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Narrative

Website and Internet Compliance for the Hospitality Industry

I. Introduction/Background

The internet has impacted the way individuals communicate with each other and has changed how business is conducted locally and globally. Mobile connectivity has advanced communications far beyond the standard of five years ago. Social Media has changed the way people and business communicate and advertise/promote their products and services. The law, however, has been slow to adjust, and companies have been even slower in recognizing how the advances in technology impact the risk of exposure that has emerged. With the growth of new media come risks never before anticipated. A periodic website and social media e-audit should be considered as part of a company's compliance routine.

In addition, insurers have been called upon to answer for risks not previously anticipated and have had to apply traditional wording of policies to risks that do not necessarily fit within historical policies. With gaps in coverage becoming evident, insurers have devised new policies to address media and cyber coverage. It is critical to understand the types of coverage that have been looked to for coverage of these risks and the sections of the policies to be aware of when an insured is seeking a determination of coverage.

Twenty years ago, most businesses did not operate an interactive website, and if a business did, it was not likely a prominent source of revenue. Today, however, most businesses have complex interactive websites and portals, in addition to social media accounts and even a "mobile strategy," all of which are critical to their financial success and notoriety. While technology growth has changed the world in a very short time, the laws pertaining to the internet and the understanding of those laws have largely lagged. Thus, most people do not know or understand which laws apply or the tangle of global legislation that impacts their online presence.

Historically, companies would view the responsibilities of their brick and mortar operation differently than their online presence and would delegate responsibilities amongst their employees accordingly. Before plunging into and investing significant funds in a new brick and mortar venture, it is common for the business owner to evaluate the risks and challenges. For example, a restaurateur, before opening a restaurant, is likely to budget for the cost and life cycle of its food supply, understand the financial reality of the rent and negotiate accordingly,

seek insurance to protect it and its workers, and budget for the labor costs. But the restaurateur, and in many cases the retailer, will also need to know labor laws impacting its workers, the taxes it must collect and pay, laws related to acquiring and maintaining a liquor license, laws related to data security and credit card acceptance, laws regarding advertising, laws regarding the performance of music in the establishment, as well as other laws, rules and regulations. In a brick and mortar setting, the restaurateur is likely to seek legal advice regarding these issues or delegate these responsibilities to an experienced manager or professional. However, when the business is an online enterprise, or when the brick and mortar business develops a website, the responsibilities are often delegated to less experienced personnel.

A restaurateur is unlikely to delegate the responsibility of selecting a location and procuring the lease to a junior person working in the IT group. Rather, such a responsibility will typically fall to the owner and its counsel. But, when a domain name is secured and titled, that role may fall to the junior member. When ad content is created for a restaurant, a senior manager or marketing professional is likely to be involved, but when content is posted on social media, it is more than likely it will be created by a person with far less business experience. When comparing responsibilities between the traditional and new platforms for business, these types of differences are common. With the less experienced staff controlling these important decisions in an online environment, companies employing such platforms are exposed.

For many companies, a website and social media are perhaps the most important and valuable tools for sales and promotion of the company's goods and services and for informational purposes. A website is often visited to validate a business and assess its sophistication. Just as an owner would build its flagship restaurant carefully from the ground up and not overlook any important structural detail, companies that own and operate websites should take great care to address not only the aesthetics but also every legally significant component of the website and its content. When operating a website or exploiting social media, it is critical to ensure the company is compliant with all applicable laws and regulations, not only to guard against potential liability to regulators, competitors and consumers but also to instill faith and confidence in consumers that the website and company operate according to the highest standards.

Professional assistance may be required when establishing an online presence or operating in an interconnected environment. Whether a business is primarily local or a global e-commerce enterprise, there are considerations that each operator of a website or social media presence should be careful to examine. A lack of compliance risks significant exposure and an embarrassing situation could go viral.

One way to mitigate the risk and strive for compliance is to conduct an "E-Audit" that reviews an entity's website, mobile platform and social media presence, and determines compliance in a variety of categories. And, it is always crucial to have an appropriate insurance policy to protect the online conduct from claims. While many people believe that their Commercial General Liability Policy or their Directors and Officers Liability Policy will protect them from claims, exclusions in these policies are often applicable to void coverage for significant suits. It is critical to ensure that the conduct of the business is understood so that the business can be properly insured.

II. The Rush to Get Online Since COVID-19

Online activity was already on the increase when COVID-19 sent most people to work from home, and encouraged businesses who previously did not have a significant presence on the internet, or had merely informational websites, to suddenly transform their online presence to an e-commerce platform.

Online shopping was growing so fast in 2020 that it was expected to hit \$4 trillion in 2020, and will easily reach \$5 trillion by 2022 and \$6 trillion by 2024. See <https://www.emarketer.com/content/worldwide-ecommerce-will-approach-5-trillion-this-year>. In 2019, Shopify Plus expected that would grow to \$4.9 Trillion by 2021. <https://www.shopify.com/enterprise/global-ecommerce-statistics>. And those number were before COVID. The US alone expecting to have 300 million online shoppers by 2023, or approximately 91% of the country's population. <https://optinmonster.com/online-shopping-statistics/> (and citing Statista.com) In 2017, NASDAQ predicted that by 2040, 95% of shopping will be facilitated by eCommerce. See <https://letstalkaboutmoney.com/ecommerce-statistics/>). It is starting to look like COVID may have shaved at least 10 years off of these expectations. More and more businesses have become reliant on the internet.

Over the last few years, e-commerce has become an indispensable part of the global retail framework. In 2019, an estimated 1.92 Billion people purchased goods or services online. <https://www.websitebuilderexpert.com/building-online-stores/ecommerce-statistics/>; See also Statista.com. And e-retail sales surpassed \$3.5 Trillion worldwide. <https://www.statista.com/statistics/379046/worldwide-retail-e-commerce-sales/> And, again, that was before COVID.

E-Commerce is expected to grow. Ecommerce software provider CommerceHub released survey results on October 5th, finding that 67% find it more convenient to buy online rather than in stores. See <https://www.commercehub.com/resources/commercehub-covid-19-consumer-retail-trends-survey-6-months-later/> And a whopping 89% planned to continue spending about the same or more online. Id. Global retail e-commerce traffic stood at a record 22 billion monthly visits in June 2020. <https://www.statista.com/statistics/1112595/covid-19-impact-retail-e-commerce-site-traffic-global> With the younger generation feeling more comfortable using technology, the move to online shopping and services is likely to increase at a hefty rate. The impact of COVID has brought about this transition quickly and it will likely last.

III. Concerns in Operating in an Online Environment

The risks in operating in an online environment start from the very beginning of the operation, in selecting a name, securing rights to a domain, engaging a web developer and licensing appropriate third-party technology. This structural creation and maintenance, including data security, privacy, and web accessibility pose risks for an entity in operating on line.

The task of registering a domain name often is not given sufficient consideration. Left to an uninformed employee, a domain can be registered in an incorrect name (*e.g.*, the wrong corporate entity), in the name of the web developer or IT service provider, or in the name of an employee. Each of these can have an adverse impact. The registration of the domain under the

wrong corporate entity could result in exposure for that entity. If the domain name is registered to a web developer or IT professional, and then the relationship between the developer/vendor and the operator of the site sours, it can result in a battle over control of the domain name and the goodwill that has been generated.

Similarly, it is critical that the rights to the website design are properly assigned and titled. Copyrights vest in the creator (author) of a work, such as a website, from the date the work is created and fixed in a tangible form. Thus, once the layout, design and content of the site are accessible, and absent an employer-employee relationship, a work-for-hire agreement or an assignment, the creator of the website owns the rights to the layout, content and design and may have the legal right to control the manner in which this material is used.

Failing to secure the copyright or license in the website can have a devastating impact on a business, as the creator of the website could legally require the company to stop using the website design in the event that their relationship sours. A company does not want to find itself in a situation where it has no active website or, worse, a bare-bones website that will reflect poorly on the operator.

Rather than have an unwritten course of conduct, website operators are often able to set the parameters for the relationship with their visitors, and the importance of Terms and Conditions, Rules of Acceptable Conduct, Privacy Policies and Terms of Sale become important to prepare.

After confirming that the domain is properly titled, the infrastructure is secured, and the forward-facing content and marks are properly protected, a website operator should determine the rules it wants to set for the use of its website. Much like the restaurateur sets the conditions for eating at the establishment (*e.g.*, the times it is open, the dress code, a no-sharing policy), the website operator should establish its own parameters for using the website.

Websites can serve as a forum for owners, operators and users to publish and disseminate information in creative and original ways. Website owners and operators, online service providers, e-commerce retailers or other businesses maintaining an online presence potentially risk direct and indirect liability, which may be limited by contract. Terms of Use define the acceptable use of the website by contract and, like any other website policies, should be conspicuously posted so users can locate them easily. Such placement may determine whether they are viewed by a court as a nonbinding policy statement or an enforceable contract. Terms of Use should inform website users of policies related to proper use of the website and its content. Ideally, a website may want an affirmative action assenting to the Terms of Use. Certainly, whenever the website is interacting with a user and collecting data or performing a transaction, a method to confirm acceptance of the terms is highly recommended.

Among other concerns, Terms of Use can be helpful in establishing “choice of law” and “forum selection” clauses, arbitration requirements and other clauses that could limit exposure to lawsuits, and in providing information that could comply with local laws. Forum selection clauses have been useful in having cases litigated in a forum convenient to the operator. While a website may interact with individuals from many different locales, a website operator generally prefers to have any litigation or claims brought in its home jurisdiction so that it does not need to expend resources fighting claims in many jurisdictions across the country. Forum selection

clauses have been upheld and have resulted in the dismissal of actions or a change in venue. Similarly, arbitration provisions are often useful in preventing class actions and in keeping the proceedings confidential.

Content management is a significant risk that must be considered by a website operator or one who utilizes social media. Concerns include copyright, trademark, rights of publicity and privacy as well as ensuring compliance with industry and governmental standards.

Effective websites use a combination of text, images and functionality. The internet provides ease of access for companies and web developers to copy images and text from other sites. However, despite popular misconceptions, merely because material is available on the internet and has no copyright notice does not mean that it can be freely copied and used.

Companies often use the intellectual property of others when marketing materials on their websites. Before using others' intellectual property (e.g., copyrights, trademarks, patents, trade dress, trade secrets), it is advisable to have the authorization to do so in signed written form (typically a license agreement), outlining the authorized and permitted uses. It is particularly important to secure the appropriate licenses to use images on a website. Failure to do so increases the exposure of website operators to claims of copyright infringement. Stock and other image licenses often come with restrictions prohibiting the use of the content in a certain manner or limiting the duration of the use or the number of uses.

It also is important that a website operator not remove or modify copyright management information in an image. Even if an image can be fairly used, the deletion or modification of the copyright management information (e.g. the removal of the name of the credited photographer) may subject a website operator to statutory damages ranging from \$2,500 to \$25,000, or actual damages and any additional profits of the violator, plus attorney's fees. See 17 U.S.C. 1202 and 1203.

It is not sufficient to claim ignorance or to claim that the image was available on the internet without a copyright notice. This is a common misconception that leads an operator to liability, and in many cases, statutory damages are available, thus making the error a potentially costly one.

Disclosure and transparency is another concern for operators in an online environment, including industry specific requirements and disclaimers. The FTC has been vigilant about pursuing paid influencers and endorsers who do not properly disclose their connection to products or services being endorsed.

And, there are special circumstances that arise in an online environment, including special rules regarding minors, health claims and information, FDA, alcohol and dangerous substance disclosures, and interactivity.

Perhaps most significant difference between brick and mortar and online operations is the geographic scope of the risk. While a stand-alone business may only need to concern itself with the rules of its locality, the globalization of industry involved in online operations make the understanding of the interplay with other laws critical.

IV. Risk Mitigation and Insurance

Businesses can mitigate their risk through proper planning and the procurement of applicable insurance. Traditional policies may not be helpful with many risks and it will be important to understand that gaps in traditional coverage that need to be filled when operating online.

While companies typically will purchase a Commercial General Liability Policy (“CGL”) or a Business Owners Policy, these policies may not fully cover the risks associated in operating in an online environment. There are two different types of companies to be addressed: the company that has a brick and mortar business that uses the internet to complement its business, using e-commerce and social media to drive business, and the company that is solely an online based business, focusing solely on its online presence to do business. Some business choose to instead operate solely on the platforms of others such as Facebook, Instagram or an online marketplace such as e-Bay or Amazon. The risks associated with each of these platforms may impact the exposure that the insured will encounter.

A traditional CGL policy will have primary coverage for bodily injury and also provide coverage for personal and advertising injuries. However, the personal and advertising injury coverage often comes with exclusions that carve out a significant part of the coverage that would be in place for a brick and mortar business. And, when coverage is provided, it is often limited to intellectual property risks that arise from the advertisement, not from the sale of the product or services. Other types of exposure are specifically excluded from coverage under these policies.

It is therefore imperative to ensure that the insured’s full scope of risk is understood and appropriate coverage is secured. If a business is in fashion, and sells its product primarily based on the popularity of the name it promotes on its apparel, will there be coverage for infringement claims that arise with respect to the sale of the product, or only with respect to advertising? Will there be coverage for the website that sells the product if the website is not accessible to the disabled? Will there be coverage for statements made by paid influencers who do not reveal that they are paid by the company to help promote the product, or are provided with free product to “test?” Does the website secure the personally identifiable information of its visitors, and if there is a hack and the information is accessed, will there be coverage?

There are different types of policies that have developed to address some of these risks, including media and cyber liability policies. Many of these policies are still new and the law is still developing in regards to how such claims are addressed. As such, it is critical to identify the coverage needed, determine whether the specific policy addresses that risk, and if it does not, to determine whether an endorsement can be crafted to provide the additional scope of coverage.

V. Conclusion/Takeaways

Online business is increasing, and social media and mobile connectivity are impacting how people interact and engage in commercial transactions. COVID-19 has exposed the need to join this movement as soon as possible. Many of those who have been unable to transition their

business have perished and COVID-19 has accelerated the timeline to be online comprehensive, sophisticated and compliant by several years.

Attention to detail and rules are important, and cannot be left to junior, unsupervised individuals. A brick and mortar business would not leave the decision of where to locate the business to a recent college graduate who had no prior experience, and would not allow that individual to negotiate a complex construction contract. Neither should an online business or a business with an online component.

A periodical review of a website and social media accounts should become part of normal compliance as such audits can be effective in reducing exposure. And, since exposure can last for many years, digital hoarding should be examined as closely as physical hoarding is viewed.

And, finally, it is critical to have proper insurance to protect a business from the myriad exposures presented from operating in an online environment.