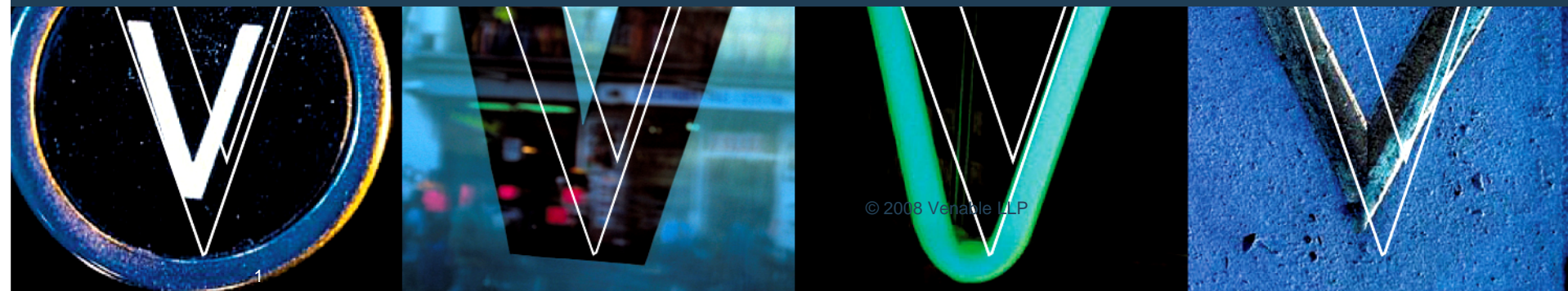


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Traps on the Web: Legal Essentials on Social Media, Protecting Data, HR Policies, and More

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Agenda for Today

- Legal Issues – “Similar Issues, New Platforms”
 - (1) Educating Your “Speakers”
 - (2) Entity Use of Online Social Media Platforms
 - Defamation, IP, Privacy, Agency
 - (3) Entity Online Programs and Efforts
 - Promotions, Tax-Exempt Status
 - (4) Employee Use of Online Social Media
 - Workplace Environment, Recruiting/Hiring, Privacy, Developing Policy



Social Media Policies – *The End Game*



“We got blindsided by two idiots with a video camera and an awful idea.

Even people who’ve been with us as loyal customers for 10, 15, 20 years, people are second-guessing their relationship with Domino’s, and that’s not fair.”

Jim McIntyre, Dominos Spokesman

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**



Entity Use of Social Media *Defamation*

- Act of harming reputation of another through false statements to a third party
 - Defamation, misrepresentation, infliction of emotional distress, negligence
 - Easy to do in the real-time environment of social media
- Law still trying to catch up to new medium and technologies
- Comments made by others can be attributed to the organization
 - Use of moderator to post offending message “could” lead to liability. Cornelius v. Deluca (D. Idaho April 26, 2010).
- Companies injured in commercial settings by anonymous speakers on the Internet can use civil discovery to learn the identities of the speakers
 - Quixtar, Inc. v. Signature Management Team, LLC.



Entity Use of Social Media *Defamation*

- 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 Neutral Where Possible.
 - Be Mindful of Agency or Outsourced Roles.
 - Remain Mindful of Trade Secrets and Confidentiality.



Entity Use of Social Media *Privacy*

- Limit on Collection and Publishing of **Personally Identifiable Information.**
 - **FTC** Enforcement still possible.
 - Consider Use of **Privacy Notices Describing Data Collection.** Be truthful. Don't Exaggerate Available Security for Data.
 - Remember **Disclosure and Consent Requirements.**
 - Be Mindful of **Privacy Policies of 3rd Party Platforms.**



Intellectual Property



Entity Use of Social Media *IP Issues*

- Avoid **Trademark** Misuse
 - Seek **Permission**.
 - Be Especially Careful in **Commercial Context**.
 - Avoid Using Others' Trademarks or Trade Dress in **Search Terms, Avatars, Frames, Domain Names, or User Names**.
 - No DMCA-like Immunity for trademarks, but Some Follow Similar **Take-Down Policy**.



Entity Use of Social Media *IP Issues*

- Be Mindful of **Copyright Ownership**. Social Media Is Primarily About the Content and its Distribution.
 - **Work-made-for-hire doctrine, Written Assignments of Rights with employees and contractors.**
 - Be careful with using **3rd party content**. Incorporating unauthorized 3rd party content into page or site can lead to claim for infringement.
 - **Emergence of companies enforcing copyright for a profit – 20 year old blo**
 - **Blogger sued for \$150,000 over photo use**
 - Don't rely on the "**Fair Use**" doctrine, which is fact sensitive. **Safer to get permission.**
 - **Have DMCA take-down policy that allows for quick action.**



Entity Use of Social Media *IP Issues*

- **Protecting Own Intellectual Property Rights**
 - **Monitor for Misuse.** Most operators have take-down policy.
 - **Balance IP Protection with Reputation Protection.**
 - Many Times, it's an Innocent Infringer.
 - Aggressive enforcement behavior could become public.
 - Use Clear Placement of Appropriate Symbols - ©, ®, TM.
 - Enforce with **Policy Statements, DMCA, Demand Letters, and Legal Proceedings.**
 - Consider **Available Registrations**, such as for Trademark, Domain Name, Search Term, or User Name.
 - Be **aware that many operator policies require broad license.** Review terms if there is a concern. Don't assume protection of your interests.



Programs

- Promotions
- Sponsor Recognition
- Tax-Exempt Status



Entity Use of Social Media *Promotions and Contests*

- **Sweepstakes and Contests** are Popular but Heavily Regulated
 - Including **Terms and Conditions of Social Media Sites**
 - Facebook – May Promote, But Cannot Administer (Collecting Entries, Notifying Winners) Without Prior Approval
- **Requiring a Donation to Enter = Lottery Under Most State Laws**
 - Payment, Chance & Prize
 - Registration Is Required
- **Take Away:**
 - Many Contests Governed by State Law
 - Control Through Use Terms and Limits on Participation



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.



Tax Issues

- **Unrelated Business Income (UBI)**
 - General
 - Advertising
 - Royalty
 - Sponsorship
 - Fundraising Arrangements
- **Affiliated Entities**
 - General exemption issues
 - Political activities and lobbying



Unrelated Business Income Tax — Generally

- Unrelated Business Income (UBI)
 - Income generated from a trade or business, regularly carried on, not substantially related to exempt purposes.
 - Income from the **sale of advertising is almost always taxable.**
 - Unrelated business income may be **offset by directly-connected expenses** when calculating tax obligations (990-T).



Unrelated Business Income Tax — Advertising

- IRS treatment of internet advertising

“The Service has yet to consider many of the questions raised by web advertising, merchandising, and publishing, however, it is reasonable to assume that as the Service position develops it will remain consistent with our position with respect to advertising and merchandising and publishing in the off-line world.”

2000 EO CPE at 131.



Unrelated Business Income Tax – Advertising

- **513(i)(A)**—Defines advertising in sponsorship context as “including messages containing qualitative or comparative language, price information, or other indications of savings or value, an endorsement, or an inducement to purchase, sell or use” products or services.
- **PLR 201029031**—Internet advertising, even when used to generate donations to an exempt organization, is taxable
- **PLR 200303062**—Internet listings of member benefit programs not taxable



Taxable or Not?

- Periodical Advertising –
 - Almost certainly **taxable**
 - IRS provides a **favorable method** for allocating expenses against advertising income
 - Online version **sufficiently like hard copy periodical?**



Unrelated Business Income Tax — Sponsorships

- “Qualified sponsorship payments” are excepted from the definition of UBI.
- A “qualified sponsorship payment” is a payment in exchange for which the corporate sponsor **neither gets nor expects any return benefit** other than:
 - Goods or services, or other benefits, the total value of which does not exceed **two** percent of the sponsorship payment; or
 - **Recognition**, i.e., use or acknowledgment of the sponsor’s name, logo, or product lines in connection with the nonprofit’s activities



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



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).



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.



Taxable or Not?

- Internet “Periodicals”
 - Corporate sponsorship safe harbor is not available for acknowledgments of corporate support appearing in a nonprofit’s “**regularly scheduled and printed material**,” such as newsletters and magazines.
 - For these purposes, “printed material” presumably includes materials that are **published electronically**.
 - Remember, **failure to meet safe harbor does not necessarily mean taxable**.



Unrelated Business Income Tax — Royalty

- **Royalty**
 - As a general rule, passive royalty income is excepted from the definition of UBI.
 - See PLR 200303062
 - To be characterized as a royalty:
 - The payments must be for the **use of valuable intangible property rights**, i.e., use of a name or logo; and
 - The organization **must be passive**, i.e., the organization cannot provide additional services in connection with the transaction.



Unrelated Business Income Tax — Royalty

- Royalty Examples
 - Payments for use of organization logo on another website.
 - License payments for use of intangible property.



Taxable or Not?

- **On-line Charity Malls**
 - % of purchase price goes to charity
 - Structure as **payment of royalty fees**, rather than referral
- **Virtual Storefronts**
 - Section 513(c) **Fragmentation Rule**
 - IRS will review each piece of merchandise
- **On-line Auctions**
 - Regularly carried on?
 - Conducted by outside vendor?
 - Must be “**continually controlled**” by charity



Taxable or Not?

- Virtual Trade Shows
 - In the 2000 EO CPE, the IRS stated that it will need to consider all facts and circumstances regarding virtual trade shows in making a decision:
 - Whether the virtual trade show consists **entirely of links to sponsors**;
 - Whether the virtual trade show **includes educational information**;
 - Whether the virtual trade show **is timed to coincide with an actual trade show or annual meeting**; and
 - Whether the virtual trade show is **available on the internet year round**.



Affiliated Entities — General Exemption Issues

- Affiliation through hyperlinks
 - “When an organization establishes a link to another web site, the organization is responsible for the consequences of establishing and maintaining that link, even if the organization does not have control over the content of the linked site.” Rev. Rul. 2007-41.
 - To avoid risks of UBI, private benefit, private inurement, and political intervention, organizations must monitor their hyperlinks for:
 - Advertising;
 - Political statements and campaign activities;
 - Non-exempt activities.



Affiliated Entities — Multiple Tax-Exempt Entities

- **Affiliated Organizations:**
 - With multiple sites, need different entry points
 - “**Tab**” for 501(c)(3) entity and any PACs
 - Gives **indicia of operational separation**
 - Possible to “**attribute**” activity – important both for political and for non-charitable operations
 - IRS TAM 200908050 — suggests the IRS will look for significant “separation” between related entities
- **Reasonable Apportionment** of Site Costs



Lobbying and Political Activity Policies

- IRS issued Rev. Rul. 2007-41 regarding political intervention stating that, “If an organization posts something on its web site that favors or opposes a candidate for political office, the organization will be treated the same as if it distributed printed material, oral statements or broadcasts that favored or opposed a candidate.”



Lobbying and Political Activity Policies

- A link to **candidate-related material alone will not constitute political campaign intervention.**
- Facts demonstrating that the link is not campaign intervention:
 - **All** candidates for an office are represented;
 - An **exempt purpose** is served by offering the **link**; and
 - The link **does not directly connect the organization's web site to a web page that contains material favoring or opposing a candidate for public office.**



Lobbying and Political Activity Policies

- **Carefully monitor content** – and links
 - A website that contains a view of legislation, as well as a link to a voting legislator’s e-mail, will be considered a “call to action”
- **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



Fundraising

- Jurisdiction/registration and reporting
 - “Charleston” Principles
 - Set of guidelines
 - Personal jurisdiction issues



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)



Employment

- Recruiting and Hiring
- Employee Use of Social Media



Recruiting and Hiring Considerations

- Get **written consent** from job applicants
- Screen candidates in **uniform manner**
- 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



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** (4th 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**



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



Employee Use of Social Media *Discipline*

- **Linked to social media policy**
- **Proceed with caution** before taking disciplinary action for violations
- Recent cases
 - AMR & Facebook firing
 - “AMR has agreed to revise its policy to ensure that it **does not improperly restrict employees from discussing their wages, hours and working conditions** with co-workers and others while not at work and that it would not discipline or discharge employees for engaging in such discussions”



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Questions?



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