

Online Social Networks, Cyber Risk and Your Nonprofit: What You Need to Know



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Resource Type: Articles

Topic: Data Privacy, Tech Risk, Cybersecurity

Online social networking sites, such as the popular offerings provided by MYSPACE, FACEBOOK, TWITTER, and LINKEDIN, offer new ways for nonprofits to connect and interact with key stakeholder groups and the community at-large. An online networking site can offer opportunities and rewards due to the ease with which a nonprofit can rapidly spread or easily target a message or communication. Incorporating the use of social media and online networking sites into a nonprofit's larger communication or marketing strategies, however, raises a number of potential legal risks and associated liability exposure. With advance planning, these risks can be managed effectively. 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 stakeholders who connect with your nonprofit through an online social networking site.

It's More Public than You Think. Don't be naïve about the availability of information for display or review as well as what is being preserved for future display and use. Nonprofits should exercise care in selecting items to post or send and assume that greater (not less) publication or disclosure is possible.

Avoid Use of Material Obtained without Permission and Provide Proper Attribution for Content Used With Permission. Avoiding copyright infringement is a critical concern for nonprofits with online activities. Avoid the risk of harm stemming from the unauthorized use of material belonging to others by prohibiting this practice in your nonprofit. With respect to any licensed material, remember to abide by any license terms and ensure that the right to use extends to electronic formats (or otherwise modify its license rights/permission to secure such rights). Comply faithfully with attribution requirements. Do not rely on the "fair use" defense for your publishing activities except to the extent that you clearly understand this limited doctrine.

Be Careful When 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. Nonprofits should avoid encouraging or promoting 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. Exercise great care 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, adopt 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 your nonprofit. Copycat sites, pages or activities may even be in furtherance of a nonprofit’s mission or goals. However, as such sites are not controlled by the nonprofit, it is important to clarify and announce the nonprofit’s role in the content distribution, display and publication processes. Keep in mind that when a nonprofit encourages other users to use its name, connect to its page/ site, post supporting information, or generate communications in line with the nonprofit’s mission, it is preferable in such situations for the nonprofit 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.

Pattern Behavior to Take Advantage of Potential Immunity. Certain immunities may be available to a nonprofit 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 a nonprofit 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 nonprofit (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. A nonprofit should 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, nonprofits should avoid directing other users to exploit any content or materials available on a third-party site or page. Moreover, your nonprofit should never frame, deep link to, or incorporate any third party content without permission when linking to other sites or pages.

Don’t Misuse Trademarks. Third party trademarks should be used by a nonprofit 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 of third-party logos or stylized versions of trademarks is also more problematic in comparison to plaintext versions. Moreover, a nonprofit 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. A nonprofit 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, 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. Be aware that certain prize or reward practices can constitute illegal gambling.

Watch What You Say When You Market. Avoid passing along false or misleading information and exercise extreme care with any practice that is or may be perceived to be advertising in disguise. For example, certain social networking techniques, such as blogging about a nonprofit 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). Promotional campaigns within an online social network should therefore be controlled and monitored in the same fashion as with other media or formats and your nonprofit'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 may be perceived as an advantage.

Don't Ignore the Rights of Privacy or Publicity. Be mindful of publishing information concerning individuals that may not be generally known or available to the public. Also 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, post 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. 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 a nonprofit to liability for any displayed or discussed content, due to less control over the posted information. If a blog will be utilized by a nonprofit, 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 nonprofit's responsibility and potential liability. As indicated previously, a clear take-down policy also should exist.

Protect Your Intellectual Property and Use Proprietary Notices. A nonprofit 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. Remember to reserve rights in the nonprofit's 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, consider the use of a TM, ® and/or © symbol in connection with more prominent placements of the nonprofit's intellectual property and otherwise provide notices and conditions for any use of intellectual property by other users within an online social network.

Don't Ignore Employer/Employee Considerations. Every nonprofit employer should define its expectations regarding employee use of social networking sites to advance the nonprofit's mission. With respect to volunteers and paid vendors/ consultants, a nonprofit should revisit its use of written assignment of rights agreements with individual authors, particularly non-employees, in order to ensure ownership of material that should be owned by the nonprofit. The blurring of personal and business conduct during the day heightens the need for attention to the nonprofit's rules and requirements.

Develop Policies for Social Networking and Media. Every nonprofit that uses social networking tools should develop internal and external policies and agreements to address the risks described above. With respect to preparing these policies, keep in mind that the terms of service provided by social network providers are primarily for the benefit of the social network providers and not the nonprofit user.

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