

Managing a High-risk Environment

Are you responsible for illegal postings in forums or blogs?

WE CONDUCT A lot of website audits in which we go through a website, identify the legal issues and assist clients in effectively managing risks. We seem to be litigating these issues across the country regularly, so we have a pretty good view of the landscape. You want to get in trouble? Blindly allow third parties to post on your site. The liabilities may seem obvious if you are running music or video file-swapping sites, but the risk is just as real if you have a forum or an open blog. Third-party postings bring into play a number of significant legal issues.

The biggest issues are what I refer to as the “big four:” copyright infringement, trademark infringement, defamation and 2257 violations (sexually explicit images). I will cover these issues at a high level, and, in future articles, delve into them in more depth. Your liability or exposure arises when third parties, whether well intentioned or not, decide to post something on your site that violates the law.

Copyright infringement can occur when someone posts the creative works of another (an image or text are most common). The site owner often has no way of knowing that the content posted is the copyright-protected works of a third party. Congress, recognizing that copyright infringement liability arises for a website owner even if he has no knowledge or intent at all, passed a “safe harbor” law creating immunity from such claims under certain circumstances. The important thing to note is that if you do certain things (register an agent and follow the law on DMCA take-down notices) then you have no liability. This assumes, of course, that you are not knowingly facilitating copyright infringement.

Along a similar vein, Congress passed an immunity provision protecting websites from defamation claims arising out of third-party postings. The reasoning was that an “interactive service provider” should not be liable for publishing defamatory statements it knew nothing about and over which it had no control. Consider, though, that you have no immunity if your site is an “interactive content provider” for purposes of the posting. The difference between a service provider and a content provider is tied into the amount of editorial control you use. The more you edit, the greater the likelihood you will lose your immunity. So, don’t think you can fix all of the potential problems by simply removing posts whenever someone complains.



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Congress and the Department of Justice have created an entirely new risk that most companies would never consider. Known as “2257” to the adult industry, it is a law (with many and recent amendments) and a series of regulations attempting to clamp down on the porn industry. Basically, it creates civil and *criminal* liability under the child pornography laws if your site has “sexually explicit material” without mandated notices and records, and it is clear that this term does not necessarily require nudity. So, if someone posts such an image in your forum, in your blog or on your site, you could have major problems. Lawsuits have been filed and courts are ruling on the constitutionality of the regulations. At the same time, Congress just passed a stronger bill and the Justice Department is drafting new regulations.

Congress has so far stayed away from passing the proposed new trademark law. The best high level advice I offer is to understand how to handle a trademark infringement cease and desist letter. Proactive defensive options are very limited. We’ll get into all of these issues in more detail in the months to come. 

The information in this article is not intended to be legal advice. Always consult your attorney when faced with legal issues.

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