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Social Media: A Labyrinth of Legal Liability

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Forms of Social Media



- Definition of Social Media: An inclusive term that describes activities that integrate technology, social interaction and user-generated content.

- Social Networking Sites



- File-sharing sites



- Aggregation Sites



- Virtual worlds



- Micro-blogs



- Blogs



Prevalence of Social Media



- 37% of internet users have a social networking profile
- 11% have blogs
- 8% uploaded videos
- 6% participated in a virtual world¹

Estimated Unique Visitors Per Month



- Facebook: 340 million (157% increase over 2008)²
- Twitter: 44.5 million³
- YouTube: 100 million⁴
- MySpace: 123 million⁵
- Wikipedia: 300 million⁶

User-Generated Content (UGC) and Social Media



- What is user-generated content?
 - The actual material uploaded to the Internet by users of a social media platform
- Estimated 116 million people “consumed” UGC in 2008⁷
- An estimated 82.5 million people created UGC in 2008 (43% of all US Internet users)⁸

UGC vs. Site-operator Content



- Prior to Web 2.0 majority of content was posted by site operator
 - Site-operator content often has high degree of quality control
 - Liability issues meant more oversight went into site-operator content

UGC: Other People's Property?



- UGC can fall into four types of ownership categories:
 1. Owned by uploader
 2. Partly owned by the user, with some third party rights existing
 3. An adaptation of content owned by a third party
 4. Owned by a third party

Potential Legal Issues



- Usefulness of Social Networks vs. Legal Realities - potential legal issues
 - Copyright infringement
 - Trade-mark infringement
 - Defamation
 - Advertising and Marketing Issues
 - Privacy Issues
 - Other

Legal Issues: Copyright



- LOLcats, FailBlog (cont'd)
 - These sites provide tools to create these sorts of images very easily
 - Goals:
 - Generate advertising revenue
 - Once concept becomes sufficiently popular, to sell books containing most popular images
 - Often the underlying image is subject to copyright

Legal Issues: Copyright



- When *is* permission required?
- Types of works that attract copyright protection include:
 - Architectural work
 - Artistic work
 - Choreographic work
 - Cinematographic work
 - Collective work
 - Compilation
 - Dramatic work
 - Literary work
 - Musical work
 - Work of joint authorship

Legal Issues: Copyright



- Other Rights to Consider
 - Rights in a “performer’s performance”
 - Rights in sound recordings
 - Rights in broadcasts

Legal Issues: Copyright



- Photographs
 - License
 - Release
 - Modification

Legal Issues: Copyright



- Music and Sound
 - If music and sound are used, there are several issues to consider
 - Performing rights
 - Reproduction rights
 - Distribution rights
 - Adaptation rights

Legal Issues: Copyright



- Film and Video Clips
 - Many layers of rights that have to be cleared
 - Script rights
 - Underlying literary work
 - Soundtrack rights
 - Use of characters

Legal Issues: Copyright



- Permitted Use
 - Original work of poster – no third party content
 - No copyright/limited copyright claimed
 - Creative Commons-licensed material
 - Public domain material
 - Copying of an insubstantial part
 - Fair Dealing (Canada) vs. Fair Use (US)
 - Educational Institutions
 - Libraries/Archives/Museums

Legal Issues: Copyright



- Aggregator Sites
 - Basics of news aggregation
 - Notable US Cases
 - *Kelly v. Arriba Soft Corp.*, 336 F 3e 811 (9th Cir. 2003)
 - *Perfect 10 Inc. v. Amazon.com* 487 F. 3d 701 (9th Cir. 2007)
- Linking
 - *Ticketmaster v. Tickets.com* 2003 US Dist. LEXIS 6483 (C.D. Cal. 2003)

Legal Issues: Copyright



Website Operator Liability for Infringing UGC - Canada

- *SOCAN v. Canadian Association of Internet Providers* [2004] 2 S.C.R. 427 (S.C.C.)
 - No liability for copyright infringement for ISPs acting merely as “passive conduit” – Section 2.4(1)(b) of *Copyright Act*
 - Does this apply to website operators?
- “Notice and notice” regime proposed by Bill C-61
 - Copyright owner notifies ISP about infringing content → ISP notifies alleged infringer
 - Bill died on order paper in 2008

Legal Issues: Copyright



Website Operator Liability for Infringing UGC – US

- *Digital Millennium Copyright Act*
 - Detailed “safe harbour” provisions to protect “service providers” from liability for infringing content uploaded to their sites
 - Service providers must not have knowledge of infringing content and must remove material upon obtaining such knowledge
 - Service providers must not receive financial benefit – element of control
 - “Notice and takedown” regime - upon proper notification of infringement, service provider must remove material expeditiously
 - Repeat offender policy and non-interference with standard technological measures
 - Counter notification system

Legal Issues: Copyright



Website Operator Liability for Infringing UGC – US

- *Lo Group v. Veoh Networks Inc.* 586 F. Supp. 2d 1132 (N.D. Cal. 2008)
 - Veoh website enabled users to upload and share videos
 - Veoh eligible for safe harbour provisions – considered to be a “service provider”
 - Veoh had ability to control own system, but not the infringing activity
 - Veoh took active steps to limit incidents of infringement and worked diligently to keep unauthorized works off site
 - Veoh’s automatic processes to facilitate user access do not invalidate safe harbour protection

Legal Issues: Copyright



Website Operator Liability for Infringing UGC – US

- *UMG Recordings Inc. v. Veoh Networks Inc. 2008 US Dist. LEXIS 104980 (C.D. Cal. December 29, 2009)*
 - UMG disputed right to use s. 512(c) of DMCA safe harbour where service provider “by reason of the storage at the direction of a user of material that resides on a system or network...of service provider”
 - Court held that s. 512(c) – not limited to mere storage – applies to infringement of copyright *by reason of the storage.....*
 - Veoh’s automatic processes again in issue
 - 2009 – Court granted Veoh’s motion for summary judgement – Veoh entitled to s. 512(c) safe harbour



Website Operator Liability for Infringing UGC – US

- *Viacom v. YouTube*⁹
 - Copyright infringement claim re 150,000 unauthorized clips of Viacom programs
 - Viacom seeking \$1 billion in damages
 - Also raises question of whether notice by copyright owner of one particular infringement covers every instance on the site

Legal Issues: Copyright



- Do Canadian companies need to concern themselves with the DMCA?



- Types of Trade-marks
 - Ordinary marks
 - Registered or unregistered (common law marks)
 - Words or logos
 - Distinguishing Guise
 - Identify the shapes of wares or their containers
 - Certification Marks
 - Goods or services that meet a defined standard



- **Relevance of Social Media to Trade-marks**
 - Social Media gives buyers and sellers an easy way to connect – an effective marketplace for use of trade-marks
 - More opportunity for trade-marks exposure and misuse
 - Trade-marks problems arise in new ways not previously contemplated, even in “Web 1.0” world



- Improper Use of Trade-Marks in Social Media
 - Twittersquatting
 - Tony La Russa
 - Louis Vuitton
 - Internal policy – must have intent to mislead
 - Twitter retains full rights to pull content
 - Facebook “vanity URLs”
 - Only *registered* TMs may seek removal



- US Concept of Contributory Infringement
 - Not part of Canadian law
 - Potential problem if operating social media website in US
 - *Inwood Labs, Inc. v. Ives* established principle of contributory infringement when knowledge of infringing activities present
 - Subsequent cases extended doctrine to services
 - Element of knowledge required

Legal Issues: Trade-marks



- Use of trade-marks in meta-tags
 - Words embedded in underlying code of a website header that are recognized by search engines
 - Issue not extensively litigated in Canada
 - *BCAA v. Office and Professional Employees' Int. Union* 2001 B.C.S.C. 156
 - In US, cases have gone both ways
 - *Standard Process, Inc. v. Total Health Discount, Inc.*, 559 F. Supp 2d 932 (E.D. Wisc.2008)
 - *Designer Skin LLC v. S&L Vitamins, Inc.*, 560 F. Supp. 2d at 811
 - Meta-tags may now be irrelevant; Google AdWords perhaps more significant

Legal Issues: Defamation



- Definition - “A publication which tends to lower a person in the estimation of right-thinking members of society, or to expose a person to hatred, contempt or ridicule” *Botiuk v. Toronto Free Press* [1995] 3 S.C.R. 3
- The basic elements for a defamation action are:
 - Allegedly defamatory words were published;
 - The allegedly defamatory words refer to the plaintiff; and
 - The allegedly defamatory words are in fact defamatory of the plaintiff, either in their ordinary meaning or in some extended meaning
- Communication can occur over the Internet

Legal Issues: Defamation



- Defences to Defamation

- Truth

- Privilege

- Fair Comment

- *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420, 2008 SCC 40

- Consent

- Responsible Communication of Matters of Public Interest (New)

- *Grant v. Torstar Corp.*, 2009 SCC 61

- *Quan v. Cusson*, 2009 SCC 62



- Defence of Responsible Communication of Matters of Public Interest
 - Recent decisions from Supreme Court of Canada (*Grant v. Torstar Corp.* and *Quan v. Cusson*)
 - Two elements for defence:
 1. Publication must be matter of public interest
 2. Defendant was diligent in trying to verify the allegations given the circumstances

Legal Issues: Defamation



- Republication Rule
 - Every republication of a defamation is a new publication and gives rise to a separate cause of action
- New Exception - Reporting
 - Introduced in Canada in *Grant v. Torstar Corp.*
 - “[The] repetition rule does not apply to fairly reported statements whose public interest lies in the fact that they were made rather than in their truth or falsity”

Legal Issues: Defamation



- Can a website operator be held liable for defamatory statements uploaded to site by a third party?
 - Most social media sites do not monitor content¹⁰
- Hyperlinking
 - Recent BC decision held that merely providing a hyperlink does not constitute republication (*Crookes v. Wikimedia Foundation Inc. 2009 BCCA 392*)
 - The context of the link can be important
 - If link appears in article that endorses or directs viewers to the defamatory statement, the poster of the link could be liable



- Jurisdiction Issues

- Will an Ontario court assume jurisdiction over a US defendant for statements posted online in the US?
 - There must be a real and substantial connection between the action and the forum in which the action is commenced for the court to take jurisdiction
 - *Bangoura v. Washington Post (2005)*, 258 D.L.R. (4th) 341 (O.C.A)



Website Operators' Liability for Infringing UGC in Online Contests

- Canadian *Competition Act* & US *Lanham Act* prohibit use of materially false or misleading representations in commercial promotions
- Will the company running the contest be held responsible for user-generated videos containing false advertising claims that were posted to its site?
 - *Subway v. Quiznos*¹¹ – Quiznos asked consumers to submit homemade videos depicting Quiznos' sandwiches as superior to Subway Sandwiches





Testimonials Made on Blogs

US Federal Trade Commission's guidelines:

- Clarify when a consumer's positive blog post about a product will constitute an endorsement:
 - Blog post = endorsement if blogger periodically reviews products and receives free samples
 - If blog post = endorsement → must disclose material connections between advertiser and endorser/blogger



“Astroturfing”

- Process whereby a company’s employees pose as independent consumers to post positive reviews and commentary to websites about their company
- Lifestyle Lift - cosmetic surgery company that engaged in astroturfing
 - Internal email: “Friday is going to be a slow day – I need you to devote the day to doing more postings on the web as a satisfied client”
 - Settlement with NY Attorney General: “Astroturfing constitutes deceptive commercial practice, false advertising and fraudulent and illegal conduct”



- Sources of Privacy Rights and Regulation
 - *Personal Information Protection and Electronic Documents Act (PIPEDA)*
 - *Personal Information Protection Act (B.C., Alta)*
 - *Act Respecting the Protection of Personal Information in the Private Sector (Quebec)*
 - *Privacy Act* and provincial “Freedom of Information” legislation; provincial health information legislation
 - Emerging tort of invasion of privacy

PIPEDA



- PIPEDA governs the collection, use and disclosure of personal information by organizations in the course of commercial activities
- Personal information:
 - Any information about an “identifiable individual” – e.g., name, address, gender, employment and income, visual images; excludes certain “business card” information
- 10 Privacy Principles
- Individual or Commissioner may file complaint for breach of PIPEDA

Privacy Commissioner & Facebook: The Report



- Canadian Internet Policy and Public Interest Clinic (CIPPIC) filed a complaint against Facebook in May 2008
- Commissioner's Report, July 2009: Facebook needs to improve privacy practices
 - Retention policy
 - Inadequate safeguards re: third party applications
 - Personal information of non-users
 - Accounts of deceased users
- 30 day review period

Privacy Commissioner & Facebook: The Response



- *Retention Policy*
 - Facebook to clarify “Delete” v. “Deactivate”
- *Third-party applications*
 - Applications will require express consent from users in order to access various categories of personal information

Privacy Commissioner & Facebook: The Response



- *Personal information of non-users*
 - Terms of Use will be clarified: users must obtain consent of non-users before providing email addresses
- *Deceased Users*
 - Privacy Policy to clarify what happens in event of user's death

Privacy Commissioner & Facebook: The Fallout



- December 2009, a group of US Privacy Watchdogs filed a complaint with the FTC about Facebook's new privacy policy
 - Publicly available information
 - Misleading representations
 - Complication of Third-party Application settings
 - Contact Importer / Facebook Connect / Smartphone Sync
 - Widespread disapproval of changes
- January 2010 – Canada's Privacy Commissioner launches second Facebook investigation

Tort of Invasion of Privacy:



- Invasion of Privacy – not traditionally recognized as independent tort at common law
- Provinces without legislation creating statutory tort must rely on common law
- No clear standards for establishing cause of action

Privacy Legislation and Provincial Privacy Acts



- Statutory torts adopted in British Columbia, Saskatchewan, Manitoba and Newfoundland & Labrador
- *Privacy Act*, R.S.B.C. 1996, c. 373
 - S. 1(1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another

Tort of Invasion of Privacy:



- Canadian case law has recognized the possible emergence of an independent cause of action, but no clear direction yet
 - *Somwar v. McDonald's Restaurant of Canada Ltd.* 79 O.R. (3d) 172
 - *MacDonnell v. Halifax Herald Ltd.*, 279 N.S.R. (2d) 217

Risk Management



- If operating a social networking site:
 - Have strong Terms and Conditions dealing with:
 - Objectionable content (e.g., defamatory, obscene, harassing, infringing etc.)
 - Privacy
 - Implement, as part of your Ts & Cs, a “notice + takedown” or “notice + notice” procedure
 - See www.ugcprinciples.com
 - Implement a privacy policy and follow it

Risk Management



- Operating a social network site (*continued*)
 - Avoid taking an active role re: content - position site in “passive conduit” sense
 - Do not include functionality that prompts for certain answers;
 - Limit interaction to automatic functions required for technical operation of site
- Site’s terms and conditions
 - Easy to find (throughout site)
 - Easy to read

Risk Management



- Operating a social network site (*continued*)
 - Preferable if users are required to accept Ts and Cs before using site
 - Review and update Ts and Cs regularly
 - Have clear policies and procedures re dealing with UGC complaints and administer them consistently

Risk Management



- Social Networking as a business tool
 - Blogs - control this activity and be transparent
 - Make sure blogging employees are subject to confidentiality agreements and understand potential ramifications of their blog postings – e.g., securities violations
 - Train employees on blogging

Risk Management



- Social Networking as a business tool
 - Have a blogging policy:
 - Consistent with company rules
 - Avoid disclosing: confidential information or information about competitors, vendors, customers or employees
 - Implement a process to vet blog entries before posting
 - Identify bloggers
 - Do not disclose information in violation of securities laws

Risk Management



- **Social Networking as a business tool:**
 - Do not permit inflammatory confrontational, harassing defamatory or obscene posts
 - Use best efforts to ensure all posts comply with applicable law
 - Correct errors
 - Do not use or refer to any company intellectual property
 - Make clear that employees are expressing their own opinions and not those of the company
 - If employees are allowed to post to third party blogs in addition, require that they follow third party's site terms
 - Have a social networking manager or coordinator to vet all content

Risk Management



- **Control Your Twittering!**
 - Choose Twitter names carefully in alignment with your trade-mark strategy
 - Monitor Twitter for Twittersquatting, counterfeiters
 - Monitor posts for defamatory comments – e.g., check names that are similar to your brand
 - *Must* employees Twitter? – Control in same way as blogging
 - Note records preservation and Twitter’s deactivation policy

End Notes



- ¹Davis Wright Termaine LLP “Legal Issues Surrounding User-Generated Online Content” (Paper presented to the Entertainment, Advertising Media Law Symposium, March 2009).
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- ⁶Michael Arrington, “10 Millionth Article Written on Wikipedia” (28 March 2008), online: <<http://www.techcrunch.com/2008/03/28/10-millionth-article-written-on-wikipedia/>>.
- ⁷Paul Verna, “A Spotlight on UGC Participants” (February 2009), online: <<http://www.emarketer.com/Article.aspx?R=1006914>>.
- ⁸Ibid.
- ⁹Complaint (13 March 2007), online http://w2.eff.org/legal/cases/viacom_v_google/ViacomYouTubeComplaint3-12-07.pdf
- ¹⁰Kathryn L. Ossian, “Legal Issues in Social Marketing” *Institute of Continuing Legal Education* (2009), online: <http://www.millercanfield.com/media/article/200120_LEGAL%20ISSUES%20IN%20SOCIAL%20NETWORKING.pdf>.
- ¹¹Doctor’s Associates Inc. v. QIP Holders LLC Complaint (27 October 2006) The trial has not yet commenced.
- ¹²John Schwartz “As Jurors Turn to Web, Mistrials are Popping Up” *The New York Times* (18 March 2009), online: <http://www.nytimes.com/2009/03/18/us/18juries.html>.
- ¹³Noam Cohen “Courts Turn to Wikipedia, but Selectively” *The New York Times* (29 January 2007), online: <http://www.nytimes.com/2007/01/29/technology/29wikipedia.html>.



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