

PRACTICAL ADVICE

MEDIA, DEFAMATION & PRIVACY LAW PRACTICE



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Companies Risk Litigation Over Blogs and Websites

Corporations are using Web sites, blogs, and podcasts in their marketing efforts, and it seems that everyone is involved in the effort. Employees are blogging – sometimes with their bosses' consent, sometimes without – about every topic under the sun. But the power of these new communications comes at a price – the increased risk of exposure to legal issues such as defamation, trade libel, product disparagement, copyright violations, improper disclosure of trade secrets, and other suits. Companies also may be on the hook for irresponsible postings by disgruntled employees.

Congress has mitigated liability for third party postings. Section 230 of the Communications Decency Act (CDA) gives immunity to “providers” and “users” of an “interactive computer service” to the extent that they are deemed a “publisher” of information provided by another provider. That means that if an outsider posts something on your blog, you can't be held responsible for certain legal claims, most notably defamation. This immunity applies even if you made the decision to post, or edited the content, as long as you didn't materially change the meaning.

Companies also have taken the offensive and are suing bloggers who make defamatory statements about company products or business practices. Some bloggers are employees; others are public interest activists or disgruntled consumers. Since blogger-offenders can be located anywhere, jurisdictional questions can be complex, and damages are difficult to prove. Settlements may include blogger agreement to cease the offensive postings, and in some cases the courts have shut down incorrigible bloggers.

So what's a “cyber-smear” corporate victim to do? One option is to sue the individual who posted the nasty comment, but bloggers often operate anonymously, which makes it difficult to identify the defendant. Alternatively, companies can sue a “John Doe” or two, then subpoena the host entity to determine the identity of the individual. However, litigation can be complicated by First Amendment protections, which require that the libel plaintiff make out a prima facie case that would survive a motion to dismiss in order to obtain an anonymous blogger's identity.

Copyright violations are also commonplace in this cut-and-paste world – with confidential or copyrighted materials often posted online for all the world to see. The Digital Millennium Copyright Act (DMCA), gives safe-harbor immunity from copyright liability for service providers who respond quickly to notices claiming that they are hosting or linking to infringing material. Although the requirements of the DMCA are fairly technical, its safe-harbor provision offers substantial protection when those requirements are satisfied. Companies increasingly have sought legal recourse for improper Internet disclosure of trade secrets and confidential business information by current or former employees. Apple Computer has brought several such lawsuits with mixed success. Blog postings also have run afoul of trademark infringement, securities laws, privacy laws, and consumer protection statutes.

Put Your Legal Internet House in Order

Blog postings can have a devastating effect in civil litigation or criminal prosecutions – just ask Enron and Arthur Anderson about the impact of employee e-mails on their run-ins with the law. So it's important that companies put their legal Internet house in order by following a few simple procedures.

1. Have counsel explain your legal risks
2. Create policies to minimize exposure and deter offending conduct
3. Include appropriate disclaimers
4. Establish an appropriate internal clearance procedure prior to posting
5. Provide for review by outside counsel for classifications of postings raising higher risk
6. Regularly monitor websites and blogs
7. Promptly post corrections in cases of error
8. Discipline wayward employees
9. Register an agent to take advantage of DMCA protections
10. Obtain insurance if not already covered

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