

# III: GETTING AN EDGE: STANDING UP FOR FREE SPEECH

**C**ompanies are increasingly realizing that customer loyalty is closely related to that customer's freedom of speech. Giving a customer a forum to express her views, free from censorship and other limitations, can build a sense of place and community that can enormously benefit the company involved.

## PROMOTE FREE SPEECH



### DOES OUR BUSINESS PROMOTE COMMUNICATIONS REGARDLESS OF METHOD, TOPIC, OR VIEWPOINT?

Speech can be restricted in many ways, such as by censoring politically sensitive messages or slowing down certain types of online traffic. In either case, businesses can easily alienate their user base and run afoul of the law, generating bad press, outraged clients, and governmental intervention. None of this is good for business.



**COMCAST:** In 2008 cable giant Comcast was taken to task by the Federal Communications Commission (FCC) and members of Congress for interfering with peer-to-peer technologies such as BitTorrent, thereby intruding upon its users' freedom of speech. The widespread press coverage, along with legislative and administrative inquiries, led Comcast to pledge to change its behavior.<sup>85</sup> Nevertheless, the company has been hit with a class-action lawsuit for making false representations about its service and may be paying for its anti-free speech mistake for years to come.<sup>86</sup>



**VERIZON:** Verizon made a costly mistake in 2007 when it told NARAL Pro-Choice America that the nonprofit could not use the telecommunication company's network to send text messages to people who had requested information updates. The company reversed its decision after receiving a barrage of complaints from activists, members of the media, and legislators.<sup>87</sup> The FCC opened an investigation into the incident, causing senior executives to apologize repeatedly in both written comments and in-person testimony before the agency.<sup>88</sup>



- ◆ **PROMOTE FREE EXPRESSION THROUGH YOUR PRODUCT OR SERVICE.** Your product and community of users will grow and benefit if you open your doors to as many potential users as possible.



**YAHOO!:** Yahoo! became a free speech leader in 2001 when it refused to cave to pressure from the French government to ban the sale of Nazi memorabilia on the Yahoo! auction site. Yahoo!'s principled stand not only helped to guarantee that Americans would be able to read, think, and speak freely in the marketplace of ideas, but also helped set an important precedent for Internet businesses about the need to stand up to conflicting international laws that threaten the rights of users.<sup>89</sup>



**AT&T:** Censoring the political speech of the popular rock band Pearl Jam landed AT&T in hot water in 2007. The company censored the first few seconds of its Web cast of the group, replacing the lyrics, "George Bush, find yourself another home," with silence. Although the company quickly reposted an uncensored version, the damage to its reputation could not be reversed as easily.<sup>90</sup>



## **DO WE SUPPORT THE RIGHTS OF OUR USERS TO SPEAK ANONYMOUSLY?**

Millions of users of all ages rely on the Internet every day as an important resource to search for private information and as a forum for discussion and expression.<sup>91</sup> Many choose to do so anonymously or pseudonymously. Whether it be a domestic violence survivor, an LGBT youth, a government whistleblower reporting an abuse of power, or someone who just wants to keep her online activities private, anonymous online speech is vital so individuals can access and share information without fear or embarrassment.

The courts have repeatedly affirmed that "protections for anonymous speech are vital to democratic discourse."<sup>92</sup> In addition, users "who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identities."<sup>93</sup> Have your company do its part by developing a clear policy that helps to safeguard the anonymous speech of users.

- ◆ **DISCLOSE USER INFORMATION ONLY WHERE REQUIRED BY LAW.** Thoroughly review any subpoenas or demands for information, ensuring that they comply with proper legal process, and resist inappropriate or overbroad requests. Challenge requests on behalf of your users rather than complying by default.



**VERIZON:** In 2003, the Recording Industry Association of America (RIAA) obtained a subpoena under the Digital Millennium Copyright Act (DMCA) ordering Verizon to reveal the identity of a subscriber who had allegedly used peer-to-peer software to share music online.<sup>94</sup> Verizon refused to comply with the subpoena, arguing that it raised serious privacy concerns and was not in fact authorized by the DMCA.<sup>95</sup> Verizon succeeded in defeating the subpoena on appeal,<sup>96</sup> garnering praise for its commitment to user privacy.<sup>97</sup>

- ◆ **GIVE USERS AN OPPORTUNITY TO DEFEND THEIR ANONYMITY.** Provide notice, within no more than seven days of receipt of a subpoena, to each user whose personal information is sought, and inform the user of her right to file a motion to quash (fight) the subpoena. Give the user at least thirty days from the time notice is received to file a motion to quash the subpoena.



**YOUTUBE/GOOGLE:** As part of an ongoing suit against YouTube/Google for copyright infringement,<sup>98</sup> in 2007 Viacom sought and obtained a discovery order forcing YouTube to disclose all “video-related data from the logging database,” including information identifying the users who watched each video.<sup>99</sup> YouTube continued to fight for the privacy of its users and in 2008 reached an agreement with Viacom to anonymize the IDs and IP addresses of non-Google employees in any data conveyed to Viacom.<sup>100</sup>

- ◆ **DISCLOSE ONLY REQUIRED INFORMATION.** Never disclose more information than is requested by a subpoena or other document.



**YAHOO!:** The search engine and email giant has been forced to settle multi-million-dollar lawsuits,<sup>101</sup> grilled repeatedly during Congressional hearings,<sup>102</sup> rebuked in the press, and targeted by international protests<sup>103</sup> for turning over identifying information in 2006 about its users to the Chinese government. The Chinese government used this data to link users to pro-democracy activities and to imprison dissidents.

## AVOID POLICIES AND PRACTICES THAT CHILL FREE SPEECH



### **ARE OUR TERMS OF SERVICE CLEAR AND SUFFICIENTLY NARROW TO ACCOMPLISH OUR GOALS WITHOUT DETERRING LEGITIMATE SPEECH?**

In drafting terms of service, companies that provide a forum for content or communication need to consider carefully whether they want to be in the business of policing those forums. Terms of use that include vague or overbroad prohibitions, such as speech seen as “offensive,” may not only deter users by limiting speech, they may put a company in the undesirable position of having to decide whether and how to respond to disputes between users about alleged violations of terms of service.

- ◆ **PROHIBIT ONLY CONTENT OR SPEECH THAT IS ILLEGAL OR DISRUPTS THE PRIMARY FUNCTION OF YOUR SITE OR SERVICE.** Terms of use that are narrowly tailored in this manner will help avoid burdensome monitoring of speech and the potential for inconsistent applications and accusations of bias.
- ◆ **PROVIDE AN APPEAL MECHANISM.** Give users a way to appeal any alleged violation and resolve disputes over whether a given piece of content violates the terms of service. Give users an opportunity to present their side of the story before imposing consequences.
- ◆ **CLEARLY SPELL OUT THE CONSEQUENCES OF VIOLATING TERMS OF SERVICE.** Allow users to remedy violations rather than automatically deleting content or terminating accounts.



**TWITTER:** “Microblogging” site Twitter was dragged into drama in 2008 because of its overbroad terms of service. By including a clause that “users must not...harass...or intimidate other Twitter users,” it was caught in the middle when two users were in conflict. Rather than taking sides, Twitter did the right thing and modified its terms of service. Of course, it could have avoided the problem if it had finely tuned its terms of service in the beginning to avoid overbroad language such as “harass” or “intimidate.”<sup>104</sup>



## DO WE PROMOTE FREE SPEECH OR INTERFERE BY MONITORING ONLINE ACTIVITIES?

Businesses that try to build up marketing profiles by intercepting and tracking Web searches, email, online downloads, and other activities through deep packet inspection interfere with an individual's ability to rely on the Internet as a trusted forum for information and discussion. When users are forced to worry about whether or not they can safely use the Internet to ask questions and communicate about health, sexual orientation, religion, politics, or other sensitive topics, companies face the heavy wrath of consumers and the government.<sup>105</sup> According to one technology consultant, "Users have made it very clear that they don't want any part of ISP monitoring regimes that watch everything they do and say on the Internet."<sup>106</sup>

- ◆ **CONSIDER THE CONSEQUENCES OF MONITORING USER BEHAVIOR.** If users believe that their activities are being tracked, they are not only less likely to produce content but also less likely to seek it out. Firmly establishing a policy of not monitoring activity can lead to a more robust forum and a more engaged user base.



**VERIZON:** In late 2007, Verizon received widespread praise when it made a pro-free speech pledge not to monitor its network backbone for peer-to-peer file sharing. The company pledged that it would not "accept the role of network police agency."<sup>107</sup>

- ◆ **REFRAIN FROM MONITORING USER ACTIVITY THAT DOES NOT PERTAIN TO YOUR SERVICE.** Do not use deep packet inspection, third-party cookies, or other methods to obtain information about online activities of users that occur beyond the boundaries of your service.



**NEBUAD:** The data analysis company's deep packet inspection system, designed to track every Web click for targeted online advertising, led to broad consumer outcry, an inquiry into its legality by the House Energy and Commerce Committee, the resignation of the founder and chief executive, and the cancellation of major partnership agreements, including a pilot program with the fourth-largest Internet service provider in the United States.<sup>108</sup>

- ◆ **CLEARLY INFORM USERS ABOUT YOUR MONITORING PRACTICES AND OBTAIN OPT-IN CONSENT.** It is far better to clearly inform customers about monitoring practices and obtain opt-in consent than to keep these practices a secret and risk widespread outrage, negative press, and potential investigations and lawsuits.



## DO WE RESPECT FREE SPEECH AS WE SEND TAKEDOWN REQUESTS?

When company content ends up online or consumers' online activities push against the boundaries of copyright or trademark law, a company may consider whether to send a takedown notice to another company to remove online information. If your company is considering such a letter, ensure that you respect others' freedom of expression while you protect your own rights.

- ◆ **USE INFORMAL CHANNELS TO OPEN DISCUSSIONS.** Attempt to resolve conflicts without litigation or its threat.
- ◆ **ENSURE THAT YOU HAVE A LEGAL BASIS TO DEMAND THAT CONTENT BE TAKEN DOWN.** Do not demand takedown of materials that clearly constitute permitted uses of your material, including fair use under copyright law.



**APPLE:** Apple's attempt to clamp down on blog posts about rumored upcoming products was not only a bad legal strategy, according to the judge, but also bad business strategy, according to *Forbes*. The court held that bloggers have the same right to protect the confidentiality of their sources as do offline reporters; Apple was chastised by *Forbes* for "biting the fans that feed it."<sup>109</sup> Its poor decision to disregard free speech cost the company substantial legal fees as well as its sparkling reputation in the blogosphere.<sup>110</sup>

- ◆ **CREATE WEB AND EMAIL "HOTLINES" WHERE TAKEDOWN REQUESTS CAN BE CONTESTED.** Give individuals and content hosts a quick and easy way to contest or respond to takedown requests through an email hotline. Such a service will allow mistakes and relationships to be repaired without costly litigation. If you send a takedown request, ask that links to these hotlines be posted in place of any removed content and be sent to the owner or poster of any removed content.



**VIACOM:** Downplaying fair-use rights led to a lawsuit and media firestorm for Viacom. The company sent Digital Millennium Copyright Act (DMCA) cease-and-desist letters to YouTube in early 2007 demanding the removal of thousands of video clips that it claimed were infringing on its copyrighted material. Some of the clips taken down, including one produced by MoveOn.org, were making fair use of copyrighted material for activities such as political commentary and parody.<sup>111</sup> Viacom conceded that it had erred in issuing the DMCA notice regarding MoveOn's video and agreed to set up a Web site and email "hotline" promising to review any complaints within one business day and reinstate the video if the takedown request was improper.<sup>112</sup> However, many users and online video enthusiasts remain bitter at the company for its actions.<sup>113</sup>

- ◆ **CONSIDER THE POTENTIAL CONSEQUENCES OF ANY ATTEMPT TO REMOVE CONTENT FROM THE INTERNET.** Cease-and-desist letters and the like often backfire, further fanning the flames of interest in the information that you were hoping to remove and resulting in significant damage to brands and loss of goodwill. As one Internet activist has noted, “The Net interprets censorship as damage and routes around it.”<sup>114</sup> Once information has been leaked to the Internet, it is very difficult to put the genie back into the bottle. Trying to do so may only keep the problem in the spotlight.



**BANK JULIUS BAER:** Swiss bank Julius Baer ended up in the free speech hot seat and its leaked corporate documents received widespread attention when it tried to prevent the popular Wikileaks site from distributing copies of these documents.<sup>115</sup> When the bank was able to obtain an initial court order disabling the Wikileaks domain name, the incident attracted widespread press attention, the information was republished on many other Internet sites, and the ACLU of Northern California and a number of other public interest groups became involved in the case. Ultimately, the judge recognized the important free speech principles involved and dissolved the injunction,<sup>116</sup> but not before the controversy—and the original data breach—was broadcast worldwide.



## **DO WE HAVE A CLEAR PROCEDURE TO PROTECT FAIR USE IF WE RECEIVE A TAKEDOWN LETTER?**

If your company hosts user-generated material, you may find yourself on the receiving end of a letter demanding that you remove material or disable a user account because of alleged copyright infringement. To protect your users and your reputation, develop a procedure to review the targeted content carefully and do not remove content that constitutes fair use. The document, “Fair Use Principles for User Generated Video Content,”<sup>117</sup> provides advice on avoiding missteps by developing a procedure that properly balances intellectual property and fair use rights.

- ◆ **TAKE FAIR USE INTO PROPER ACCOUNT.** Don’t take down content that constitutes fair use or that is noncommercial, creative, and transformative in nature. In questionable cases, look for ways to support your users’ rights without relinquishing your safe harbor protections.<sup>118</sup>
- ◆ **MINIMIZE IMPACT ON PROTECTED ACTIVITIES.** Don’t overreact and infringe on protected speech by removing other content posted by the same user, canceling someone’s account, or removing user comments posted about a particular content item.
- ◆ **INCORPORATE “THREE STRIKES” PROTECTIONS FOR FAIR USE INTO ANY AUTOMATED FILTERS.** Do not use a filtering mechanism to automatically remove, prevent the uploading of, or block access to content unless that automated system is able to verify that the content has previously been removed pursuant to an undisputed Digital Millennium Copyright Act (DMCA) takedown notice or that all of the following “three strikes” against it apply:

1. The video track matches the video track of a copyrighted work submitted by a content owner
2. The audio track matches the audio track of that same copyrighted work
3. Nearly the entirety of the challenged content is composed of or is included in a single copyrighted work

If there is an automated match, give the user an opportunity to dispute the conclusion of an automated filter, and provide human review if requested.

- ◆ **NOTIFY USERS WHEN A TAKEDOWN LETTER IS RECEIVED.** Let users know that content has been taken down by posting information at the location where the content formerly appeared and by directly contacting the content creator or uploader. Include a copy of the takedown letter, and inform the user about her right to issue a DMCA counter-notice and your procedure for acting on such notices. Assist the user in contacting the content owner directly in order to request reconsideration of the takedown notice.



## **HAVE WE CAREFULLY CONSIDERED THE RAMIFICATIONS OF ANY USE OF DIGITAL RIGHTS MANAGEMENT (DRM) TOOLS?**

Although it might be tempting to use DRM to guard your intellectual property, you need to weigh the costs and benefits carefully. Google, Microsoft, Virgin Digital, Sony, and Major League Baseball have all made costly mistakes in rolling out DRM.<sup>119</sup>



**GOOGLE:** In 2007 Google became the target of public outcry when it tried to close down its video service that incorporated DRM technology. Because users would have been unable to continue to use their previously purchased content once Google terminated the service, Google was forced to fully refund all payments for the service as well as keep the service active for an additional six months.<sup>120</sup>

- ◆ **CONSIDER THE LONG-TERM FINANCIAL COSTS OF DRM.** The upfront costs of DRM are fairly obvious: the financial outlay and time spent on acquisition or implementation. The long-term costs are more difficult to measure. DRM can force your company to choose between maintaining a distribution model or authentication system that you would rather abandon and alienating users who purchased content that is suddenly unusable. In addition, the administrative costs of maintaining DRM are likely to continue to grow.
- ◆ **EVALUATE THE IMPACT OF DRM ON YOUR USERS.** Users may be dissuaded from using your product or service if their freedom is constrained by DRM, especially if there is not enough “breathing space” to allow your customers to create new content or find new uses of your products or services that you never envisioned. In addition, user trust in your product may erode as customers realize that DRM is interfering with their expectations.
- ◆ **EVALUATE THE BENEFITS AND EFFECTIVENESS OF DRM.** Rather than providing strong protection for intellectual property, DRM often simply presents a speed bump that will quickly be circumvented. With this in mind, your company might benefit more from encouraging broad distribution and creative uses of your property rather than by attempting to retain tighter control.