

# New Liability Risks Connected to Social Media Revolution

By: Michael A. Hamilton and Elizabeth R. Dill

Appeared on: *Property Casualty 360, A National Underwriter Website*

October 6, 2011



Focused on the Business of Insurance™

Social networking Internet sites present their users with a vast array of personal and business opportunities, but these opportunities are accompanied by new risks.

As of September, the number of Internet users topped 2 billion and the explosion over the last 20 years has revolutionized communications with the use of social networking sites and blogs.

In fact, Internet users now spend a majority of their time on social networking sites. As of last year, Facebook passed Google as the most visited site on the Internet.

It is essential that individuals and businesses, as well as their insurers, be aware of the significant—and yet to be fully explored—legal issues created by use of this media tool.

Information posted on social networking sites instantaneously get transmitted—reaching consumers and competitors—vastly increasing the exposure to liability for claims of false advertising, unfair consumer commercial practices, defamation, and patent, copyright and trademark infringement, to name a few.

## Defamation and Cyber-bullying

The rise in popularity of social networks, blogs, chat rooms and other interactive websites has created a growth of “cyber-bullying” incidents. One of the most recent and tragic incidents occurred when a Rutgers University student committed suicide after his roommate used a webcam to video the student’s intimate encounter with another man. The roommate has been charged with the hate crime of bias intimidation.

Similarly, the increased use of social media has spawned a corresponding increase in defamation claims. For example, in *Finkel v. Dauber*, the plaintiff was the subject of ridicule on a Facebook group started by six of her fellow classmates.

The site contained derogatory sexual remarks posted by the members of the group, including statements that the plaintiff engaged in sexual activity with multiple individuals at the same time, and that she had contracted the HIV virus.

In *D.C. v. R.R.*, a student initiated an action for defamation after derogatory statements and threats were posted by other students on the comments section of D.C.’s website.

Claims of defamation via interactive websites and social networks, as opposed to claims involving traditional print or broadcast media, broaden the number of potential defendants. Plaintiffs have sued not only the members of a social media group, but also the members’ parents. In *D.C. v. R.R.*, the plaintiff filed suit against the students who allegedly posted the comments, as well as their parents, the school, its board of directors and three school employees.

## Trademark Infringement

Trademark infringement is generally defined under the Lanham Act as copying or imitating a trademark in connection with the sale of goods in a way that is likely to confuse consumers about the source of those goods.

Social networking sites are fertile ground for infringement of trademarks by competitors, current or former employees, and even unsatisfied customers. For example, in *Asanov v. Legeido*, an employer sued its former employee for trademark infringement where the employee represented on LinkedIn that he was the owner of the employer's newest company.

In *Doctor's Associates, Inc. v. Subway.SY, LLC*, a restaurant sues a competitor for trademark infringement for using the Subway name and well-known Subway slogans on advertisements posted on its Facebook page.

## False Designation and Advertising

In addition to trademark infringement, the Lanham Act also prohibits "false designation of origin" and false or deceptive advertising.

Many social media users are not as careful in reviewing and/or screening the information that is used for marketing purposes. Thus, the increase in social networking sites may lead to more business disputes over the content of such advertising.

For example in *BlueStar Management LLC v. The Annex Club, LLC*, a proprietor of a rooftop club at Wrigley Field filed a suit against a competitor for false designation and false advertising. The competitor allegedly used photographic images of the claimant's club in their advertisements. The claimant alleged that the advertisements were misleading and causing consumers to incorrectly believe that they could purchase tickets to the claimant's club by contacting the competitor.

## Invasion of Privacy

Not only can a person instantly access information on any subject that he or she may desire to learn more about, in many cases people can also instantly access a wealth of information about other individuals—much of which that individual may wish to keep private.

The issue of invasion of privacy via social networking sites was recently addressed in *Yath v. Fairview Clinics, N.P.*, in which an individual made a claim against an employee of a medical clinic who accessed her medical records and posted the information on a MySpace page.

Since Yath's private information was posted on a public website that anyone could view, it was made available to the public at large and as such, was "publicized" for the purposes of an invasion of privacy claim based on public disclosure of private facts.

## Insurance Coverage

Lawsuits involving social media in one aspect or another are on the rise. Given the number of people and organizations who are participating in social networking, the universe of potential plaintiffs is staggering. Therefore, individuals and organizations are looking more and more to the insurance industry to provide protection from the risks that participation in social media can create.

Traditional policies that are widely available to consumers, such as homeowner and commercial general liability policies, may not be sufficient to protect either the individual or the organization from these new and emerging risks.

What products are insurers developing to fill the gaps left by the traditional policies?

## Homeowners' Policies

Will a homeowners' policy provide coverage to the student and parent defendants accused of defamation in *Finkel v. Dauber* or to the individual defendant accused of invasion of privacy in *Yath v. Fairview Clinics*? The answer lies in courts' interpretation of the terms contained in such policies.

Homeowners' insurance policies issued today generally contain liability coverage. Under many of these policies, coverage is provided for claims or suits brought against the policyholder for "bodily injury" or "property damage" arising out of an "occurrence."

Most courts have held that injuries such as mental anguish—which is the most common injury alleged in defamation cases—standing alone, do not constitute "bodily injury." Additionally, most courts are in agreement that offenses such as defamation and invasion of privacy cannot constitute an "occurrence," which is usually defined as "an accident".

Likewise, offenses such as trademark or copyright infringement, or violations of the Lanham Act such as false designation or false advertising are unlikely to be covered by homeowners' policies because the very nature of these causes of actions involves a commercial enterprise, which puts them squarely within the exclusion contained in most homeowners' policies for injury arising out of business pursuits.

## Commercial General Liability Policies—Ad Injury

The typical commercial general liability policy is divided into two main categories: bodily injury and property damage coverage (Coverage A), and personal and advertising injury coverage (Coverage B). Most insureds attempt to seek coverage for defamation, invasion of privacy and intellectual property claims under Coverage B for personal injury or advertising injury.

The initial inquiry in the advertising injury coverage analysis is whether the complained-of act falls within one of the enumerated offenses covered by the applicable policy.

If the policyholder's alleged actions do not fall within one of the described types of conduct, there is no coverage. Perhaps even more important is the requirement that the injury allegedly caused by the enumerated offense must have occurred "in the course of" the insured's "advertising activities."

In essence, there is no coverage for a loss that occurs outside of the policyholder's efforts to advertise its goods, products, or services. Therefore, much of the liability created by the use of social media would not be covered under provisions for advertising liability.

For example, the defendants in *D.C. v. R.R.* and *Finkel v. Daubert* accused of defamation may not have liability coverage because the defamatory statements were not "advertising activity" nor were they made in the course of advertising. On the other hand, if an insured's accused of violating a competitor's intellectual property rights via advertising through social media, there may be coverage for the claims.

## Personal Injury

The claims set forth in the *Yath v. Fairview Clinics* case is the perfect example of a situation where a CGL policy's coverage for personal injury would most likely protect an insured where the policy's coverage for advertising injury would fall short. Since the patient's suit did not arise in the course of the clinic's advertising activities, CGL coverage for advertising injury would not typically respond to such a lawsuit.

However, since coverage for personal injury includes coverage for claims arising out of the enumerated offense of wrong oral or written publications that violates a person's right of privacy, the clinic could be entitled to coverage for the lawsuit under its CGL policy, assuming there was no exclusion applicable to the claim.

## New Products to Fill the Gaps?

Insurers in the property and liability markets are developing new products that focus specifically on the kinds of risks raised by the use of social media for both individuals and businesses.

Cyber-liability policies are entering the market to offer protection from third party risks such as transmissions of viruses, failure to prevent unauthorized access to a computer system by a third party, disclosure of confidential material, and allegations of intellectual property infringement and defamation resulting from emails, social networking sites and blogs.

Since these policies are in an early stage of development, it is difficult to predict whether they will function as planned.

In light of the rise in lawsuits involving social media, however, it is likely that courts will have many opportunities to interpret the scope of coverage provided in the near future.

Insurers in other markets are also beginning to educate themselves on the need for such policies. In 2008, the Media Bloggers Association announced that it planned to launch programs providing liability insurance for bloggers against claims for defamation, invasion of privacy and other allegations arising out of blogging activities.

While the ever-expanding networks and virtual worlds created by social media have clearly produced new risks, many of which were not contemplated by the more traditional categories of insurance policies; in essence, new risks create new opportunities for the insurance industry to develop products to fill a growing demand.

© 2011 Nelson Levine de Luca & Horst, LLC

### About the Authors

**Michael Hamilton** chairs the firm's National Insurance Coverage Group. He concentrates his practice in the areas of insurance coverage disputes, bad faith defense and commercial litigation. Mr. Hamilton has extensive trial and appellate practice experience in both state and federal courts. He represents insurers in all aspects of insurance coverage litigation, including claims involving construction defects, bankruptcy matters, and complex property and business interruption losses. He may be reached at 215-358-5172 or [mhamilton@nldhlaw.com](mailto:mhamilton@nldhlaw.com).

**Elizabeth Dill** is an associate in the firm's National Insurance Coverage Practice Group, and concentrates her practice in insurance coverage matters, including analysis and litigation of property and liability claims as well as the defense of bad faith suits. She may be reached at 215-358-5145 or [ldill@nldhlaw.com](mailto:ldill@nldhlaw.com).