



## 210 - Dealing with Web Critics: Rumors, Blogs, & yourcompanystinks.com Websites

**Franklin E. Fink**  
*Vice President, Business Affairs*  
AG Interactive, Inc.

**Anne Gerry**  
*Corporate Counsel*  
The Home Depot, Inc.

**Mark Meckler**  
*General Counsel/Chief Operating Officer*  
Unique Leads

## Faculty Biographies

**Franklin E. Fink**  
Vice President, Business Affairs  
AG Interactive, Inc.

### **Anne Gerry**

Anne Gerry is corporate counsel at the Home Depot in Atlanta. In this role she handles IT, eCommerce, and telecommunications legal matters.

Prior to joining The Home Depot, she was a partner with the Atlanta law firm of Arnall Golden Gregory LLP.

Ms. Gerry received her B.A. and J.D. from the University of Florida.

### **Mark Meckler**

Mark Meckler is the general counsel and chief operating officer for UniqueLeads.com, Inc., and Unique Lists, Inc. in Wellington, Florida.

Mr. Meckler has been practicing for several years, beginning in the area of real estate and business. More recently he has been exclusively focused on the online advertising industry. He's been general counsel and chief operating officer for several companies and has developed advertising law compliance plans, privacy policies, and affiliate network compliance programs.

He writes regular columns on legal and compliance issues facing online advertisers and has spoken extensively on the subject. Mr. Meckler is also a member of the International Association of Privacy Professionals.



## Session 210 - Outline

### Mark Meckler

**Introduction**  
**JL Kirk Example**

### Frank Fink

**You've Got a Web Critic. What Should You Do?**  
**Having Content Removed from the Web**  
**Locating Anonymous Web Posters**  
**Legal Considerations**  
**Discovery Considerations**

### Anne Gerry

**Employee Blogs, Message Boards, Internal Leaks**  
**When Blogs and Message Boards *are* a Problem**  
**Best Practices**

### Panel

**Q&A**  
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Mark Meckler - General Counsel / C.O.O.

- unique leads —————

## Introduction

### JL Kirk Example



## Definitions

- **“Blog”** - A **blog** is a website where entries are written in chronological order and commonly displayed in reverse chronological order. "Blog" can also be used as a verb, meaning *to maintain or add content to a blog*.

Blogs provide commentary or news on a particular subject such as food, business, politics, or business; some function as more personal online diaries. A typical blog combines text, images, and links to other blogs, web pages, and other media related to its topic. The ability for readers to leave comments in an interactive format is an important part of many blogs.

- **“Message Board”** / A Message Board or **Internet forum** is an online application which allows groups of people to hold discussions and post user generated content. Message boards are also commonly referred to as **web forums, internet forums, discussion boards, (electronic) discussion groups, discussion forums, bulletin boards, or simply forums**. The terms "forum" and "board" may refer to the entire community or to a specific sub-forum dealing with a distinct topic.



## Handling Negative Web Publicity The Wrong Way

Example:

JL Kirk & Associates v. Just Another Pretty Farce

Or

### How to Turn a Molehill Into a Mountain

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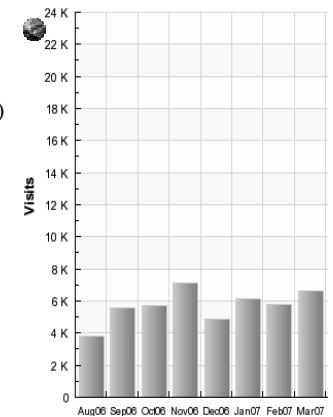


## Just Another Pretty Farce (General Subject Matter Blog – Low Readership)

### Sitemeter Statistics Before JL Kirk

(Visits in the months of Aug. '06 through Mar. '07)

**Average:** Just Under 6,000 Visits per month (200 per day)



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## Just Another Pretty Farce

<http://mycropht.blogspot.com/2007/02/jl-kirk-associates-my-story.html>

### Time Line to Blogstorm

Occasionally, a spike in web activity occurs surrounding a single subject or controversy. When this phenomenon reaches a frenzy in the blogosphere, it is commonly referred to as either a “**blogstorm**” or “**blog swarm**.” This can drive incredible traffic counts to any sites related to the issue. As sites cross link, the phenomenon becomes self perpetuating.)

- February 27, 2007 – Blog Author posts negative entry about husband’s experience with JL Kirk employment agency.
- April 7, 2007 – Direct response in comments by a JL Kirk employee. Response reveals confidential client information, etc. Further comments in blog indicate readers feel commenter has proven Author’s case.
- April 11, 2007 – Lawyers get involved. Blogstorm begins

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## The Lawyers Get Involved

### Lawyers for JL Kirk and Associates issue threatening Cease and Desist Letter.

*“If you do not comply with these demands on or before April 13, 2007, JL Kirk Associates intends to sue you for damages.”*

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**JUST ANOTHER PRETTY FARCE**  
a Dayadhvam Danyata Shanthi Shanthi Shanthi

**This Entry For A Limited Time Only**  
Apr 11th, 2007 by Katherine Coble

The doorbell rang 5 minutes ago.  
It was delivery of a certified letter.

I am being ordered to take down all of my blog entries pertaining to JL Kirk & Associates. If I don't, they will sue me for tortuous interference and other damages.

In a subsequent conversation with the attorney, Alan Kopady of King & Ballow Law Offices, if I do not take down the blog entries they will contact my Internet Service Provider, Comcast, to have my internet access shut down.

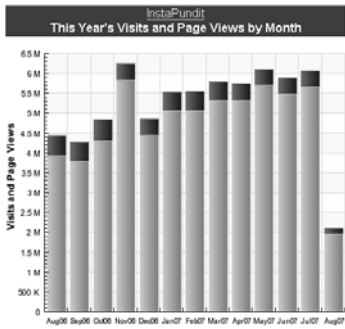
I have until April 13th to comply with the demands of the letter.

I have not yet decided which action to take.



**Blogswarm Spreads Story of Alleged JL Kirk Misdeeds.**

Story Picked Up and Spread by Major Blogs Including Instapundit.com.



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**INSTAPUNDIT.COM**  
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Try the FT in print or online.  
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APRIL 11, 2007

**TENNESSEE BLOGGER THREATENED WITH LIBEL SUIT.** The text of the demand letter is here. Some thoughts on why threats like this are usually a bad idea can be found in this article on libel in the blogosphere.

Brittney Gilbert, meanwhile, has a characteristically pungent response. This statement in the demand letter suggests a lack of familiarity with federal law on the subject: "As the 'publisher' of your blog, you control, and are responsible for, the content appearing in it. References by persons posting to your blog to JL Kirk Associates as 'crooks' and its services as a 'scam' are equally false and defamatory as your own." If, as it seems to be, this is a reference to posts by blog commenters, it appears inconsistent with the Communications Decency Act's immunity provisions. Perhaps, however, I misunderstand the argument.

UPDATE: SayUncle thinks this was a **bad move**: "They've probably done more damage with this than her original post did."

ANOTHER UPDATE: **Bill Hobbs**: "As for JL Kirk Associates, if I was in the job market - and, as it turns out, I am - I wouldn't use them. Not because of what Katherine Coble wrote, nor because of what I found about them via google, but because they and their law firm decided that threatening to sue a blogger to squelch criticism was a better business tactic than addressing problems that may exist with how they do business."

It's already made the *News-Sentinel*.

MORE: Uh oh.

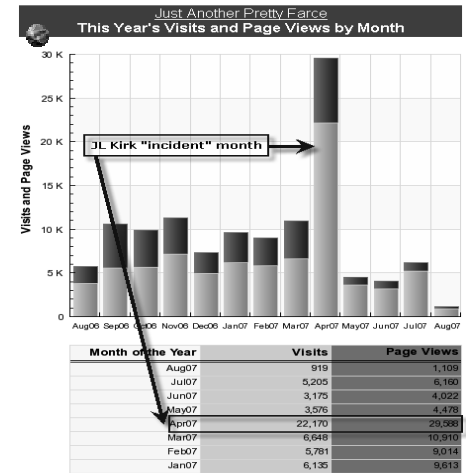
<http://instapundit.com/tech/200486.php> posted at 05:03 PM by Glenn Reynolds

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**Sitemeter Statistics**

**Visits and Page Views for "Just Another Pretty Farce" blog. (Aug. 06 – Aug 07)**



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## Moral of the Story

Small story becomes HUGE story due to heavy handed lawyers not being aware of the consequences of their actions in a web enabled society.

Search JL Kirk & Associates on the web today. The negative effects of this incident will linger for years to come due to heavy handed tactics of JL Kirk and its lawyers.

## Make Sure You Have a Plan

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## Be Aware – There is Free Assistance for Offending Bloggers and Other Web Critics

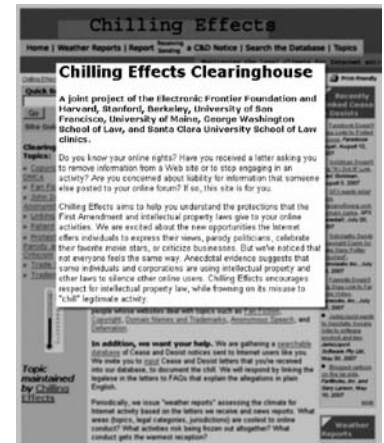
### Chilling Effects

[www.chillingeffects.org](http://www.chillingeffects.org)

*"We are excited about the new opportunities the Internet offers individuals to express their views, parody politicians, celebrate their favorite movie stars, or criticize businesses. But we've noticed that not everyone feels the same way. Anecdotal evidence suggests that some individuals and corporations are using intellectual property and other laws to silence other online users. Chilling Effects encourages respect for intellectual property law, while knowing on its release to 'chill' legitimate activity."* (emphasis added)

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**Electronic Frontier Foundation**

[www.eff.org/bloggers/](http://www.eff.org/bloggers/)

*“We’re working to shield you from frivolous or abusive threats and lawsuits. Internet bullies shouldn’t use copyright, libel, or other claims to chill your legitimate speech.”*

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**Frank Fink – VP, Business Affairs**



**You’ve Got a Web Critic. What Should You Do?**

**Having Content Removed from the Web**

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**Legal Considerations**

**Discovery Considerations**

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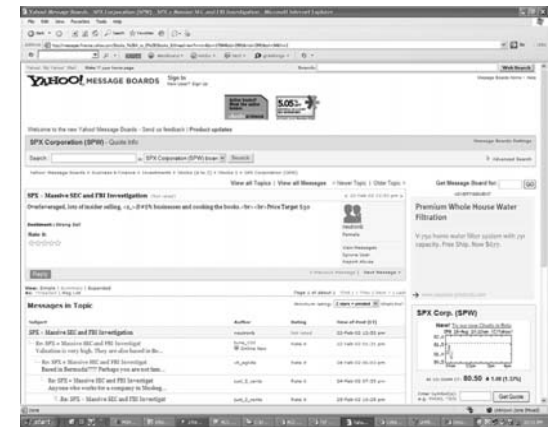
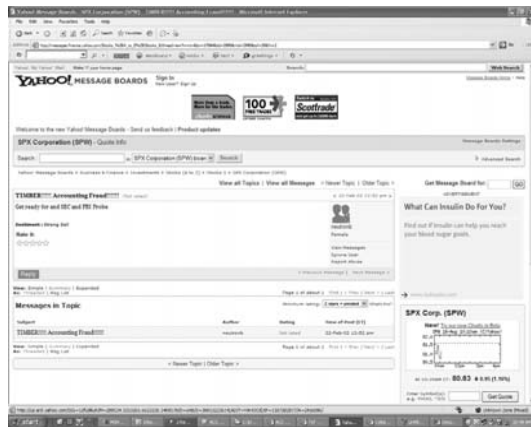
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## SPX CORP v. DOE

## SPX CORP v. DOE



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## THE EASY WAY: ASK NICELY

- Virtually every online network has established a process to request removal of inappropriate material.
  
- If the material violates the network's terms of service, they will generally remove promptly.

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## YAHOO'S TERMS OF SERVICE

### 6. MEMBER CONDUCT

You agree to not use the Service to:

- a. upload, post, email, transmit or otherwise make available any Content that is unlawful, harmful, threatening, abusive, harassing, tortious, defamatory, vulgar, obscene, libelous, invasive of another's privacy, hateful, or racially, ethnically or otherwise objectionable; . . .
  
- f. upload, post, email, transmit or otherwise make available any Content that you do not have a right to make available under any law or under contractual or fiduciary relationships (such as inside information, proprietary and confidential information learned or disclosed as part of employment relationships or under nondisclosure agreements); . . .
  
- k. intentionally or unintentionally violate any applicable local, state, national or international law, including, but not limited to, regulations promulgated by the U.S. Securities and Exchange Commission, any rules of any national or other securities exchange, including, without limitation, the New York Stock Exchange, the American Stock Exchange or the NASDAQ, and any regulations having the force of law;

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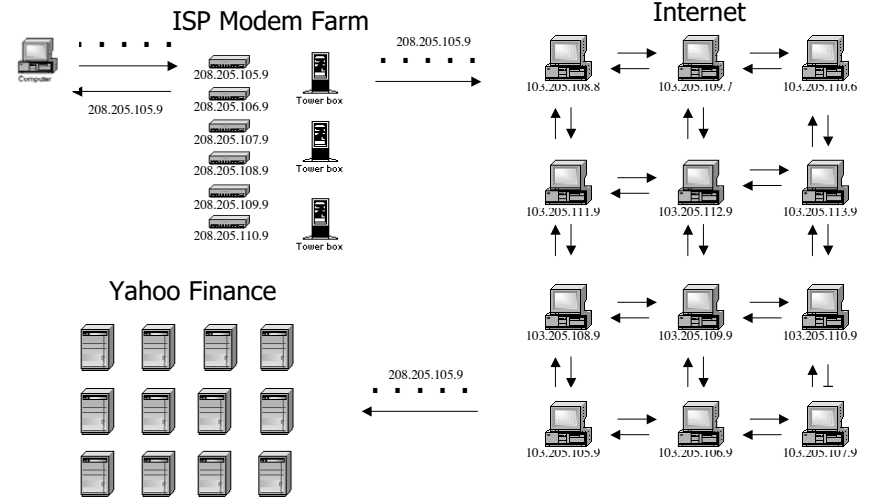


## THE HARD WAY: TRACK DOWN THE EVILDOERS

- Despite appearances to the contrary, no one is truly anonymous on the Internet.
- All of our activities leave electronic fingerprints stored in the web logs of online networks.
- It is often (though not always) possible to connect a posting to a specific computer

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## SAMPLE ACCESS LOG ENTRY

```

71.124.121.220 - - [13/Aug/2007:08:08:55 -0400] "POST /outbox/review.pd?mode=res
end&m=954153903&i=443269668&t=OrderUsage HTTP/1.1" 302 275
146.145.79.140 - - [13/Aug/2007:10:23:49 -0400] "POST /outbox/review.pd?mode=res
end&m=886415351&i=443341583&t=OrderUsage HTTP/1.1" 302 275
63.144.216.83 - - [13/Aug/2007:14:37:04 -0400] "POST /outbox/review.pd?mode=rese
nd&m=34415235&i=443341543&t=OrderUsage HTTP/1.1" 302 275

```

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## WHOIS LOOKUP ON WWW.DNSSTUFF.COM



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## WHOIS RESULT



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## TIME IS OF THE ESSENCE

- Each ISP has a different information retention policy.
  - All purge their web logs – some in as little as five days
  - Different information collected and retained
  - Different privacy and information disclosure policies
  
- Send immediate written notice instructing potential subpoena targets to preserve the records, even before serving the subpoena

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## DON'T TRY THIS AT HOME

- These methods may be unsuccessful or yield inaccurate results depending on a number of factors
  - Spoofed Origin
  - Anonymizer (and similar products)
  - Firewalls
  - Encapsulation
  - Discrepancies in log time stamps
- **BOTTOM LINE: ALWAYS COORDINATE YOUR DISCOVERY STRATEGY WITH AN EXPERIENCED WEB OPS EXPERT**

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## COMMENCEMENT OF LITIGATION

- Most states authorize commencement of actions against John Doe defendants, where wrongful acts can be identified but defendants cannot.
- Most states provide for pre-service discovery to identify missing defendants.
- Litigation must be filed in good faith, and not merely as a means to procure exposure of author or chilling potential critics.
  - Rule 11
  - Fee-shifting Statutes
  - Public criticism

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## POTENTIAL CAUSES OF ACTION

- Defamation
- Securities fraud
- Misappropriation of trade secrets
- Violation of confidentiality agreements
- Breach of fiduciary duty
- Tortious interference with contract

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## SUBPOENA DIRECTED TO ONLINE SERVICES

- Two step process:
  - To the online service hosting the message:
    - All IP addresses corresponding to the source and origin of the target message
    - Date/Time Stamp
  - ISP to which the IP address was issued:
    - Account information of user to which IP address was issued at the time message was sent

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## STATUTORY, CONSTITUTIONAL AND ETHICAL ISSUES IN DISCLOSURE

- Sites will require a subpoena, search warrant, or court order before releasing non-public user information.
  - Electronic Communications Privacy Act of 1986, 18 U.S.C. §2701 *et. seq.*
  - Privacy Policy
  - Terms of Service
- Must be issued by court with jurisdiction over online service
- See generally, F. Fink, *The Name Behind the Screen Name: Handling Information Requests Relating To Electronic Communications*, 19 *Comp. & Internet Lawyer* 1 - 14 (Nov. 2002).

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## FIRST AMENDMENT ISSUES

- First Amendment protects the right to speak anonymously
  - *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341 (1995)
  - See also *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 197-99 (1999)
- Principle applies in the context of anonymous online postings
  - *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001)
  - *In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. 26; 2000 Va. Cir. LEXIS 220, 2000 WL 1210372 (Cir. Ct. Fairfax, Jan. 31, 2000).

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## SLAPP SUITS AND CHILLING EFFECTS

- Courts will scrutinize attempts to use legal process to compel disclosure of identity of anonymous Internet posters
- SLAPP Suits – Strategic Lawsuits Against Public Participation
  - Lawsuits of dubious merit (typically defamation) intended to tie up opponents in litigation and force them to spend money on costs of defense
  - Twenty states currently have anti-SLAPP statutes providing for accelerated disposition and fee shifting

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## SHOWING REQUIRED TO COMPEL DISCLOSURE

- *Columbia Insurance Company v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999)
- *In re Subpoena Duces Tecum to America Online, Inc.* 52 Va. Cir. 26; 2000 Va. Cir. LEXIS 220, 2000 WL 1210372 (Cir. Ct. Fairfax, Jan. 31, 2000)
- *Dendrite International, Inc. v. John Does*, 342 N.J. Super. 134; 775 A.2d 756 (App. Div. 2001)
- *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001)
- *Orie-Melvin v. Doe*, 49 Pa. D. & C. 4<sup>th</sup> 449 (Allegheny C.C.P. 2000), rev'd on other grounds 575 Pa. 264, 836 A.2d 42 (2003)
- *Doe v. Cahill*, 884 A.2d 451 (Del. 2005)

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## COMMON ELEMENTS OF TESTS

- Party should identify all previous steps taken to locate the missing defendant; and
- That the evidence sought was centrally relevant to a core claim or defense;



## DIFFERING THRESHOLD SHOWINGS

- Legitimate, good faith basis to believe conduct is actionable
  - *In re Subpoena Duces Tecum to America Online, Inc.*
  - *Orie Melvin*
  - *2TheMart.com*
- Sufficient to survive motion to dismiss
  - *Dendrite*
  - *Seescandy.com*
- Sufficient to survive motion for summary judgment
  - *Cahill*



## MESSAGE BOARD HYPERBOLE

- *Global Telemedia International, Inc. v. Doe*, 132 F. Supp. 2d 1261 (C.D. Cal. 2001) (Views expressed in Internet message boards are so flip and irreverent that no reasonable person would take them seriously)
  - Importantly, the postings are full of hyperbole, invective, short-hand phrases and language not generally found in fact-based documents, such as corporate press releases or SEC filings. . . . To put it mildly, these postings, as well as the others presented to the Court, lack the formality and polish typically found in documents in which a reader would expect to find facts. It is unlikely, for example, that a corporation would express the view that investors should "up the volume for some of that 2 dollar love" or "gotta love this companies potential." *Id.*, Ex. A at 57. Nor would the SEC ever state that GTMI is "steering the sinking ship but don't worry they are headed for the calmer waters of the caribbean where your money will be safe from federal authorities.

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## BLOGGER IMMUNITY FOR THIRD PARTY POSTS

- Communications Decency Act, 47 U.S.C. § 230(c) provides absolute tort immunity to users and providers of interactive computer services for third party postings.
  - *Zeran v. America Online, Inc.*, 129 F.3<sup>rd</sup> 327 (4<sup>th</sup> Cir. 1997);
- This provision has been construed to extend *absolute immunity* to bloggers for third party postings:
  - *Barrett v. Rosenthal*, 40 Cal.4th 33, 51 Cal. Rptr.3d 55, 146 P.3d 510, 514 (Cal. 2006)
  - *Batzel v. Smith*, 333 F.3d 1018 (9<sup>th</sup> Cir. 2003)

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## Anne Gerry – Corporate Counsel, Technology

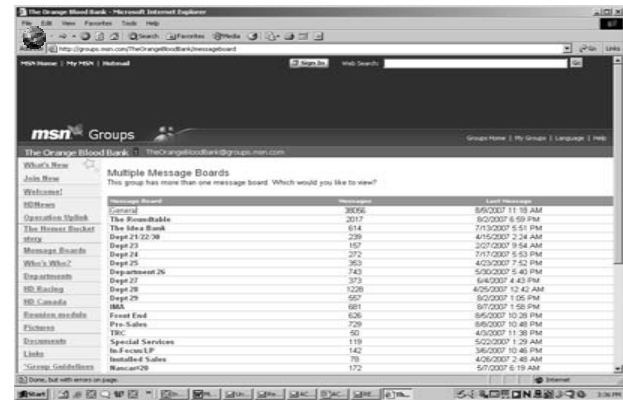


## Employee Blogs, Message Boards, Internal Leaks When Blogs and Message Boards *are* a Problem Best Practices

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## Employee Boards/Blogs are Fairly Common e.g., The Orange Blood Bank Message Board for Home Depot Employees



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### When Blog/ Message Board Is Problem

- Disclosure of Nonpublic Information or other communication that could affect stock price.
- Reputation of Company harmed.
- Disclosure of Confidential Information/Trade Secrets.
- Use of work time or resources.

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### When Blog / Message Board Is a Problem

(continued)

- Disclosure that potentially affects Stock Price.
  - Whole Foods/Wild Oats – Whole Foods CEO, John Mackey, has, for eight years, regularly posted comments about Whole Foods on the Yahoo stock forums using a pseudonym.
  - Announcement of informal SEC investigation and internal BOD investigation.

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**Whole Foods CEO sorry for anonymous Web posts**

REUTERS Published on ZDNet News: Jul 18, 2007 3:45:00 AM

TalkBack ADD YOUR OPINION SHARE PRINT E-MAIL MOST THUMBLETS +7 11 VOTES

Tags: Reuters, Web Technology

**The chief executive of Whole Foods Market apologized to shareholders on Tuesday for anonymously posting comments about his company on the Internet as the organic and natural foods grocer said the U.S. Securities and Exchange Commission had launched a probe into the matter.**

News of the SEC probe comes a week after court documents filed by the U.S. Federal Trade Commission revealed that Whole Foods Chief Executive John Mackey posted messages on a Yahoo chat forum under an alias for years.

In the postings, Mackey talked up his company while predicting a bleak future for Wild Oats Markets, the rival his firm is trying to acquire.



## When Blog / Message Board *Is* a Problem (continued)

### ● Reputation of Company

- Ellen Simonetti – Delta Air Lines  
<http://queenofsky.journalspace.com>
- Former Delta flight attendant blogged about her work experiences. Blog included pictures of Simonetti in her uniform on a Delta airplane in suggestive poses. In late 2004, Simonetti suspended and then fired.

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## When Blog / Message Board *Is* a Problem

### ● Disclosure of Confidential Information

Microsoft fired contract worker, Michael Hanscom, for posting picture of pallets of Apple Power Mac G5 computers, on Redmond campus, together with blogged statement: "It looks like somebody over in Microsoft land is getting some new toys."

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### Blogger dismissed from Microsoft

Copy shop worker loses position after posting Mac photo

By Jon Bonné  
MSNBC

Oct. 30, 2003 - Michael Hanscom admits it probably wasn't the best idea. He thought the photo on his personal blog of Apple computers being offloaded at a Microsoft loading dock might get a couple of smirks from friends. He never imagined it would cost him his job.

That's precisely what he says happened, though. Hanscom has found several minutes of Web fame this week as the latest example of how bloggers' blend of personal and professional can backfire. Hanscom, who says he has kept



Courtesy of Michael Hanscom  
This photo in Michael Hanscom's blog is what he believes cost him his job.



## When Blog / Message Board *Is* a Problem (continued)

### ● Use of work time or work resources

- The Washingtonienne
- <http://washingtoniennearchive.blogspot.com/>
- Jessica Cutler – U.S. Senate staff assistant to Sen. Mike DeWine and former intern in Joe Lieberman’s office, posted her sex diaries on her blog. She was fired after she was exposed as the blogger.
- Fired for using Senate resources to post what were deemed offensive materials to her blog.



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## Best Practices – Official Policy

- Recommend Having Policy on Disclosure of Proprietary Information that includes disclosure on blogs and/or message boards
- Policy should outline repercussions for violating the policy, including termination of employment, personal liability, and criminal prosecution.

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## Best Practices – Official Policy

- **Disclosure Policy should include prohibitions on disclosing or making:**
  - Any Financial information
  - Promotions, marketing, future products or forecasting information that is not available to the general public.
  - False or misleading information about the company
  - Any internal company communications (i.e., memos/emails)
  - Any material that is copyrighted or trademarked.
  - Defamatory statements



## Best Practices – Leaks from Inside

- Have process in place for when inappropriate posts are made
  - Weigh importance – what is nature of disclosed information?
    - Cost of measures to determine source of disclosure
    - Risk of unauthorized use or disclosure
    - Is it “forward looking” information?





## Best Practices – Leaks from Inside

- Is it easy to determine who made disclosure?
- Try to identify source of leak without legal measures (i.e., narrow down to people who could have possibly known about the information leaked and then conduct interviews).
- If the former doesn't work, and nature of disclosure serious, seek subpoena to determine identity.

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## Best Practices – Outside Web Critics

- When an unrelated website poster just doesn't like you.
  - People are entitled to their opinions.
  - Is your trademark being used in an inappropriate fashion?
  - Are defamatory and/or untrue statements being made?
  - Weigh carefully whether it's worth being perceived as a heavy because you can count on the fact that your C&D letter will be posted. See [www.chillingeffects.org](http://www.chillingeffects.org).

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## Best Practices – Outside Web Critics

MSN Money Columnist Scott Burns' March 7, 2007, column expressed distress regarding customer service at The Home Depot. This column received thousands of responses, many agreeing with Mr. Burns.

- <http://articles.moneycentral.msn.com/Investing/Extra/HomeDepotShaftingShoppers.aspx>

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## Best Practices – Outside Web Critics

- Home Depot's response to Mr. Burns' web column:
  - The Home Depot CEO, Frank Blake, responded with apology and commitment to do better.
    - (<http://articles.moneycentral.msn.com/Investing/Extra/HomeDepotCEOWeLetYouDown.aspx>)

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