. Having a presence on popular social media websites can be effective for launching new products, building brand loyalty, identifying prospects and communicating with customers or other stakeholders. It also can facilitate business-to-business activities. Facebook, YouTube, Twitter, Instagram and LinkedIn are among the largest and best known social networking websites, but hundreds of other sites serve smaller, generally more narrowly focused, audiences. Twitter is the most used social media platform for companies, with 77 percent of Fortune 500 companies having active corporate Twitter accounts in 2013.³

The proliferation of online communication channels exposes organizations to the full array of media liability exposures. The number of channels and the ease with which information can be posted to corporate websites, blogs, and especially social media sites can make centralized control difficult. Social media can be especially perilous and difficult to manage since social networking tends to be far more freewheeling and informal, with fewer checks

Media companies, however, are not the only businesses exposed. Any company with an online presence can inadvertently run into copyright infringement trouble if copyright-protected material is used on a website, social media webpage, blog, message board, report, or presentation without proper authorization.

and balances, as compared to traditional marketing and communication channels. The ease with which digital music, images and text can be cut, pasted and redistributed magnifies the risk of multimillion dollar lawsuits.

Adding to the challenge, many organizations are simply unaware of all the social media sites purporting to represent them. A survey by public relations firm Burson-Marsteller found that companies engaged on Twitter, Facebook and YouTube tended to have multiple accounts: each active company reviewed in their survey had 4.2 Twitter accounts, 2.1 Facebook pages, and 1.6 YouTube channels. The PR firm found that for companies with multiple Twitter accounts, typically one was a primary corporate account while other accounts often were launched and managed by a local office or a special-interest group within the company, or was related to a sponsorship event the company was engaged in. Researchers often found it difficult to determine which Twitter account was the primary corporate account — if there was one.⁴

Copyright Infringement

Copyright infringement is rampant on the Internet. Copyright infringement occurs when someone uses, sells, distributes, or recreates another person's work without consent. By design, the Internet enables people to copy and spread information quickly and easily, potentially exposing organizations to situations – often without their knowledge – where they can be held liable for infringing copyrights. Frequently infringed copyrighted material includes news articles, photographs, movies and other video media, paintings, music, and literary works.

Many of the highly publicized copyright lawsuits involve online media companies. For example, Internet media company BuzzFeed was sued for \$3.6 million by a photographer who claimed BuzzFeed infringed his copyright by using a photograph he posted on Flickr without consent. BuzzFeed removed the picture after it received a takedown notice, but by that time the damage had been done; the photo had gone viral and could be found on websites across the Internet. The lawsuit claims that BuzzFeed is liable for contributory infringement for the photo's used on other sites.⁵

Media companies, however, are not the only businesses exposed. Any company with an online presence can inadvertently run into copyright infringement trouble if copyright-protected material is used on a website, social media webpage, blog, message board, report, or presentation without proper authorization.

Copyright protection has been around for centuries. Over the years copyright laws have evolved to respond to changing technology and new forms of digital publishing, networking, and communication.

Copyright laws

Copyright protection has been around for centuries. Over the years copyright laws have evolved to respond to changing technology and new forms of digital publishing, networking, and communication. This fluidity has inevitably created legal gray areas which are frequently tested in the courts. To complicate matters, the Internet has no national border which means organizations may have a heightened exposure to enforcement actions under foreign copyright laws.

Before 1976, copyrights were generally secured in the United States by Article 1, Section 8, Clause 8 of the United States Constitution, often referred to as the Copyright Clause. The Clause secured writings and discoveries for a limited time with a notice of copyright. Since then, the primary legislation governing copyright issues in the U.S. is the Copyright Act of 1976 which has been amended over the years to address changing exposures. Most recently this occurred in 1998 when the Digital Millennium Copyright Act (DMCA) was passed. This amendment was the first designed to address the exposures of the digital age.

The DMCA combined two World Intellectual Property Organization (WIPO) treaties with additional provisions addressing other copyright-related issues. The Act criminalizes production and distribution of technology, devices, or services intended to circumvent measures that control access to copyrighted works. Additionally, it shields online service providers from copyright infringement liability for simply transmitting protected information over the Internet, and requires “webcasters” to pay licensing fees to record companies. Other provisions carve out exclusions and limitations of liability for nonprofit libraries, archives, and education institutions.

Under the DMCA, website operators that post unauthorized copyright material may be liable for copyright infringement. However, the DMCA provides a safe harbor for online service providers if certain conditions are met such as establishing a notice and take-down procedure and having a copyright agent that receives copyright infringement complaints.⁵

Types of copyright infringement

Every organization with an online presence needs to be mindful of the origin of all the content on its websites, blogs, message boards, and social networking sites. This includes text, photographs and other visual material, and music and other sound recordings.

Many blogs quote from news articles. News organizations, however, are often opposed to even snippets of unlicensed stories appearing in blogs and social media.

Many blogs quote from news articles. News organizations, however, are often opposed to even snippets of unlicensed stories appearing in blogs and social media. While they have backed off considerably from heavy-handed enforcement tactics common a few years ago, news organizations still actively enforce their copyrights.

Recorded music also is a common source of copyright disputes. In an incident that received wide news coverage, the Republican National Committee settled a lawsuit alleging that the organization used a segment of Jackson Browne's song "Running on Empty" without permission in a YouTube video promoting presidential candidate John McCain. Even a tiny snippet from a copyrighted recording can cause trouble. The single syllable, "oh," is the subject of a lawsuit filed against rapper Jay-Z, his Roc-A-Fella Records, LLC, Atlantic Recording Corp. and several other companies. The suit alleges that Jay-Z sampled the syllable from funk musician Eddie Bo's "Hook & Sling Part I" for use in the hit song, "Run This Town."⁷

Photographers also have been assertive in protecting their copyrights. Though the amount involved was small, one illustrative case involves a company that was sued for \$8,000 for infringing the copyright of an amateur photographer whose snapshot of the city of Omaha, Nebraska was published on the company's blog without permission. The photo had been posted by a firm hired to produce content for the blog.⁸

The Omaha photo incident involved a miniscule amount, but that is not always the case. U.S. Copyright law allows for up to \$30,000 per infringed work, or up to \$150,000 per infringed work for a "willful infringer."⁹ Gossip blogger Perez Hilton (Mario Armando Lavandeira, Jr.) was sued by a New York Times photographer, Robert Caplin, who demanded \$2.1 million for the wrongful use of 14 photographs.¹⁰ In a precedent-setting case, freelance photographer Daniel Morel was awarded \$1.2 million in a suit against Getty Images and Agence France-Presse for using photos without his permission that he posted on Twitter. The ruling affirmed that photographers maintain the right of ownership to their photographs posted on social-media platforms.¹¹

A challenge for organizations is staying abreast of a fluid copyright risk landscape. Another precedent-setting case involves the recording of a live performance. Live performances generally are not copyright protected. "A copyrighted work must be fixed in a tangible medium of expression, and live performances are dynamic and ephemeral, not fixed."¹² If a performance is videotaped, however, does it become fixed? If it is posted online without the performers consent, is it a violation of performance rights? These were the questions

The Internet has provided a new platform for traditional exposures such as infringing trademarked logos, designs, and text as well as created new exposures such as domain name disputes, URL hijacking, infringing sponsored linked ad text, keyword bidding, and infringing website advertisements.

asked by an actress who agreed to perform a minor role in what she was told was a historical adventure film, but in actuality was an anti-Islamic film that created uproar in Islamic communities around the world.

The film was posted on the Internet and the actress sought to have it taken down. Under the DMCA, however, only the owners of the copyrighted work can demand takedown and the film was the producer's copyrighted work not the actresses. The wrinkle in this case was the actress's argument – an argument that she won on appeal – claiming she owned an independent copyright in her performance because it was fixed in tangible form in the film. According to the judge, most actors do not own copyrights due to contractual stipulations, but in this case there was no contract and therefore her work was eligible for copyright protection.¹³

Some copyright infringement issues in the digital age, such as fair use of news articles, are modern variations of old problems. Others, such as the case just mentioned are products of this era. Taken as a whole they represent a challenging and evolving set of exposures for every business with an online presence.

Organizations also should be aware of a comparatively new phenomenon – the so-called copyright troll. A copyright troll purchases copyrights solely for the purpose of enforcing them and making money through litigation. Often, the use of the material in question falls under the fair use exception to copyright protection, but the trolls' targets may be intimidated by threatening communication and end up settling.¹⁴

Trademark Infringement

Closely allied with copyright infringement is trademark infringement which has also experienced an explosion of Internet related lawsuits. The Internet has provided a new platform for traditional exposures such as infringing trademarked logos, designs, and text as well as created new exposures such as domain name disputes, URL hijacking, infringing sponsored linked ad text, keyword bidding, and infringing website advertisements. Additionally, it is a medium that is much easier for trademark owners to monitor and therefore increases the infringing company's exposure to liability.

AvePoint, Inc. v. Power Tools, Inc. is an example of an Internet related trademark dispute. In this pending case, software maker AvePoint, Inc., brought a trademark infringement and defamation action against its competitor Power Tools, Inc. The complaint was based on

The Lanham Act, enacted by Congress in 1946, provides for a national system of trademark registration and holds liable any person or company who uses a registered trademark with the sale of goods or services in a way that is likely to result in consumer confusion.

allegations that Power Tools, Inc. made false and deceptive statements about them through Twitter and LinkedIn, but also created customer confusion by developing a fake LinkedIn account under the plaintiff's name. In an era where user-generated reviews and social media recommendations are often preferred over more traditional paid advertising, actions such as this can have significant consequences.¹⁵

Trademark Laws

The Lanham Act, enacted by Congress in 1946, provides for a national system of trademark registration and holds liable any person or company who uses a registered trademark with the sale of goods or services in a way that is likely to result in consumer confusion. To do this, the infringing company must prove that it has a protectable right in a trademark and that the infringing company used a confusingly similar mark in a way that would create confusion with consumers.

Before the Internet, similar trademarks could coexist as long as they were in different geographic locations. The justification was that distance would eliminate any consumer confusion. The Internet has made the world much smaller. We now live in a global economy and can access a company on the other side of the country – or other side of the world– just as easily as one in our own town. Hence, the geographic limitations of trademarks in the past no longer exist and expose businesses to a greater degree of risk.

Traditional trademark law applies to the majority of trademark violations that occur on the Internet. There has only been one law enacted specifically to deal with trademarks on the Internet. The Anticybersquatting Consumer Protection Act (ACPA) was added to the Lanham Act in 1999. The Act established a cause of action for registering, trafficking in, or using a domain name confusingly similar to, or dilutive of, a trademark or personal name. Its purpose is to stop “cybersquatters” from registering domain names containing trademarks with no intention of creating a legitimate web site, but instead to sell the name to the trademark owner or the highest bidder.

Cybersquatting and other deceptive uses of domain names are the most common forms of Internet trademark infringement but they are not the only ones. Internet related trademark cases have also been a result of infringement in hidden text (a.k.a. metatags), domain names, related links, and search engines.¹⁶ Taken as a whole, the Internet creates array of opportunities to infringe a trademark. While these are all modern variations of an old problem, they too represent a challenging and evolving set of exposures for every business with an online presence.

Defamation is a false statement of fact that is harmful to an individual's or company's reputation, and is published as a result of negligence or malice.

Defamation

The ability to openly express ideas and opinions to a large audience in relative anonymity has created a breeding ground for defamatory comments in the online world. These comments can affect the reputation of the defamed business or individual and expose an organization to potential liability for comments made by one of its employees.

Defamation is a false statement of fact that is harmful to an individual's or company's reputation, and is published as a result of negligence or malice. Reputational damage can lead to lost customers, revenue, investors, and employees. It is frequently cited as a top concern for companies of all sizes.

Defamation can be broken into two subcategories, libel and slander. Libel is defaming in a printed forum such as a newspaper, magazine, or website. Trade libel, or commercial disparagement, is libel in a commercial context. Slander is spoken defamation that could be made person-to-person, or also broadcast over a radio, Internet, or television.

The Internet has become a hot bed for defamation lawsuits. In one recent case, a dentist sued a competitor, claiming he pretended to be a client and wrote negative reviews about him online.¹⁷ In another case, a Florida rifle company sued a shooting website and a gunsmith for \$75,000 claiming they falsely depicted one of its rifles in an online review and discourages any positive comments about its guns, company and owner.¹⁸

Managing the threat of a defamation suit caused by a rogue employee is a vexing problem since the allegedly defamatory action does not even need to occur on an organization's own website, blog or social media page. Employers may be found vicariously liable for an employee defaming customers, other employees, or competitors via any social networking channel if the employer knew or had reason to know that the employee was engaging in such activities and did not take action. Legal experts advise that an employer may be especially vulnerable if it encourages employees to participate in social media networks,¹⁹ which may happen for sales, marketing, recruiting or product development purposes. It is vital for employers to establish clear and concise policies around employee use of social media and other Internet forums to limit their risk of a defamation claim.

Media liability risks typically are excluded from traditional liability insurance products such as a commercial general liability policy.

Risk management

From a liability perspective just about every company is a now potentially a publisher. Common sense risk avoidance practices are always the first step in managing any type of risk, but the complexity of media liability risks and the rapidly evolving nature of digital communication create scenarios that sometime defy common sense. Therefore every company should have a media liability risk management program. Here are some suggestions:

- Create a written statement that prohibits the use of copyrighted or trademarked material without permission in any material produced on behalf of the company. A limited exception can be made for the cautious use of material falling under the fair use provision of the law.
- Establish that when posting on the Internet via social media, blogs, or other forums, the employee is prohibited from speaking on behalf of the employer unless specifically authorized to do so.
- Require that if employees mention the company in any capacity online without authorization they include a disclaimer that they are their views and not a representation of the company.
- Provide fair use education to all employees who produce material to be published on behalf of the company.
- Develop a written policy for responding to DMCA take-down notices and other demands for removing copyright-protected material from a website.
- Have a lawyer knowledgeable in copyright and trademark law review the company's website and policies.
- Purchase insurance that adequately covers media liability risks.

Insurance

Media liability risks typically are excluded from traditional liability insurance products such as a commercial general liability policy. While insurance for alleged infringement of someone else's intellectual property can be available in various forms, many non-media companies seek protection under a cyber liability policy. Certain cyber liability policies may provide a package of coverages relating to Internet communication, computer network activities and information assets, addressing both first and third party risks.

Social media – an important communication channel for many organizations – poses especially knotty problems since controls tend to be few and difficult to enforce, particularly as concerns employees’ activities away from the office.

Conclusion

Organizations have been benefitting from the Internet for several decades, yet many are still grappling with basic liability issues that come with being online. This includes media liability risks such as intellectual property infringement and defamation. Every organization with a website or blog is exposed to these risks. Social media – an important communication channel for many organizations – poses especially knotty problems since controls tend to be few and difficult to enforce, particularly as concerns employees’ activities away from the office.

Settlements of media liability claims can run into the millions of dollars. Consequently, media liability insurance needs to be a part of almost every organization’s risk management program. While loss control measures can reduce the likelihood of a lawsuit, the risk can never be eliminated. Insurance can be an effective backstop, and provide an organization with the assurances it needs to have a robust presence in the increasingly essential, but often dangerous, online world.

This document was prepared by Advisen and as such does not represent the views or opinions of OneBeacon Professional Insurance. OneBeacon Professional Insurance makes no claims or representations concerning the completeness or accuracy of the information provided by Advisen Inc. and has no responsibility for its content or for supplementing, updating or correcting any such information. This document is provided for general informational purposes only and does not constitute legal, risk management, or other advice. Readers should consult their own counsel for such advice.

¹ In general terms, IP is any product of human intelligence and creation that the law protects from unauthorized use by others

² "Fortune 500 Companies Are Getting More Social in 2013 with Twitter on Top," Newstex <http://newstex.com/2013/08/08/fortune-500-companies-are-getting-more-social-in-2013-with-twitter-on-top/>

³ "Fortune 500 Companies Are Getting More Social in 2013 with Twitter on Top," Newstex <http://newstex.com/2013/08/08/fortune-500-companies-are-getting-more-social-in-2013-with-twitter-on-top/>

⁴ The Global Social Media Check-up: Insights from the Burson-Marsteller Evidence-Based Communications Group, Burson-Marsteller, p. 9

⁵ John Villaseñor, Forbes, "Copyright Infringement And Photo Sharing: A New Lawsuit Tests The Limits of Fair Use," (June, 22 2013), <http://www.forbes.com/sites/johnvillaseñor/2013/06/22/copyright-infringement-and-photo-sharing-a-new-lawsuit-tests-the-limits-of-fair-use/>

⁶ U.S. Copyright Office Summary, "The Digital Millennium Copyright Act of 1998," (December 1998), <http://www.copyright.gov/legislation/dmca.pdf>

⁷ "Jay-Z Fights One-Syllable Infringement Lawsuit," JETLaw <http://www.jetlaw.org/2014/09/23/jay-z-fights-one-syllable-infringement-lawsuit/>

⁸ "How using Google Images can cost you \$8,000," PR Daily http://www.prdaily.com/Main/Articles/How_using_Google_Images_can_cost_you_8000_14912.aspx

⁹ "The Economics of Copyright Infringement in Robert Caplin vs Perez Hilton," Fordham university School of Law <http://law.fordham.edu/newsroom/30383.htm>

¹⁰ "The Economics of Copyright Infringement in Robert Caplin vs Perez Hilton," Fordham university School of Law <http://law.fordham.edu/newsroom/30383.htm>

¹¹ "Photographer Wins \$1.2 Million Lawsuit Over Images Taken From Twitter," Mashable <http://mashable.com/2013/11/23/photographer-lawsuit-twitter/>

¹² Mark Sableman, Thompson Coburn LLC, Mondaq Business Briefing, "Copyright And Performance Right in An Online Video World," (September 5, 2014), https://www.advisen.com/HTTPBroker?action=jsp_request&id=articleDetailsNotLogged&resource_id=224374132

¹³ Mark Sableman, Thompson Coburn LLC, Mondaq Business Briefing, "Copyright And Performance Right in An Online Video World," (September 5, 2014), https://www.advisen.com/HTTPBroker?action=jsp_request&id=articleDetailsNotLogged&resource_id=224374132

¹⁴ "Protect Your Business Against Copyright Trolls," i-Sight <http://i-sight.com/infographic/protect-your-business-against-copyright-trolls/>

¹⁵ Cowan, Debaets, Abrahams & Sheppard LLP, "The Secret Life of Jim Chung: Virginia District Court Holds That Fake LinkedIn Profile May Create Liability for Trademark Infringement and Other Torts," (January 8, 2014), <http://cdas.com/the-secret-life-of-jim-chung-virginia-district-court-holds-that-fake-linkedin-profile-may-create-liability-for-trademark-infringement-and-other-torts/>

¹⁶ Bakken, Law Tech Journal, "Unauthorized Use of Another's Trademark on the Internet," (2003), http://www.lawtechjournal.com/articles/2003/03_030629_bakken.pdf

¹⁷ Smile-on news, "Dentist's competitor 'posted false online reviews,'" (December 6, 2014), <http://www.smile-onnews.com/news/view/dentists-competitor-posted-false-online-reviews>

¹⁸ Daniel Terrill, Guns.Com, "Florida rifle maker sues shooting forum, gunsmith for \$75,000, claims defamation," (February 2014), <http://www.guns.com/2014/02/27/tactical-rifles-sues-snipers-hide/>

¹⁹ Maria E. Recalde, The Need for a Social Media Policy, Sheehan Phinney Bass & Green, <http://www.sheehan.com/uploads/pdf/New%20folder/Article%20-%20The%20Need%20For%20a%20Social%20Media%20Policy.pdf>