



Top 10 Potholes on the Internet Highway

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Our Top 10 Potholes

- Copyright Infringement
- Trademark Infringement
- Cybersquatting
- Privacy
- Lobbying & Political Activity
- Fundraising
- Antitrust
- Accessibility (ADA)
- Employee Misconduct
- Social Networking




Copyright ©

- Copyright exists on the web
- Copyright owner has exclusive right to sell, distribute, duplicate, make derivative works, perform, display the work
- Automatically vested in creator
- Registration creates additional enforcement rights




Copyright ©

- Safe Practices
 - Obtain a license or transfer agreement from authors and speakers to publish created material
 - Ensure the agreement covers all intended publication, including electronic
 - Be sure the author/creator owns the work and not their employer




Copyright ©

- Safe Practices (cont.)
 - Link to, rather than republish, other work, unless you get permission, even then be careful
 - Parody and fair use
 - Canadian copyright reform legislation




Copyright ©

- Listserves & Discussion Groups
 - Provide usage rules to prohibit defamatory or offensive posts, discussions of price setting, infringement of intellectual property
 - Monitor the discussions and posts
 - Correct violations and respond to complaints




Copyright ©

- Enforcement
 - Preserve the record - make copies of the electronic evidence
 - Determine if there actually is an infringement
 - Find out infringer's identity; John Doe suits
 - Send DCMA take down notice
 - Send a cease and desist letter
 - Litigation



Trademark

- Register your trademark and monitor its use
- Obtain domain names that use the trademark
- Don't use other's trademark without permission
- Liability for diluting brand
- User names that may imply ownership of brand



Cyber Squatters

- What is it?
 - Bad faith registration, sale or use of a domain name that is confusingly similar to another's trademark
- Variations
 - Tasting - registering millions of names to see which will drive traffic
 - Kiting - registering, deleting and then re-registering a domain name without paying for it
 - Typosquatting - registering variations of misspellings of a legitimate and popular site



Cyber Squatters

- What to do when a squatter shows up
 - File a domain name dispute proceeding
 - ICANN's Uniform Domain Name Dispute Resolution
 - Faster and less expensive than litigation
 - Cancellation of squatter's registration
 - No monetary damages or attorney fees
 - File a lawsuit



Cyber Squatters

Anti-Cybersquatting Consumer Protection Act

- Federal Court
- Injunctive relief
- Actual damages or statutory damages
 - Up to \$10,000 per domain name
 - Attorneys' fees some cases



Cybersquatting Cases

- *Citigroup, Inc. v. Shui* (E.D. VA 2009)
 - Site promoting financial services
 - Used Citibank and Citi trademarks
 - Maximum statutory damages of \$100,000
- *Rasmussen v. General Growth Prop.* (UT 2005)
 - Provotownecentre.com, .biz, .net
 - Arbitration before WIPO - mall owner won
 - State court - domain names ordered transferred



Cyber Squatters

- Basic protection for your association's domain name(s)
 - Police the marketplace
 - Watch services
 - Register defensive domain names
- How far should you go?



Privacy Laws

- Health information -- HIPPA
- Financial information - SOX 2003, Fair & Accurate Credit, GLB 2002
- Education - FERPA, State
- On-line - Electronic Communications Privacy Act, SCA



Privacy Laws

- State/Province laws, international laws
- Torts: public disclosure of private facts, intrusion on seclusion, false light, appropriation for commercial gain
- *Moreno v Hartford Sentinel* (Cal. 2009): Torts for republishing MySpace posting



Lobbying

- Definition
- Facilitate member lobbying
 - Inexpensive vs. direct mail or phone banking
 - Easier for members to lobby online - click and send form letter
 - Track response rates



Lobbying

- Tracking expenses
 - Costs allocated to web content, broadcast email or other lobbying communication to members or others
 - Staff time developing content of communication, setting up online system, etc.
 - 501(c)(3) lobbying limits



Lobbying or Political Activity?

- How many clicks does it take to get you in trouble?
 - Crossing the line into political activity
 - Implications for 501(c)(3) organizations



Lobbying or Political Activity?

- 501(c)(3) and 501(c)(4)
 - Beware shared websites
 - C4 that posted candidate questionnaire results and endorsements on its related c3's website caused the c3 to intervene in a political campaign by distributing campaign endorsements on its website. TAM 200908050
 - Solution
 - Maintain independent websites
 - Provide warnings when leaving 501(c)(3) site
 - Do not deep link to candidate or political party sites



Lobbying or Political Activity?

- 501(c)(6)
 - Tracking lobbying expenses
 - Political activity
 - Beware campaign finance laws



Fundraising

- Whose laws apply?
 - Fundraising communication occurs anywhere someone views website or email
 - Regulators believe internet fundraising gives them right to regulate
 - Targeting residents of certain jurisdictions
 - Disclaimers



Fundraising

- Raffles, sweepstakes, etc.
 - May be illegal gambling
 - Check laws of any jurisdiction where game is held
 - Example: Florida requires free raffle tickets
 - Do not send raffle tickets or any other part of a game of chance in US Mail
 - Use disclaimers - no minors, etc.



Fundraising

- Online donations
 - Who holds the money?
 - Provide required disclosures online
 - Provide tax receipts for charitable donations
- Charitable fundraising
 - Charitable solicitation registration required
 - Professional fundraising counsels and solicitors



Fundraising

- Websites and search engines that generate funds
 - Igive.com - a penny a search and portion of each purchase donated to named charity
 - Goodsearch.com - donation made for every search
 - Online charity malls - shopping online with contribution made by vendor to charity
 - CaféPress.com - online storefront



Fundraising

- Corporate sponsorships
 - Rules for qualified corporate sponsorship payments don't change online
 - Recognition vs. advertising



Antitrust

- Liability for antitrust violations
 - Association
 - Liable for actions of association
 - Liable for actions of members if
 - Member's conduct had association's actual approval
 - Member's conduct appears to have association's approval



Antitrust

- Liability for antitrust violations (cont'd)
 - Association members
 - Liable only if member had actual knowledge and intent
 - Association officers and directors
 - Personal liability if they knowingly participate in or approve of unlawful conduct



Antitrust

- Member interactions on association hosted web forum or listserv
 - Potential for price fixing
 - Defamation of non-members
 - Disclaimer of association's responsibility for postings essential
 - Establish rules for use of association hosted web forum or listserv



Antitrust

- Nonmember's rights of access
 - Nonmembers must have equal access to any services provided to members that are "competitively essential"
 - Examples
 - Access to website
 - Online services - publications, training, etc.



Antitrust

- Nonmember's rights of access (cont.)
 - Differential pricing for members and nonmembers allowed
 - Nonmember price
 - May be higher
 - Must be reasonable
 - Should not exceed pro-rata share of cost to support service



Antitrust

- Online surveys
 - Carefully select information to be collected and shared
 - Potential for price fixing
 - Benchmarking - potential for other competitive advantage for members
 - Public dissemination of information can prevent antitrust problems



ADA

Americans with Disabilities Act Amendment Act of 2008 (ADAAA)



- ADAAA expands application/enforcement of age discrimination law
- ADAAA clarifies definitions of assistive technology
- Are websites public accommodations?
- www.ada.gov



ADA

- ADA Accessible Websites
 - Employer: Must provide reasonable accommodation to disabled employee required to access internet/intranet as an essential function of the job
 - Association should provide equal access to website for people with disability



ADA

- ADA Accessible Websites (cont.)
 - What barriers to web access if access is method to obtain licensing or certification?
 - Not merely "access", but effective communication, to members and public
 - 10% of on-line population has a disability



ADA

- Accessible Website compliance
 - Universal design may also improve handheld device experience, slow modems, etc.
 - Will a screen reader "see" your website? Is there text or just images? Too many frames, PDF files, tables or columns?



ADA

- Accessible Website compliance (cont.)
 - Is audio content available in readable format?
 - Are font size and colors readable? Can user choose display?
 - Are Webinars synchronized with captioning, signing or additional text descriptions?



ADA

- IEA 2009 New Business Item #4
 - IEA-NEA will enable the audio portion of CDs or DVDs it produces to be viewable by members either by captions or file attachments
 - INA-NEA will evaluate software and/or hardware requirements for captioning computer or web-based (podcasts, webinars, etc.) presentations with audio



ADA

- IEA 2009 New Business Item #4 (cont.)
 - Hearing impaired considerations will be part of planning these events
 - In order to begin immediate accessibility to audio content, IEA-NEA will use whatever means currently available as long as it can be accomplished within the existing budget



ADA

- IEA 2009 New Business Item #9
 - IEA-NEA directs the Communications and Program Development Departments to draft a policy for consideration by the Board of Directors to ensure IEA website, and computer or web-based presentations are accessible to people with disabilities to the greatest extent feasible, including using screen reading software



ADA

- Accessibility Resources
 - W3C - User Agent Accessibility Guidelines
 - National Federation of the Blind - Nonvisual Accessibility Web Certification
 - IBM Accessibility Center



Misconduct on the Web

- Employee Misconduct
 - Create and enforce acceptable use policy and provide training/guidance
 - Make sure the AUP is current for smartphones, social networking, etc.
 - *Quon v Arch Wireless* (Cal 2008): AUP did not apply to text



Misconduct on the Web

- Employee Misconduct (cont.)
 - Obtaining employee phone record may violate Stored Communication Act
 - *Pietrylo (NJ 2009)*: Violate SCA when pressure employee to reveal MySpace password



Misconduct on the Web

- Employee Misconduct (cont.)
 - *Konop* (9th Cir. 2002): Violate SCA with secret monitoring of password protected site
 - *Guard Publishing* (D.C. Cir 2009): Union related emails are protected



Misconduct on the Web

- Off-Duty Conduct
 - What is “off-duty” when employees work at home and outside normal work hours?
 - Constitutional issues for public employees; just cause for union employees
 - *Morrison* (Cal 1969): nexus evidence necessary to enforce moral codes



Misconduct on the Web

- Off-Duty Conduct (cont.)
 - Greater ability for public to discover the conduct & publicize it
 - What steps has the employee taken to minimize damage to the employer?



Misconduct on the Web

- Member Misconduct
 - NBA fines owner Mark Cuban \$10,000 for tweet about referee
 - Bylaws and Board policies—what do they say regarding board and member responsibilities and sanctions for breaching?



Social Media Networks

Blogging, tweeting, Facebook, Youtube, LinkedIn, etc.

- Defining terms of use and making them stick
 - End-user license agreement (EULA)
 - Use of “click through” terms and conditions vs. link
 - Balance need to make terms stick vs. making site access difficult and losing traffic



Social Media Networks

- Helping your EULA survive a court challenge
 - Basic contract law
 - Contract of adhesion - one party dictates terms - disfavored by courts
 - Don't make it too restrictive
 - *Bragg v. Linden Research* (E.D. Pa. 2007) arbitration clause in EULA held invalid - procedurally and substantively unconscionable



Social Media Networks

- Helping your EULA survive a court challenge
 - Review and update periodically
 - Reserve right in EULA to revise it periodically
 - Put burden on user to keep informed of content of EULA
 - State continued use of site constitutes consent to any changes to the EULA



Social Media Networks

- Defamation claims
 - Publication of false information causing harm to third party's reputation
 - Elements of defamation
 - Initial defamatory statement
 - Publication of defamatory statement
 - *GTX Global Corp. v. Left* (CA 2007)
 - Stock blog a public forum - free speech protection



Social Media Networks

- Who is liable - party that posts or owner of site?
 - *Barnes v. Yahoo!, Inc.*, (9th Cir. May 7, 2009)
 - Barnes claimed negligent undertaking and promissory estoppel for failure to remove photos
 - Yahoo protected from negligence claim but not promissory estoppel



Social Media Networks

- Communication Decency Act
 - 47 U.S.C. 230
 - Protects association for liability if:
 - Association is provider or user of interactive computer service
 - Person claiming defamation treats association as a publisher or speaker of alleged defamatory content; and
 - Alleged defamatory content is provided by another information content provider



Social Media Networks

- Communication Decency Act
 - Protection available even if association exercises some editorial control over content on its site
 - Enforcing rules about appropriate content okay
 - Minor editing okay



Social Media Networks

- Monitoring content on your sites
 - Site owner's level of responsibility for content
 - Notice to users if monitoring conducted
 - Maintain monitoring to avoid liability for failure to monitor



Social Media Networks

- Member, board and employee use of third party sites
 - Fan groups
 - Who owns the online group?
 - Who owns the profile when employees use association's email address?
 - Controlling your association's name and logo



Social Media Networks

- Endorsements/recommendations by staff, board or members
 - Liability for negligent endorsement?
 - Personnel issues if poor performer gets recommendation online by non-supervisor



Social Media Networks

- Social media policy
 - Does your association need one?
 - What should be included?
- Association Code of Conduct
 - Include use of social media?
 - How frequently is code of conduct updated?
 - Does violation lead to loss of membership status?



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