

Media Liability Coverage Isn't Just for News Conglomerates Anymore

Social Media Use Opens Risk of Slander, Libel, Cyberbullying, and Intellectual Property Rights Violations

by Kathleen J. Devlin and Julia C. Talarick



Social media refers to the means of electronic communication, including websites for social networking and microblogging, through which users may create, share, or exchange information, ideas, personal messages, videos, and other content in virtual communities or networks.¹



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Popular social media platforms include Facebook, Twitter, YouTube, Instagram, LinkedIn, TikTok, and blogs, to name a few.

Facebook is the world's largest social network, with more than 2.8 billion monthly active users.² Users create a personal profile and add others as friends, exchange messages, photographs, and status updates.³ Twitter is another social networking platform that allows groups and individuals to connect through the exchange of short status messages (280 characters or less). YouTube is a video hosting and watching website. Instagram allows free photo and video sharing, as well as digital filters and special effects.⁴ LinkedIn is a professional network on the internet where people can find a job and/or build professional relationships.⁵ TikTok is an app for making and sharing short videos.⁶ "Blog" is an abbreviated version of "weblog," a term used to describe websites that maintain an ongoing chronicle of information, featuring diary-type commentary and links to articles on other websites.⁷

Indeed, social media has changed the way businesses market, disseminate information, and communicate with the public. It has also changed the way individuals communicate. With the advent of social media, we reacquaint with old school friends, join groups with people that have similar interests, look at cute baby pictures of relatives in distant lands, feel connected with family and friends during a pandemic, and learn the latest fashion trends and gossip from Hollywood stars. Comments previously confined to water cooler chatter or private communications are now posted or "tweeted" to thousands of people, friends, and/or "followers."

Potential Liability Arising From Social Media Use

Social media also exposes its users to potential liabilities and implicates vari-

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ous insurance coverage issues. Social media liability may include claims for slander, libel, cyberbullying, harassment, invasion of privacy, or intellectual property rights violations.

A statement is defamatory if it is "false, communicated to a third person, intends to lower the subject's reputation in the estimation of the community or to deter a third person from associating with him."⁸ A defamatory statement may consist of libel or slander.⁹ Libel is defamation by written or printed words, or by the embodiment of the communication in some tangible or physical form. Slander consists of the communication of a defamatory statement by spoken words or transitory gestures.¹⁰

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In the cyber-harassment statute, the Legislature made it a crime when a defendant, through an electronic device or through a social networking site, "threatens to inflict injury or physical harm;" "threatens to commit any crime against [a] person or [a] person's property;" or "knowingly sends, posts, comments, requests, suggests, or proposes any lewd, indecent, or obscene material to or about a person with the intent to emotionally harm a reasonable person or place a reasonable person in fear of physical or emotional harm to his person."¹²

Invasion of privacy may include the public disclosure of private facts, such as making public private information about a plaintiff; placing a plaintiff in a false light in the public eye, which does not need to be defamatory but must be something that would be objectionable to the ordinary reasonable person; and appropriation, for the defendant's benefit, the plaintiff's name or likeness.¹³

Further, social media may give rise to claims of infringement of intellectual property rights. Allowing users to share videos, photographs, and other documents, social media is easy for users to improperly use copyrighted materials. Likewise, trademark infringement claims may arise from social media use.

Types of Policies Implicated

As for the mitigation of social media risk, there is no standard approach.¹⁴ Coverage that is available is typically part of a media liability policy or cyber coverage.¹⁵ While the growth of social media has led to policy enhancements and forms that are written to address social media risks,¹⁶ policyholders, faced with a social media liability, may look to different policies for coverage such as media liability, general liability, and directors and officers coverage. However, where policies were once limited to legacy media companies like ABC or CNN, these types of policies are increasing in popularity for commercial entities because of increased risk such as social media. Such media has become a significant tool used by business entities to

disseminate information and promote themselves.¹⁷ In addition, entities also join forces with social media “influencers” to market themselves and their products.¹⁸

Media liability coverage is typically an Errors and Omissions policy for media-related businesses.¹⁹ It is written on a “named peril” basis, subject to exclusions and conditions, and typically covers defamation, invasion of privacy, and copyright infringement.²⁰ A typical insuring grant in a media liability policy provides coverage when the insured’s performance of media activities during the policy period results in a claim against the insured and arises from covered media or advertising activities, regardless of when a claim is made, including, but not limited to, claims for infliction of emotional distress or outrage, breach of confidentiality, invasion of privacy, a violation of any other legal protections for personal information, and negligent supervision of an employee and any form of negligence but only where the negligence arises from the insured’s media content disseminated in covered media or advertising.²¹ Terms like media or advertising activities and media content are defined terms.²² While social media is a specific type of media liability, *e.g.*, Twitter, Facebook or a blog, a policy will need to provide coverage for particular risks associated with social media that include not only typical media risks but employment practices as well.²³

Alternatively, based on the allegations of the complaint, a policyholder may look to its general liability policy. Such policy can have two separate coverage grants, Coverage A and Coverage B.²⁴ Coverage A applies to “bodily injury” and “property damage.” If the complaint alleges “bodily injury,” the insured may seek coverage under Coverage A; however, exclusion o. under Coverage A excludes coverage for “bodily injury” arising out of “personal and

advertising injury.”²⁵ In addition, even if a complaint alleged “bodily injury,” it may not allege an “occurrence” or an accident.

The insured may fair better under Coverage B, which provides coverage for “personal and advertising injury.” “Personal and advertising injury” is typically defined as injury, including consequential “bodily injury,” arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services;
- e. Oral or written publication, in any manner, of material that violates a person’s right of privacy;
- f. The use of another’s advertising idea in your “advertisement”; or
- g. Infringing upon another’s copyright, trade dress or slogan in your “advertisement.”²⁶

As discussed *infra*, claims of libel and slander and copyright infringement are not uncommon when an insured is faced with a social media claim. Therefore, Coverage B could, at a minimum, trigger a duty to defend under d., e., f., or g. However, Coverage B has several exclusions. For example, exclusion j. excludes coverage for “personal and advertising injury” committed by an insured whose business is: (1) advertising, broadcasting, publishing or telecasting.²⁷ Another common exclusion is first or prior publication exclusion that excludes coverage for “[i]njury

arising out of oral or written publication of material whose first publication took place prior to the beginning of this policy or such coverage under this policy.”²⁸ Under this exclusion, “it is essential to fix the time vis-a-vis the date of issuance of the policy when the first offending publications took place.”²⁹

Corporate officers and directors may also look to Directors & Officers (D&O) insurance for coverage. CEOs and other high-level officers may take to Twitter to post something that could be considered potentially false or deceptive as to the company’s products or services resulting in shareholders’ suit to the extent the company’s stock is affected or government action is taken.³⁰ The act or event that triggers coverage under a D&O policy generally arises from an actual or alleged “Wrongful Act,” a defined term under a D&O policy.³¹ Typical D&O policy exclusions include the elimination of coverage for claims or activities known prior to purchasing the policy, and losses related to criminal or deliberately fraudulent activities.

Conclusion

The chances of a business or individual being exposed to a social media liability claim has increased significantly with the escalation of various social media platforms and online communications. Businesses can mitigate their social media exposures through risk management practices, such as the preparation and implementation of a social media policy defining acceptable social media usage, controls over messaging, and content. However, it is important that attorneys counsel their clients and increase their awareness of potential social media liability and review their insurance policies. The increased exposure created by social media raises important issues about whether such claims are covered under certain insurance policies. ☞

Endnotes

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