



Understanding Social Media and the Law

June 25, 2019

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Overview

- Intellectual property
- Privacy and protection
- Employment law
- Fundraising
- Lobbying and political activity



Intellectual Property



Intellectual Property Issues

- Posting third party content that you find online
 - Not everything you find online is fair game to post
 - Most content is protected by copyright or trademark.
 - You cannot post it on social media (or anywhere else) without permission
 - Copyright: protecting creative expression
 - Trademark: protecting brand
 - Obtaining permission can be a complicated process – check with pro bono counsel



Intellectual Property Issues

- How to obtain permission for third-party content
 - Copyrights
 - Photos or video clips: try to identify the owner of the copyright and contact that person or entity
 - Music: you will need permission to use the copyrights in both the musical work and the sound recording.
 - Trademarks
 - If you want to use a third party's trademark (such as its logo) in a manner that might cause confusion as to your relationship with the third party, you should consider reaching out to that entity to obtain permission



Intellectual Property Issues

- Permission is not always necessary
 - "Public domain" works (i.e. available for public use without permission):
 - Works whose copyright protection has expired
 - For more information about duration of copyright, see U.S. Copyright Office Circular 15a.
<https://www.copyright.gov/circs/circ15a.pdf>
 - Works that have been dedicated to the public domain by the copyright owner
 - Works that do not meet the originality standard (*e.g.*, titles, short phrases) or are not fixed in a tangible medium (*e.g.*, ideas)
 - Works created by the U.S. government (*e.g.*, federal statutes)



Intellectual Property Issues

- Permission is not always necessary (cont'd)
 - Reposting on social media:
 - Check the “terms of use” or “terms of service”
 - Most social media platform terms of use will allow reposting content found on the platform within the same platform
 - For example, the Twitter Terms of Service state that all Twitter users grant a license authorizing Twitter to "make your Content available to the rest of the world and to *let others do the same.*" In other words, you can retweet!



Intellectual Property Issues

- Permission is not always necessary (cont'd)
 - Using a basic hyperlink:
 - Generally seen by courts as a roadmap to the content, not a use of the work itself
 - However, please ensure that the hyperlinks direct users to content that is lawfully posted and is not itself infringing!
 - Note that *embedding* the link so that the copyrighted content appears on the same page might constitute infringement.



Intellectual Property Issues

- FAIR USE (permission is not necessary)
 - Trademark and copyright law allow for certain exceptions where use of protected content is permissible.
 - Copyright law (covers use of photographs, video clips, excerpts, music, etc.)
 - » Whether a use falls within the "fair use" exception is determined based on a four factor test:
 - character and purpose of the work (e.g., "transformativeness," parody, satire)
 - nature of the copyrighted work (fiction, fact)
 - amount of the copyrighted work copied (quantitative, qualitative)
 - whether the allegedly infringing work usurps the market for the original



Intellectual Property Issues

- FAIR USE (permission is not necessary), cont'd.
 - Trademark law (covers use of logos, names, colors, slogans, etc.)
 - Courts examine the following factors:
 - use of the mark is not likely to create consumer confusion;
 - using mark is necessary to describe both the third party's product or service and your product or service;
 - you use only so much of the mark as is necessary to describe your product or service; and
 - your conduct or language reflects a true and accurate relationship between you and the third party's products or services.



Privacy and Protection



Privacy and Protection

- Privacy of organization
 - confidential information
 - donor information
- Privacy of program participants
 - special considerations for children
- Privacy of employees
 - employee personal information



Privacy and Protection

- Photo releases
 - You cannot post photos without permission
 - Even if you took the photo
 - Have a comprehensive photo release
- Releases for other types of content (video, quotes, original material)



Privacy and Protection – special considerations

- Working with children
 - special privacy considerations
 - photo releases
 - communication with parents
 - parental consent



Privacy and Protection – special considerations

- General Data Protection Regulation (GDPR)
 - law designed to protect the personal information of persons in the EU
 - applies if you collect any kind of data from anyone in the EU
 - have a GDPR policy (or provision in your privacy policy)



Privacy and Protection

- Put it in writing!
 - Should have written policies to cover:
 - child protection and privacy
 - confidentiality
 - GDPR, as applicable
 - can be separate policies or can include these elements in a general social media policy



Employment Law



SOCIAL MEDIA & EMPLOYEES:

Social Media Accounts

- Who owns accounts used for work purposes?
 - Courts often have to determine if employers are owners of social media or e-mail accounts, especially after an employee leaves.
 - *Eagle v. Morgan* (2013): employee lost control of LinkedIn account used at previous job when the former employer changed her password
 - *In re Info. Mgmt. Servs., Inc. Derivative Litig.*, (2013): corporation's policy notified employees it had unrestricted access to communications sent using company computers, so employees did not have an expectation of privacy
- Let EEs know ER owns the accounts in advance!
 - Make sure that EE's share passwords with ER.
- Always ask departing EEs about their business-related social networking activities.



SOCIAL MEDIA & EMPLOYEES:

General Principles

- The underlying laws concerning employer obligations and employee conduct have not changed.
- The discussion now turns to applying these rules in a world where:
 - Employees can access personal social media accounts during working hours.
 - Employee discussions can be widely disseminated.
 - Employee posts on social media are indelible.



SOCIAL MEDIA & EMPLOYEES:

Applying the General Principles

- **Employers** should be asking:
 - What information about applicants or employees am I able to access?
 - Should I access this information?
- **Employees** should be asking:
 - What information about myself should I be sharing on social media?
 - What information should I be accessing on employer-provided devices?



RESEARCHING APPLICANTS / EEs:

Demanding Access to Social Media or Passwords

- Most states now have laws barring employers from asking employees for information about their social-media accounts, including passwords.
- **New York:** A.B. 10396 (2011)
 - Prohibits an employer from requiring disclosure of a log-in name, password or other access means to a personal account or service.
- **Connecticut:** Substitute Senate Bill No. 426, Public Act No. 15-6 (2015)
 - Prohibits an employer from requiring or requesting an employee or applicant to provide it with a username and password or to access a personal online account in the presence of the employer.
- **New Jersey:** A.B. 2878 (2013)
 - Prohibits requiring disclosure of user name, password, or other means for accessing a personal account or service through electronic communications by employers.
- *Pending legislation:*
 - A.B. 935 / S.B. 2728 (New York): relates to the Uniform Employee and Student Online Privacy Protection Act



RESEARCHING APPLICANTS: Risks

- Access to a private social media site can increase the risk of learning protected information.
- Remember, you only need job-related information.
- Be consistent. If you conduct Internet searches on applicants, do so in a consistent manner to avoid discrimination claims.
- Observe laws regarding password protection.



EE ONLINE POSTS: Access

- **Stored Communications Act (18 USC § 2701)**
 - Prohibits ER from hacking into EE's private account, including unauthorized use of another EE's password.
 - *Crispin v. Christian Audigier, Inc.* protected Facebook and MySpace communications under the SCA
 - *Pietrylo v. Hillstone Rest. Group* employer wrongly obtained employee's password through coercion, violating SCA
- **Computer Fraud and Abuse Act (CFAA, 1984)**
 - Prohibits accessing a computer without authorization
 - *United States v. Nosal* Defendant used victim's employee credentials to access computers "without authorization" and was properly convicted under CFAA.
 - *Lee v. PMSI, Inc.* employee violated their employer's acceptable-use policy, the court found the employee did not violate the CFAA.
- **Electronic Communications Privacy Act (ECPA, 1986)**
 - Provides some privacy protections for employee's e-mail messages, cell phones, and other electronic communications.
- **Shoulder Surfing:**
 - Watching a user's activity online in the hope of obtaining usernames or passwords to accounts is often prohibited.



EE ONLINE POSTS: Access

- When can an ER safely confront an EE about a private posting?
- When the EE has voluntarily “friended” the ER.
- When the posting is reported by another EE.
 - Employee out on intermittent FMLA leave for back injuries, but posts Facebook photos of herself enjoying a beer festival. Photos seen by fellow EEs and supervisor, who were “friends”. Court approves EE’s termination!



REGULATING EE ONLINE POSTS:

The Rules

- Misconduct and harassment rules *still* apply.
 - No threats.
 - No bullying.
 - No harassment.
- Privacy/confidentiality rules *still* apply.
 - Other employees' privacy.
 - Patient/consumer privacy.
 - Employer's protected information.
 - Donors' protected information.
- Other considerations:
 - Organizational confidential information.
 - Obscenity.
 - Illegal activity.
 - Official statements.
- However, all policies must be consistent with EE's exercise of **NLRA § 7** rights.



SOCIAL MEDIA POLICIES

- Social media policies should:
 - Not proscribe the use of social media to discuss or attempt to resolve concerns about working conditions.
 - Encourage EEs to use internal mechanisms to report harassment / discrimination but not require such use.
 - State that ERs will investigate harassment / discrimination complaints regardless of how they are discovered (i.e., on social media sites).
 - Be placed in the handbook where it is clear that the employer is not trying to curtail § 7 rights.
- ERs should also:
 - Advise supervisors to be cautious about “friending” EEs or engaging in social media.
 - Supervisors must report discrimination / harassment claims discovered through “friending”.



Fundraising



Multistate Charitable Solicitation

- Charitable solicitation laws are regulated
 - Need to register in each state where you are soliciting funds
- Are you soliciting?
 - Letters, phone calls, grants, etc – YES
 - What about online?
 - What about social media??



Multistate Charitable Solicitation

- Charleston Principles of Internet Solicitation
 - Charities conducting charitable solicitation via the internet should be registered as charities in the state where the charity has its principal place of business.
 - If the charity is soliciting via the internet and (a) targets donors of a specific state or (b) receives contributions from the state on a repeated and ongoing basis or a substantial basis, the charity may be required to register in that state.



Multistate Charitable Solicitation

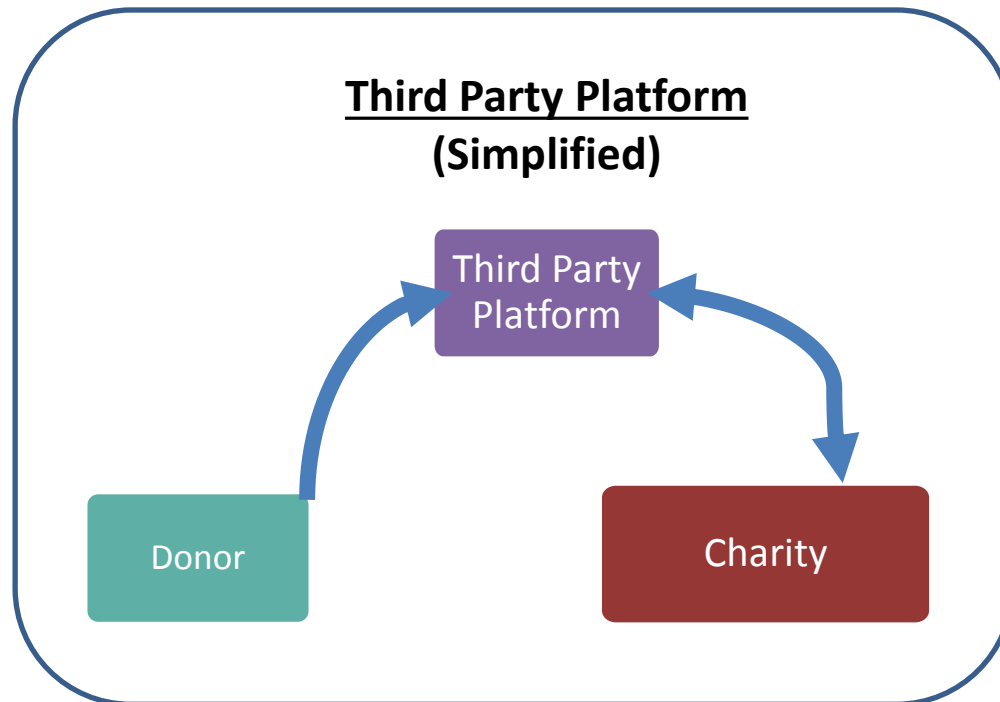
- You are likely subject to the charitable solicitation laws of a particular state if you:
 - Have a “Click Here to Donate!” or “Donate Now” button/link on social media
 - Otherwise direct traffic to your website that has a “Donate Now” button
 - Follow up with donors once they donate



Multistate Charitable Solicitation

- What can you do?
 - Stay on top of where your funds come from
 - Register in every state with requirements
 - Another option: post a disclaimer that you will only accept contributions from the states in which you are registered

Crowdfunding





Crowdfunding Legal Issues

- State charitable solicitation laws
 - Registration requirements
 - Who is the solicitor?
 - Is the third party platform a fundraising professional?
- Federal tax issues
 - Who has the 501(c)(3) status?
 - Who will issue donor acknowledgments?
 - UBIT
- State sales tax issues if goods/services are sold
- Restricted gifts
- Antifraud and consumer protection laws
- Intellectual property

Be aware of legal issues arising from contracting with third parties and involving volunteers.



Lobbying and Political Activity



Partisan Political Activity

- **501(c)(3) organizations** *cannot* engage in partisan political activity, including supporting or opposing:
 - someone running for public office, or
 - a political party
- Support or opposition can include:
 - retweeting or “liking” a candidate’s campaign posts
 - linking to a campaign or political party website
- During election season:
 - What’s the non-electoral reason for your advocacy?
 - Focus on the issue not individual candidates



Issue Advocacy – Lobbying

- **Public charities** *can* lobby, but have a *limit* on the amount of legislative lobbying they can do
 - Legislative lobbying must be reported on IRS 990
- **All organizations** must *track* lobbying aimed at federal government, NYS, NYC
 - You may be lobbying if you're trying to ...
 - influence legislation
 - change agency rules
 - get government funding
 - and more
 - Register & report as a lobbyist if you spend:
 - \$13k/quarter lobbying the federal government
 - \$5k/year lobbying state or local government in NY



Grassroots lobbying

- Refers to specific bill (or other official government action)
- Takes a position on the bill
- Asks the reader to lobby on the bill

Call Sen. Schumer and tell him:
Pass the Ethics in Government
Act now!

The City Council must pass the
Ethics in Government Act now! Find
your Council Member's email
address [here](#)

Click [here](#)
to add your
name to our
petition asking
Sen. Jones
to co-sponsor
the School Lunch
Bill.



NYS – Social Media

Lobbying

- direct message to official
- post on official's page
- tagging a public official
- asking readers to lobby

@SenSmith Pass the
Ethics in Government
Act now!

Not lobbying

- referring to but not tagging
official (even if official is
a follower)

Sen. Smith: pass the
Ethics in Government
Act now!

*Member or employee's personal social media posts as
part of job duties are attributable to the organization*



Facebook & other online forums

Factors to consider

- Is the organization the moderator of the forum?
- Is the organization responsible for content contributed by others?
- Does allowing partisan comments foster a charitable purpose?



Personal Activities of Staff & Board

Everyone has a right to participate in the political process, even if they are affiliated with a nonprofit

Don't

- Use organizational social media accounts (or time, mailing list, email)

Do

- If you use work title for identification purposes, make clear all opinions are your own
- Be careful about using own social media account for work purposes
- Conduct your political activities (including social media) after work



- Lawyers Alliance offers several workshops throughout the year on exempt organization regulations (e.g., board responsibilities, fundraising, etc.)
- We also release Legal Alerts on nonprofit legal issues that are applicable to any nonprofit organization

info@lawyersalliance.org

**Resource Call Hotline
212-219-1800 ext. 224**