

## **When Users Post, Do Advertisers Pay?**

*By Terri Seligman*  
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Advertisers who target a teenage and young adult demographic often seek to exploit the latest online phenomenon. As marketers know, the phenomenon of the moment is user-generated content and websites that feature it, such as MySpace and YouTube. Such sites enable users to post content that others can read, listen to, view and download, and both have social networking features that allow users to comment on the content.

Some of the content that is posted to and downloaded from these sites could lead to lawsuits against the website operators, the creators of such content, and those who post the content to the site. Potential claims include copyright and trademark infringement, defamation, and invasion of the rights to privacy and publicity.

An important question for advertisers is whether they could be liable for any of these claims when they place their ads on sites featuring user-generated content, whether by making an ad buy or simply posting their ads on the sites. This article discusses theories of liability for copyright infringement and defamation, whether an advertiser could be liable for either claim, and steps an advertiser can take to reduce the risk of liability.

### **Copyright Infringement**

It has been well established by the courts that when someone posts copyrighted material to a website, without the permission of the copyright owner, that person is liable for copyright infringement.

Copyright law also recognizes that someone who facilitates copyright infringement -- without actually being the one who is directly copying or distributing the work, for example -- can also be liable for infringement. There are two theories of so-called secondary infringement: contributory infringement and vicarious infringement. To be liable for contributory infringement, a person must have knowledge of the infringing activity and induce, cause or materially contribute to the infringing conduct.

To be liable for vicarious copyright infringement, a person must have the right and ability to supervise the infringing activity and must have a financial interest in the exploitation of the copyrighted work. Note that to be liable for vicarious copyright infringement, a person does not need to have knowledge of the infringing activity.

Copyright owners have successfully used these theories of secondary infringement to go after operators of peer-to-peer file sharing networks such as Napster and Grokster. However, so far, courts in the United States have not addressed whether an advertiser could be liable for contributory or vicarious copyright infringement if it advertises on a website that makes infringing material available.

Whether or not an advertiser could be liable is likely to depend on several factors, such as how obvious it is that a website is making available infringing material, whether the advertiser can choose where its ads

appear (for example, choosing which videos its ads appear in or next to), whether the advertiser is inducing or encouraging the downloading of certain videos (through send-to-a-friend mechanisms or other viral marketing techniques), whether the advertiser's ads are embedded in videos, and whether the advertiser could be found to be benefiting financially from the infringing activity.

An advertiser who has some control over the operation of a website, such as a sponsor who selects certain videos or directly invites users to submit videos, is more likely to be found liable for copyright infringement than an advertiser who simply buys ad space on a site, does not determine where the ad appears, and is not in any way encouraging the posting or downloading of any particular content.

If an advertiser is actually controlling -- and not just placing ads on -- a website that provides access to user-generated content, it might be able to take advantage of the safe harbor protections afforded to "online service providers" by the Digital Millennium Copyright Act (DMCA). To be eligible for the safe harbor, an online service provider must have a policy for terminating repeat infringers and must not try to circumvent technological measures used to protect copyrighted material. There is no requirement that the online service provider monitor the site for infringing content. To take advantage of the safe harbor, however, an online service provider must meet several requirements outlined in the DMCA. To do so may be difficult for an advertiser, so relying on the DMCA safe harbor can be risky.

### **Defamation**

Can an advertiser be liable for a defamation claim stemming from user-generated content when the advertiser's ad is in or near the content, such as a blog? It probably depends on whether an advertiser would be considered a publisher of the defamatory statement contained in the blog.

In the "old media" world, publishers and distributors can be held liable for publishing or selling materials that contain defamatory statements written by someone else. But there is a federal law -- Section 230 of the Communications Decency Act -- that shields online publishers from liability for defamation and certain other torts committed by someone else. This law states that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

Many companies and individuals, from AOL to online newspaper publishers to bloggers, have successfully used this provision to avoid liability for defamation. But since courts have not addressed whether Section 230 would apply to an advertiser, it is not known whether an advertiser would be protected by this law.

### **Tips for Advertisers**

Advertisers who are interested in advertising on websites that provide access to user-generated content can take some steps to reduce their potential risk of liability:

- When making an ad buy on a site featuring user-generated content, do not select a specific location for your ads, unless you know that location contains only non-infringing material
- Do not embed your ads in user-created videos unless you are certain the videos do not contain any infringing material (this includes music used in the video) or defamatory content

- Do not induce or encourage the downloading of specific videos unless you are certain such videos do not contain any infringing or defamatory material
- Do not advertise on a site that flaunts access to material that is obviously published without permission of the copyright owners
- Do your own due diligence of the sites where you intend to advertise; do not rely on indemnities from the website owners as a substitute for scrutiny of their content.

In my next article, I will address advertisers' (and their agencies') use of user-generated content on their own websites.

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