


**VENABLE**<sup>LLP</sup>

**Cyberspace Risk:  
What You Don't Know Could Hurt You**

George E. Constantine  
Lisa M. Hix  
Venable, LLP  
Washington, DC

November 3, 2010



---

---

---

---

---

---


---

---

**VENABLE**<sup>LLP</sup>

**Welcome!**

- Carlye Christianson
- Senior Counsel and Director of Special Projects
- Nonprofit Risk Management Center
- [Carlye@nonprofitrisk.org](mailto:Carlye@nonprofitrisk.org)
- (202) 785-3891



© 2010 Venable LLP

---

---

---

---

---

---

---

---

**VENABLE**<sup>LLP</sup>

**Seminar Overview**

- Legal Issues – “Similar Issues, New Platforms”
  - (1) Organization’s Online Presence
  - (2) Trademark/Copyright
  - (3) Tax-Exemption
  - (4) Workplace Environment



© 2010 Venable LLP

---

---

---

---

---

---

---

---

- **Tools of the Trade** (e.g., Facebook, LinkedIn, Twitter, MySpace, Friendster, Skype, YouTube, Blogs, Instant Messaging, etc.)



© 2010 Venable LLP

---

---

---

---

---

---

---

---

### Organizational Online Presence

- Defamation
- Confidentiality
- Intellectual Property
- Contributory Infringement

© 2010 Venable LLP

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

**VENABLE LLP**

## Organizational Online Presence

Responsibility for Statements/Posts

- Important to train before incidents occur and set up clear communication guidelines for
  - Board
  - Members
  - Employees
- Apply to:
  - Postings on organization-sponsored sites, blogs, etc.
  - Postings which could be attributed to the organization

© 2010 Venable LLP

---

---

---

---

---

---

---

---

---

---

**VENABLE LLP**

## Defamation

- Defamation - Act of harming reputation of another through false statements to a third party
  - @abonnnen had a public Tweet and 20 followers: "Who said sleeping in a moldy apartment was bad for you? Horizon realty thinks it's ok."
  - Horizon sued for defamation, although case was ultimately dismissed.
- Comments made by others can be attributed to the organization

© 2010 Venable LLP

---

---

---

---

---

---

---

---

---

---

**VENABLE LLP**

## Limiting Apparent Authority and Protecting Organizational Identity

- The policy should make clear that directors, members and employees may not:
  - Use the organization's name in the online identity (e.g. username, "handle", or screen name)
  - Claim or imply authorization to speak as an organization representative (e.g., blogs, comments)
  - Use the organization's intellectual property, logos, trademarks, and copyrights in any manner unless authorized

© 2010 Venable LLP

---

---

---

---

---

---

---

---


---

---

**VENABLE LLP**

## Privacy, Confidentiality and Disparaging Information

- **Privacy/Confidentiality**
  - Policy should include guidance that directors, members and employees engaging in social networking and blogging for either personal or professional reasons **may not**:
    - Write about, post pictures of, or otherwise refer to any employee, member, vendor, supplier, business partner, or competitor without his or her permission



© 2010 Venable LLP

---

---

---

---

---

---

---

---

**VENABLE LLP**

## Preventing Unlawful Harassment And Discrimination

- Policy should emphasize that director, employees and members may not:
  - Post material that is **abusive, offensive, insulting, humiliating, obscene, profane or otherwise inappropriate** regarding the organization, its employees, members, exhibitors, business partners, competitors, etc.
  - Post material that **may be construed** as discrimination or harassment based on race, ethnicity, color, national origin, religion, sex, sexual orientation, age, disability, or any other legally protected characteristic.

© 2010 Venable LLP

---

---

---

---

---

---

---

---

**VENABLE LLP**

## Limiting Liability for Defamation, Infringement

- How to Avoid
  - Federal Communications Decency Act - § 230
  - Utilize **Disclaimers and Terms of Use**
  - Enforce a **Take Down Policy**
  - Refrain from **Commenting on Third-Party Posts**
  - Remain **Mindful of Confidentiality**
  - Consider **Available Screening Capabilities for Third-party Hosts**

© 2010 Venable LLP

---

---

---

---

---


---

---

---

**VENABLE LLP**

## Intellectual Property



© 2010 Venable LLP

---

---

---

---

---

---

---

---

**VENABLE LLP**

## Intellectual Property Issues

- **Avoid Trademark Misuse**
  - Seek **Permission**
  - Be **Especially Careful in Commercial Context**
  - **Avoid Using Other's Trademarks in Search Terms, Domain names, or User Names**
    - Oneok (a natural gas company) sued Twitter over a misappropriated user name
    - Hasbro vs. R.J Software over a Facebook version of its game Scrabulous, which had more than 500,000 users

© 2010 Venable LLP

---

---

---

---

---

---

---

---

**VENABLE LLP**

## Intellectual Property

- **Be mindful of Copyright Ownership.** Online presence is primarily about the content.
  - **Who owns work online?**
  - **Work-made-for-hire doctrine, written assignments of rights, licenses**

© 2010 Venable LLP

---

---

---

---

---

---

---

---

**VENABLE LLP**

## Intellectual Property

- Protecting Own Intellectual Property Rights
  - Monitor for Misuse
  - Balance IP Protection with Reputation Protection
    - Many Times, It's an Innocent Infringer
    - Use Clear Placement of Appropriate Symbols
      - ©, ®, ™
  - Enforce with Policy Statements, DMCA, Demand Letters,
  - Consider Available Registrations, such as for Trademark, Domain name, or User Name

© 2010 Venable LLP

---

---

---

---

---

---

---

---

**VENABLE LLP**

## Organization Online Presence Tax Issues

*"Organizations and web designers must be aware that the traditional rules with respect to prohibitions on providing particular services, treatment of advertising income, sales activity, as well as lobbying restrictions still apply to website activities."*

2000 EO CPE at 140.

© 2010 Venable LLP

---

---

---

---

---

---

---

---

**VENABLE LLP**

## Organization Online Presence Tax Issues

- Unrelated Business Income
  - (a) Trade or Business, (b) Regularly Carried on, (c) Not Substantially Related to Organizations Purpose
- Advertising Usually UBI; Qualified Sponsorship is not

© 2010 Venable LLP

---

---

---

---

---

---

---

---

**VENABLE LLP**

### Acknowledgment vs. Advertising

- Unlike Sponsorship Payments, Payments Received for Advertising are Characterized as UBI
- Characteristics of Advertisements Include:
  - Comparative or qualitative language
  - Price, savings or value information
  - Endorsements
  - Inducement to buy

© 2010 Venable LLP

---

---

---

---

---

---

---

---

**VENABLE LLP**

### Acknowledgment vs. Advertising

- Banners
  - 2000 EO CPE, the IRS stated that “a moving banner is probably more likely to be classified as an advertisement.”
  - The IRS indicated that banners are more likely than hyperlinks to be characterized as advertising.
  - Fees based on “pay-per-view” or “pay-per-click” measures are also likely to be characterized as advertisements.

© 2010 Venable LLP

---

---

---

---

---

---

---

---

**VENABLE LLP**

### Acknowledgment vs. Advertising

- Hyperlinks
  - A hyperlink may convert acknowledgment to advertising
    - Hyperlinks that lead to a website that features the nonprofit’s endorsement of the sponsor’s products more likely to be advertising
  - Be certain that when hyperlinks are provided in exchange for payment to have written agreement (for tax and general liability reasons).
  - Exercise oversight over the location of the hyperlink (both on the relevant tax-exempt web page and on the “linked-to” page).

© 2010 Venable LLP

---

---

---

---

---

---

---

---

**VENABLE LLP**

### Multiple Tax-Exempts

- **Affiliated Organizations**
  - With multiple sites, consider different entry points
  - “Tab” for 501(c)(3) entity and any PACs
  - Watch for issues with “framing,” copyright and privacy notices
- Possible to “attribute” activity – important both for political and for non-charitable operations
- **Reasonable Apportionment of Site Costs**

© 2010 Venable LLP

---

---

---

---

---

---

---

---

**VENABLE LLP**

### Lobbying and Political Activity Policies

- Check sites for links added inadvertently or without authorization
  - Freedom Alliance – Lost 501(c)(3) status due to excessive lobbying, including link to partisan site
  - 501(c)(3) Organizations – ABSOLUTELY prohibited from campaign intervention
  - 501(c)(4) Organizations – Primary activity cannot be campaign intervention

© 2010 Venable LLP

---

---

---

---

---

---

---

---

**VENABLE LLP**

### Workplace Environment

© 2010 Venable LLP

---

---

---

---

---

---

---

---



### Workplace Environment Issues

- Use is Likely Inevitable
- So, Avoid "Head in Sand" Approach and Educate
  - Historically, Organizations Tried to Control Risk by Denying Access
- Develop Policy that Addresses Permissible Use While Guarding Against Legal Risk
- Organize Team in Advance to Handle Crisis (Legal, Executive, Marketing, HR)

---

---

---

---

---

---

---

---

### Reducing the Expectation Of Privacy

- The First Amendment does NOT protect an employee from being monitored, disciplined or terminated for violating a clear and reasonable policy
- Employees have NO absolute Constitutional right to privacy in the workplace (4<sup>th</sup> Amendment on searches and seizures does not apply)
- But you need a clear and reasonable policy that sets out expectations and restrictions on usage

---

---

---

---

---

---

---

---

### Reducing the Expectation Of Privacy

- Policy should reduce any expectation of privacy on the organization's computers, email systems, blackberry, telephone/voicemail systems and any of the data on these systems by:
  - Making sure employees know that certain information exchanged on social networking sites can be monitored and accessed by the company
  - Expressly stating: no expectation of privacy, even with personal use and when telecommuting
  - Reserving right to remove content without notice
  - Reminding employees about privacy settings

---

---

---

---

---

---

---

---

**VENABLE LLP**

### Potential Privacy Pitfalls

- Some states have specific restrictions on monitoring and/or use of information
- A particular issue arises when monitoring and/or compliance is associated with off-duty conduct
  - For example, posting information on Facebook from home account over the weekend
  - Policy needs to describe employer's interest in monitoring and regulating off-duty conduct if it presents a conflict of interest and is reasonably related to the job

© 2010 Venable LLP

---

---

---

---

---

---

---

---

**VENABLE LLP**

### Recruiting and Hiring Considerations

- Screen candidates in uniform manner
- Get written consent from job applicants
- Use Neutral Third Party to filter protected information (non-decision maker)
- Still need a legitimate, non-discriminatory reason for employment decision based on information found online

© 2010 Venable LLP

---

---

---

---

---

---

---

---

**VENABLE LLP**

### contact information

George E. Constantine, III  
 575 7th Street NW  
 Washington, DC 20004  
 (202) 344-4790  
 geconstantine@venable.com

Lisa M. Hix  
 575 7th Street NW  
 Washington, DC 20004  
 lmhix@venable.com  
 t 202.344.4793

To view Venable's index of articles and PowerPoint presentations on Organization and nonprofit legal topics, see [www.venable.com/nonprofits/publications](http://www.venable.com/nonprofits/publications)

[www.Venable.com](http://www.Venable.com)

© 2010 Venable LLP

---

---

---

---

---

---

---

---



---

---

---

---

---

---

---

---

**VENABLE**<sup>LLP</sup>

## Next Month's Webinar from the Nonprofit Risk Management Center

December 1, 2010 – 2 pm Eastern

**What Do the Numbers Say About Your Nonprofit?**

The story of your nonprofit is told in various ways and formats. One of the ways is through your published financial statements and Form 990. While you may hope that stakeholders are focusing on your "vision statement" and the compelling descriptions of programs on your Web site, in reality their attention may be riveted to the story your numbers tell. Attend this webinar to learn how to manage the risks associated with telling your story in numbers and practical steps for ensuring that the story is both accurate and mission-advancing.

To register: [www.nonprofitrisk.org/training/webinars/registration.asp?id=246](http://www.nonprofitrisk.org/training/webinars/registration.asp?id=246)

© 2010 Venable LLP

---

---

---

---

---

---

---

---