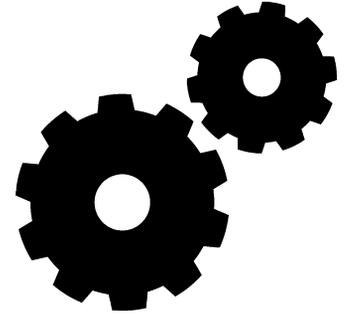


Managing Risk for Online Communities



HIGHLIGHTS

- The top three legal issues for which community managers should monitor are the following:
 - Defamation.
 - Intellectual property infringement.
 - Anti-trust violations.
- To ensure that the organization is practicing due diligence, ensure that these three key factors are in place with respect to the company's Terms of Use policy:
 - The Terms of Use policy is readily available.
 - The Terms of Use are followed.
 - There is sufficient training on the Terms of Use within the organization/association.
- Due to the importance of being able to train all moderators in risk management as a way to demonstrate due diligence, Blake recommends that an association permit only a limited number of moderators. This should be written right into the policies and procedures. Ideally, one person should own the responsibility and have final approval for any postings, meaning any content produced by the organization/association.

SPEAKERS

Maddie Grant, [Social Fish](#),
Ben Martin,
[Online Community Results](#),
Blake Hegeman, [Attorney](#)

COMPETENCIES

Community
Management,
Policies and
Governance

MATURITY PHASES

CMM1, CMM2, CMM3,
CMM4

OVERVIEW

- Maddie's Background: Maddie is a Digital Strategist with Social Fish. Her focus is on associations and non-profits. As a Community Roundtable Champion in this space, Maddie plans to host several of these types of calls over the next year with various subject matter experts who have community management proficiency.
- Ben's Background: Ben works for Online Community Results, a consultancy firm specializing in the unique needs of associations and non-profits, especially as it relates to white label, members-only or branded online communities. Their clients run the gamut from technical organizations to professional societies.
 - Ben has 12 years of experience working for a software company designing online community software for communities and non-profits. He used to work with Blake at the Virginia Association of Realtors (VAR).
- Blake's Background: Blake is Deputy General Counsel at VAR. He has been with the Association for approximately eight years. He has earned his Certified Association Executive Credentials.
 - Blake stated that Ben helped him to see the value of social media when they worked together. As a result, he has made it a special practice to learn how to limit the inherent risks associated with bringing social media and associations together.
- Blake wanted to disclose that he did not attend this call on behalf of the VAR. He attended on behalf of himself as he is very passionate about this topic.



Maddie Grant



Ben Martin



Blake Hegerman

BEST PRACTICES

Know the Top Three Legal Issues Facing Associations: Blake shared what he felt to be the top three legal issues facing associations:

- **Defamation:** Defamation is defined as making a false statement about somebody else in writing or verbally that harms their reputation. Associations really do face risks in that online space because – for whatever reason – when people get behind a keyboard they lose all sense of propriety and tend to be more aggressive. This holds true for all companies, not just associations.
 - As community managers are well aware, once something is online, it is there forever. If someone writes a false statement online that could injure the reputation or professional background of another, the evidence is there in black and white, making it difficult to refute or defend.
- **Intellectual Property Infringement:** It is incredibly simple for somebody to copy and paste content, pictures, music, presentations, etc. from someone else's website. However, for those large companies who own copyrights, it is very easy for them to track infringements on their copyrights. Permission is always needed before posting anything that belongs to someone else.
- **Anti-Trust Violations:** This is especially true in the association world because there are many competitors who come together to promote the interests of the industry. The anti-trust laws seek to prevent trade restraint, boycotts or price fixing.
 - People say things online that they would not normally say face-to-face. In the anti-trust space, individuals face criminal violations for saying the wrong thing when it comes to trade restraint or price fixing. Associations could be shut down if they hosted a conversation that was used to try and restrain trade – even if this was done innocently.

Practice Due Diligence: There are three key factors that courts look for if they are investigating the company's Terms and Conditions. It is not enough to have a set of Terms and Conditions without the following three practices:

- Are the Terms and Conditions readily available?
- Are the Terms and Conditions followed?
- Is their sufficient training within the association on the Terms and Conditions?

BEST PRACTICES

Permit Only a Limited Number of Moderators: Due to the importance of being able to train all moderators in risk management as a way to demonstrate due diligence, Blake recommends that an association permit only a limited number of moderators. This should be written right into the policies and procedures. Ideally, one person should own the responsibility and have final approval for any postings, meaning any content produced by the association. Ultimately, that should be the CEO's decision, but Blake has generally seen that responsibility lie with the VP of communications or the director of communications with training from in-house or external counsel. Again, the goal would be to keep the number as small as possible so as to control what is posted. With the inherent liabilities of social media, the person with final approval wants to protect the association.

- Blake further explained that the courts are looking to see if the organization applies their online Terms and Conditions to the online community group and whether or not it trains the staff responsible for those policies and procedures.
- Blake recommends quarterly training for risk management in the social media world. It could be conducted in-house by the online community manager or by an attorney or other risk management professionals.

Follow These Steps in the Event of an Anti-Trust Violation: Blake advises that if anyone in the community starts talking about fees, the moderator needs to stop that conversation immediately and state: "As a reminder to the community, we do not allow speaking about individual company policy related to fees. This is an important risk management area for the association and I'd ask that everybody that is online agree". If that cannot be done in real time and it has been an ongoing discussion, Blake suggests contacting legal counsel immediately.

- Blake stated that he cannot oversell the importance of the anti-trust space. It is an aggressive law. To demonstrate the severity of this rule, Blake shared a story about a music teachers' association that was recently handed a massive anti-trust lawsuit from the federal government. The people in this association teach piano in their homes. This association had a code of ethics that prevented one member from soliciting the client of another member. It was viewed as an anti-competitive restraint of trade. If the federal government is going after groups like this, it shows that they are very serious.

LESSONS LEARNED

The following is a summary of lessons learned as shared by participants within the discussion:

- Ben asked Blake his opinion on whether public-facing social media or privately owned is riskier for an organization, especially an association or a non-profit. Blake believes that the privately-owned internal community association is a little more risky because the internal policies and procedures of the public-facing companies like Facebook and Twitter have incredible amounts of legal protection. They are generally just hosts of the content vs. producers of the content to any great degree.
- Facebook and Twitter, for example, are not content producers in the same sense as a private, online community association group. In that vein, the association really owns the content. Therefore, as the content producer, they need to be very well trained on content moderation as they will take on more liability for what is posted.
- With respect to the top three legal issues brought forth by Blake, Maggie asked how much of the responsibility lies on the community manager, especially in the case of anti-trust and defamation:
 - Defamation: Blake replied that it is imperative that the person who monitors the online community be properly trained. In the defamation space, the community manager would not generally be held liable for a false or defamatory statement if he/she follows the Communications Decency Act. This Act generally protects online publishers from liability for defamatory statements made by others.
 - That would include blogs, comments on websites or listservs. The important thing to know as a community manager is to not engage in selecting and/or editing any comments that are posted. That would make the community manager a publisher and puts him/her in danger. So, the risk is minimal in terms of defamatory comments made by others on the site as long as the association did not publish it.
 - Blake's advice would be to have a well-crafted Terms of Use policy that includes a zero tolerance rule on that kind of behavior. In addition, ensure that the defamatory comments are deleted immediately.

LESSONS LEARNED

Copyright: In terms of intellectual property infringement, there is something called a Digital Millennium Copyright Act. That generally holds associations harmless if a third party goes on to an online community group and posts content that he/she does not own and it infringes on somebody's copyright. However, there are some very definite steps that the association has to take when that happens. As well, there needs to be clear policies included in the company's Terms and Conditions of use. For example, there needs to be clear contact information that a copyright owner can go to immediately to ask for the content to be removed.

- If a company does experience a copyright infringement, Blake would encourage the use of the Copyright Office's website. They have a good overview of the Digital Millennium Copyright Act. Generally speaking, if someone contacts you saying that something has been wrongfully posted, act immediately to notify the person who posted it that there is an infringement claim. Give them an opportunity to rebut that and if they cannot, take it down immediately.

Anti-Trust: This risk is a lot scarier. Anti-trust violation is any conversation in which one member has stood up and said: "I think we should all charge this amount of money in commissions" and nobody else in the association meeting disputes it. Even if it was a common commission for everybody, the Department of Justice would look at that as an implied anti-trust violation simply because everybody happened to be charging similar fees. It comes across as an implied conspiracy.

Blake advises associations to protect themselves by providing training for anybody who monitors their online community. Have an anti-trust policy linked to the Terms and Conditions of use. Any time your association sees anything online in which people are talking about individual business practices like fees they charge or any type of encouragement relating to anti-trade or boycotting, it needs to be immediately removed. Furthermore, everyone involved must loudly disassociate themselves from that online comment. If it continues, shut it down and call your attorney immediately. Corporate counsel should always be involved where there are anti-trust concerns.

LESSONS LEARNED

- Maddie wondered if, when an individual agrees to the Terms of Use by checking the box, it is enforceable in terms of what was just discussed in the above point. Blake replied that it is a heavily litigated issue currently. Some courts have ruled that a link to the company's Terms and Conditions at the bottom of the web page is not adequate. They have found in favor of organizations that required a click that prompted the individual to agree to the Terms and Conditions before entering the website.
- Therefore, a good practice for a private online community group is to make sure that everybody clicks and signs the Terms and Conditions of use before being granted access to the desired site. That will be more powerful at protecting the association.
 - Ben added a Terms of Use template that he and Blake have worked on together that is easy to understand and written in non-legalese. See Resources Section below for the link.
 - Blake cautioned that for anyone who chooses to use this template to ensure that their corporate counsel approves it. It is only a generally drafted document and might not protect all jurisdictions. It is intended only as an educational document.
- Ben asked if there are any circumstances in which a community manager could be held personally liable for any of the violations mentioned. Blake replied that, generally speaking, the community manager will most likely fall under the protection of the association's policy and enjoy that corporate shield against personal liability, unless they engage in criminal activity such as fraud or deceit. If they initiate anti-trust and/or perpetuate anti-trust activity or if they are part of a defamatory comment, they could see some personal liability. Blake does not feel that there would be a huge risk to the personal assets of a community manager under any circumstances, but do not lie, cheat or steal in that capacity – or initiate intellectual property infringement on purpose. Blake cautioned to be careful what is said online and if baited, do not retaliate.

LESSONS LEARNED

- Maddie asked Blake for advice on how to bring members into a community that has opted-out of receiving emails from the company. Blake stated that it is important to consider the Can-Spam Act, which is a federal law that prevents communicating with individuals who have indicated that they do not want to receive communications.
- Blake added that he would never recommend migrating an entire database of individuals and then opening up a community profile without specifically gaining their consent. Instead, explain as part of the consent process what will be included in the profile and to respond by X date if they choose to opt-out of that activity. To be even safer, Blake recommends asking for affirmative action to opt-in to the process. Be as clear and as transparent as possible and let the individual know that his/her privacy is valued.
- Ben added that this is a tricky situation and one that he deals with within his role. Typically, he does a lot of work with associations that are just starting up their communities. He recommends to them that they make it opt-in up until a certain point.
- When the community reaches a certainly level, it should become opt-out because the danger of perpetual opt-in is that it becomes difficult to grow the membership and to build-up champions and/or community catalysts. However, before the opt-out method is put in place, multiple communications explaining the new practice must be sent out to members, while also giving them the option to opt-out in those pieces of communication.
- When it comes to walking the line in terms of what would be considered offensive in the online community, the litmus test in Blake's mind is whether or not a reasonable person would find it offensive. When in doubt, ask around and see what others think. There should be room for free and fair exchange, but the line is crossed for liability when it is discriminatory against a protected class. The rest is more public relations oriented.
- Ben added that he has not found a perfect formula to handle this type of situation and, therefore, handles it on a case-by case basis. He feels that that is the soft side of community management where having good relationships within the membership and calling upon community champions helps to quell any dissent. That will help to mitigate some of those risks that crop up occasionally.