



ABA FORUM ON COMMUNICATIONS LAW

# WICL Newsletter

## April 2019

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## Do You Know Where Your Content Is?

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We are living in a world of digital media where the options for dissemination continue to grow. Companies of all sizes are posting content on their web pages, Facebook, LinkedIn, Twitter, YouTube, Instagram, and Snapchat. For dedicated content creators, this may also include Pinterest, or one of the many video or audio streaming platforms. The variety of methods of dissemination is multiplied even further for companies that maintain different platforms for different productions, brands, and targeted audiences. This multi-platform world brings with it increased options for companies and their content creators to reach audiences of a myriad of

demographics, interests, and critically, buying habits.

However, with additional options comes additional risk. Dissemination of content across more platforms and reaching more audiences means greater likelihood that an error or publication of incorrect facts will reach those increased audiences. It also creates an internal challenge for each company to keep track of what content is placed on which platform, and what steps are needed if the company wishes to quickly take down content or issue a retraction after making a determination to do so. Over the years, many companies have turned their focus

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toward crisis plans, business continuity plans, and succession plans. In order to avoid the negative business toll taken by a fire, natural disaster, act of terror, or cyber event, many companies have performed a deep dive into their corporate structure and set up plans for an appropriate coordinated response to enable business continuity, and ensure compliance with corporate and legal obligations. Some have set up “phone trees,” delegated tasks, or even handed out “fire warden” hats to establish a chain of command and make sure everyone knows his or her role. A

company that publishes content should likewise consider how it would act in the event of a “content crisis” and the first step is to know where the content is. That may seem like a simple task but, in this multi-platform world that is not always the case.

There are many types of content crises that could occur. The most obvious one is where the company learns that it published erroneous information and has made the choice to take it down or issue a retraction. Some states have retraction statutes that limit damages in a defamation suit where a retraction responsive to a takedown request adheres to legal requirements. However, there are many items that bear upon whether to issue a retraction or just a correction, including the scope, timing, and manner of the request, and the concern that a retraction or correction would revive a statute of limitations. The decision of whether or not to take down or correct content depends on the facts of any given situation, as well as a granular legal analysis of relevant statutory and case law, which will not be addressed herein.

Another scenario would be where the company agrees to refrain from broadcasting or publishing content pursuant to an agreement, it needs to keep careful track of all distribution channels in order to comply. Also, if the company is obligated to preserve audio, video, or other content in order to avoid spoliation of evidence, it needs to

know where to find the content that must be preserved.

In the event of a crisis, the company needs to know where the content was published. Was it on a website? A streaming platform? Facebook? Twitter? Instagram? Snapchat? LinkedIn? Pinterest? YouTube? If there are multiple platforms, which websites? Which Facebook pages? Which YouTube channels? Was the content in written form, photographic, videographic, or some combination? In what countries was the content disseminated? Who is responsible for knowing which platforms were involved in publication?

This raises the question of what the remediation process will look like. Who are the content creators involved? Who are the editors? Who has final editorial control? Who has authority to direct a correction or retraction? Who is in charge of making any actual changes on the respective platforms? Is it a different department with a different chain of authority? Who has physical technical control to make the change? Does each platform have a different person with editorial or technical control? Does each corporate division or channel have a different person with editorial or technical control? Is there anyone in place to coordinate this response? Has legal counsel been brought into the conversation?

The ability to answer these questions swiftly might minimize the likelihood of a claim of defamation, invasion of privacy,

violation of the right of publicity, copyright violation, or trademark infringement or, at the very least, might minimize the loss. A company that is armed to respond to the challenges of multi-platform distribution can carry out its risk management tasks with greater ease and success.

If faced with an immediate need to take down or correct content, unraveling the corporate maze can be quite onerous. Being nimble in the face of a content crisis can go a long way toward averting a claim or mitigating damages. Companies that publish content may want to create a content crisis plan or, if one is already in place, carefully review the one they have. A thorough understanding of corporate structure and chains of editorial and technical command, coupled with a comprehensive content crisis plan, is an invaluable addition to any risk management practice.

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