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The Antisocial Effects of Social Media and How Colleges and Universities Can Manage Related Litigation Risks

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Abstract

Rapid advancements in information technology have transformed day-to-day university operations and, in doing so, have altered the landscape of risk management. Authors Gregory L. Demers, J. William Piereson, Mark A. Cianci, and Peter L. Welsh provide an overview of some of the most significant social-media-related risks faced by colleges and universities, before considering ways to mitigate these risks through a broad insurance coverage plan. The article explains how, given the relative novelty of this field, the coverage afforded by insurance policies inevitably will vary, often significantly, from insurer to insurer.



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The Antisocial Effects of Social Media and How Colleges and Universities Can Manage Related Litigation Risks

Gregory L. Demers, J. William Piereson, Mark A. Cianci, and Peter L. Welsh—Ropes & Gray LLP*

I. INTRODUCTION

Now more than ever, colleges and universities,¹ comprised of administrations, faculties, and employees, face numerous and varied risks. As university operations continue to grow in size and scope, so do the attendant legal risks. Consequently, over the last twenty years, university risk management has evolved into an increasingly sophisticated enterprise. From assembling risk assessment teams to developing compliance and prevention protocols, to implementing crisis management strategies, colleges and universities are now developing multi-layered plans for counteracting the risks they face.

This emphasis on prevention and crisis management is both important and justified. However, prophylactic measures are not enough. The reality is that, while such approaches can help minimize risks, they cannot eliminate risk entirely. As a result, the most critical aspect of a comprehensive risk management plan is the same today as it was fifty years ago: insurance. Yet, its value, and the breadth of the protection offered can vary enormously from policy to policy.

This article is part of a series examining emerging litigation risks facing colleges and universities today, in order to provide guidance on managing these risks, with a focus on insurance. Specifically, this article takes a closer look at litigation risks arising from the explosive popularity of social media and other emerging technologies on college campuses.

Generally, colleges and universities are at the cutting edge of information technology; yet, updates to student handbooks, university protocols, and insurance policies often lag far behind technological advancements. Worse yet, in some cases,

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¹ For the sake of brevity, this article will use the terms "college" and "university" interchangeably.

these changes are implemented as remedial measures in response to a catastrophic event.² This article will consider coverage issues that arise from these emerging risks and will suggest ways in which educational institutions can ensure the broadest coverage possible. This article will provide an overview of some of the most significant social-media-related risks faced by colleges and universities today, before considering ways to mitigate these risks through a broad insurance coverage plan.

II. EMERGING RISKS AND LITIGATION TRENDS

Not that long ago, members of the higher education community were still marveling at the explosive popularity of social media³ among college students. Jeff Olson, a Kaplan representative, explained to *The Wall Street Journal*, “[w]e’re in the early stage of a new technology. . . . It’s the Wild, Wild West. There are no clear boundaries or limits.”⁴ This remark was prompted by an anonymous survey of 320 colleges in which the vast majority reported that they had no policy in place for accessing applicants’ social networking profiles.⁵

Now, not only have many universities developed expansive social media policies, but they have actively embraced social media as a critical part of the admissions process. According to a 2015 study conducted by the Council for Advancement and Support of Education (“CASE”), the Huron Education Consulting Group, and mStoner, schools employ a growing number of social media platforms as part of their operations.⁶ According to the study, 91% of schools use Facebook,

² As one author has observed, “[t]he rapid expansion of digital technology and the internet caused a revolution in the way schools and colleges work with information.” MICHAEL PRAIRIE & TIMOTHY GARFIELD, *COLLEGE AND SCHOOL LAW: ANALYSIS PREVENTION AND FORMS 364* (Nancy L. Herbst ed., 2010). And these risks are growing. *Id.* at 599 (“The types and magnitude of potential liability facing schools and colleges seem not only to have no end or limit, but actually are increasing.”).

³ This article uses the term “social media” to refer to any website that allows for the creation and exchange of user-generated content. The most popular such websites include Facebook, Twitter, and Instagram. As of July 2015, Twitter had approximately 320 million monthly active users. Drew Olanoff, *Twitter Monthly Active Users Crawl to 316M*, TECHCRUNCH (July 28, 2015), <http://techcrunch.com/2015/07/28/twitter-monthly-active-users-crawl-to-316m-up-just-15-year-over-year>. In December 2015, Facebook had approximately 1.6 billion monthly active users. David Cohen, *Everything You Need to Know About Facebook’s Q4 and Full-Year 2015 Results*, ADWEEK (Jan. 28, 2016), <http://www.adweek.com/socialtimes/q4-full-year-2015-results/633437>. Instagram, as of September 2015, had approximately 400 million active users. *Celebrating a Community of 400 Million*, INSTAGRAM (Sept. 22, 2015), <http://blog.instagram.com/post/129662501137/150922-400million>.

⁴ John Hechinger, *College Applicants, Beware: Your Facebook Page is Showing*, WALL ST. J. (Sept. 18, 2008), <http://online.wsj.com/article/SB122170459104151023.html>.

⁵ *Id.*; see also Press Release, Kaplan Test Prep, At Top Schools, One in Ten College Admission Officers Visits Applicants’ Social Networking Sites (Sept. 18, 2008).

⁶ Meris Stansbury, *5 major trends in higher education’s use of social media*, ECAMPUS NEWS (Nov. 12, 2015), <http://www.ecampusnews.com/top-news/trends-social-media-620> (citing CASE/Huron/

81% use Twitter, 76% use LinkedIn, 67% use YouTube, and 54% use Instagram.⁷ The same study shows that these institutions are using social media *frequently*; 49% post to Facebook at least once a day, while a majority post to Twitter at the same rate.⁸ In addition, a large number of college athletic programs are aggressively employing social media platforms to attract athletes.⁹ “Every single school does it,” according Darrick Yray, a recruiting coordinator for Oregon State.¹⁰ As evidenced by the study, social media is now an ingrained part of administration in the world of higher education.

The CASE, Huron, and mStoner study demonstrates the immense utility that college administrators see in platforms such as Facebook and Twitter. As evidenced by the staggering success of social media companies, these sites are a firmly entrenched part of American culture, especially in the world of higher education.¹¹ As expected in a highly competitive market, university and college admissions officers are adapting to meet the demands of a new student body. With new technologies and a new generation of students come new litigations risks.

mStoner study); see also *Social Media Adoption Soars as Higher-Ed Experiments and Reevaluates Its Use of New Communications Tools*, UNIV. MASS. DARTMOUTH 1 (2011), <https://www.umassd.edu/media/umassdartmouth/cmr/newsletters/NewsletterFall2011.pdf> (reporting that 98% of colleges and universities have a Facebook page, 84% have a Twitter account, and 66% have a blog; explaining that, between 2010 and 2011, admissions officers using LinkedIn as part of their recruiting efforts increased threefold, from 16% to 47%).

⁷ *Id.*

⁸ Stansbury, *supra* note 6.

⁹ Jeremy Crabtree, *The ‘social’ science of recruiting*, ESPN (Jan. 26, 2016), http://espn.go.com/college-football/recruiting/story/_/id/14646545/social-media-becomes-powerful-aide-dangerous-connection-recruiting.

¹⁰ *Id.*

¹¹ Social media use has increased by nearly 1000% among users aged 18–29 years old, according to the Pew Research Center. Joanna Brenner & Aaron Smith, *72% of Online Adults are Social Networking Site Users*, PEW RESEARCH CTR. (Aug. 5, 2013), <http://www.pewinternet.org/2013/08/05/72-of-online-adults-are-social-networking-site-users>. Approximately 98% of U.S. adults aged 18–24 use social media in some fashion, according to the consumer insight service Experian Simmons. Sherilynn Macale, *98% of online US adults aged 18–24 use social media*, NEXT WEB (2012), <http://thenextweb.com/socialmedia/2011/10/08/98-of-online-us-adults-aged-18-24-use-social-media>. One 2009 study found that 96% of students used Facebook daily. Mary Bart, *Do College Students Spend Too Much Time on Facebook, YouTube and Other Social Networking Sites?*, FACULTY FOCUS (Dec. 30, 2009), <http://www.facultyfocus.com/articles/trends-in-higher-education/do-college-students-spend-too-much-time-on-facebook-youtube-and-other-social-networking-sites>. Dependence on these platforms is becoming so great that some analysts have characterized the technology as “addictive.” David Ottalini, *Students Addicted to Social Media—New UM Study*, U. OF MD. (Apr. 21, 2010), <https://usu.instructure.com/courses/468344/files/65911701/download?verifier=yLDmNgCGxt3dSLXXHvMwbNk08xnho2L9wGjoKwRC&wrap=1>; Pei Sze-Cheng, *FOMO: The Unintended Effects of Social Media Addiction*, NBC N.Y. (May 20, 2011), <http://www.nbcnewyork.com/news/local/Social-Media-Is-Causing-Anxiety-and-Depression-122260279.html>.

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Issues commonly arise when students' online commentary implicates possible violations of the student code of conduct, or worse, the law. While the nature of the infractions has not changed much with time—often involving alcohol, sex, hazing, bullying, or interpersonal conflicts—the means of communicating has evolved considerably.¹² Students, as members of one of America's most vocal demographics, are now able to broadcast their thoughts to a massive audience within seconds. Social media platforms provide both a new vehicle for students to express themselves as well as a corollary obligation, at least as a practical matter, for universities to understand and manage the associated risks.¹³

By 2006, commentators had already observed “a growing trend where officials nationally are paying attention to what their students are posting on the Internet.”¹⁴ This trend, which has only accelerated, is largely the result of external pressures on colleges to keep tabs on their students' online activities.¹⁵ Both private actors, such as copyright holders seeking to enforce their rights, and public actors, such as law enforcement officers seeking evidence of illicit behavior, rely on universities to bring on-campus malefactors to justice.¹⁶

Even the NCAA has joined the movement, as students' use of electronic and social media can implicate college athletic programs. The case of former University of Mississippi (“UMiss”) athlete Laremy Tunsil demonstrates this.¹⁷ On the night of

¹² See, e.g., Josh Logue, *Who Should Prevent Social Media Harassment*, INSIDE HIGHER ED. (Oct. 22, 2015), <https://www.insidehighered.com/news/2015/10/22/colleges-face-new-pressure-monitor-social-media-site-yik-yak> (noting that “[a]nonymous social media apps are the new frontier of unlawful conduct under Title IX”); see also D.M. Burl, *From Tinker to Twitter: Managing student speech on social media*, NACUA NOTES (Univ. Conn., Storrs, Conn.), Mar. 16, 2011, at 2, http://www.studentaffairs.uconn.edu/docs/risk_mgt/nacua5.pdf (noting that “[t]he issue of inappropriate, controversial or contentious student speech on campus communities is not a new one, but online speech adds to the challenge,” due to the volume of speech, the breadth of the audience, and the “layers of student-imposed privacy” that exist online).

¹³ Logue, *supra* note 12.

¹⁴ Sheldon Steinback & Lynn Deavers, *The Brave New World of Myspace and Facebook*, INSIDE HIGHER ED. (Apr. 3, 2007), <http://www.insidehighered.com/views/2007/04/03/steinbach#ixzz1q95UCpRG>.

¹⁵ *Id.*

¹⁶ See Zach Winn, *Countering Potential Threats with Social Media Monitoring: School and university administrators are starting to appreciate these services as an effective tool to improve campus security and identify at-risk individuals*, CAMPUS SAFETY (Jan. 20, 2016), http://www.campusafety.com/article/countering_potential_threats_with_social_media_monitoring; see also Tamara L. Wandel, *Colleges and Universities Want to be Your Friend: Communicating via Online Social Networking*, 37 PLANNING FOR HIGHER EDUC. 35 (2008) (“Online photographs have provided evidence in numerous . . . cases.”).

¹⁷ Ken Belson, Mark Leibovich & Ben Shpigel, *For Laremy Tunsil and N.F.L., Combustion When a Bong and Social Media Mix*, N.Y. TIMES (Apr. 29, 2016), <http://www.nytimes.com/2016/04/30/>

the 2016 NFL draft, it became apparent that Tunsil's social media accounts had been breached by hackers.¹⁸ These hackers posted text message conversations in which Tunsil ostensibly asked UMiss athletic officials for money.¹⁹ Relatedly, a scandal occurred at the University of North Carolina involving football players allegedly receiving improper benefits and then making comments about those benefits on the internet.²⁰ The NCAA issued a report which appeared to encourage colleges to monitor student accounts: "While we do not impose an absolute duty upon member institutions to regularly monitor such [social networking] sites, the duty to do so may arise as part of an institution's heightened awareness when it has or should have a reasonable suspicion of rules violations."²¹

Several university administrators have openly acknowledged that they patrol students' accounts on a regular basis.²² One example of this is the college administrator at Dartmouth, who acknowledged that she regularly monitors student postings on the anonymous social media application Yik Yak.²³ In a campus safety survey of 513 campus officials, over 68% of officials openly acknowledged that their institutions monitored publicly available social media postings.²⁴ Schools also monitor social media extensively in order to ensure compliance with the law, ethics codes, or NCAA athletic rules. For example, a company called "UDiligence.com" now contracts with colleges and universities to monitor the Facebook, Instagram,

sports/football/laremy-tunsil-at-nfl-draft-combustion-when-a-bong-a-gas-mask-and-social-media-mix.html?_r=0.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *University of North Carolina, Chapel Hill Public Infractions Report*, NCAA 12 (Mar. 12, 2012), <http://www.ncaa.org/sites/default/files/UNC%2BPublic%2BInfractions%2BReport.pdf>.

²¹ *Id.*

²² *Id.*

²³ Tyler Kingkade, *Your College Dean Might Be Spying On Your Yik Yak Posts*, HUFFINGTON POST (Nov. 20, 2015), http://www.huffingtonpost.com/entry/colleges-monitoring-social-media_us_564f4756e4b0d4093a5765ae. Similarly, a professor at Indiana University at Bloomington noted that it is common practice for campus security officers to pass the time by viewing student Facebook profiles for possible infractions. Martin Van Der Werf, *Beware of Using Social-networking Sites to Monitor Students*, *Lawyers Say*, CHRON. OF HIGHER EDUC. (Mar. 8, 2007), <http://chronicle.com/article/Beware-of-Using/28063>.

²⁴ *Campus Safety Survey*, MARGOLIS HEALY (2015), http://www.margolishealy.com/files/resources/2015MargolisHealy_CampusSafetySurvey_1.pdf. Monitoring of student social media profiles has been a long running trend. According to a 2008 article, an administrator at the University of Michigan reviewed students' online profiles once a semester to ensure they conformed to the code of conduct. *See* Wandel, *supra* note 16, at 41.

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and Twitter pages of thousands of student athletes across the nation to search for evidence of student activity that violates the law or the schools' ethics codes.²⁵

But regulating students' (and, in some cases, employees') online activity presents distinct risks to colleges. As this section will explain, these risks include potential First Amendment and Due Process claims, intellectual property issues, violations of federal statutes, such as the Family Educational Rights and Privacy Act (FERPA) and the Stored Communications Act (SCA), and common law claims for negligence and invasion of privacy.

A. *Constitutional Violations*

The following cases are emblematic of recent constitutional litigation involving social media use by students at the graduate, undergraduate, and high school levels. Such litigation covers a spectrum of online misconduct ranging from perceived threatening behavior to offensive comments.

In *Bell v. Itawamba County School*,²⁶ a high school student alleged that the school violated his right to free speech by taking disciplinary action against him for posting a rap video, containing threatening language, which he made while off-campus.²⁷ The rap lyrics included a slew of derogatory terms and a number of threats of violence against school coaches.²⁸ While holding that the student's recording did not reach the level of posing a grave threat to students' physical safety, the Fifth Circuit ruled that the recording reasonably could have been forecast to cause a substantial disruption to the school and thus did not qualify for First Amendment protection.²⁹

In *Keefe v. Adams*,³⁰ a nursing student at Central Lakes College alleged First Amendment violations after the school removed him from the nursing program for

²⁵ Jim Henry, *Colleges Do UDiligence to Prevent Social Networking Embarrassment*, AOL NEWS (Feb. 1, 2010), <http://www.aolnews.com/2010/02/01/colleges-do-udiligence-to-prevent-social-networking-embarrassment>.

²⁶ *Bell v. Itawamba County School*, 799 F.3d 379 (5th Cir. 2015).

²⁷ *Id.*

²⁸ *Id.* at 384.

²⁹ *Id.* at 382.

³⁰ *Keefe v. Adams*, 44 F. Supp. 3d 874 (D. Minn. 2014). *See also* *Tatro v. Univ. of Minn.*, 816 N.W.2d 509 (Minn. 2012) (In this case, a student of mortuary sciences sued the University of Minnesota and alleged First Amendment violations after the school disciplined her for posting threatening status updates on her personal Facebook page. Among the student's many posts was a threat to "stab a certain someone in the throat." The student also posted offensive messages about a cadaver that she had coined "Bernie." The court found that the University of Minnesota did not violate the student's right to free speech by sanctioning her for the Facebook postings because the academic program rules that served as

posting threatening comments about fellow students on Facebook.³¹ In one post, the student threatened to inflict physical violence on other students using an electric pencil sharpener.³² In holding that the school did not violate the plaintiff’s free speech rights, the District Court emphasized that, because he was in a professional school, the student “understood that he was subject to standards that govern the nursing profession,” and that the college could hold its students to those standards.³³

As these cases illustrate, litigation relating to social media often involves alleged free speech or due process violations. Many universities will take comfort in this fact, as case law suggests that awards for damages may be nominal or non-existent. This is especially true for private universities whose actions are not governed by the same constitutional strictures³⁴ or graduate programs that limit student speech as part of a broader goal of enshrining professional standards. In fact, several similar cases resulted in favorable outcomes for the institution involved.³⁵

It is important, however, not to underestimate the potential liability that remains for any institution. It is equally important not to underestimate the costs of litigation, which might impose both financial burdens and reputational harms on the school. In some cases, plaintiffs may tack on additional claims to their constitutional suits, such as negligence and breach of contract. For instance, students whose careers have been adversely affected by a school’s disciplinary action might seek consequential damages, which can be immense. As an example, a professionally-recruited student-athlete who loses a scholarship and a place on a university roster as a result of a

the source of the sanctions were narrowly tailored and directly related to established professional conduct standards.).

³¹ *Id.*

³² *Id.* at 879.

³³ *Id.*

³⁴ *See, e.g.*, Hack v. President & Fellow of Yale Coll., 237 F.3d 81 (2d Cir. 2001) (affirming the dismissal of plaintiffs’ constitutional claims relating to college’s coeducational dormitory policy because college was not “a state actor or instrumentality acting under color of state law”).

³⁵ *See, e.g.*, Yoder v. Univ. of Louisville, No. 3:09-CV-00205, 2012 WL 1078819 (W.D. Ky. Apr. 4, 2012) (granting summary judgment for university on constitutional claims brought by nursing student who was expelled after putting a critical and embarrassing description on her Myspace page of the live births she witnessed during her internship); Murakowski v. Univ. of Del., 575 F. Supp. 2d 571 (D. Del. 2008) (granting summary judgment for university on student’s due process claim and for the student on his First Amendment claim when university suspended him for maintaining a website that contained explicit descriptions of violence and sexual abuse); Snyder v. Millersville Univ., No. 07-1660, 2008 WL 5093140 (E.D. Pa. Dec. 3, 2008) (holding that the student was acting as a public employee during her student-teaching internship and could not show that she had commented on a matter of public concern when she posted comments critical of school officials, as well as provocative photographs, on Myspace).

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UDiligence.com online search could, hypothetically, sue the university for reputational damage and lost earnings.

B. Invasion of Privacy

An even more significant source of potential liability is the complex web of privacy laws that may be implicated by universities' regulation of social media.³⁶ In addition to common law invasion of privacy claims, plaintiffs have a number of statutory bases to rely on, including the Electronic Communications Privacy Act ("ECPA"),³⁷ the Computer Fraud and Abuse Act ("CFAA"),³⁸ the Stored Communications Act ("SCA"),³⁹ as well as state privacy statutes. Possible relief under these statutes include compensatory damages, punitive damages, liquidated damages, attorneys' fees, and litigation costs. Even an isolated intrusion into a student's online profile or email account could open an institution to future lawsuits under state and federal privacy statutes.

In *Chaney v. Fayette County Public School District*,⁴⁰ a high school student brought an action against a school district and a school director of technology for violation of her right to privacy, after the director used in a school presentation a picture of the student in a bikini taken from her personal Facebook page.⁴¹ Because she had intentionally used the broadest privacy setting available, the Court held that she surrendered any reasonable expectation of privacy when she posted the picture.⁴² The Court also held that the fact that the student was in a bikini in the photograph

³⁶ Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr's Misguided Call for Judicial Deference*, 74 *FORDHAM L. REV.* 747, 766 (2005) ("If electronic surveillance law was clear, [law professors] would have a lot less to write about.").

³⁷ The ECPA was an amendment to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (the Wiretap Statute) enacted to extend government restrictions on wire taps from telephone calls to transmissions of computer data. 18 U.S.C. § 2511 (2012). It provides a cause of action against "any person who . . . intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication." *Id.* § 2511(1)(a).

³⁸ The CFAA provides a cause of action against "[w]hoever . . . intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer." 18 U.S.C.A. § 1030(a)(2)(C) (2012).

³⁹ The SCA provides a cause of action against anyone who "(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such a system." 18 U.S.C. § 2701(a) (2012).

⁴⁰ *Chaney v. Fayette County Public School District*, 977 F. Supp. 2d 1308 (N.D. Ga. 2013).

⁴¹ *Id.*

⁴² *Id.* at 1315.

did not require a different result, because, while individuals have a reasonable expectation of privacy generally, the student voluntarily shared the photo.⁴³

In *Reichert v. Elizabethtown College*,⁴⁴ a student alleged that administrators at the college violated ECPA after ordering a computer investigation service to monitor his email account after it was determined that he was a threat to the school.⁴⁵ The student also alleged violations of CFAA and SCA, as well as the Pennsylvania Wiretapping and Electronic Surveillance Act (“PWESA”).⁴⁶ The court dismissed the student’s ECPA and PWESA claims, because he had “not alleged facts suggesting that the College accessed his e-mail at the time of transmission,” meaning he could not meet the requirement that interception occurred “contemporaneously with the transmission.”⁴⁷ Similarly, the court dismissed the student’s SCA claim.⁴⁸ The college itself had provided the email account that was being monitored, meaning that it was exempted from the SCA’s requirements.⁴⁹

In *Robbins v. Lower Merion School District*,⁵⁰ a student filed a class-action lawsuit against his high school for remotely activating web cameras on school-issued laptops in order to target theft and other criminal behavior.⁵¹ The student sought damages for violations of the ECPA, SCA, and PWESA.⁵² After issuing a preliminary injunction against the school district, the court granted in part the plaintiff’s request for \$435,790.60 in attorneys’ fees and costs.⁵³ The parties ultimately agreed to settle the case in October 2010 for \$610,000.⁵⁴ In addition to

⁴³ *Id.* at 1316.

⁴⁴ No. 10-2248, 2011 WL 3438318 (E.D. Pa. Aug. 5, 2011).

⁴⁵ *Id.*

⁴⁶ *Id.* at *4–5.

⁴⁷ *Reichert v. Elizabethtown College*, No. 10-2248, 2011 WL 3438318, *4–5 (E.D. Pa. Aug. 5, 2011); *see also* *Thompson v. Thompson*, No. 02-091, 2002 WL 1072342 (D.N.H. May 30, 2002) (holding that viewing an email after it is sent does not constitute illegal wiretapping); *Eagle v. Investment Serv. Corp. v. Tamm*, 146 F. Supp. 2d 105, 111–13 (D. Mass. 2001).

⁴⁸ *Reichert*, 2011 WL 3438318 at 4.

⁴⁹ *Id.* at *5.

⁵⁰ No. 10-CV-0665, 2010 WL 3421026 (E.D. Pa. Aug. 30, 2010).

⁵¹ *Id.*

⁵² The PWESA prohibits the interception of wire, oral, or electronic communications. 18 PA. CONS. STAT. §§ 5701–5703 (2016).

⁵³ *Robbins*, 2010 WL 3421026 at *8.

⁵⁴ John P. Martin, *Lower Merion District’s Laptop Saga Ends with \$610,000 Settlement*, PHILA. INQUIRER (Oct. 12, 2010), http://www.philly.com/philly/news/20101012_Lower_Merion_district_s_laptop_saga_ends_with_610_000_settlement.html.

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these costs, the district accrued more than \$2 million in legal fees paid to outside counsel and more than \$270,000 in technology consulting fees.⁵⁵ Although the school officials' conduct in *Robbins* appears particularly egregious and unlikely to reoccur, monitoring can take many forms, each bringing a risk of liability under these statutes. For instance, even an isolated intrusion into a student's online profile or email account could open an institution to lawsuits under state and federal privacy laws.

Once litigation has been initiated, schools might also encounter issues related to social media privacy during discovery. For example, in *Melissa "G" v. North Babylon Union Free School Dist.*,⁵⁶ a student filed suit against the school district for damages stemming from sexual contact with a teacher.⁵⁷ The defendant school district filed a motion demanding the "production of complete, unedited account data for all Facebook accounts maintained by plaintiff," asserting that the content of the pages was material to their defense.⁵⁸ In holding that the plaintiff has a "reasonable expectation of privacy" with regard to one-on-one Facebook messages, the court held that private messages need not be reviewed absent evidence that they contain material information necessary to the defense.⁵⁹

C. Negligence

At the same time, the *failure* to regulate online misconduct can also pose risks. If a university was aware, or should have been aware, of a threat to student safety based on social media postings, the failure to investigate and remedy the threat can expose the university to negligence claims.⁶⁰ This is especially true in light of the national attention paid to bullying and, in particular, "cyber bullying" in recent years.⁶¹

⁵⁵ Richard Ilgenfritz, *Legal Fees Mount for LMSD*, MAIN LINE TIMES (Aug. 11, 2010), http://mainlinemedianews.com/articles/2010/08/11/main_line_times/news/doc4c62bd6f7bdac151351309.txt.

⁵⁶ *Melissa "G" v. North Babylon Union Free School Dist.*, 48 Misc. 3d 389, 390 (N.Y. Sup. Ct. 2015).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 393.

⁶⁰ Neal Hutchens, *You Can't Post That . . . Or Can You? Legal Issues Related to College and University Students' Online Speech*, 49 J. STUDENT AFF. RES. & PRAC. 1, 12 (2012).

⁶¹ See, e.g., Linda Conner Lambeck, *New Cyberbullying Law Forces Schools to Intervene*, CONN. POST (Oct. 8, 2011), <http://www.ctpost.com/local/article/New-cyberbullying-law-forces-schools-to-intervene-2209625.php> (reporting on Connecticut's passage of a cyber bullying law that created a legal obligation for school officials to intervene when they are made aware of online harassment); see also Nick Gillespie, *Stop Panicking About Bullies*, WALL ST. J. (Mar. 30, 2012), <http://online.wsj.com/article>

In addition, if the university undertakes some action in which it voluntarily assumes a duty, then it must perform that duty with due care.⁶² Thus, the institution may face increased liability if it actively monitors student accounts:

If a college monitors its students' online activities to assure that students act in accordance with its mission, such as a military or religious institution, then it may create a "duty of care" toward its students. A duty of care would obligate a college to take all reasonably practicable steps to prevent its students from harm. If a college with a duty of care toward its students does not take all reasonably practicable steps to prevent harm to its students, the college's actions may be negligent and could expose the college to lawsuits.⁶³

The instance of Rutgers University student Tyler Clementi is illustrative. Clementi committed suicide in 2011 after a roommate surreptitiously videotaped his sexual encounter with another man and encouraged other voyeurs to watch the encounter on Twitter.⁶⁴ As this fact pattern demonstrates, a university that undertakes to monitor its students' online activity could face the risk of liability in the event of such a tragic occurrence. Given the varied ways in which universities approach social media today, it may only be a matter of time before a suit is filed under similar circumstances.⁶⁵

(efforts such as "The Anti-Bullying Bill of Rights" passed by the New Jersey state legislature, a new highly acclaimed documentary called efforts such as "The Anti-Bullying Bill of Rights" passed by the New Jersey state legislature, a new highly acclaimed documentary called "Bully", and the creation of a new Department of Health and Human Services website, stopbully.gov). Gillespie, however, questions whether America is really in the midst of a "bullying crisis" and concludes that "one thing seems certain: The focus on bullying will lead to more lawsuits against schools and bullies . . ." *Id.*

⁶² See RESTATEMENT (SECOND) OF TORTS § 323 (Am. L. Inst. 1965) ("One who undertakes . . . to render services to another . . . is subject to liability . . . for *physical harm* resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.").

⁶³ Steinback & Deavers, *supra* note 14; see also Matt Dunning, *Social Media Has Schools on Defense*, BUS. INS. (July 24, 2011), <http://www.businessinsurance.com/article/20110724/NEWS07/307249975> (quoting one risk manager as stating that universities are "essentially assuming a duty of care that they can't enforce"); Jack Stripling, *Panelists Debate How Far Colleges Should Go to Monitor Online Behavior*, CHRON. OF HIGHER EDUC. (Feb. 7, 2011), <http://chronicle.com/article/Panelists-Debate-How-Far/126298> (noting that several presenters at the National Conference on Law and Higher Education warned that "a policy that suggests Internet behavior will be monitored creates an obligation that colleges do so fairly and effectively").

⁶⁴ Ian Parker, *The Story of a Suicide*, NEW YORKER (Feb. 6, 2012), http://www.newyorker.com/reporting/2012/02/06/120206fa_fact_parker.

⁶⁵ Such suits might eventually be brought under state laws banning cyberbullying. Although there are no federal anti-bullying laws, states have begun to take action against cyberbullying. As of January 2016, 23 states had anti-bullying laws that explicitly prohibited bullying via information technology or other electronic means, according to the Cyberbullying Research Center. Of those states, 18 of the 23 have

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Another example is the case of *Zeno v. Pine Plains School District*.⁶⁶ Although this case did not involve the use of social media, it is emblematic of the risks that a college or university might incur by being indifferent toward bullying or cyberbullying incidents. The plaintiff, a high school student, had been subjected to years of race-related bullying at his high school by fellow students.⁶⁷ He brought an action alleging that the school district was deliberately indifferent to his continued harassment.⁶⁸ A jury found the school liable for violating Title VI of the Civil Rights Act and awarded the plaintiff \$1.25 million in damages (which was lowered to \$1 million on remittitur).⁶⁹ On appeal, the Second Circuit found that the District Court did not abuse its discretion by allowing such an award, because the plaintiff “suffered ‘substantially adverse educational consequences’ as a result of the [school] District’s deliberate indifference.”⁷⁰ As *Zeno* demonstrates, colleges and universities could be playing a dangerous game by standing idly by while such activities are taking place.

D. Defamation

In addition to spreading proprietary information, social media also provides students with new ways of spreading misinformation. With universities now embracing social media as a useful tool for recruitment and instruction, one concern is that students (and other third parties) now have more university-sponsored platforms from which to broadcast their views.⁷¹ Universities can thus face actions for defamation as well as the negligent or intentional infliction of emotional distress based on comments posted on their Facebook pages, blogs, and Twitter accounts.

allowed criminal sanctions for cyberbullying incidents. See Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies* (Jan. 2016), <http://cyberbullying.org/Bullying-and-Cyberbullying-Laws.pdf>. These activities also bring regulatory risks. In 2008, New Jersey’s Office of the Attorney General sent out a letter to colleges and universities emphasizing the dangers posed by “cyber-harassment” and offering a series of preventative measures. Letter from Anne Milgram, Attorney Gen., New Jersey, to Dr. Richard L. McCormick, President, Rutgers University (Aug. 26, 2008), <http://www.nj.gov/oag/newsreleases08/082608-college-internet-letter.pdf>. Although she does not threaten action directly against non-compliant universities, Attorney General Milgram noted that the state has adopted an “aggressive, multi-pronged approach” to remedy this problem, including the use of both criminal and civil enforcement actions. *Id.*

⁶⁶ *Zeno v. Pine Plains School District*, 702 F.3d 655 (2d Cir. 2012); see generally Sameer Hinduja & Justin W. Patchin, *Cyberbullying Legislation and Case Law: Implications for School Policy and Practice*, CYBERBULLYING RES. CTR. (Jan. 2015), <http://cyberbullying.org/cyberbullying-legal-issues.pdf>.

⁶⁷ 702 F.3d at 659–61.

⁶⁸ *Id.* at 668.

⁶⁹ *Id.* at 659.

⁷⁰ 702 F.3d 655, 672.

⁷¹ Bradley A. Areheart, *Regulating Cyberbullies Through Notice-Based Liability*, 117 YALE L.J. POCKET PART 41 (2007) (“Given its immediacy, anonymity, and accessibility, the Internet offers an unprecedented forum for defamation and harassment.”).

Depending on the identity of the victim and the resulting reputational impact, the potential damages in such suits can be quite substantial. In February 2016, Hollywood actor James Woods sued an anonymous Twitter user who had referred to him as a “cocaine addict,” seeking \$10 million in damages.⁷²

Administrators can take some comfort in knowing that Congress has significantly circumscribed certain liabilities by creating express protections for internet content providers in the Communications Decency Act (“CDA”).⁷³ Courts have repeatedly held that the CDA shields a “provider or user of an interactive computer service” from liability for defamatory or otherwise offensive material posted on their website by third parties.⁷⁴ Moreover, the CDA does not impose an obligation on universities to take action upon notice of potentially tortious content.⁷⁵

Nonetheless, a university could still be held vicariously liable for acts committed by individuals acting on the university’s behalf. If an administrator or other university employee posts disparaging remarks during the course of his or her employment, the victim could seek to bring a claim against the university under a *respondeat superior* theory of liability.⁷⁶

⁷² Eli Rosenberg, *James Woods Clears Hurdle in Effort to Unmask Twitter User*, N.Y. TIMES (Feb. 11, 2016), http://www.nytimes.com/2016/02/12/technology/james-woods-seeks-to-unmask-twitter-user-in-defamation-case.html?_r=0.

⁷³ 7 U.S.C.A. § 230(c)(1).

⁷⁴ See, e.g., *Nemet Chevrolet v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 260 (4th Cir. 2009) (holding that defamation claims for comments posted by other users on a company website were not cognizable under the CDA); *Universal Comm’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007); *Dimeo v. Max*, 433 F. Supp. 2d 523, 529–31 (E.D. Pa. 2006). But see *Fair Housing Council v. Roommates.com, LLC*, 521 F.3d 1157, 1166 (9th Cir. 2008) (holding that CDA safe harbor did not protect website operator where users were forced to disclose unlawful content about themselves and their desired roommates as a precondition to use).

⁷⁵ See generally Areheart, *supra* note 71 (arguing that lawmakers should amend the CDA to include a notice requirement similar to that which exists under the DCMA, thus creating liability for website operators that fail to remove the allegedly defamatory content after the expiration of a notice-and-takedown period).

⁷⁶ It is also not out of the question that higher education institutions could face liability under state laws for aiding and abetting defamation by a third party. Such liability, however, is generally difficult to establish. For example, in *Doe v. Brandeis Univ.*, a student alleged that Brandeis aided and abetted defamation of him by failing to correct, among other things, public comments on social media made by a third-party. 177 F. Supp. 3d 561 (D. Mass. 2016). The plaintiff had recently been the subject of a sexual misconduct investigation stemming from incidents in a previous relationship, and his former partner had posted disparaging comments about him (including the final outcome letter from the investigation) on social media sites. *Id.* at 616. By not intervening to correct these comments, the plaintiff alleged that Brandeis allowed his former partner to create a hostile environment for him on campus. *Id.* at 583. Citing Massachusetts state law, the court dismissed the claim, on the grounds that Brandeis had not “actively participated in or substantially assisted in the commission of the tort.” *Id.* at 616.

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E. Intellectual Property

The advent of social media introduced a powerful new information-sharing capability to college campuses. This ability to share information includes the potential to share protected and proprietary information. Most students, and even some university administrators, did not fully appreciate the magnitude of this potential liability until they received pre-litigation “settlement letters” from the Recording Industry Association of America (“RIAA”) in 2007.⁷⁷ This wave of property rights enforcement activity came on the heels of the Supreme Court’s landmark copyright decision in *MGM Studios, Inc. v. Grokster*,⁷⁸ in which the Court held that peer-to-peer file-sharing companies that provided a platform for users to share protected information could be sued for copyright infringement.⁷⁹

When the RIAA first began targeting college campuses, it was unclear whether the organization would take direct action against universities for contributory infringement. However, the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512 *et seq.*, provides a series of safe harbors that expressly exempt internet service providers from liability for actions taken by its users.⁸⁰ As a result, although the RIAA continued to pressure universities to take proactive measures to minimize illegal file-sharing,⁸¹ the resulting litigation was limited to the individual infringers.⁸²

⁷⁷ *RIAA Launches New Initiatives Targeting Campus Music Theft*, RECORDING INDUS. ASS’N. OF AM. (Feb. 28, 2007), http://www.riaa.com/newsitem.php?news_year_filter=&resultpage=10&id=0BB7A35D-544B-2DD2-F374-4F680D6BAE9B.

⁷⁸ *MGM Studios, Inc. v. Grokster*, 545 U.S. 913 (2005).

⁷⁹ *Id.*

⁸⁰ *See* 17 U.S.C. § 512(a).

⁸¹ Mike Musgrove, *Music Industry Tightens Squeeze on Students*, WASH. POST (Mar. 9, 2007), <http://www.washingtonpost.com/wpdyn/content/article/2007/03/08/AR2007030801895.html> (“[The RIAA] said it plans to go after colleges in a big way this year, including efforts to pressure school administrators to shut down computer network access to online services where pirated music is illegally traded.”). *See also* Antionette D. Bishop, *Illegal P2P File-Sharing on College Campuses—What’s the Solution?*, 10 VAND. J. ENT. & TECH. L. 515, 517–23 (2008) (noting how the RIAA “has been requesting more active involvement from colleges to promote its anti-piracy campaign” and arguing that the RIAA should turn its attention elsewhere, as public policy cuts against a finding of secondary liability in these cases).

⁸² The 2008 revisions to the DMCA did, however, require colleges to take a more active role in ferreting out infringement activity by their students in order to receive the protections of the safe harbor. *See* Dexter R. Mullins, *‘Free’ movies, songs no more as colleges bust file-sharing*, USA TODAY (Aug. 3, 2010), http://www.usatoday.com/news/education/2010-08-04-Filesharing04_ST_N.htm. A service provider may avail itself of the § 512 safe harbors only if the service provider has “adopted and reasonably implemented, and inform[ed] subscribers of . . . a policy that provides for the termination . . . of . . . account holders . . . who are repeat [copyright] infringers.” 17 U.S.C. § 512(i)(1) (2012).

The relative success of colleges and universities in avoiding litigation could create a false sense of security. Universities are subject to strict reporting requirements with respect to any detected misuse by students or employees. For instance, the 2008 Higher Education Opportunity Act (“HEOA”), Public Law 110-315, requires universities to develop and implement “written plans to effectively combat the unauthorized distribution of copyrighted material.”⁸³ The HEOA also requires institutions to make annual disclosures to the student body concerning the illegal distribution of this material, to present alternatives to illegal file-sharing, and to periodically review the effectiveness of their established protocol.⁸⁴

Moreover, while the peer-to-peer file-sharing controversy was by far the most widely publicized instance of alleged on-campus infringement, it is not the only activity for which universities could be held secondarily liable. For instance, instead of simply providing internet access to file-sharing networks, schools may be creating such networks themselves. These school-sponsored social media accounts create potential liability. Student posts containing unauthorized information, such as the risk of embedded links or unattributed excerpts from protected works, could be inviting a lawsuit against the school. This is relevant today, where social media platforms, such as Facebook, have begun to emphasize and encourage the sharing of video that could contain copyrighted material.⁸⁵

In these cases, liability could turn on the speed with which universities act to remove the potentially infringing material and whether they are even capable of removing that material upon its discovery.⁸⁶ And the stakes are high: the Copyright

⁸³ 34 C.F.R. § 668.14(b)(3)(i).

⁸⁴ See generally *Peer-to-Peer File Sharing Requirements of the Higher Education Opportunity Act*, NACUA NOTES (Univ. Conn., Storrs, Conn.) (July 22, 2010), <https://www.smu.edu/-/media/Site/LegalAffairs/NACUANOTES/Peer-2-Peer-HEOA.ashx?la=en>.

⁸⁵ Rob Price, *Facebook’s new video business is awash with copyright infringement and celebrities are some of the biggest offenders*, BUS. INSIDER (May 6, 2015), <http://www.businessinsider.com/facebook-copyright-infringement-facebook-content-id-celebrities-2015-5?r=UK&IR=T> (“Facebook’s video views are skyrocketing—but there’s a dark side to this growth. The social network also has a serious problem with copyright infringement, and rights holders say the company is doing little to stop it.”).

⁸⁶ *Cf.* UMG Recordings, Inc. v. Shelter Capital Partners, No. 09-55902, 2011 WL 6357788 (9th Cir. Dec. 20, 2011) (holding that defendant was entitled to protection under the DMCA’s safe harbor); Viacom International Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (holding that YouTube was protected by the DMCA’s safe harbor); Gucci Am., Inc. v. Frontline Processing Corp., 721 F. Supp. 2d 228 (S.D.N.Y. 2010) (holding credit card processing company liable for contributory infringement where the company provided services to a counterfeiter of luxury goods); Flava Works, Inc. v. Gunter, 1:10-cv-06517, 2011 WL 3205399 (N.D. Ill. July 27, 2011) (rejecting defendant’s argument that it deserved protection under the DMCA’s safe harbor and granting plaintiff’s motion for preliminary injunction).

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Act,⁸⁷ provides for statutory damages of up to \$30,000 for *each work* infringed.⁸⁸ Moreover, upon a finding of willful infringement, the court or factfinder may increase the damages award up to \$150,000 per work.⁸⁹

In addition, universities face the risk of direct infringement liability resulting from actions of university faculty and administration. The internet has offered a means of sharing educational content with students much more rapidly and on a much larger scale than ever before. Often this information-sharing comes at little or no cost to colleges and universities, making legal battles virtually inevitable.⁹⁰

In 2011, for example, the University of California at Los Angeles was sued for streaming videos, such as “The Plays of William Shakespeare,” on its network for students and faculty to access from remote locations at their leisure.⁹¹ The university argued, *inter alia*, that any unauthorized copying of the work constituted incidental “fair use” under the Copyright Act and was therefore permissible.⁹² Although the case was ultimately dismissed, the court’s ruling hinged largely on sovereign immunity grounds and thus provides little comfort to private colleges and universities.⁹³

A number of large educational institutions—including the University of Michigan, UCLA, University of Wisconsin, Indiana University, and Cornell University—also found themselves the subject of a major copyright infringement lawsuit in September 2011, arising from joint efforts of their research staff to digitize

⁸⁷ 17 U.S.C. § 101 *et seq.*

⁸⁸ 17 U.S.C.A. § 504(c)(1).

⁸⁹ See 17 U.S.C. § 504(c) (2012). Congress has attempted to expand these penalties to no avail. In late 2011, Congresspersons proposed the Stop Online Piracy Act (“SOPA”) and Protect IP Act (“PIPA”) in the House of Representatives and Senate, respectively, in an effort to expand existing criminal penalties for online copyright infringement. *Sopa and PIPA Anti-Piracy Bills Controversy Explained*, BBC NEWS (Jan. 17, 2012), <http://www.bbc.co.uk/news/technology-16596577>. However, partly due to the fact that they inspired massive opposition from tech companies and from open internet advocates, neither bill passed. See, e.g., Art Brodsky, *PIPA And SOPA Were Stopped, But the Web Hasn't Won*, HUFFINGTON POST (Mar. 26, 2012), http://www.huffingtonpost.com/art-brodsky/pipa-and-sopa-were-stoppe_b_1230818.html.

⁹⁰ Sam Favate, *When Your Professor Doesn't Make You Buy the Whole Book*, WALL ST. J.: L. BLOG (Apr. 2, 2012, 12:57 PM), <http://blogs.wsj.com/law/2012/04/02/when-your-professor-doesnt-make-you-buy-the-whole-book> (“As physical media becomes less a part of our daily lives and people shift to electronic delivery, battles over digitized content are inevitable.”).

⁹¹ Association for Info. & Media Equip. v. Regents of Univ. of Cal. L.A., No. CV 10-9378, 2011 WL 7447148 (C.D. Cal. Oct. 3, 2011).

⁹² Association for Info. & Media Equip. at *4–5.

⁹³ *Id.* at *2–3.

and upload millions of copyrighted works.⁹⁴ A similar lawsuit, *Cambridge University Press v. Becker*,⁹⁵ was filed against Georgia State University in 2010. In 2012, the U.S. District Court for the Northern District of Georgia held the university liable for five specific instances of infringement, but also determined that the vast majority of claims were barred by the fair use doctrine or by the plaintiffs' failure to demonstrate that the works were copyrighted.⁹⁶ Although most commentators have declared the ruling a victory for academia, the case is highly fact-specific.⁹⁷ Thus, a great deal of uncertainty remains concerning the exposure of similarly situated institutions.

Finally, although the foregoing cases concern university-wide educational practices, institutions also face the risk of potential liability for individual unauthorized uses of copyrighted works by faculty members. In May 2012, for example, the University of Georgia agreed to pay \$300,000 to settle a copyright infringement lawsuit brought by the National Association of Boards of Pharmacy ("NABP") after a professor allegedly gathered and distributed copyrighted questions from NABP exams to use in a course he was teaching.⁹⁸ Although the Eleventh Circuit found that NABP could not seek damages from the university under the Copyright Remedies Clarification Act, 17 U.S.C. § 511(a), NABP's claims were allowed to proceed against the individual defendants, resulting in settlement.⁹⁹ If the individuals' employment contracts contained indemnification clauses, then the university may have contributed.

F. Discrimination

A 2010 study by United Educators reported that more than half of all "wrongful act" claims brought by students against colleges and universities over a five-year

⁹⁴ Complaint, *Authors Guild, Inc. v. HathiTrust*, No. 11-CV-06351 (S.D.N.Y. Sept. 12, 2011), ECF No. 1. See generally Julie Bosman, *Lawsuit Seeks the Removal of a Digital Book Collection*, N.Y. TIMES (Sept. 12, 2011), <http://www.nytimes.com/2011/09/13/business/media/authors-sue-to-remove-books-from-digital-archive.html>.

⁹⁵ 863 F. Supp. 2d 1190 (N.D. Ga. 2012), *rev'd*, 769 F.3d 1232 (11th Cir. 2014).

⁹⁶ See generally 863 F. Supp. 2d 1190 (N.D. Ga. 2012).

⁹⁷ Jennifer Howard, *Long-Awaited Ruling in Copyright Case Mostly Favors Georgia State U.*, CHRON. OF HIGHER EDUC. (May 13, 2012), <http://chronicle.com/article/Long-Awaited-Ruling-in/131859>.

⁹⁸ See Lee Shearer, *Pharmacy Licensing Group Settles Lawsuit Against UGA Professors*, ONLINE ATHENS (May 14, 2012), <http://onlineathens.com/uga/2012-05-14/pharmacy-licensing-group-settles-lawsuit-against-uga-professors>.

⁹⁹ Nat'l Ass'n of Bds. of Pharm. v. Bd. of Regents of the Univ. Sys. of Ga., 633 F.3d 1297, 1301 (11th Cir. 2011).

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period involved allegations of discrimination.¹⁰⁰ Discrimination, of course, takes many forms, and universities can be found liable for both action and inaction. The Department of Education's Office of Civil Rights has warned schools that student misconduct and harassment may trigger the school's responsibilities under federal antidiscrimination laws.¹⁰¹ Thus, if student harassment involves issues of race, color, national origin, sex, disability, or other protected status, institutions can be held liable if they have knowledge of the harassment and fail to act.

The set of facts surrounding *Hannah v. Northeastern State University*¹⁰² are illustrative of how social media use might expose a university to discrimination suits.¹⁰³ After allegedly being denied tenure and placed on administrative leave for reasons related to his Native-American heritage, the plaintiff sued the university, arguing that the university engaged in racial discrimination in violation of Title VII.¹⁰⁴ In so doing, the plaintiff pointed to a number of Facebook posts made by other university faculty that either directly or impliedly impugned his heritage.¹⁰⁵ On appeal the Tenth Circuit remanded the case to the District Court to allow the plaintiff to amend his complaint.¹⁰⁶ Nonetheless, it is emblematic of the ways that student and employee social media use can factor into claims of discrimination against a university.¹⁰⁷

G. Employment Practices Liability

It may be an encouraging sign that case law involving social-media-related claims by employees against universities has historically been sparse. However, it is not such the case for claims made outside of the educational context, and the

¹⁰⁰ STUDENT LOSS REPORT 2004–2008, UNITED EDUCATORS 7, <https://www.edurisksolutions.org/DownloadAsset.aspx?id=1299>.

¹⁰¹ See Department of Education, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>; see also Burl, *supra* note 12, at 3 (discussing the Department of Education's guidance concerning a school's responsibility to remedy harassment and bullying).

¹⁰² No. CIV-14-074-RAW, 2015 WL 501933 (E.D. Ok. Feb. 5, 2015), *rev'd*, 628 Fed. Appx. 629 (10th Cir. 2016).

¹⁰³ *Id.*

¹⁰⁴ No. CIV-14-074-RAW, 2015 WL 501933, 4–5 (E.D. Ok. Feb. 5, 2015), *rev'd*, 628 Fed. Appx. 629 (10th Cir. 2016).

¹⁰⁵ *Id.* at *2–3.

¹⁰⁶ See *Hannah v. Cowlishaw*, 628 Fed. Appx. 629 (permitting plaintiff to amend complaint to add a § 1983 claim premised on an alleged violation of his rights).

¹⁰⁷ Similarly, students may bring discrimination claims where the university has chosen to monitor selectively certain students' or prospective students' online profiles and where a disproportionate number of those students are part of a protected class.

arguments and liability theories therein are often identical to what could be asserted against a university. Thus, a broader view of employer/employee social media litigation can provide some helpful insights into the risks universities face.

Alleged First Amendment violations are the focus of many actions by employees against their employers in such cases. As discussed above, the issues in these cases closely resemble those in cases brought by students and often hinge on the court's determination of whether the employee's speech was sufficiently disruptive or threatening to warrant disciplinary action.¹⁰⁸

An increasing threat comes from lawsuits alleging labor law violations. According to a study conducted by the U.S. Chamber of Commerce, the National Labor Relations Board ("NLRB") has seen a surge in the number of charges filed against employers related to the use of social media.¹⁰⁹ The most common allegations are that a newly enacted social media policy is overbroad or that the employer unlawfully disciplined or terminated an employee due to the content of online posts.¹¹⁰ These cases continued to multiply throughout 2011, prompting the NLRB to issue a second report in January 2012,¹¹¹ as well as a third report in May 2012.¹¹² These reports demonstrate that the NLRB has not hesitated to strike down overly restrictive social media policies. Remarkably, of the seven NLRB-reported cases involving challenges to employers' policies, only one policy was found to be lawful.¹¹³

Perhaps the most striking example of how protective the NLRB has been of employee social media use is the Board's decision in *Pier Sixty, LLC*.¹¹⁴ This case

¹⁰⁸ See, e.g., *Curran v. Cousins*, 509 F.3d 36 (1st Cir. 2007) (rejecting First Amendment and retaliation claims brought by corrections officer who was terminated for offensive and threatening remarks posted to a union website); *Spanierman v. Hughes*, 576 F. Supp. 2d 292 (D. Conn. 2008) (rejecting various constitutional claims brought by high school teacher who was terminated after posting inappropriate pictures and comments on his Myspace account).

¹⁰⁹ *The NLRB and Social Media*, NLRB, <https://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media> (last visited Sept. 16, 2017); see also Michael J. Eastman, *A Survey of Social Media Issues Before the NLRB*, U.S. CHAMBER OF COMMERCE 2–3 (Aug. 5, 2011), <https://www.uschamber.com/sites/default/files/documents/files/NLRB%2520Social%2520Media%2520Survey%2520-%2520FINAL.pdf>.

¹¹⁰ See Eastman, *supra* note 109, at 11–12.

¹¹¹ *Acting General Counsel Issue Second Social Media Report*, NLRB (Jan. 25, 2012), <https://www.nlr.gov/news-outreach/news-story/acting-general-counsel-issues-second-social-media-report>.

¹¹² *Acting General Counsel releases report on employer social media policies*, NLRB (May 30, 2012), <https://www.nlr.gov/news-outreach/news-story/acting-general-counsel-releases-report-employer-social-media-policies>.

¹¹³ *Id.*

¹¹⁴ 362 N.L.R.B. 59 (2015). See also Kara E. Shea, *Facebook Firings: Beware of the NLRA*, 30 NO. 5 TENN. EMP. L. LETTER 3 (2015).

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involved an employee who had been fired after referring to his manager with an epithet in a Facebook post.¹¹⁵ The NLRB found that the employee had *not* lost the protections of the National Labor Relations Act and had to be reinstated.¹¹⁶ In ordering the employee’s reinstatement, the NLRB panel applied a “totality of the circumstances” test that excused the employee because “the Respondent tolerated similar profanity in the workplace” and because other factors made the vulgar language not so egregious as to strip the employee of the NLRA’s protections.¹¹⁷ This case should “offer[] a cautionary tale for employers and demonstrate[] the near-impossibility, under the current Board standards, of imposing workplace rules seeking to maintain basic respect and decorum.”¹¹⁸

Employment actions might also be brought by the Equal Employment Opportunity Commission (EEOC) for discriminatory hiring practices. According to a 2016 survey by the Society for Human Resource Management, 84% of member organizations use social media for recruiting purposes.¹¹⁹ This represents a massive growth in the use of social media in the screening and hiring process. As recently as 2011, only 56% of such organizations used social media platforms for recruitment.¹²⁰ The EEOC commented that “[t]he use of sites such as LinkedIn and Facebook can provide a valuable tool . . . [b]ut the improper use of information obtained from such sites may be discriminatory.”¹²¹

As with student lawsuits, the most significant threat posed by employee lawsuits may be the potential for recovery under various state and federal privacy laws. Privacy is likely the first issue that comes to mind when employers contemplate their exposure to social media litigation. In more recent years, employers in various industries have increased their use of social media to vet prospective employees. Some went as far as to demand access to individuals’ private accounts as a

¹¹⁵ *Pier Sixty, LLC*, 362 N.L.R.B. 59 (2015).

¹¹⁶ Stephanie M. Caffera, *NLRB protects vulgar workplace Facebook rant, reinstates fired employee*, NIXON PEABODY (Apr. 6, 2015), <https://www.nixonpeabody.com/en/ideas/articles/2015/04/06/nlr-protects-vulgar-workplace-facebook-rant-reinstates-fired-employee>.

¹¹⁷ *Summary of NLRB Decisions for Week of March 30–April 3, 2015*, NLRB (Mar. 30, 2015), <https://www.nlr.gov/cases-decisions/weekly-summaries-decisions/summary-nlr-decisions-week-march-30-april-3-2015>.

¹¹⁸ Caffera, *supra* note 116, at 1.

¹¹⁹ *SHRM Survey Findings: Using Social Media for Talent Acquisition—Recruitment and Screening*, SOC’Y FOR HUMAN RES. MGMT. (Jan. 7, 2016), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/SHRM-Social-Media-Recruiting-Screening-2015.pdf>.

¹²⁰ *Id.*

¹²¹ *Social Media Is Part of Today’s Workplace but its Use May Raise Employment Discrimination Concerns*, EEOC (Mar. 12, 2014), <https://www.eeoc.gov/eeoc/newsroom/release/3-12-14.cfm>.

precondition of employment.¹²² Unsurprisingly, such measures have been met with strong opposition, including threats of lawsuits, as well as legislative action.¹²³

While universities are unlikely to make the mistake of forcing prospective employees to divulge their Facebook passwords, they remain exposed to other forms of liability under these laws. For instance, if an interpersonal conflict were to prompt an IT professional or another tech-savvy individual to gain unauthorized access to a university employee's *personal* email account, the university might face liability. Likewise, if a college administrator unlawfully accessed a faculty member's restricted blog or online profile, the university could be on the hook. A case outside of the educational context underscores this point.

In *Hoofnagle v. Smyth-Wythe Airport Commission*,¹²⁴ a former airport operations manager sued his former employer, alleging violations of the SCA, for accessing his email account without permission after he was fired, and for subsequently changing the password to prevent future access.¹²⁵ The plaintiff used the account—a Yahoo! account that he had created—for both work and personal matters.¹²⁶ In denying the defendant's motion for summary judgment on plaintiff's SCA claim, the court emphasized that there was a genuine issue of material fact as to whether the defendant had exceeded its existing authorization to access the

¹²² See, e.g., Joanna Stern, *Demanding Facebook Passwords May Break Law, Say Senators*, ABC NEWS (Mar. 26, 2012), <http://abcnews.go.com/Technology/facebook-passwords-employers-schools-demand-access-facebook-senators/story?id=16005565> (describing how some employers and schools have requested Facebook login information from applicants); see also Jonathan Dame, *Will employers still ask for Facebook passwords in 2014*, USA TODAY (Jan. 10, 2014), <https://www.usatoday.com/story/money/business/2014/01/10/facebook-passwords-employers/4327739/> (describing employers requesting social media passwords as part of marketing internship application process).

¹²³ In March 2012, employers' social media policies came under heightened scrutiny after Facebook's chief privacy officer noted "a distressing increase in reports of employers . . . seeking to gain inappropriate access to people's Facebook profiles." Martha Neil, *Facebook, US Senators Say Employers Who Seek Job Applicants' Passwords Could Be Violating the Law*, ABA J. (Mar. 26, 2012, 12:55 PM CDT), http://www.abajournal.com/news/article/facebook_warns_of_possible_suit_against_employers_who_demand_job_applicants/. This revelation prompted Senators Richard Blumenthal and Charles Schumer to begin drafting new legislation to make clear that such practices are illegal. In addition, numerous states, including Nevada, New Hampshire, California, and Virginia, have passed laws prohibiting employers from requesting access to current or prospective employees' social media accounts. Joanne Deschenaux, *State Laws Ban Access to Workers' Social Media Accounts*, SOC'Y FOR HUMAN RES. MGMT. (July 29, 2015), <https://www.shrm.org/legalissues/stateandlocalresources/pages/states-social-media.aspx>.

¹²⁴ No. 1:15CV00008, 2016 WL 3014702, at *1 (W.D. Va. May 24, 2016).

¹²⁵ *Id.*

¹²⁶ *Hoofnagle v. Smyth-Wythe Airport Commission*, No. 1:15CV00008, 2016 WL 3014702, *1 (W.D. Va. May 24, 2016).

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account by changing the password.¹²⁷ Furthermore, the Court rejected the argument that the plaintiff must prove actual damages to pursue the SCA claim, because he was seeking an award of punitive damages and attorneys' fees.¹²⁸

III. RISK MANAGEMENT THROUGH INSURANCE

A. *Evolving Risk Management Strategies*

In the last two or three decades, risk management at colleges and universities has become an increasingly sophisticated affair. This is likely the foreseeable byproduct of the increasing size and scope of universities themselves. They now operate on the same plane as the largest companies in the United States by supervising hundreds or thousands of employees, providing food and housing to thousands of students, generating and distributing hundreds of millions of dollars each year, managing multi-billion-dollar endowments, undertaking massive construction projects, engaging in countless non-profit endeavors, and sustaining world-class research programs.¹²⁹

Even today, the most fundamental of all risk-management tools remains a comprehensive insurance plan. But, insurance has evolved a great deal in recent years, as insurers attempt to satisfy shifting consumer demands by producing new policies and modifying or drafting new coverage provisions. Like all consumers, colleges and universities need insurance products that will cover the broad array of risks spawned from their expanding operations. In years past, universities could survive with a standard general liability policy and perhaps one or two supplemental policies. This is not the case today.

Now, it is common for the largest universities to maintain some or all of the following: Comprehensive General Liability Insurance (CGL), Directors and Officers Insurance (D&O), Educators Legal Liability Insurance (ELL), Employment Practices Liability Insurance (EPL), First-Party Property Insurance, Automobile Liability Insurance, Sexual Abuse and Molestation Insurance, Disaster Insurance, Athletic Insurance, and Medical Malpractice Insurance.¹³⁰ Some even purchase

¹²⁷ *Id.* at *11.

¹²⁸ *Id.* at *12.

¹²⁹ See Evan Comen & Michael B. Sauter, *The Largest Employer in Every State*, 24/7 WALL ST. J. (Mar. 17, 2017), <http://247wallst.com/special-report/2017/03/17/largest-employer-in-every-state/> (stating that “[e]ducational . . . institutions . . . frequently top a state’s list of [largest] employers”).

¹³⁰ See, e.g., *Property & Liability Insurance*, BROWN U., <https://www.brown.edu/about/administration/policies/property-liability-insurance> (last visited Oct. 16, 2017) (describing authorization to purchase of Property Insurance, General Liability Insurance, Automobile Liability Insurance, and Professional Liability Insurance); see also *Insurance Overview*, U. OF DAYTON, <https://udayton.edu/>

endorsements or separate policies that cover aircraft,¹³¹ water craft,¹³² ROTC, kidnap and ransom, and rare books,¹³³ to name a few.

In many instances, these policies are often supplemented by numerous excess insurance policies, third-party insurance policies required by contract (*e.g.*, professional liability policies, event coverage policies), and self-insurance plans. Given the increasing variety and complexity of plans available, it is incumbent upon universities to regularly reassess the coverage afforded by their existing policies. This is especially true in an age in which the scope of university operations and rapid technological advances give rise to new risks almost daily.

B. Contractual Protections

Before turning to insurance, risk managers should revisit, and perhaps revise, the protections afforded by their existing contracts. When considering social media liability issues, the first place to turn is the Student Handbook. Most, if not all, universities today dedicate a portion of their Student Handbooks to the use and misuse of social media. In addition to outlining the boundaries of appropriate use, the Handbooks should also clearly identify the scope of the university's power to discipline students based on their online activities. Courts generally treat Student Handbooks as a standard contractual agreement, subject to the prevailing law of contracts.¹³⁴ As such, it is critical for the university to limit exposure by clearly defining the scope of its obligations and its power to remedy student misbehavior in a digital environment. This should be done with the same comprehensiveness and attention to detail as exists in the more well-worn areas of the Handbook.

Furthermore, Student Handbooks should spell out to what extent, if any, the university actively monitors student accounts. For universities that do not engage in such activities, so stating may help quell any misperceptions to the contrary and may

facilities/ehsr/risk_management_folder/insurance_folder/index.php (last visited Oct. 16, 2017) (explaining University's Automobile Insurance, Directors and Officers Insurance, General Liability Insurance, Professional Liability Insurance, and Personal Property Insurance).

¹³¹ See, *e.g.*, *UA Aviation Insurance*, U. OF ALASKA, https://www.alaska.edu/risksafety/b_insurance/insurance-coverage/aviation/ (last visited Oct. 16, 2017).

¹³² See, *e.g.*, *Watercraft Insurance*, N.C. STATE, <http://irm.ehps.ncsu.edu/other-insurance/watercraft-insurance/> (last visited Oct. 16, 2017).

¹³³ See, *e.g.*, *Artifacts and Rare Books*, BRANDEIS U., <http://www.brandeis.edu/risk-management/artifacts.html> (last visited Oct. 16, 2017).

¹³⁴ See, *e.g.*, *Reardon v. Allegheny Coll.*, 926 A.2d 477, 480 (Pa. Super. Ct. 2007) ("The relationship between a privately funded college and a student has traditionally been defined in this Commonwealth as strictly contractual in nature. . . . As such, we review the agreement between the parties concerning disciplinary procedures, contained within a portion of the student handbook known as The Compass, as we would any other agreement between two private parties.") (internal citations omitted).

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undercut any future efforts to hold universities accountable for breach of privacy or breach of an assumed duty of care.

The same holds true for provisions relating to file-sharing. Most Student Handbooks now contain detailed sections that define peer-to-peer file-sharing and summarize the most pertinent laws on student use. It is important for universities to state clearly the ability and extent to which the institution will work with law enforcement and copyright holders to uncover and prosecute infringing behavior.

Risk managers should also consider using consent forms or waivers to decrease their litigation exposure. For instance, in *Yoder*,¹³⁵ the university was able to escape liability largely due to the existence of a consent form that outlined prohibited conduct during the course of student internships. Because the form manifested the student's agreement not to disclose confidential patient information, the court summarily dismissed the student's claims as her disparaging Myspace posts clearly violated this non-disclosure agreement.¹³⁶

C. *Uncertainty Surrounding Traditional and Specialized Policies*

Currently, it appears that many universities do not maintain separate policies covering losses relating to social media, sometimes referred to as "e-media policies."¹³⁷ Yet the various potential claims based on social media use outlined above may not be covered by existing policies. Will a court find that defamatory posts by students or faculty members using university-sponsored platforms fall under the "advertising injury" provision of the university's CGL policy? What about claims by a student-athlete for lost future earnings when the university suspends him for comments made on Twitter? Will a court find that the university's EPL or ELL policy covers the invasion of privacy claims brought by an employee for allegedly monitoring her emails, especially where punitive damages are sought? Or discrimination claims arising out of a cyber bullying incident? The answers to these questions are far from clear, partly because "newer social media insurance coverage

¹³⁵ 2012 WL 1078819, *8 (W.D. Ky. 2012).

¹³⁶ *Id.* at *7.

¹³⁷ See, e.g., *Risk Financing and Insurance Coverages: Insure Your Risk*, U. OF MO., <https://www.umsystem.edu/ums/fa/management/risk/insurancecoverages-riskfinancing> (last visited Oct. 16, 2017) (listing no policy related to social media); see also *Major Property/Casualty Insurance Programs*, PURDUE U., http://www.purdue.edu/business/risk_mgmt/Risk_Management_Insurance_Program/index.html (last visited Oct. 16, 2017) (listing no social media or "e-media" policy); see also *General Insurance Information*, U. OF MASS., <https://www.umassp.edu/hr/risk-management/general-insurance-info> (last visited Oct. 16, 2017) (listing no social media policy).

products and emerging social media exclusions in CGL, EPL, and E&O policies are largely untested in the courts.”¹³⁸

The *Robbins v. Lower Merion School District* case, discussed above in Part II.B, illustrates this lack of clarity.¹³⁹ The case involved a student who successfully sued his high school for covertly monitoring students through the use of cameras embedded in school-issued laptops.¹⁴⁰ The school district faced staggering costs, one outlet reporting those costs at over \$2 million—with \$1.2 million spent on the litigation itself.¹⁴¹ In 2010, the district’s insurer, Graphic Arts Mutual Insurance Company, filed suit seeking a declaratory judgment that the loss was not covered under the district’s CGL policy.¹⁴² Graphic Arts argued, *inter alia*, that the claims did not constitute a “personal injury” as that term was defined in the policy, and that coverage was barred by an exclusion for statutory violations involving the unauthorized recording or transmission of information.¹⁴³ Ultimately, Graphic Arts agreed to cover \$1.2 million of the costs in a private settlement, less than half of the loss.¹⁴⁴ Following the settlement, an attorney for Graphic Arts told a reporter that “given the advances in technology, I’m confident that we’re going to see variations of this [coverage] issue going forward.”¹⁴⁵

Robbins is just one example offered to highlight the fact that a great deal of uncertainty remains under traditional policies with respect to the emerging litigation risks discussed in this article. In addition, insurers are now drafting endorsements that cover only specific internet-related risks and offering coverage that is far from

¹³⁸ Anthony P. Tatum, *Navigating the Changing Landscape of Commercial Insurance*, 2014 WL 7666064, at *7.

¹³⁹ 2010 WL 3421026.

¹⁴⁰ *Id.*

¹⁴¹ Christopher Dawson, *Lower Merion spycam settlement; Fallout for student laptop programs?*, ZDNET EDUCATION (Oct. 13, 2010), <http://www.zdnet.com/article/lower-merion-spycam-settlement-fallout-for-student-laptop-programs/>.

¹⁴² See Mike Cherney, *Insurer, School District Settle Over Webcam Spying Suit*, LAW 360 (Oct. 15, 2010), <https://www.law360.com/insurance/articles/201689/insurer-school-district-settle-over-webcam-spying-suit> (stating that Graphic Arts argued that “the claims in the underlying complaint did not fit into any of the defined offenses included in the personal injury coverage”).

¹⁴³ Brief in Support of Motion for Judgment on the Pleadings, *Graphic Arts Mut. Ins. Co. v. Lower Merion Sch. Dist.*, 2:10-CV-01707-JD (E.D. Pa. June 29, 2010), ECF No. 16.

¹⁴⁴ See Martin, *supra* note 54.

¹⁴⁵ Gene Killian, *Coverage for Invasion of Privacy*, N.J. INS. COVERAGE LITIG. (Nov. 16, 2010), <http://www.newjerseyinsurancecoveragelitigation.com/emerging-trends/coverage-for-invasion-of-privacy>.

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comprehensive.¹⁴⁶ Many CGL policies also limit the scope of coverage by adding express exclusions for such losses. For instance, an increasingly common exclusion like the one at issue in *Robbins* prohibits coverage where the insured is alleged to have violated “any statute, ordinance or regulation . . . that prohibits or limits the sending, transmitting, communicating or distribution of material or information.”¹⁴⁷ Such exclusions leave universities exposed to significant potential liability, making it imperative for institutions to rethink their existing policies and demand more comprehensive coverage solutions.

D. Key Coverage Provisions

Given the relative novelty of this field, the coverage afforded by insurance policies inevitably will vary, often significantly, from insurer to insurer. Thus, whether internet-related losses are covered by more specialized “cyber liability” policies or by endorsements to traditional policies, a regular and thorough review of key policy features by experienced professionals must be a priority for any university risk manager. Such review is critical to mitigating future losses, as it ensures that the university is not reliant upon a court’s interpretation in a situation not expressly contemplated by the terms of the policy.

The following are a few examples of key provisions that universities should demand in a well-drafted policy or endorsement:

- A well-drafted policy should cover all claims relating to injury to the reputation or character of any person or organization, including defamation, libel, slander, and the wrongful appropriation of a person’s image or likeness, brought against the insured and arising from the use of electronic communication.
- “Electronic communication” or the functional equivalent should be defined broadly to include any transmission of electronic information, regardless of the specific form of the communication or the sender or recipient. For instance, coverage should not be limited to university-operated networks, websites, and email, as such a limitation would exclude Tweets, Facebook messages, mass text messages, and various other means of electronic communication.

¹⁴⁶ Andrew Cohn, *Making the case for internet liability coverage*, INS. J. (Sept. 24, 2007), <http://www.insurancejournal.com/magazines/features/2007/09/24/85153.htm> (stating that internet insurance policies generally only cover “very specific wrongful acts”).

¹⁴⁷ See, e.g., “*Violation of Statutes*” *Exclusion Bars Coverage of Video Privacy Suit*, WILEY REIN, (Mar. 2014), <https://www.wileyrein.com/newsroom-newsletters-item-4893.html> (discussing federal district court’s finding that there was no coverage for violations of the Video Privacy Protection Act (VPPA) under a commercial general liability (CGL) policy that excluded coverage for violation of statutes that address the transmission of material or information).

- Coverage should not be restricted to the *insured's* electronic communications, as it would leave the university exposed to claims based on the monitoring or regulation of *students'* online media.
- The policy should provide coverage for claims of invasion of privacy. Given the multiplicity of state and federal statutes creating liability for unauthorized access to electronic information, such coverage provisions should be non-negotiable. This is especially true in light of the potential for punitive damages and large statutory damages awards.
- Although not yet standard features in cyber liability policies, coverage for negligence and discrimination should also be sought by universities that actively monitor student or employee accounts through the use of websites such as UDiligence.com. Such protection might even prove valuable for universities that only passively monitor student accounts, *i.e.*, when administrators or campus security officers attempt to glean information about prospective or enrolled students from online sources. One caveat is that insurers could refuse to provide coverage or renege on the agreement in cases alleging intentional discrimination, which, depending on the state, could preclude coverage on public policy grounds.
- Social media coverage should also apply to claims of copyright or trademark infringement arising from an electronic communication or transmission. Policies should include coverage for allegations of plagiarism, the unauthorized use of any artistic or literary work, and lesser known infringement claims, including domain name infringement. Any secondary liability not extinguished by the safe harbor provisions of the DMCA should also fall under this provision.

As noted above, many CGL policies now contain exclusions for liability arising from the transmission of electronic information. Cyber liability policies may not contain such provisions, but they may prohibit coverage for statutory violations. Ideally, such an exclusion would be negotiated out of the policy, but if that is impracticable, the insured should demand that such a provision would be triggered only in cases of willful or intentional violations. Likewise, any such exclusion should be contingent upon a finding of intent in a final, non-appealable adjudication.

IV. CONCLUSION

Rapid advancements in information technology have transformed day-to-day university operations and, in doing so, have altered the landscape of risk management. On every campus, students, faculty, and administrators exchange massive amounts of data while Tweeting, Facebooking, Instagramming, Skyping, blogging, file-sharing, and e-mailing on a daily basis. These interactions give rise to

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new risks that standard university insurance policies simply do not contemplate or worse, specifically exclude.

But insurance is not cheap, and universities are experiencing significant budgetary constraints.¹⁴⁸ As this article illustrates, the risks and costs associated with litigation are steep—far steeper than the premiums that are necessitated by a comprehensive coverage plan. Higher education institutions face increased scrutiny and regulation from the federal government, combined with the lasting effects of the recession, which include sharp decreases in government funding and massive blows to university endowments.¹⁴⁹ While there may be a need to take a hard look at expenditures and make some sacrifices, it is not a time to cut corners when it comes to liability insurance coverage.

¹⁴⁸ See, e.g., Melissa Korn & Cameron McWhirter, *Public Universities Become Prime Targets for State Budget Cuts*, WALL ST. J. (Feb. 10, 2017), <https://www.wsj.com/articles/public-universities-become-prime-targets-for-state-budget-cuts-1486722602>; see also Katie Lobosco, *Illinois is starving state colleges and universities*, CNN (June 29, 2017), <http://money.cnn.com/2017/06/29/pf/college/illinois-budget-higher-education/index.html>; see also Ashley Jost, *Mizzou likely to cut hundreds of positions amid expected 7 percent enrollment drop*, ST. LOUIS POST-DISPATCH (May 16, 2017), http://www.stltoday.com/news/local/education/mizzou-likely-to-cut-hundreds-of-positions-amid-expected-percent/article_74125e87-a764-505f-872c-a454640d4205.html.

¹⁴⁹ See Sam Batkins, Chad Miller & Ben Gitis, *Rising Tide of Education Rules Increase Costs*, AM. ACTION FORUM (Apr. 30, 2014), <https://www.americanactionforum.org/research/rising-tide-of-education-rules-increase-costs/>; see also Jason Rosenbaum, *As State Budget Revenues Fall Short, Higher Education Faces A Squeeze*, NPR (Mar. 3, 2017), <http://www.npr.org/2017/03/03/517073825/as-state-budget-revenues-fall-short-higher-education-faces-a-squeeze>; see also Danielle Douglas-Gabriel, *College endowment returns sink to their lowest level since the financial crisis*, WASH. POST (Jan. 31, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/01/31/college-endowment-returns-hit-a-new-low/?utm_term=.2f58a817ac45.