

Legal Issues in Social Networking

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I. Social Networking – Great Marketing Tool or Legal Landmine?

A. The Social Networking Phenomenon

Sites like www.facebook.com (“Facebook”), www.myspace.com (“MySpace”) and www.linkedin.com (“LinkedIn”) offer members the ability to instantly connect and communicate with other members, including friends, relatives, colleagues, contacts, prospects and even the general public. Most social networking sites are offered free of charge and include a quick and easy registration process.

From a marketing perspective, what could be better? Here’s an opportunity to get your face and message out to a large audience at virtually no cost and with only as much time commitment as you are willing to make. In your enthusiasm to make the most of these networking tools, however, it is necessary to stay mindful of the legal ramifications of your actions. New legal issues with social networking seem to arise on a weekly, if not daily, basis.

B. How Social Networking Is Used By Individuals and Organizations

Online Communities. Social networks are essentially online communities. In addition to the broadly-based Facebook, MySpace and LinkedIn, there are a number of specialized

social networks including ones that are industry or profession driven or interest-based, such as dating sites, classmate search sites or sites focused on health topics. Some social networking sites specifically target lawyers, including the new Martindale-Hubbell Connected, found at www.martindale.com/connected, still in a beta phase.

Microblogs. Microblogging sites, such as www.twitter.com (“Twitter”) are rapidly gaining in popularity. Twitter allows registered users to send short messages (limited to only 140 spaces) to their ‘followers’ and to receive similar messages from those individuals and organizations they are following. If desired, such messages can even be directed to a mobile phone or Blackberry device.

Building Connections. Social networking sites generally include a directory for members to find others sharing common interests and backgrounds. Members build their individual networks by connecting with other members. Most social networks require mutual consent before members are considered “connected.”

In individual profiles, members post information about themselves, their interests and activities as well as affiliations, education and occupational background. Social networks often allow members to choose from different levels of privacy, such as whether to allow any member of the network to see their profile content or to limit it only to the connected members and may allow even further refinement of access control within the connected community. Members often post non-original content to their profile pages, such as photos and videos.

Some social networks allow members to create groups. The group may be limited to those members having a particular affiliation (such as Automation Alley’s LinkedIn Group) or revolve around a specific topic, such as interest in a common political cause. Members joining groups interact with other members within the group even if they are not otherwise connected.

Business Uses. In terms of business-focus, members may use social networks for professional development to supplement face-to-face networking, to describe business efforts and opportunities or seek advice or opinions by asking questions to the social network community. Organizations may utilize social networks to disseminate “press release” type information and may link back to their own website for additional details. Promoting events on Facebook can result in more rapid, widespread coverage than an organization could obtain anywhere else as notifications are sent to all of a member’s friends when that member RSVPs for an event.

Companies may even use social networking to quickly respond to critics, such as recent ‘tweets’ (Twitter messages) by General Motors to help diffuse severe comments by government officials and the media. An even more recent example is Domino’s issuance of an apology on www.youtube.com (YouTube) in reaction to an earlier video showing two North Carolina based workers engaging in less than hygienic conduct while assembling pizzas.

Social networking activities raise legal issues around content use and infringement, defamation, attribution as well as good old-fashioned tort liability. Social networking sites are also fertile ground for garnering evidence in criminal matters and for other investigatory purposes.

C. What are the Legal Implications of Social Networking Activities?

Keep in mind that existing laws apply equally to online and offline conduct. Is the content you post on a social networking site being reviewed and scrutinized prior to its release in the same manner as other content that is published by your organization on a more formal basis?

Third Party Content. Anytime you are publishing content on a social network, including text, graphics, photos or other media content, compliance with applicable copyright laws is an important consideration. Have you secured the right to post all third party content?

Content Ownership/Control. Who owns your social networking profile page? If you delete your page, is the content truly gone or does the social network retain the right to access, use or share your deleted information? Have you read the terms of use for the social networking site? In your haste, could you be disclosing sensitive or proprietary information?

Defamation/Other Torts. Could any of your posted content be considered defamatory to a third party? Could it be the basis for other tort liability, such as intentional infliction of emotional distress, interference with advantageous economic relations, fraud or misrepresentation?

Criminal Activity. Postings of text and photos on social networking sites have been the source of discovery of criminal activity and, ultimately, evidence of crimes. Social networking activities have also served as a catalyst for offline criminal activities and charges.

Employment Practices. Social networks are used as a source of information about individuals and organizations. Members may not realize the full impact of statements made or content posted on a social network profile. What are the ramifications of taking social networking information into account when making hiring or firing decisions?

Litigation Impact. As more and more people incorporate real-time technology and social media tools into their daily lives, litigants, witnesses and even jurors are no exception. What about the propriety of checking out the profiles of prospective jurors or witnesses? Could a juror's use of such technology be the basis for a mistrial? Is a party's profile discoverable?

Each of these topics will be discussed in further detail below.

II. Delving into the Legal Ramifications

A. Do You Post Third Party Content?

Copyright Infringement. Content-related risks must be taken into account when engaging in social networking. While the technology of the Internet may easily allow text,

graphics, photos and logos to be copied and pasted from one site to another, doing so will, in most instances, violate copyright law. Using any third party content, i.e., photos that were taken by or belong to someone else or grabbing a video or song off of a third party web site without permission can result in both criminal and civil liability, including treble damages and attorney fees under the U.S. Copyright Act, *17 U.S.C. Section 101, et. seq.*¹

Copyright holders can take stringent measures to enforce their rights. In 2007, Getty Images, Inc., the world's leading provider of visual content, established a partnership with PicScout, a company that uses sophisticated crawling and image recognition technology to track down unauthorized use of Getty Images' copyrighted works online. Getty pursues statutory damages under the U.S. Copyright Act based on each separate occurrence of infringement, such as each use of a single image on multiple web pages².

Use of Likeness. Posting photos or videos of people without their permission can also result in liability based on breach of privacy rights. The best practice is to obtain a release of likeness from each person in a photo or video before posting it, particularly if it could be argued that the content is for a commercial purpose or use.

Terms of Use. Most social networking sites address the use of third party content in their terms of use. For example, Twitter's "Basic Terms" include the statement that users are "solely responsible for . . . any data, text, information, screen names, graphics, photos, profiles, audit and video clips, links" that the user submits, posts or displays. Another Basic Term states that users "must not, in the use of Twitter, violate any laws in your jurisdiction (including but not limited to copyright laws)."³ Thus, in addition to violating copyright laws, the unauthorized use of third party content violates the terms of use of most social networking sites and could serve as an additional basis for liability.

Infringement Notification. Mindful that copyright infringement is a real possibility on their sites, many social networks provide a mechanism to notify them of infringing activities by their users. Facebook, for example, has a separate "Facebook Copyright Policy" in addition to its Terms of Use, with explicit directions on how to report incidents of copyright infringement and indicating that Facebook will take prompt action upon receipt of such a report, including taking down infringing content and terminating repeat offenders.⁴

Minimizing the Risks. These content-related risks can be minimized through various steps, including establishing and following organizational policies regarding the publication of online content. Such policies should address attribution disclaimers, the review of all content before its release, screening of third party content for copyright permission issues and obtaining appropriate releases.

¹ More information on the U.S. Copyright Act and other relevant laws is available at www.copyright.gov/title17/

² An article with additional information about Getty Images' copyright enforcement practices may be found at <http://www.millercanfield.com/publications-alerts-112.html>

³ <http://twitter.com/tos>

⁴ <http://www.facebook.com/copyright.php>

B. Who Owns and Controls Your Content?

Will Information You Delete Continue To Be Used by Your Social Network? When posting information on a social network, members undoubtedly believe that their profile content, photos, etc. are theirs to own and control, but is this really the case? A recent change made by Facebook to its Terms of Use brought this issue to the forefront. Facebook deleted a sentence from the Terms stating that its users' license grant to Facebook for user content automatically expired when the user removed the content. This deletion, among other changes, created such an uproar throughout the Facebook user community that Facebook made an abrupt about-face, restoring the sentence and explaining that it never intended to change its privacy practices.⁵

Are You Disclosing Sensitive or Proprietary Information? Social media tools provide an instantaneous means of communicating with your entire online community. Using these tools in haste can lead to unintended and perhaps even disastrous results. A perfect example is the undoubtedly well-intended 'tweet' in early February from Congressman Peter Hoekstra that he had just landed in Iraq for what was supposed to be a secret trip.⁶

Terms of Use. Social networking sites differ widely in their policies and practices. LinkedIn, for example, requires its users to grant LinkedIn a "nonexclusive, irrevocable, worldwide, perpetual, unlimited, assignable, sublicenseable, fully paid up and royalty free right . . . to copy, prepare derivative works of, improve, distribute, publish, remove, retain, add, and use and commercialize, in any way now known or in the future discovered . . . without any further consent, notice and/or compensation to you or to any third parties" with respect to all submitted content.⁷

Twitter, on the other hand, "claims no intellectual property rights over the material [users] provide" and further states that users "can remove [their] profile at any time by deleting [their] account" and that doing so "will also remove any text and images [users have] stored in the system."⁸

Minimizing the Risks. Members would be well advised to review the terms of use of the particular social networking sites they use to understand these ownership and control issues. Taking those terms into account, members can then make informed decisions about whether to use the site and the types of content they choose to post. Great care should always be taken not to disclose sensitive or proprietary information using social media tools – think before you tweet!

C. Defamation and Other Tort Liability Issues

Watch What You Say! Like other forms of online content, postings you make on a social networking site are instantly available and, once posted, incapable of 'true' deletion.

⁵ For an article with more information, go to:

<http://online.wsj.com/article/SB123494484088908625.html>

⁶ More details are available at http://news.cnet.com/8301-17939_109-10159054-2.html

⁷ http://www.linkedin.com/static?key=user_agreement&trk=hb_ft_userag

⁸ <http://twitter.com/tos>

Given this phenomenon, it is extremely important to exercise due care in what you state, particularly about third parties. Have you made any statements that could be considered defamatory?

Lawsuits alleging defamation based on online content are not uncommon⁹ and are generally treated by courts in the same manner as those involving traditional offline defamation claims. For example, an attempt to expand the State of Texas' one-year statute of limitations for online defamation was rejected by a federal district court.¹⁰

Unlike other online defamation claims that often involve anonymous posters, however, defamation occurring on a social networking site is likely to be attributable to an actual individual (assuming their profile information accurately reflects their identity). This magnifies the risk of liability for such online activities.

Terms of Use. Not surprisingly, social networks generally prohibit the posting of defamatory content by members and reserve the right (while not assuming the obligation) to remove any such content.¹¹

Other Potential Tort Liability. Beyond defamation, content posted on social networking sites could serve as the basis for claims such as intentional infliction of emotional distress or interference with advantageous economic relations. Incidents of “cyberbullying” are increasing and can also be the basis for criminal charges (see Section II, D, below). Facebook was recently sued by a teenager alleging that four of her former classmates set up a group “designed to ridicule and disgrace” her.¹²

Another potential pitfall is responding to a question asking about experiences with a particular business entity – care should be taken that responses are accurate and not misleading. Giving an opinion can even be tricky in this situation as it could become the basis for a claim if your response prevents that business entity from acquiring a future opportunity.

Are You Putting Your Organization at Risk? The consequences of posting defamatory or other content that could form the basis for a tort action can flow not only to the individual poster but, potentially, also to the poster's employer or affiliated group under a vicarious liability theory. The plaintiff would, of course, have to prove a case against the organization, however, defense costs, even to get to the point of a summary judgment motion, can be significant.

⁹ For example, Canadian model Liskula Cohen sued Google over remarks made about her by an anonymous blogger using Google's Blogger Service. More information is available at <http://www.techcrunch.com/2009/01/07/model-sues-google-over-snarky-blogger-remarks/>

¹⁰ To learn more, go to <http://www.millercanfield.com/publications-alerts-364.html>

¹¹ See, for example, <http://twitter.com/tos>

¹² For an article with additional information, go to http://news.cnet.com/8301-17852_3-10187531-71.html

Minimizing the Risks. The tort liability risks can be minimized if posters follow established organizational policies regarding the publication of online content. Such policies should include attribution disclaimers and the review of content before its release for accuracy and sensitivity to tort liability issues.

D. Criminal Activities Relating to Social Networking

Evidence of Criminal Activity. Social networks are increasingly becoming a source for the discovery and investigation of criminal activity by members. A glaring example is the woman who shoplifted various goods and then displayed them proudly on her profile page. Profiles can be useful in determining the identity of and/or locating the perpetrator of a crime.¹³ Less than flattering photos of defendants found on social networking sites are also offered by prosecutors as character evidence during sentencing hearings in seeking harsher punishments.

Social Networking Leading To Crimes. Social networking can itself constitute or lead to criminal activity. The most famous case involves Lori Drew, a Missouri woman, who created a fictitious MySpace account to pose as a teenage boy pretending to be interested in an acquaintance of her daughter. When the girl discovered the ruse, she committed suicide. Ms. Drew was charged with various counts, including felonies. In November 2008, Ms. Drew was convicted of three misdemeanor counts of computer fraud.¹⁴ In January 2009, a British man who killed his wife over her listing her Facebook status as "single" received a sentence of 18 years.¹⁵

Terms of Use. Like other conduct deemed inappropriate, social networking sites prohibit the use of their sites for illegal purposes.¹⁶

Minimizing the Risks. Organizational policies should already prohibit employees from engaging in illegal activities, online or off and make it clear that the organization will fully cooperate with authorities in the event of any investigation into alleged criminal activity.

E. Employment Practices

Your Future Boss May Be Watching. According to a survey by CareerBuilder.com, over twenty percent of hiring managers routinely check online profiles when screening job applicants. More than one third of those managers indicated that they have dropped a candidate from consideration based on what they found in an online profile.¹⁷ Individuals

¹³ More information can be found at http://news.cnet.com/8301-17852_3-10187531-71.html

¹⁴ For more information, go to <http://www.nytimes.com/2008/11/27/us/27myspace.html>

¹⁵ Further details are available at http://www.huffingtonpost.com/2009/01/23/british-man-killed-wife-o_n_160453.html

¹⁶ See, e.g., <http://www.twitter.com/tos>

¹⁷ For more information about the CareerBuilder.com survey results, go to <http://www.msnbc.msn.com/id/26658850>.

posting and maintaining profiles should keep this in mind before proudly posting photos and content that could cost them a job in the future.

But beyond the obvious impact on the applicant, does an employer who takes information gleaned from a social networking profile in making employment decisions face any risk in doing so?

Violation of Employment Laws? If an employer makes an adverse employment decision because of information gathered from Facebook or another social network, could this be a violation of applicable employment and labor laws? What if the information revealed on the site puts the applicant in a protected class under federal or state laws – such as the applicant did not disclose the fact that she is pregnant to the potential employer, however this fact is stated on a profile page? Whether or not the pregnancy was a determining factor in the adverse hiring decision, the fact that the employer checked the profile and was aware of that fact can give rise to an allegation of discrimination. In addition, the applicant’s conduct could be protected concerted activity under federal labor law. Finally, some states prohibit adverse employment actions based on political expression.

Terms of Use. Another possible pitfall is that most social networks’ Terms of Use prohibit the use of their sites for “commercial purposes”. It has been argued that employers searching social networking profiles is a violation of this term of use¹⁸. While no court has decided this issue, it is clear that an employer posing as someone else in order to obtain the right to view an applicant’s profile information would violate the Term against impersonating another in using social networks. Facebook members, for example, must agree not to “impersonate any person or entity, or falsely state or otherwise misrepresent yourself, your age or your affiliation with any person or entity”.¹⁹

Minimizing the Risks. While social network profiles may contain interesting and informative information about a potential candidate, given the potential exposure to liability, a prudent employer should tread carefully into this area and seek legal counsel so that it can make an informed decision.

F. Litigation Impact

Investigation of Parties and Witnesses. As with criminal matters, lawyers in civil matters also find social networking sites a fertile ground for information about adverse parties and witnesses. You can also assume that your opposing counsel will undertake such an investigation of your client and witnesses and should be prepared for what may be lurking on their social networking profile pages.

Grounds for a Mistrial? Juries obviously play an important role in both criminal and civil trials. The impartiality of jurors is a fundamental element of our justice system. Moreover, courts typically instruct juries not to access information about the subject matter of the trial outside of the court proceedings as this can interfere with the jurors' obligation to deliberate based solely on the evidence presented by the parties. The wide-spread use of

¹⁸ An interesting perspective on this topic is available at http://www.collegerecruiter.com/weblog/2006/09/employers_using.php

¹⁹ <http://www.facebook.com/terms.php?ref=pf>

technology and social media by Americans, including those called to jury duty, is impacting the outcome of trials and, in some cases, has become the basis for a mistrial.

Several courts have recently dealt with motions filed by parties based on the fact that sitting jurors accessed information about the case from outside sources, in particular from Internet sites. For example, in *United States v. Hernandez, S. D. Fla, No. 07-60027-CZ (March 10, 2009)*²⁰, a federal court in Florida granted a motion for mistrial after learning that several members of the jury located and read key information about the case online.

By contrast, in *United States v. Siegelman, 11th Cir., No. 07-13163 (March 6, 2009)*²¹ the U.S. Eleventh Circuit Court of Appeals recently affirmed a lower court's denial of a request for mistrial where a juror had viewed an unredacted version of the original indictment against the defendant on the court's web site. The appellate court reasoned that the access did not expose the jury to any new or additional facts and, therefore, did not prejudice the defendant.

Are Social Networking Profiles Discoverable? A Canadian Court recently answered this question affirmatively. In *Leduc v. Roman, Ont. Super. Ct. No. 06-cv-3054666PD3 (February 20, 2009)*, the court allowed pretrial discovery of a party's Facebook profile²². The plaintiff had brought an auto negligence action and the defendant sought information from the profile relevant to the question of whether the accident had impacted his ability to participate in his regular activities. The court further stated that the plaintiff's privacy settings were irrelevant and that the profile information was "data and information in electronic form" discoverable under Canada's Rules of Civil Procedure.

Minimizing the Risks. Lawyers and jury consultants also find social network content to be a useful resource for gathering insightful information about parties, witnesses and even potential jurors, including experiences that could impact the juror's perspective toward a particular case. Such research may provide insight into how tech-savvy potential jurors are and may serve as an indicator of whether additional jury instruction and closer monitoring of the jury's use of technology is in order. A careful advocate who does not want to be caught off guard should also determine what information may be located on social networks for their own clients and witnesses.

III. So, the Answer is . . .

Social networking can be a great marketing tool but can also be a legal landmine for the unwary. Using social networking to establish and maintain personal and business relationships can be very productive but must always take into consideration the myriad of ever-lurking legal ramifications.

²⁰ The Hernandez court's order can be found at http://pub.bna.com/eclr/07cr60027_31009.pdf

²¹ The Siegelman court's opinion is located at http://pub.bna.com/eclr/07cv13163_3609.pdf

²² The text of the court's opinion is available at <http://www.lawsonlaw.ca/leduc-v-roman-facebook>