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Allowing User-Generated Content on Social Media: Steps for Minimizing Nonprofits' Legal Risks

Allowing donors, supporters, members, or other interested third parties to communicate with and about a nonprofit through its social media networks can facilitate and improve a nonprofit's communication and marketing efforts, aid in fundraising and membership development, and otherwise help further the nonprofit's mission. Nonprofits may therefore allow and even encourage third parties to post messages or display content to the nonprofit's controlled social media pages. However, allowance of user-generated content on social media pages controlled or operated by a nonprofit can raise a number of potential legal risks and liability issues, which are due in large part to the fact that the nonprofit may not have complete control over what a third party posts or displays. Below is a non-exhaustive list of legal steps to consider that will help minimize the likelihood that legal liability arises from user-generated content posted to a nonprofit's social media pages.

Know the Role: Establish and know when a communication or posting is published or edited on behalf of the nonprofit, and when a posting or other content is provided by a third party (and thus, outside of the nonprofit's control).

Monitoring: Although controls should be established to ensure an editorial role only when desired, it is still important to monitor all social media pages controlled or operated by the nonprofit for problematic postings in order to be in a position to take timely and responsive action.

Terms of Use: Establish clear policies regarding appropriate content, disclaiming responsibility for user-generated content, providing for removal of posts containing prohibited content, and precluding posts containing prohibited content.

Take-Down Action: Prohibit and remove posts containing content that is abusive, offensive, intimidating, humiliating, obscene, profane, discriminatory, irrelevant to the nonprofit's work, or otherwise inappropriate.

Advertising: Be mindful of posts containing product and service advertisements because of federal and state rules and guidelines governing advertising and potentially requiring additional compliance obligations.

Immunity for Copyright Infringement: Given the ease with which material can be obtained and posted online, avoiding copyright infringement claims based on the use, display, reproduction, or distribution of content posted on social media pages will always be an important concern for nonprofits. The federal Digital Millennium Copyright Act of 1998 (the "**DMCA**") lays out certain safe harbors for Internet service providers that could provide protection for nonprofits from such claims in this area. Every nonprofit should become familiar with the safe harbor requirements and consider taking the steps necessary to obtain statutory immunity.

Trademark Infringement: Unlike under the DMCA, there are no statutory safe harbors for trademark infringement claims. The safest approach is for nonprofits to prohibit posts containing third-party trademarks absent consent from the trademark owner, and to demonstrate a good-faith effort to prevent and manage trademark infringement by implementing the same take-down policies required to obtain immunity under the DMCA.

Content Attribution: Ensure that the nonprofit can verify and distinguish its own posted material from messages or materials posted by users. Consider requiring use of a TM, ®, and/or © symbol in connection with prominent placements of the nonprofit's intellectual property on social media pages, and otherwise provide notices and conditions for any use or display of the nonprofit's intellectual property by third parties.

Rights of Privacy and Publicity: Nonprofits should remember that privacy laws, including laws

designed to protect medical records, financial information, and the privacy of children under the age of 13, still apply to posts made on social media sites. Moreover, the exclusive right to exploit one's likeness for commercial gain similarly applies to social media environments. Restrictions should be stated to control the use or disclosure of such protected data and images without permission.

Defamation: Editing, displaying, or distributing posts containing defamatory statements about a third party could lead to civil liability. The federal **Communications Decency Act of 1996** offers providers of interactive computer services safe harbor protection from civil liability for defamation (and certain other) claims where the provider is not the content provider. As with the DMCA, nonprofits should be well versed in the safe harbor requirements and pattern their behavior to qualify for this protection when possible.

Guard against Antitrust Risks: Social networking sites and related media can make it easy for members of trade and professional associations to let their guard down and share information or engage in discussions that could lead to violations of federal and state antitrust laws. Remind members that they may not communicate via nonprofit-sponsored social networking to make anticompetitive agreements such as agreeing to restrict production or services, to share competitively sensitive information such as (but not limited to) pricing information, to engage in group boycotts, or to engage in other anticompetitive conduct.

Employer-Employee Issues: Remember that content generated by employees (even without the approval of management) can expose the nonprofit employer to liability. Consistent with the recommendation for knowing a nonprofit's role, consider adopting a policy or guidelines for employees governing their use – both “on” and “off-the-clock” – of social media sites; this has now become the norm with nonprofits.

Retain Records: Nonprofits using social media should retain records related to such use for a reasonable period of time in the event the records are needed in connection with a federal or state agency investigation, lawsuit or arbitration, or other legal proceeding.

Posts Are More Public than You Think: As always, be careful about which posts are permitted to remain on social media pages and always assume that greater (not less) publication or disclosure is possible.

Nonprofits should consider carefully the above issues and guidance and then develop a social media strategy that is properly tailored to their planned goals, activities and concerns.

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For more information, contact **A.J. Zottola** at or **Robert Parr** at .

This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.