Fifteen Steps to Reducing Web Site Liability Risks

By Lawrence Savell

Corporate and individual Web sites[1] can be extremely effective, efficient, and immediate vehicles for communication, whether their purpose is marketing/advertising, providing information, encouraging interaction, spreading creativity, or disseminating opinions or any combination of these or other objectives. Like virtually every other activity, however, there is also the potential for legal liability. Such risks can be significantly reduced (although never eliminated) by keeping in mind and following a few basic principles.[2]

STEP 1: REVIEW YOUR SITE AS IF YOU WERE A PLAINTIFF'S LIBEL LAWYER

From the standpoint of potential damages, perhaps the greatest risk in the Web site context is defamation. Although definitions vary from state to state, generally speaking a defamatory statement is a false and disparaging statement about another that causes injury to reputation (or in some cases causes emotional distress). It is a communication that exposes persons to hatred or contempt, lowers them in the esteem of others, causes them to be shunned, or injures them in their business or calling. Classic examples include statements:

1. Affecting one's esteem or social standing (such as assertions of criminal conduct or immorality);
2. Ridiculing another (more than a simple joke or satire/exaggeration);
3. Imputing current disease or mental illness;
4. Alleging general incompetence in one's trade, occupation, office, or profession; or
5. Challenging a corporation's integrity, credit, or ability to carry on business, including charges of dishonest or unethical behavior.

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The subject need not be an individual or entity, as there can be a claim for product disparagement.

Such risks can be reduced somewhat by using qualifying language, such as by incorporating less-than-absolute words like "may" or "might" or terms like "alleged" or "reported," which may provide some insulation.

Keep in mind that there are several recognized defenses to a defamation claim, such as truth, the "fair reports privilege," and the fact that the statement was one of opinion/rhetorical hyperbole. Truth is a complete defense and it is usually sufficient if there is "substantial truth" or the "gist" of the statement is accurate, even if minor details are off.

A key protection for legal and news-oriented Web sites is the fair reports privilege, which protects fair and accurate reports of judicial, legislative, or executive proceedings and records. The official source must be identified, the report should reflect the entire record/proceeding, and denials of a civil complaint should be summarized.

It used to be the case that opinion was virtually completely protected from being the basis for libel liability. However, the scope of the exception has been narrowed by more recent court decisions. Calling something an opinion does not make it so, and words like "I think" or "I believe" do not necessarily assure protection for what follows. A statement may be actionable to the extent that it implies a false assertion of fact. Nevertheless, statements may be protected if they are truly opinion and are not capable of being proven either true or false.[3]

Should you determine that a mistake was made and a false derogatory statement was posted on your site, a prompt correction/clarification of prominence comparable to the original should help reduce potential damages. Plus, it furthers the goal of providing accurate information to your audience.

STEP 2: THINK TWICE ABOUT ALLOWING THIRD-PARTY SUBMISSIONS

Risks arising from posts or comments by third parties can be avoided by simply not allowing them. There is no requirement that such posts be permitted, and in fact many Web sites do not allow them. Not allowing posts or comments by others can have practical downsides. It is one of many examples of the conflict/trade-off between maximizing legal protections and business, image, and other considerations. A less-severe alternative would be to provide an email address as opposed to direct posting capability, with the idea that you can then select which messages to post. The selection element, however, may

increase the risk of exposure in certain respects due to the arguably more active involvement of the site operator in publicizing the content of the post/comment.

May Web site operators be held liable for defamatory statements posted on their sites by third parties? One influential court has recently said no. On November 20, 2006, in *Barrett v. Rosenthal*,[4] the Supreme Court of California ruled that, pursuant to the Communications Decency Act of 1996, "plaintiffs who contend they were defamed in an Internet posting may only seek recovery from the original source of the statement," that is, the third party who posted the statement on the operator's site. The court "acknowledge[d] that [its] recognizing broad immunity for defamatory republications on the Internet has some troubling consequences." It remains to be seen to what extent other courts will follow the California Supreme Court's lead or whether Congress will step in and revise the law.

If you allow posts on your Web site and have an issue with something someone has posted, you are probably best off simply removing it. Attempting to edit it may expose you to potential liability. This issue can be addressed in the Web site's terms of use, affirmatively specifying broad power to delete items.

STEP 3: RECOGNIZE THE POSSIBLE IMPLICATIONS OF EMPLOYEE POSTINGS

Business Web site operators have to consider what latitude to give employees to make posts. As companies are generally held responsible for actions by their employees performed within the scope of the employees' employment, the ramifications can be quite significant. Presumably, the company will already have a policy that requires employees to hold all proprietary and sensitive information of the business in confidence. It may be useful to remind staff that such guidelines apply to postings on both the company and personal Web sites. Areas of potential liability to the company include unauthorized disclosure of proprietary/confidential client information and statements in violation of applicable securities laws. It is critical to monitor the Web site periodically for compliance with laws and company policies and to provide training to involved employees.

STEP 4: MAKE SURE YOU DO NOT VIOLATE THE COPYRIGHTS OF OTHERS

Copyright infringement is a serious concern for Web site operators, both in terms of the potential use of others' intellectual property on your site and others' use of your intellectual property elsewhere. With regard to the former, you have to make sure that you only use on your Web site material that you own, that you have permission to use, or that falls under the scope of fair use, allowing you to use it without the permission of its owner. If your Web site offers podcasts (pre-recorded and downloadable audio segments), make sure they are podsafe–that the audio content offered does not infringe the rights of others (*e.g.*, any unlicensed and copyrighted background music).

Again, if you allow posts, bear in mind that you could be on the hook for infringing material that is posted on your Web site by others. There are ways to deal with this or at least to try to reduce the scope of damages potentially recoverable. One is to have an express agreement with posters that states that they are representing that they have the right to post the content that they post. But that can only take you so far and does not prevent you from being found responsible in a suit by the true owner. There may be a safe harbor exception under the Digital Millennium Copyright Act if the Web site can be considered an Internet service provider (which is questionable), which would require the Web site operator to remove infringing content once notified of the problem.

"Fair use" is a privilege allowing others than the copyright owner to use copyrighted material in a reasonable manner without the owner's consent. There is a balancing of interests, including the purpose and character of the use, the nature of the copyrighted work, the proportion that was used, and the economic impact of the use (the extent to which the use may diminish the value of the original work). Common examples of fair use include educational use, parody, criticism, comment, and news reporting.

STEP 5: CAREFULLY STRUCTURE AND CONSISTENTLY USE AGREEMENTS WITH CONTENT PROVIDERS

Do you know for sure who owns the rights to the content on your Web site? Material that is created by you is owned by you. Situations of joint creators, where there is joint ownership, can present issues when the creators/owners develop differences. When content is created by another for you, it is necessary to scrutinize the terms of the arrangement. For example, if content is created by an employee within the scope of his or her employment, under the Copyright Act the employer automatically owns all rights in the work. In such circumstances, no specific grant of rights is necessary. In the situation of a freelance content creator, the key is for the Web site operator to structure the arrangement with the author as a work made

for hire under the Copyright Act, with an express agreement between the parties that the copyright belongs to the party commissioning the work. The alternative approach in the freelance context is to have an agreement with the freelance provider that specifically grants all rights to the site owner. With regard to posts/comments submitted by third parties, you probably would be viewed as having an implied license from the posting party to have the material appear on your site (in the absence of terms-of-use language conveying greater rights).

Such contracts should include a variety of additional provisions such as representations and warranties by the creator that the material is the creator's sole work, that it contains no material that is libelous or that infringes the rights of others or is unlawful, and that it is accurate; indemnification of the site owner against claims relating to the content (the value of this may be limited by the "shallow pockets" of the creators); and the right of the site operator to edit or otherwise change the work.

STEP 6: CONFIRM YOU HAVE APPROPRIATE PERMISSION TO USE THE TRADEMARKS OF OTHERS

Similar considerations arise when trademarks are considered, with issues including the name of the Web site, the use of others trademarks on the Web site, and affirmatively asserting the Web site's trademark against use by others. Make sure that you have permission to use any other individual's or company's brand names or trademarks that you display on your site. In a trademark infringement case, a plaintiff has to prove two things: (1) that its mark is entitled to protection, and (2) that the defendant's use of its mark will likely cause consumers to confuse it with the plaintiff's mark.

Trademark issues in the Web site context include the registration of domain names that allegedly infringe on existing trademarks and the use of trademarks of others in hidden metatags (internal Web site programming code that may be accessed and used by search engines).

STEP 7: AGGRESSIVELY PROTECT YOUR INTELLECTUAL PROPERTY RIGHTS

In addition to registering your trademarks, you should consider registering your Web site's name and possibly also a variety of similar names as domain names to protect yourself from others who may try to divert traffic from your site. You should also search the Internet on a regular basis for illegal uses of your domain name, Web site name, trademark, or similar names. If you find others using your name or trademark, determine whether the other uses are legitimate, and if they are not, contact such users, tell them it is yours, and ask them to stop using it.

STEP 8: WATCH OUT FOR POTENTIAL INVASIONS OF PRIVACY

Statements that invade the privacy of another can provide the basis for a claim. Depending upon the jurisdiction, actions exposing a Web site operator to liability include use (appropriation) of a person's name, portrait, or picture for advertising or trade purposes without prior written consent; public disclosure of private and embarrassing facts; and statements portraying one in a false light (similar to libel). One defense to a name or likeness appropriation claim is that a picture was used to depict a newsworthy event or illustrate a matter of public interest with which the picture was reasonably related.[5]

There is increasing federal and state legislation regarding Internet privacy. Many Web site operators draft and post privacy statements on their sites, promising to protect the confidentiality of user information that may be provided or collected. Those operators that undertake such measures must make sure that they comply with the representations made in such statements.

STEP 9: DETERMINE AND COMPLY WITH APPLICABLE ADVERTISING AND RELATED LAWS AND REGULATIONS

Given the possibility that a Web site may be viewed in whole or part as an advertisement, companies must make sure that they comply with all applicable advertising, consumer protection, deceptive practice, and unfair competition laws and regulations. A related and currently hot issue is whether lawyer Web sites constitute lawyer advertising; the language of some prohibitions is quite broad, and could sweep up law Web sites within their scope.

The use of language expressly affirming that no warranties are being made and denying any liability for damages, plus specification of the other terms and conditions under which the site and its information are being made available, coupled with a click-through agreement from users before proceeding further onto the site, may provide some insulation to reduce liability exposure to site users. Some Web sites may face specific risks. For example, product manufacturers and sellers must avoid making any unsubstantiated health claims, and investment company operators must properly qualify statements regarding

potential outcomes to avoid lawsuits alleging misrepresentation in and reliance upon same.

STEP 10: USE DISCRETION IN PROVIDING EXTERNAL LINKS

A plaintiff may allege that a Web site's link to another site somehow makes the first site's operator responsible for the content of that other site. To minimize the risk of such a claim, be judicious in the links that you provide. Additionally, any linking to third-party sites should be accompanied by a notice disclaiming responsibility for and affirmatively denying any endorsement of products, services, or information contained on that outside site. An example would be the following: "Links to external sources are provided solely as a courtesy to our Web site visitors. We are not responsible for and do not endorse or warrant in any way any materials, information, goods, or services available through such linked sites or any privacy or other practices of such sites."

STEP 11: FOR LAW FIRM/LAWYER SITES, PROVIDE A NOTICE THAT NO ATTORNEY-CLIENT RELATION IS CREATED

Law firm and lawyer Web sites should make it clear that the provision and use of the site does not create or necessarily evidence the existence of an attorney-client relationship. This can be accomplished through language such as the following: "We provide this Web site for general informational purposes only. We do not create an attorney-client relationship with you when you use the site. By using the Web site, you agree that the information on this site does not constitute legal or other professional advice and no privileged or confidential attorney-client or other relationship is thereby created between you and us. This Web site is not a substitute for obtaining legal advice from a qualified attorney licensed in your state."

STEP 12: DRAFT AND POST PROTECTIVE TERMS OF USE

As noted at various points in this article, an important precaution is the appropriate use of terms of use and disclaimers, which can provide some greater level of comfort and protection. But they are not perfect or ironclad, and the degree to which courts uphold them is not absolute. Beyond the legal considerations there are practical considerations: Disclaimers may turn off users, inhibit contributions that you may in fact want, or be otherwise inconsistent with your business model. If overused, they may arguably dilute the effectiveness of those disclaimers relating to your most significant concerns.

An example of language setting forth the parameters of use and requirement of compliance would be the following: "We grant you a nonexclusive, nontransferable, limited right to access, use, and display the Web site and the materials provided hereon, provided that you comply fully with these Terms and Conditions of Use." Additional language might note the reality that postings may not be current: "The information on the Web site may be changed without notice and is not guaranteed to be complete, correct, or up-to-date." It may be useful in the company context to distinguish firm from individual authors and/or posters: "The opinions expressed on the Web site are the opinions of the individual author and may not reflect the opinions of the firm or any individual employee or client." Other matters addressed in such statements could include that the use of Web site's email/messaging system does not constitute giving legal notice to the firm; reservation of the right to revise terms and conditions; and an express prohibition against certain activities by users.

STEP 13: BE MINDFUL OF THE EFFECTS OF PROVIDING RSS FEEDS

Bear in mind that if you offer RSS feeds (really simple syndication), although that may be convenient and helpful for readers (who then need not visit multiple Web sites to receive their content), it may have legal implications for you. The appearance of your Web site content in an RSS feed may change from the way you set it up, and depending on how they were created, not all of what you have carefully set up in terms of notices and disclaimers may necessarily transfer.

STEP 14: ASSESS YOUR LIABILITY INSURANCE

Check your insurance policies to determine if the type of risks described in this article are covered. Consider obtaining additional coverage if they are not, such as third-party media liability coverage for infringement and liability costs associated with Internet publishing.

STEP 15: CONSIDER RETAINING OUTSIDE REVIEW COUNSEL

If you are not a lawyer or if you are not sufficiently conversant with the applicable legal considerations, consider arranging for outside legal review. At a minimum, Web site design and maintenance personnel should be educated and periodically updated about pertinent legal issues. Internal procedures should be developed to provide

that corporate counsel (and, if in-house counsel deem necessary, appropriate outside counsel) will be consulted in the case of any questions or uncertainty as to the legal implications of contemplated Web site efforts.

CONCLUSION

Although the potential of legal liability with regard to Web sites can never be fully eliminated, increasing sensitivity to the major legal issues[6] and taking steps to deal with them in advance can certainly help reduce those risks. An ounce of prevention can certainly go a long way to minimizing headaches down the road.

NOTES

1. Included within the definition of "Web sites" are the extremely popular subcategory of streamlined sites presented primarily in journal form, known as web logs or, more succinctly, blogs. This article adapts aspects of and expands upon the analysis presented in Savell, "Is Your Blog Exposing You to Legal Liability?," *Law.com*, Dec. 22, 2006 (available at *http://www.law.com/jsp/llf/PubArticleLLF.jsp?id=1166695602960*).
2. Although this article focuses on US law, the global reach of the Internet means that the laws of many jurisdictions may potentially apply, which may vary from US law in the degree (be it greater or lesser) to which certain relevant rights are recognized and protected. Standards of what is acceptable may also vary, such as in the context of obscenity. Certain products and services promoted on Web sites may be illegal to advertise or sell in some countries.
3. A discussion of one leading court's wrestling with the question of whether an exercise in literary criticism was defamatory can be found in Sarell, "Affirming the Value of Criticism," *N.Y.L.J.*, July 22, 1994, at 2, col. 3 (available at *http://www.lawrencesavell.com/pdf/affir001.pdf*).
4. Barrett v. Rosenthal, 40 Cal. 4th 33, 146 P.3d 510, 51 Cal. Rptr. 3d 55 (Cal. Sup. Ct., Nov. 20, 2006).
5. An overview of the background and developing scope of such liability (as of 1983) in New York was provided in Savell, "Right of Privacy—Appropriation of a Person's Name, Portrait, or Picture for Advertising or Trade Purposes Without Prior Written Consent: History and Scope in New York," 48 *Alb. L. Rev.* 1-47 (1983) (available at *http://www.lawrencesavell.com/pdf/albanylr.pdf*).
6. The spectrum of potential legal liability for disseminated information is enormous, and this article does not to purport to be exhaustive in its scope. Plaintiffs' attorneys are often quite creative in asserting novel causes of action or novel applications of traditional claims. *See, e.g.*, the discussion in Savell, "Products Liability Claims Against Publishers: Can Information Be A Defective Product?," *Prod. Safety & Liab. Rptr.* (BNA) 1166-1174 (Nov. 19, 1993) (available at *http://www.lawrencesavell.com/pdf/bna-pslr.pdf*).