

Top Attendee Questions Floated at the Intermark Interactive Summit

1--Question: Can I be liable for information posted on my blog or social media site?

Answer: The short answer is yes, because these sites are the same thing as a town meeting or a public pulpit. However, in a vacuum this is a very difficult question to answer because it is so factually dependant. As a general rule, traditional liability for issues such as trademark infringement, copyright infringement, and defamation (i.e. libel or slander) apply online to the same extent they apply outside the online context. In fact, these legal issues are the primary area in which third parties get into trouble on the Internet. A blog or social media site host company can be liable for content they create and publish (much like a newspaper), but they are generally not liable (with a few notable exceptions) for third parties posting on the company's site. Because these situations are so fact specific, you likely will need to speak with an attorney for a case-by-case analysis of potential liabilities and/or responses, depending upon the situation.

2--Question: If someone online prints incorrect information that causes me or my company harm, is there a legal recourse?

Answer: Yes. This type of action is called “defamation” and you may have a legal recourse including access to monetary damages, depending upon the facts of the case. Generally, defamation only applies to “facts” and not opinion. A tension always exists between legally defaming someone and their First Amendment free speech rights, such as in posting an opinion. Posting and opinion is one thing, but posting inaccurate facts is another, and can lead to legal liability. However, courts must always balance the two interests so that free speech rights are protected, but not at the expense of ruining a third party’s commercial reputation and their ability to commercially succeed. Finally, the posting of truthful information is protected and usually provides a perfect defense. Statute of limitations on these types of actions vary state by state, but usually a damaged party must bring an action within 1-2 years of the offense occurring.

See the article titled Bloggers’ Legal Guide – Online Defamation Law on the Electronic Frontier Foundation’s site for a good primer on online defamation: ([EFF Article on Online Defamation](#)).

3—Question: Can you legally demand that someone remove incorrect information?

Answer: Sure, you can threaten a defamation action and intimidate the party into removing the information, or you can file a lawsuit and a court can issue an injunction (assuming you win) to remove the material after the case is decided. However, immediate actions to remove information by obtaining a temporary restraining order or “TRO” as they are called are usually not available in defamation situations. Also, a lot of sites will remove information upon giving notice to them and even may have specific posted policies regarding such removals. But, the sites themselves are generally legally protected from liability as long as they did not know or have reason to know about the offending information. Hence, if you let them know, they will then have “reason to know” and may feel compelled to remove the offending information.

4—Question: Is there a difference between someone writing about a negative opinion of a company or product and writing something blatantly untrue?

Answer: Yes, per the answer to question 2 above, opinion is protected speech, but the publication of false facts is not. By the way, you can't just call something you write "my opinion" on a blog or social networking site and be protected. If people understand that you are defaming someone based upon the context of your posting, you can be liable, even if you write, "in my opinion." Here is the bottom line, make sure that what you write is accurate, and never make facts up which can damage a party.

5--Question: Can I collect information from people who visit my website?

Answer: Yes, you may collect information from visitors to your website; however, there are some enhanced restrictions within certain industries, depending on the type of information collected. The best course of action is to develop a privacy policy and display it prominently on your website so that visitors know how your business handles their information. In your privacy policy, you should tell people what information you collect, what you do with that information, and who you share the information with. So, the general rule of thumb is, when it comes to privacy policies, "say what you do and do what you say."

6--Question: Is it legal to track someone's online behavior in order to serve them behaviorally targeted ads?

Answer: Yes. In accordance with the court decision called "In re DoubleClick," the collection of online behavioral information does not damage a site visitor to such an extent that they are damaged. Wikipedia has a good article about this case and its relation to behavioral profiling ([Wikipedia Article on In re DoubleClick](#)).

7—Question: What information do we need to have in our privacy policy to let people know we will be tracking their behavior on our site.

Answer: From a present, legal liability stand point--nothing. But, since the law in this area is changing so rapidly, monitory of proposed Federal Trade Commission ("FTC") policies is highly recommended. For example, in response to a great number of complaints received by the FTC, they have issued a set of proposed online behavioral advertising principles on their website www.ftc.gov (to find, search on Google using keywords "FTC and behavioral advertising principles" or go to: [FTC Proposed Guidelines](#)). Since what the FTC issues has a good chance of becoming law some day, it is usually better to adopt their policies ahead of time to avoid any potential for liability. Hence, incorporating the principles espoused in the FTC guidelines into your online privacy policy is advisable.

8—Question: What's the most important thing to know about amplifying your brand?

Answer: Don't overlook your business partners – suppliers, vendors, retailers, and dealer. They can help you multiply your marketing efforts – you just need to arm them with the right message and infrastructure. That being said, from a legal perspective, you need to make sure you have firm, clear agreements with your business partners about how they will use that message or that infrastructure. For example, what will happen if you stop doing business with each other? Never assume they will just "do the right thing" after they have lost the economic incentive to cooperate. In your agreements, you need to give some serious thought to stating not only what you and your partner promise each other, but also how you are going to enforce those promises. Generally, you can amplify your brand greatly by using business partners, but you should have the proper legal agreements in place to protect you and your partner expectations.

9—Question: Once someone has “opted in” (i.e. provided legal assent to receive communications, and especially mobile communications), can you send anything to them, anytime?

Answer: Yes, you can send messages to that person as long as it is in the context of what they opted in for. Remember, mobile is a personal medium, so be careful how often you send messages, and make sure there is a benefit to the customer. While it's always important to make sure you get an assent (i.e. an “opt in”) when necessary, it's especially important to do so in mobile marketing because of the unique federal regulations applicable to that medium. Never “fudge” an opt-in or push the envelope on how broadly you can interpret permissions, because doing so can lead to a real litigation nightmare.

10—Question: Does the CAN-SPAM Act regulate commercial SMS?

Answer: No. CAN-SPAM’s definition of an “electronic mail message” necessarily excludes SMS. “The term ‘electronic mail message’ means a message sent to a unique electronic mail address.” The term ‘electronic mail address’ means a destination, commonly expressed as a string of characters, consisting of a unique user name or mailbox and a reference to an Internet domain, whether or not displayed, to which an electronic mail message can be sent or delivered. Thus, CAN-SPAM does not apply to SMS which reach consumers only through their 10 digit mobile phone numbers. That said, the Federal Communications Commission (“FCC”) has imposed a ban on sending unwanted commercial email messages to wireless devices. The FCC’s ban covers messages sent to wireless devices, if the message uses an Internet address that includes an Internet domain name. To help enforce its ban, the FCC required all wireless service providers to messages to wireless devices. The FCC published this list at www.fcc.gov/cgb/policy/DomainNameDownload.html. Non-exempt senders of commercial email messages are prohibited from sending them to any Internet domain name on this list without the recipient’s express prior authorization. The FCC’s ban does not cover “short message,” typically sent from one mobile device to another that do not use an Internet address. Also, the FCC’s ban does not cover email messages that a consumer forwards from his/her computer to his/her wireless device.

11—Question: If consent is received to send a commercial text, what legal constraints apply?

Answer: Once consent has been obtained, when sending a text message advertisement, the company must identify itself in the text message, include in each message a free electronic mechanism (e.g. a free text number to dial) for consumers to opt-out, and ensure that the opt-out mechanism functions for 30 days after the message is sent. A company can continue to send messages to the consumer until the consumer revokes his or her authorization. If consent is revoked, the company must stop sending text messages to the consumer within 10 days.

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