

Managing Legal Risks In Social Media

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About

- Tech policy, IP/antitrust & complex litigation
- Internet law since 1995 (Netscape)
- Thought leader on social media law, e.g., *The Law of Social Media* essays
- #140Conf etc. speaker
- <http://law.manishin.com>



Introduction: "It Depends"

- There IS NO "law of social media," yet!
 - Law evolves slowly and cannot maintain pace with technological change
- Much is likely adaption of legacy rules
 - Applying traditional common law and statutory principles to new media
 - Unique aspects of social networking, e.g., one-to-many public communications, eventually reflected in specific decisions
- Progress in fits and starts, formed principally by litigation, e.g., LaRossa v. Twitter (2009), AFP v. Morel (2010)
 - State or federal legislation virtually impossible and hardly comprehensive



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Overview

- "Old wine in new bottles"
 - Social media & intellectual property
 - Social media & employment
 - Social media & privacy
- Corporate/regulatory compliance
- Managing enterprise legal risks
- Potential regulation



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Old Wine In new Bottles

- "Are users liable for their posts and tweets?"
- Privacy and tort (HIPAA, etc.)
 - Defamation, invasion of privacy, false light, e.g., *Courtney Love, Kim Kardashian*
 - NDA, non-competes, trade secret and proprietary/confidential content
- Lanham Act (trademark infringement, dilution, etc.)
- SEC Reg. FD & "quiet period" restrictions
- Others: cyber bullying, prostitution, child pornography, etc.



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Social Media and IP

- Major issue is who owns user-generated content (UGC)?
 - Possession ≠ 90% of law
 - Different conclusions for TM, © and patents
- Nature of expression AND nature of posting are both key factors
- Implied license for (some) "public" postings, depending on content, ToS and author/generator claim?
- Risky to assume ownership for commercial purposes of Facebook "Fan" Page comments w/o individual license



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Protecting Trademarks In Real-Time

- **Aspirin** on the real-time Web
 - Massive volume of UGC presents increased compliance burdens. Vexing customer relations issues from infringing brand "fans."
 - User name infringement/dilution
- Anti-Cybersquatting Act and DMCA notice-and-takedown procedures likely inapplicable to social media.
 - Personal names (unlike brands) have not usually achieved protected "secondary meaning."
 - Parody and "gripe" usage probably not "in commerce"
- **eBay/Vuitton** precedent—Nothing protects like policing!



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Social Media & Employment

- Employers may use social media UGC for hiring/firing decisions
 - Corporate "social media policy" can prohibit employee participation (e.g., WSJ, NFL players), marks/logos, use of company IT, etc.
 - Evolving common law right to workplace email privacy (e.g., New Jersey) may extend to some UGC
- Can employer meet out employee discipline for third-party comments (NLRB)?
 - <http://www.wired.com/threatlevel/2009/06/facebookfollow/>
 - Facebook as the "the new water cooler"
- Marketing/PR positions present different rights & risks



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Social Media & Privacy

- No general privacy law, but sector-specific legislation (HIPAA, financial services/GLB, etc.) on infosec & privacy applies to social media
 - Patient can disclose PHI, healthcare "covered entities" **cannot, even without patient named specifically.**
 - Photos (like ER "boards") problematic
- FTC "do not track" proposal gaining traction (S.913/H.R.954)
 - State (MA, NV) encryption mandates
- EC declares Data Protection Directive applies to social networks



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Corporate/Regulatory Compliance

- Regulated industries — especially pharma & healthcare — face challenge of reg. compliance in "social stream"
 - HIPAA applies **EVERYWHERE**
 - Consumer advocates petition FDA to disallow pharmaceutical use of social media posts (5/2010)
 - FDA fines Novartis for socmedia marketing; sharing widgets & metadata (8/2010)
 - Official FDA guidance delayed > 6 mos. (6/2011) but proposed regulation of "mobile medical apps" (7/2011)
- SEC Reg. FD always applicable to employee posts, not "individual capacity"
- Socmedia can create HR (EEOC), debt collection, consumer rights exposure, e.g., posting text, "friend/follower" selection, etc.



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Managing Legal Risks

- Proactive or defensive use of socmedia?
- Clear "social media policy" for enterprise, different from email and IT system privileges
 - Manage employees' reasonable privacy expectations
 - Practices as relevant as formal policy
- Police IP assets against dilution and genericide
- Product marketing, reputation mgmt. and hiring present major areas of risk
 - Disclosure (e.g., "sponsored" posts)
 - Nondiscrimination
 - Position-specific guidelines & "hotline"



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Best Practices

- <http://ht.ly/6IVB4>



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Potential Regulation

- Sponsored posts and “pay-per-tweet” face FTC, state consumer protection, Lanham Act and tort exposure. **Disclosure is best practice whether or not yet mandatory.**
 - Facebook advertising, contextual networks and mobile advertising present varying regulatory risks, esp. privacy/opt-in.
 - States developing laws specific to social media, e.g., North Carolina re sex offender access, New Jersey A-3757 re harassment/abuse, Calif. AB-632 re social photostream copy protection.
- Potential for federal preemption IF national standard established.
- Never underestimate ability of legislators to pass silly laws, e.g., prohibiting “silent” cell phone cameras <<http://ht.ly/6lVwD>>



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Take-Aways

- Little social media-specific judicial precedents & essentially no legislation. **Don't expect short-term statutory resolution.**
- Legacy real-world rules apply, sometimes as adapted, to social stream. **Otherwise unlawful practices are still illegal when online.**
 - Typical privacy rules (sector-specific) for social media, including EU Directive
 - UGC ownership is significant IP and corporate/HR issue
- Special compliance concerns for regulated industries and Reg FD financial/sales releases. **Pharma, banking, etc., need special SMPs.**
- Cauldron of litigation likely to yield confusing & conflicting precedents. **Nothing protects you against stupidity!**



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