

# *Chapter 1*

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## The Social Media Phenomenon

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## § 1:1 Overview

Social media is defined as “forms of electronic communication . . . through which users create online communities to share information, ideas, personal messages, and other content.”<sup>1</sup> Since the introduction of the first social networking site in 1997,<sup>2</sup> the use of social media has grown steadily. As of October 2018, almost 4.2 billion people worldwide use social media; 3.4 billion on a monthly basis.<sup>3</sup> Facebook continues to hold the top spot among social media platforms, with over 2.2 billion monthly users, followed by YouTube with 1.9 billion and Facebook’s WhatsApp with 1.5 billion.<sup>4</sup> Facebook Messenger and Chinese-based WeChat round out the top five with over 1.3 billion and over 1 billion monthly users, respectively.<sup>5</sup>

Unlike static websites, the social media environment is highly interactive and constantly evolving, with layer upon layer of user-based content. A user’s profile can change in an instant, with the addition of new content. Social media users can quickly and efficiently relay information to the entire user community or a smaller subset as selected by the user. Once posted, the information can rarely if ever be deleted.<sup>6</sup> These characteristics become important when considering specific ways that individuals, businesses, politicians, news outlets and others use social media.

This chapter identifies and discusses the most popular forms of social media and how they are used; the specific purposes for which individuals and organizations use social media; and the resulting legal issues raised by the use of social media, each of which is discussed in further detail in the ensuing chapters of this treatise.

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1. MERRIAM-WEBSTER DICTIONARY, *social media* (11th ed. 2009), [www.merriam-webster.com/dictionary/social+media?show=0&t=1317325770](http://www.merriam-webster.com/dictionary/social+media?show=0&t=1317325770).
  2. The first social networking site was SixDegrees.com. See Saqib Shah, *The History of Social Networking*, DIGITAL TRENDS (May 4, 2016), [www.digitaltrends.com/features/the-history-of-social-networking/](http://www.digitaltrends.com/features/the-history-of-social-networking/).
  3. *The State of the Internet in Q4 2018*, WE ARE SOCIAL (Oct. 17, 2018), <https://wearesocial.com/us/blog/2018/10/the-state-of-the-internet-in-q4-2018>.
  4. *Most famous social network sites worldwide as of October 2018, ranked by number of active users (in millions)*, STATISTA, <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> (last visited Dec. 23, 2018).
  5. *Id.*
  6. While a user has the ability to remove a post from his or her profile, there is always the possibility that the information has already been reposted, downloaded, or captured by another user or shared by the social media platform with a third party, effectively preventing the information from truly being deleted.

## § 1:2 Popular Forms of Social Media

### § 1:2.1 Social Networking Sites

Social networking sites are perhaps the most common and well-known form of social media. Sites like Facebook,<sup>7</sup> LinkedIn,<sup>8</sup> GooglePlus,<sup>9</sup> Instagram,<sup>10</sup> Twitter,<sup>11</sup> and Pinterest<sup>12</sup> invite users to establish online profiles through which they can share information as well as post photographs and videos either to the general user community or to a small group of other users to whom the poster is connected by mutual acceptance within the particular social networking site. Connected users have the ability to review, share, and comment on each other's postings. The continued popularity of social networking sites is undeniable.

Alternatively, users have the opportunity to send non-public messages to each other through personal message boards. A user can also establish a group or a series of pages that can be accessed only by other users who are members of the group. Examples include a group exclusively for alumni from a particular school, a group just for extended family members to plan an upcoming reunion, or those sharing a particular interest.

Businesses can also establish profiles on social networking sites to which other users can become followers or "fans."<sup>13</sup> Through its social networking pages, a business can promote its products and services, provide information about upcoming sales or events, conduct contests, gain valuable information about its consumers' preferences, and address customer complaints or other issues in a real-time fashion.

There are also specialized social networking sites, such as LinkedIn,<sup>14</sup> which focuses on business-oriented networking and offers users the ability to "endorse" each other for specific skills. Other social networking sites focus on specific industries, geographic communities, hobbies, or common interests or goals.<sup>15</sup>

Social networking sites are generally set up as being available to users at no charge. As a consequence of not charging user fees, many

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7. FACEBOOK, [www.facebook.com](http://www.facebook.com) (last visited Dec. 23, 2018).
  8. LINKEDIN, [www.linkedin.com](http://www.linkedin.com) (last visited Dec. 23, 2018).
  9. GOOGLEPLUS, <https://plus.google.com> (last visited Dec. 23, 2018).
  10. INSTAGRAM, [www.instagram.com](http://www.instagram.com) (last visited Dec. 23, 2018).
  11. TWITTER, [www.twitter.com](http://www.twitter.com) (last visited Dec. 23, 2018).
  12. PINTEREST, [www.pinterest.com](http://www.pinterest.com) (last visited Dec. 23, 2018).
  13. The term "fans" is used on Facebook. [www.facebook.com](http://www.facebook.com) (last visited Dec. 23, 2018).
  14. LINKEDIN, [www.linkedin.com](http://www.linkedin.com) (last visited Dec. 23, 2018).
  15. See, e.g., UNIVADIS, <https://www.univadis.com/player/yngursupc> (last visited Dec. 23, 2018), a social networking site for practicing physicians.

sites feature paid advertising that appears on a user's page and as sponsored posts in news feed. Not charging user fees encourages greater participation. Various third-party applications, such as the game Candy Crush Saga on Facebook,<sup>16</sup> are also made available to users through social networking sites. The presence of advertisers and application providers creates a dynamic that includes not only the site operator and users, but third parties providing advertising or applications that operate independently of those responsible for the social networking platform.

### § 1:2.2 Microblogs

The microblog is another popular form of social media. Microblog derives its name from "blog," a "web site that contains online personal reflections, comments, and often hyperlinks, videos, and photographs provided by the writer."<sup>17</sup> A microblog is simply a condensed version of a blog. The best-known microblog is Twitter,<sup>18</sup> a site that initially allowed users to post updates that are up to 140 characters in length, known as "tweets." In November 2017, Twitter expanded the limit on posts to 280, after conducting beta testing a couple of months earlier. Twitter's explanation was that "[h]istorically, 9% of Tweets in English hit the character limit. This reflects the challenge of fitting a thought into a Tweet, often resulting in lots of time spent editing and even at time abandoning Tweets before sending. With the expanded character count, this problem was massively reduced—that number dropped to only 1% of Tweets running up against the limit."<sup>19</sup> Following another Twitter user allows access to that user's tweets, which the follower can then reply to, "re-tweet," or mark as a "favorite."

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16. Created in March 2011, Candy Crush Saga launched on Facebook in April 2012 and, as of September 2018, remained the most popular game on Facebook, boasting 10 million active daily users. *Most popular Facebook games as of September 2018, based on number of daily active users (in millions)*, Candy Crush Saga, STATISTA, <https://www.statista.com/statistics/267003/most-popular-social-games-on-facebook-based-on-daily-active-users/> (last visited Dec. 23, 2018). Candy Crush Saga revenues increased to an all-time high of \$930 million in the twelve months ending June 30, 2018. Brian Crecente, '*Candy Crush Saga' Earned Just Under \$1 Billion in Past 12 Months*', VARIETY (Aug. 16, 2018), <https://variety.com/2018/gaming/news/candy-crush-saga-1-billion-1202908004/>.
17. MERRIAM-WEBSTER DICTIONARY, [www.merriam-webster.com/dictionary/blog](http://www.merriam-webster.com/dictionary/blog) (last visited Dec. 23, 2018).
18. TWITTER, [www.twitter.com](http://www.twitter.com) (last visited Dec. 23, 2018).
19. Aliza Rosen, *Tweeting Made Easier*, TWITTER BLOG (Nov. 7, 2017), [https://blog.twitter.com/official/en\\_us/topics/product/2017/tweeting-madeeasier.html](https://blog.twitter.com/official/en_us/topics/product/2017/tweeting-madeeasier.html).

Most Twitter accounts are accessible to the general public on Twitter's website unless a user changes the default settings to make his or her account private and available only to confirmed followers. A notable difference between Twitter and other social media sites is that any user can become a follower of another user with an open account without first being accepted or confirmed by that user. After the fact, however, any Twitter user has the ability to "block" other users, preventing them from following his or her account.<sup>20</sup>

Twitter users can post "hashtags," so that their tweets can be found in searches conducted on the site. According to Twitter, "a # symbol is used to index keywords or topics on Twitter. This function was created on Twitter, and allows people to easily follow topics they are interested in . . . hashtags that become very popular are often Trending Topics."<sup>21</sup> Clicking on a hashtag brings up all other tweets with hashtags in that category. Subsequently, other sites, including Facebook, began encouraging users to include hashtags in posts. The successful use of hashtags differs from platform to platform. On LinkedIn, for example, added hashtags do not appear in a posted article but, instead, are found in the commentary that displays above the article in the LinkedIn feed.<sup>22</sup> One report analyzing one billion plus posts from 30 million brand pages on Facebook concluded that posts containing hashtags got less user engagement than those without hashtags.<sup>23</sup> Some tend to overuse hashtags, causing commentators to discourage users from "watering down" a topic by using more than two hashtags per post.<sup>24</sup>

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20. Some have argued that a government official blocking other social media users from their page or feed is a violation of such users' First Amendment rights. *See Knight Institute Demands That President Unblock Critics on Twitter*, KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY (June 6, 2017), <https://knightcolumbia.org/news/knight-institute-demands-president-unblock-critics-twitter>. *See also* Davison v. Randall, 1:16cv932 (E.D. Va. July 25, 2017) (holding that Chair of County Board of Supervisors' blocking of plaintiff from her Facebook page violated his First Amendment rights), <https://docs.justia.com/cases/federal/district-courts/virginia/vaedce/1:2016cv00932/348006/132/>. The Board of Supervisors has appealed this decision to the U.S. Circuit Court of Appeals for the Fourth Circuit, where it remains pending.
  21. *How to use hashtags*, TWITTER, <http://support.twitter.com/articles/49309-what-are-hashtags-symbols> (last visited Dec. 23, 2018).
  22. *Adding Hashtags in Your Articles*, LINKEDIN HELP, <https://www.linkedin.com/help/linkedin/answer/71587/adding-hashtags-in-your-articles?lang=en> (last visited Dec. 23, 2018).
  23. *See* Steve Rayson, *How to Improve Facebook Engagement: Insights from 1bn Posts*, BUZZSUMO (Feb. 7, 2016), <http://buzzsumo.com/blog/how-to-improve-facebook-engagement-insights-from-1bn-posts/>.
  24. *See, e.g.*, Amanda Grinavich, *4 Social Media Commandments for 2015 (and Beyond)*, SHIFT COMM'CNS (Jan. 9, 2015), [www.shiftcomm.com/2015/01/social-media-commandments-2015/](http://www.shiftcomm.com/2015/01/social-media-commandments-2015/).

### § 1:2.3 Social News Sites

As the name implies, social news sites are informational sites offering current and archived news stories. What makes social news sites different from newspaper sites, like the *New York Times* website,<sup>25</sup> is that after registering with the site, users may submit stories. Editors at the site then pick and post selected stories. Like other traditional news sites, social news sites also allow users to post comments on the stories.

Digg<sup>26</sup> and Fark<sup>27</sup> are each general social news sites, but with very different spins on the news stories they publish. There are many special-focus social news sites as well. Another example of a social news site is Mashable,<sup>28</sup> which focuses on the latest news in topics including technology, social media, business, and entertainment. Instead of simply delivering the news to its subscribers, a social news site is more interactive by allowing subscribers to add new stories of interest to them.

The distinction between social media networking sites and social news sites has significantly blurred as more people utilize Facebook, Twitter and other networking sites as a source for news.<sup>29</sup> At the same time, the number of “fake” news sites and false or misleading articles being shared on social media has increased, to the point where, in 2016, Facebook began using third-party fact checkers.<sup>30</sup> In December 2017, Facebook changed its approach to addressing fake news. The platform has announced that, instead of the “disputed” flag, it will include links to other articles in an effort to provide context and evidence of untrue statements in the potentially fake story.<sup>31</sup>

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25. N.Y. TIMES, [www.nytimes.com](http://www.nytimes.com) (last visited Dec. 23, 2018).
  26. DIGG, [www.digg.com](http://www.digg.com) (last visited Dec. 23, 2018).
  27. FARK.COM, [www.fark.com](http://www.fark.com) (last visited Dec. 23, 2018).
  28. MASHABLE, <http://mashable.com/> (last visited Dec. 23, 2018).
  29. According to the Pew Research Center, one in five U.S. adults often get news from social media. Elisa Shearer, *Social media outpaces print newspapers in the U.S. as a news source*, PEW RESEARCH CTR. (Dec. 10, 2018), <http://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/>.
  30. Adam Mosseri, *Addressing Hoaxes and Fake News*, FACEBOOK NEWSROOM (Dec. 15, 2016), <https://newsroom.fb.com/news/2016/12/news-feed-fyi-addressing-hoaxes-and-fake-news/>.
  31. Tessa Lyons, *News Feed FYI: Replacing Disputed Flags with Related Articles*, FACEBOOK NEWSROOM (Dec. 20, 2017), <https://newsroom.fb.com/news/2017/12/news-feed-fyi-updates-in-our-fight-against-misinformation/>.

In 2017, the U.S. Senate and House intelligence committees held hearings to question representatives of Facebook, Twitter and Google. The focus of these hearings was multiple advertisements by Russian-linked firms that appeared on the social media platforms in an apparent effort to influence voters in the 2016 federal elections.<sup>32</sup> Despite the government interest and media attention, there was evidence that entities with Russian ties made similar efforts to influence 2018 midterm voters, culminating in criminal charges against both a social media troll farm and a Russian woman.<sup>33</sup>

#### § 1:2.4 Social Bookmarking Sites

Through social bookmarking sites, users can save or “bookmark” their favorite websites and locate more resources based on other users’ comments and recommendations. Prime examples of social bookmarking sites are Delicious<sup>34</sup> and Reddit.<sup>35</sup> Social bookmarking sites allow users to tag their bookmarks using their own descriptive terms. The site lists popular posts and often contains a search engine, allowing users to find web resources relating to any number of topics. All posted bookmarks are publicly accessible unless users change their default settings to keep their bookmarks private.<sup>36</sup>

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32. Nicholas Fandos, Cecilia Kang and Mike Isaac, *House Intelligence Committee Releases Incendiary Russian Social Media Ads*, N.Y. TIMES (Nov. 1, 2017), <https://www.nytimes.com/2017/11/01/us/politics/russia-technology-facebook.html>.
33. In October 2018, Elena Alekseevna Khusaynova was charged with allegedly working for a social media troll farm indicted earlier in 2018 by the special prosecutor for allegedly interfering with not only the 2016 but also seeking to “influence voter perceptions and decision-making in the 2018 and 2020 elections.” Deb Riechmann and Eric Tucker, *Russian woman charged in first 2018 election meddling case*, AP News (Oct. 20, 2018), <https://www.apnews.com/cca37bda5409449a900a361ba7c85a7c>.
34. DELICIOUS, <https://del.icio.us> (last visited Dec. 23, 2018). The site started in 2003 and claimed more than five million users five years later. Loren Baker, *Delicious.com Relaunches: Enhanced Speed, Search & Design with No Dots*, SEARCH ENGINE J. (July 31, 2008), [www.searchenginejournal.com/deliciouscom-relaunches-enhanced-speedsearch-design-with-no-dots/7403/](http://www.searchenginejournal.com/deliciouscom-relaunches-enhanced-speedsearch-design-with-no-dots/7403/).
35. REDDIT, [www.reddit.com](https://www.reddit.com) (last visited Dec. 23, 2018). Reddit allows users to share topics and comment and vote on stories and discussions. Reddit describes itself as “a growing family of millions of diverse people sharing the things they care about most.” *About Reddit*, REDDIT, <https://www.redditinc.com> (last visited Dec. 23, 2018).
36. See, e.g., REDDIT, <https://www.reddit.com> (last visited Dec. 23, 2018).

### **§ 1:2.5 Photo Sharing Sites**

Another popular form of social media is the photo sharing site. On these sites, registered users can post a large number of photographs, thereby allowing invitees to view the photographs by going to that site. Two examples of photo sharing sites are Flickr<sup>37</sup> and Instagram.<sup>38</sup> A very popular spin on a photo sharing site is Pinterest,<sup>39</sup> which allows users to “pin” photos from third-party sites, organize them by topic, and allow for followers to view and comment. Photo sharing sites and apps offer a user the advantage of posting photos once and sending a single message to invite friends to view them, as opposed to saving the photos on a computer hard drive, then attaching and sending them via an email or text message. These sites increasingly encourage interaction with other social media platforms. For example, Instagram photos can be easily posted to Facebook.<sup>40</sup>

Many sites allow the photographs to be downloaded, shared, and assembled for creative printing, although some sites are structured simply to conduct business. For example, a photo sharing site may be utilized by a professional photographer to allow its clients to display photos taken by the photographer, perhaps of a wedding or other event, and allow visitors to access the site to order copies of the photos from the photographer.

### **§ 1:2.6 Video Sharing Sites**

Everyone can have “fifteen minutes of fame” via video sharing sites. These sites allow users to upload videos so that anyone with access to the Internet can view them. The term “going viral” refers to an online video that becomes extremely popular very quickly.<sup>41</sup> A video that goes viral is typically shared over and over, perhaps millions of times.

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37. FLICKR, [www.flickr.com](http://www.flickr.com) (last visited Dec. 23, 2018). Flickr boasts 100 million users, down from 120 million in 2017, and will limit each non-professional user to 1000 free uploads starting in January 2019. Jefferson Graham, *Flickr adds unlimited storage for pros, lowers free usage*, USA TODAY (Nov. 1, 2018), <https://www.usatoday.com/story/tech/talkingtech/2018/11/01/photo-site-flickr-adds-unlimited-storage-pros-lowers-free-usage/1812495002/>.
  38. INSTAGRAM, <http://instagram.com> (last visited Dec. 23, 2018).
  39. PINTEREST, <http://pinterest.com/> (last visited Dec. 23, 2018).
  40. See, e.g., *How Do I Link My Instagram Account to a Facebook Page That I Manage?*, INSTAGRAM HELP CTR., [www.facebook.com/help/instagram/356902681064399](http://www.facebook.com/help/instagram/356902681064399) (last visited Dec. 23, 2018).
  41. *What does going viral mean in the internet world?*, ANSWERS.COM, [http://wiki.answers.com/Q/What\\_does\\_going\\_viral\\_mean\\_in\\_the\\_internet\\_world](http://wiki.answers.com/Q/What_does_going_viral_mean_in_the_internet_world) (last visited Dec. 23, 2018).

The most renowned video sharing site continues to be YouTube,<sup>42</sup> which was started in early 2005. Not surprisingly, there are several videos on YouTube documenting the history of YouTube.<sup>43</sup> The philosophy of video sharing sites is to encourage users to post videos, watch other users' videos, and share them outside of the site community. An example of the evolution of video sharing is VSCO,<sup>44</sup> a self-described "creative channel" that includes "tools . . . education, community and connections" for photographers.<sup>45</sup>

Like social networking sites, video sharing sites are used not only by individuals but also by businesses to promote their products and services, non-profit organizations to draw attention to their causes, and even by politicians to rally constituents on a key issue. If "a picture is worth a thousand words,"<sup>46</sup> a video can speak volumes.

## § 1:3 Specific Uses of Social Media

### § 1:3.1 Marketing and Public Relations

The popularity and seemingly infinite reach of social media continue to make it a natural vehicle for marketing. Using social networking, microblogs and photo and video sharing sites for brand enhancement has become commonplace in the corporate as well as non-profit world. An organization that has no social media marketing presence may, at best, miss out on opportunities and, at worst, find itself at a disadvantage in its particular industry.

#### [A] Promoting Goods and Services

Compared to more traditional forms of marketing, using social media to promote goods or services can be more affordable and perhaps equally or more effective. Paid advertisements on social media sites can be targeted to specific users based on their interests, demographics, and browsing and sharing history. Companies also often combine traditional marketing techniques with promotion through social media. Thus, a company running a television advertisement may expand its reach by pushing the same spot out before and/or

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42. YOUTUBE, [www.youtube.com](http://www.youtube.com) (last visited Dec. 23, 2018).

43. See, e.g., *The History of YouTube*, YOUTUBE (May 18, 2007), [www.youtube.com/watch?v=x2NQiVcdZRY](http://www.youtube.com/watch?v=x2NQiVcdZRY). As of this writing, this video has been viewed more than 368,000 times.

44. VSCO, <https://vsco.co> (last visited Jan. 29, 2019).

45. *Id.*, <https://vsco.co/about/company> (last visited Jan. 29, 2019).

46. Attributable to Napoleon Bonaparte: Search Quotes, *A picture is worth a thousand words*, [www.searchquotes.com/quotation/A\\_picture\\_is\\_worth\\_a\\_thousand\\_words./1436/](http://www.searchquotes.com/quotation/A_picture_is_worth_a_thousand_words./1436/) (last visited Dec. 23, 2018).

afterwards on Facebook, Twitter, or YouTube. In 2014 and 2015, the majority of Super Bowl ads contained hashtags. There was a slight decrease in 2016 to 45% and a dramatic drop in 2017 to only 30%. At the same time, the use of social media mentions and URLs in the ads increased to 39% from only 26% the prior year.<sup>47</sup> In 2018, Twitter hosted the first-ever #BrandBowl to honor brands that “won” the Super Bowl with the most popular ads. Winners included Pepsi, Mountain Dew, Doritos and Jurassic World.<sup>48</sup>

### [B] Market Research

The interactive nature of social media allows organizations to seek and obtain feedback from their customers and from consumers in general. Valuable information may come in the form of a response to an open question, survey, or contest or may be offered spontaneously by a social media fan. In an effort to capitalize on social media advertising, a number of services offer potential buyers demographic information useful for marketing on social media sites.<sup>49</sup> By using various tracking tools and techniques, a company can proactively locate and respond to individual posts that mention the company or its goods or services on the company’s own social media pages.

### [C] Damage Control

Social media may also be used to address a consumer issue or a public relations nightmare. For example, in 2009, after a prank video was posted on YouTube showing two North Carolina-based Domino’s Pizza employees engaging in less-than-hygienic conduct while handling food, Domino’s responded by posting a corporate apology in the form of its own YouTube video.<sup>50</sup> In June 2013, Taco Bell found itself in a similar situation when a photo of an employee licking a stack of taco shells was posted on the company’s Facebook page. Within twenty-four hours, Taco Bell posted the following response: “We have strict food handling procedures and zero tolerance for any violations.

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47. Danny Sullivan, *Hashtags in Super Bowl ads slip to 30% in 2017, overtaken by URL use in 39%*, MARKETING LAND (Feb. 5, 2017), <https://marketingland.com/hashtags-in-super-bowl-51-ads-205706>.
  48. Ryan Oliver, *Twitter announces winners of first-ever #BrandBowl*, TWITTER MKTG. (Feb. 4, 2018), [https://blog.twitter.com/marketing/en\\_us/topics/events/2018/Twitter-Announces-Winners-of-First-Ever-BrandBowl.html](https://blog.twitter.com/marketing/en_us/topics/events/2018/Twitter-Announces-Winners-of-First-Ever-BrandBowl.html).
  49. See, e.g., *Quantcast Measure: Audience Insights that Help You Tell Better Stories*, QUANTCAST, [www.quantcast.com/measure](http://www.quantcast.com/measure) (last visited Dec. 23, 2018).
  50. *Dominos President Responds to Prank Video*, YOUTUBE (Apr. 18, 2009), [www.youtube.com/watch?v=dem6eA7-A2I](http://www.youtube.com/watch?v=dem6eA7-A2I).

We believe this is a prank and the food was not served to customers. We are conducting an investigation and will be taking swift action against those involved.”<sup>51</sup> A company may choose not to respond in kind. For example, in January 2017, Donald Trump, then president-elect, tweeted that General Motors should be taxed on importing the Mexican-manufactured model of the Chevy Cruze. General Motors quickly posted a response on its corporate newsroom website, rather than using its social media outlets, that Cruze sedans are built in Ohio and that the hatchbacks manufactured in Mexico are “for global markets . . . with a small number sold in the U.S.”<sup>52</sup> It has been recommended that companies have a “social media crisis plan” that includes steps for detecting and responding to a corporate social media blunder.<sup>53</sup>

### § 1:3.2 Networking

As described above,<sup>54</sup> networking is one of the principal reasons individuals and businesses use social media. In individual profiles, users generally post information about themselves, their interests and activities, as well as affiliations, education, and occupational background. Social networks often allow each member to choose from different levels of privacy, such as whether to allow all other members of the network to see the individual’s profile content or to limit it only to the connected members. Social networks may allow even further refinement of access control within the connected community. Networking within a social media site is also accomplished through messaging, job searching, employee recruiting, and endorsing or recommending other users.

#### [A] Messaging

In many instances, social media has replaced email as a tool for sending messages, particularly in terms of business communications and collaboration.<sup>55</sup> Sending messages via social media is further

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51. Kim LaCapria, *Taco Bell Employee Fired After Facebook Photo*, SOCIAL NEWS DAILY (June 4, 2013), <https://socialnewsdaily.com/14669/taco-bell-employee-fired/>.
52. *Statement on GM Production of the Chevrolet Cruze*, GM CORPORATE NEWSROOM (Jan. 3, 2017), <http://media.gm.com/media/us/en/gm/home.detail.html/content/Pages/news/us/en/2017/jan/0103-cruze.html>.
53. See, e.g., *5 Things You Must Have in Your Social Media Crisis Plan*, SOCIALBAKERS, [www.socialbakers.com/blog/2100-5-things-you-must-have-in-your-social-media-crisis-plan](http://www.socialbakers.com/blog/2100-5-things-you-must-have-in-your-social-media-crisis-plan) (last visited Dec. 23, 2018).
54. See *supra* section 1:2.1.
55. Dan Beiler, *Social Media Collaboration in the Enterprise Environment Is Key for Business Communications*, DAN BIELER’S BLOG (June 11, 2013),

facilitated by the availability of many social media applications on smartphones and other mobile devices. Users can send personal messages using social media or by posting on another user's page or profile and, depending on the privacy settings associated with the recipient's profile, send a message that can be seen by others and perhaps by anyone. Facebook's popular messaging app, Messenger, provides a means for users to send "private" messages to other users. In December 2018, news reports revealed that, through data sharing arrangements, Facebook allowed several third parties to view and even delete or alter these messages.<sup>56</sup>

### **[B] Job Searching and Recruiting**

Individuals seeking employment use social media to post résumés, make job inquiries, and review social media profiles and postings of prospective employers. At the same time, organizations seeking new employees can post job openings using social media to spread the word that they are hiring. Where permitted by law, prospective employers may also choose to view a candidate's social media presence before making a job offer, looking to rule out candidates who show evidence of unprofessional or questionable conduct.

Recruiting and job search site Glassdoor allows users to search millions of jobs, get salary estimates, and read employee reviews.<sup>57</sup> During April 2018, Glassdoor had over 48 million monthly visitors and over 143 million total monthly views.<sup>58</sup>

### **§ 1:3.3 Information Sharing and Gathering**

#### **[A] Informal Investigations**

Prospective employers are not the only ones who use social media to conduct information investigations of individuals. Police and prosecutors may check social media profiles of defendants and witnesses. Within the bounds of ethical obligations, litigators can look up the profiles of parties, witnesses, and even jurors. The privacy settings

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56. https://go.forrester.com/blogs/13-06-11-social\_media\_collaboration\_in\_the\_enterprise\_environment\_is\_key\_for\_business\_communications/.
57. Mark Bridge, Boer Dang & Aaron Rogan, *Facebook shared private user messages with third-party firms*, THE SUNDAY TIMES (Dec. 20, 2018), <https://www.thetimes.co.uk/article/facebook-shared-private-user-messages-with-third-party-firms-rhg2qcw0g>.
58. GLASSDOOR, [www.glassdoor.com/index.htm](http://www.glassdoor.com/index.htm) (last visited Dec. 23, 2018).
59. STATISTA, *Web traffic to Glassdoor.com from the United States as of April 2018 (in millions)*, <https://www.statista.com/statistics/610452/glassdoor-web-traffic/> (last visited Dec. 23, 2018).

employed by the individuals who are the subjects of these investigations can be critical in determining how much information will be available.

### [B] A Soapbox

Blogs, microblogs, and other social media applications provide a real-time, interactive forum for sharing opinions, pushing a particular agenda, or engaging in critical commentary. No political issue, significant event, or industry is immune from becoming a topic of discussion. In 2009, Facebook amended its terms of use by deleting a sentence 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 an immediate and very vocal negative reaction throughout the Facebook user community. As a result, Facebook made an abrupt about-face, restoring the sentence and stating that it never intended to change its privacy practices.<sup>59</sup> In 2014, the "Ice Bucket Challenge," an awareness and fundraising effort, generated millions of Facebook videos of individuals dumping cold water on themselves, as well as millions of dollars in donations to the ALS Association.<sup>60</sup> In the fall of 2017, actress Alyssa Milano started the "#MeToo" movement raising awareness of sexual harassment or assault by tweeting: "Me too. Suggested by a friend: If all the women who have been sexually harassed or assaulted wrote 'Me too.' as a status, we might give people a sense of the magnitude of the problem."<sup>61</sup> Thousands replied to this message or posted elsewhere on social media using #MeToo, contributing to a general environment in which dozens of high-profile men in media, politics, entertainment and hospitality, including Harvey Weinstein, Senator Al Franken, Matt Lauer and Mario Batali, were fired or chose to resign after specific allegations were made against them.<sup>62</sup>

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59. Brad Stone & Brian Stelter, *Facebook Withdraws Changes in Data Use*, N.Y. TIMES [Feb. 18, 2009], [www.nytimes.com/2009/02/19/technology/internet/19facebook.html](http://www.nytimes.com/2009/02/19/technology/internet/19facebook.html).
60. See Timothy Stenovec, *The Reasons the Ice Bucket Challenge Went Viral*, HUFFINGTON POST [Aug. 19, 2014], [www.huffingtonpost.com/2014/08/19/ice-bucket-challenge\\_n\\_5692307.html](http://www.huffingtonpost.com/2014/08/19/ice-bucket-challenge_n_5692307.html).
61. See Anna Codrea-Rado, *#MeToo Floods Social Media with Stories of Harassment and Assault*, N.Y. TIMES TECH. [Oct. 16, 2017], <https://www.nytimes.com/2017/10/16/technology/metoo-twitter-facebook.html>.
62. See Sarah Almukhtar, Michael Gold and Larry Buchanan, *After Weinstein: 47 Men Accused of Sexual Misconduct and Their Fall from Power*, N.Y. TIMES [updated Dec. 22, 2017], <https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html>.

## § 1:4 Identifying Legal Issues

### § 1:4.1 Content Control and Ownership<sup>63</sup>

Users who post information using social media may believe that their profile content, photos, etc. are theirs to own and control—but is this really the case?

Social media sites differ in their policies and practices. LinkedIn, for example, requires its users to grant LinkedIn, with respect to all posted content, a nonexclusive

worldwide, transferable and sublicenseable right to use, copy, modify, distribute, publish and process . . . without any further consent, notice and/or compensation to you or others.<sup>64</sup>

Twitter's terms contain a similar license and also include the prominent notice: "This license authorizes us to make your Content available to the rest of the world and to let others do the same."<sup>65</sup>

Disputes over the ownership and control of social media pages can arise between users. For example, in 2007, a Swiss father and son, Sammy and Olivier Wasem, created two Ferrari fan pages on Facebook. After being approached by the automaker, the Wasems agreed to allow one of the pages to become the "official" Ferrari Facebook page. The Wasems later filed a complaint in a California state court against Facebook and Ferrari alleging that they were removed from the administration of both pages, which had collectively amassed over 19 million fans.<sup>66</sup>

Another risk of using social media is the inadvertent disclosure of confidential or sensitive information. Social media tools provide an instantaneous means of communicating with an entire online community. Using social media in haste can lead to unintended, perhaps even disastrous results. One example is the undoubtedly well-intended "tweet" in February 2009 from then U.S. Congressman Peter Hoekstra that he had just landed in Iraq for what was supposed to be a secret trip.<sup>67</sup> A December 2018 video tweet from President Donald Trump

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63. See also *infra* chapter 3.

64. *User Agreement*, LINKEDIN (rev. May 8, 2018), [www.linkedin.com/legal/user-agreement](http://www.linkedin.com/legal/user-agreement).

65. *Terms of Service*, TWITTER, <https://twitter.com/tos> [May 25, 2018].

66. Complaint, Wasem v. Facebook, Inc., Civ. 530869 (Cal. Super. Ct. Oct. 14, 2014), <http://pdfserver.amlaw.com/ca/WasemvFerrari.pdf>.

67. See Kyla King, *Congressman Pete Hoekstra's Twitter Flap Prompts Pentagon Policy Review*, GRAND RAPIDS PRESS, Feb. 11, 2009, [www.mlive.com/news/grand-rapids/index.ssf?2009/02/hoekstras\\_twitter\\_flap\\_prompts.html](http://www.mlive.com/news/grand-rapids/index.ssf?2009/02/hoekstras_twitter_flap_prompts.html). Another congressman fell victim to a major Twitter gaffe—in June 2011, U.S. Congressman Anthony Weiner admitted to

during an impromptu visit to troops in Iraq is said to have disclosed the location and identities of a Navy SEAL team.<sup>68</sup>

As a presidential candidate, Donald Trump's use of Twitter<sup>69</sup> as his communication vehicle of choice and his unfiltered tweets on topics of national interest raised concerns from journalists<sup>70</sup> and federal officials<sup>71</sup> as well as prompted reactions from foreign countries.<sup>72</sup> After being sworn in as the forty-fifth President of the United States on January 20, 2017, this behavior did not change. In addition to the example provided above, the President often engages in early morning "Tweetstorms" on subjects ranging from foreign leaders and other politicians to journalists and sports figures.<sup>73</sup> While

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sending inappropriate photos to several women after initially denying sending a nude photo of himself over Twitter. See Chris Cuomo, Chris Vlasto & Devin Dwyer, ABC NEWS, *Rep. Anthony Weiner: 'The Picture Was of Me and I Sent It'*, June 6, 2011, <http://abcnews.go.com/Politics/rep-anthony-weiner-picture/story?id=13774605>.

68. See James LaPorta, *Donald Trump Twitter Account Video Reveals Covert U.S. Navy Seal Deployment During Iraq Visit*, NEWSWEEK (Dec. 30, 2018), <https://www.newsweek.com/donald-trump-navy-seal-iraq-video-1272102>.
69. Donald J. Trump (@realDonaldTrump), TWITTER, <https://twitter.com/realDonaldTrump> (last visited Dec. 30, 2018).
70. See Michael M. Grynbaum & Sydney Ember, *If Trump Tweets It, Is It News? A Quandary for the News Media*, N.Y. TIMES (Nov. 29, 2016), [www.nytimes.com/2016/11/29/business/media/if-trump-tweets-it-is-it-news-a-quandary-for-the-news-media.html?\\_r=0](http://www.nytimes.com/2016/11/29/business/media/if-trump-tweets-it-is-it-news-a-quandary-for-the-news-media.html?_r=0).
71. See Phil McCauland, *Bernie Sanders Makes Big Statement with Oversized Trump Tweet*, NBC NEWS (Jan. 5, 2017), [www.nbcnews.com/news/us-news/bernie-sanders-makes-big-statement-oversized-trump-tweet-n703296](http://www.nbcnews.com/news/us-news/bernie-sanders-makes-big-statement-oversized-trump-tweet-n703296).
72. See Katie Hunt, Tim Schwarz & Eric Bradner, *Beijing 'Seriously Concerned' After Trump Questions 'One China' Policy*, CNN POLITICS (Dec. 13, 2016), [www.cnn.com/2016/12/12/politics/china-trump-one-china-reaction/](http://www.cnn.com/2016/12/12/politics/china-trump-one-china-reaction/); Laura King, *Britain Says Not So Fast to Trump Tweet About Nigel Farage As Ambassador to U.S.*, L.A. TIMES (Nov. 22, 2016), [www.latimes.com/nation/politics/trailguide/la-na-trailguide-updates-britain-trump-farage-1479828599-htmlstory.html](http://www.latimes.com/nation/politics/trailguide/la-na-trailguide-updates-britain-trump-farage-1479828599-htmlstory.html). Immediate and adverse reactions from other countries, U.S. businesses, and citizens occurred after President Trump's announcements regarding the United States' withdrawal from the Paris Climate Accord and position on Jerusalem being the capital of Israel. See Elle Hunt, Sam Levin and Tom McCarthy, *Paris climate agreement: World reacts as Trump pulls out of global accord—as it happened*, THE GUARDIAN U.S. EDITION, <https://www.theguardian.com/environment/live/2017/jun/01/donald-trump-paris-climate-agreement-live-news> (last visited Dec. 30, 2018), and Oren Dorell, *Trump's Jerusalem decision: How the world is reacting*, USA TODAY (Dec. 5, 2017).
73. See, e.g., David Jackson, *Trump mocks Kim Jong Un and Hillary Clinton in Sunday tweetstorm*, USA TODAY (Sept. 17, 2017), <https://www.usatoday.com/story/news/politics/2017/09/17/president-trump-mocks-kim-jong-un-and-hillary-clinton-sunday-tweetstorm/674781001/>.

the Department of Justice has taken the position that the tweets are “official statements of the President of the United States,”<sup>74</sup> the President has, on occasion, deleted his earlier tweets, such as after the Alabama senatorial candidate that he endorsed, Luther Strange, lost the Republican primary election.<sup>75</sup> The website ProPublica retains an archive of President Trump’s deleted tweets.<sup>76</sup> In June 2017, CREW (Citizens for Responsibility and Ethics in Washington) sued President Trump seeking a writ of mandamus and declaratory and injunctive relief for alleged violation of the Presidential Records Act of 1978,<sup>77</sup> among other federal statutes by White House staffers conducting official business using instant messaging applications that automatically delete messages once read.<sup>78</sup> In March 2018, the court granted the government’s motion to dismiss CREW’s complaint, in part because CREW failed to show the breach of a clear and compelling duty under the Presidential Records Act to warrant the high threshold required to obtain mandamus relief.<sup>79</sup>

When a government official directs a tweet at a specific business or industry, it could manifest in: (a) short-term reactions to stock price,<sup>80</sup> (b) effectively forcing the business to take a political stand that may alienate some of its customers, and (c) longer-term reputational damage.<sup>81</sup> President Trump’s tweets directed to players and owners of the National Football League regarding player “take a knee” protests caused an uproar within the league<sup>82</sup> and further manifested itself

74. See Defendants’ Supplemental Submission and Further Response to Plaintiffs’ Post-Briefing Notices, James Madison Project v. Department of Justice, No. 1:17-cv-00144-APM (Nov. 13, 2017), <https://assets.documentcloud.org/documents/4200037/Trump-Twitter-20171113.pdf>.
75. See Brian Naylor, *Trump Deleting Tweets After Luther Strange’s Loss Raises Legal Questions*, NPR POLITICS (Sept. 28, 2017).
76. Politwoops, PROPUBLICA, <https://projects.propublica.org/politwoops/user/POTUS> (last visited Dec. 30, 2018).
77. 44 U.S.C. §§ 2201–09.
78. Citizens for Responsibility & Ethics in Wash. v. Trump, No. 1:17-cv-01228 (Complaint filed June 22, 2017), <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2017/06/22122345/Complaint.pdf>.
79. Citizens for Responsibility & Ethics in Wash. v. Trump, *supra* note 78, Memorandum Opinion (Mar. 20, 2018, [https://ecf.dcd.uscourts.gov/cgi-bin/show\\_public\\_doc?2017cv1228-21](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2017cv1228-21)).
80. See *infra* section 1:4.7 and chapter 7 (for further discussion of this topic).
81. See *infra* section 1:4.5 and chapter 5 (for further discussion of this topic).
82. NFL Commissioner Roger Goodell called Trump’s statements “divisive” and stated that “the NFL and our players are at our best when we help create a sense of unity in our country and our culture.” *Statement from NFL Commissioner Roger Goodell*, NFL COMM’NS (last visited Dec. 30, 2018), <https://nflcommunications.com/Pages/Statement-From-NFL-Commissioner-Roger-Goodell.aspx>.

in impact to businesses that chose to publicly take a side.<sup>83</sup> In short, businesses may need to react and manage third-party social media content in more innovative ways.

There may also be challenges with retrieving information from a social media site. Given the dynamic nature of social media, capturing information at a particular moment in time may not be possible. For example, a government agency with a social media presence may have difficulty precisely responding to a request under the Freedom of Information Act<sup>84</sup> or other sunshine law.<sup>85</sup>

### § 1:4.2 Privacy Considerations<sup>86</sup>

While many social media sites offer users the ability to customize privacy settings, what happens when users do not avail themselves of that opportunity? The default settings then control what information is made available to the general public. Facebook's default setting allows anyone full access to the information on a user's profile; however, account settings allow users to define the privacy settings even on a post-by-post basis.<sup>87</sup> What users should realize is that Facebook and other social media sites do not control the third-party applications that are widely available. By signing up for an application, a user is allowing that third-party access to all of the user's profile information. Unfortunately, the application provider's information sharing practices may not be fully disclosed.<sup>88</sup> One example of this came to light in December 2018 when it was revealed that Facebook's data sharing arrangements with multiple third parties include users' perceived private messages.<sup>89</sup>

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83. The CEO of Papa John's Pizza ended up resigning in December 2017, after he blamed the protest by NFL players for a drop in the company's earnings. *See Scott Neuman, Papa John's CEO Steps Down Following Controversial Remarks on NFL*, NPR AMERICA (Dec. 22, 2017), <https://www.npr.org/sections/thetwo-way/2017/12/22/572779230/papa-johns-ceo-steps-down-following-controversial-remarks-on-nfl>.
84. 5 U.S.C. § 552, as amended by Pub. L. No. 110-175, 121 Stat. 2524 (2007), and Pub. L. No. 111-83, § 564, 123 Stat. 2142, 2184 (2009).
85. *See D. Levine, The Social Layer of Freedom of Information Law*, 90 N.C. L. REV. at 101 (Feb. 29, 2012); *id.* (Abstract), <http://cyberlaw.stanford.edu/publications/social-layer-freedom-information-law>.
86. *See also infra* chapter 2.
87. *See Privacy Basics*, FACEBOOK, [www.facebook.com/about/basics/](http://www.facebook.com/about/basics/) (last visited Dec. 30, 2018).
88. *App Safety & Security*, FACEBOOK, [www.facebook.com/help/468928659802672](http://www.facebook.com/help/468928659802672) (last visited Dec. 30, 2018).
89. *See supra* section 1:3.1[A].

Using social media will undoubtedly lead to a user's interests and profiles being tracked for marketing purposes. Facebook uses facial recognition to suggest that users "tag" themselves and others in photos posted on the site. This technology, coupled with other information being collected online and off, has the potential for many uses beyond marketing.<sup>90</sup> Illinois has enacted the Illinois Biometric Information Privacy Act, which regulates the collection and use of biometric identifiers or biometric information, including obtaining informed consent from the data subject and limiting the amount of time that a private entity may possess such biometric information.<sup>91</sup> In 2015, Facebook and Shutterfly were sued for alleged violations of the act.<sup>92</sup> In March 2016, two putative class actions were instituted against Google, Inc. alleging violation of the Illinois act.<sup>93</sup> During the second half of 2017, approximately thirty employee class actions were filed alleging violations of the Illinois law.<sup>94</sup>

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90. Martin Kaste, *A Look into Facebook's Potential to Recognize Anybody's Face*, ALL TECH CONSIDERED BLOG [Oct. 28, 2013], [www.npr.org/blogs/alltechconsidered/2013/10/28/228181778/a-look-into-facebooks-potential-to-recognize-anybodys-face](http://www.npr.org/blogs/alltechconsidered/2013/10/28/228181778/a-look-into-facebooks-potential-to-recognize-anybodys-face).
91. 740 ILL. COMP. STAT. ANN. 14/1 *et seq.* (eff. Oct. 3, 2008). Both Texas and Washington also have enacted similar laws. See TEX. BUS. & COM. CODE § 503.001 *et seq.*, <http://www.statutes.legis.state.tx.us/Docs/BC/htm/BC.503.htm>, and WASH. CH. 299 [July 23, 2017], <http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/House/1493-S.SL.pdf#page=1>. California's new data protection law, scheduled to take effect on January 1, 2020, also includes biometric information in a broad definition of personal information covered by the statute, [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180AB375](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB375).
92. See, e.g., Class Action Complaint, Gullen v. Facebook, Inc., No. 15-076881 (N.D. Ill. Aug. 31, 2015), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2037&context=historical> (this case was dismissed on personal jurisdiction grounds in January 2016 and is now consolidated with other cases pending in the Northern District of California); Class Action Complaint, Norberg v. Shutterfly, Inc., No. 1:15-cv-05351 (N.D. Ill. June 17, 2015), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1989&context=historical> (in April 2016, Shutterfly settled the case).
93. Class Action Complaint, Rivera v. Google, Inc., Case 1:16-cv-02714 (N.D. Ill. Mar. 1, 2016), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2166&context=historical>; Class Action Complaint, Weiss v. Google, Inc., Case 1:16-cv-02870 (N.D. Ill. Mar. 4, 2016), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2171&context=historical>.
94. Employers facing such actions include United Airlines, InterContinental Hotels Group, Speedway, Hyatt, and Bob Evans Restaurants. See Amy Korte, *Airlines Hit with Class-Action Lawsuits under Biometric Privacy Law*, ILL. POLICY [Nov. 20, 2017], <https://www.illinoispolicy.org/united-airlines-hit-with-class-action-lawsuit-under-biometric-privacy-law/>.

Senator Ron Wyden of Oregon introduced a “Consumer Data Protection Act” in November 2018 that would require executives of technology companies to demonstrate that their companies are in compliance with data security regulations or face penalties, including imprisonment.<sup>95</sup> Like virtually all prior attempts at comprehensive general data protection legislation at the federal level, this bill is unlikely to gain traction. By way of further example, “Do Not Track” legislation has been proposed more than once on the federal level<sup>96</sup> as well as in some states, and class lawsuits have been filed against companies alleged to be using embedded cookies to track user web browsing activities even when a user has deactivated cookies from his or her browser.<sup>97</sup>

Collecting personal information online from children under the age of thirteen without first obtaining prior parental consent is prohibited by the Children’s Online Privacy Protection Act of 1998.<sup>98</sup> Social media sites may, in fact, be unwittingly collecting information in violation of COPPA if a user under the age of thirteen enters a false date of birth, representing that he or she is thirteen or older.

International privacy rules and regulations can also impact use of data by social media platforms. In 2014, Facebook purchased the messaging service WhatsApp for \$22 billion. In August 2016, Facebook announced privacy policy changes that may differ from the original

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95. SILI18B29 *Discussion Draft*, <https://www.wyden.senate.gov/imo/media/doc/Wyden%20Privacy%20Bill%20Discussion%20Draft%20Nov%201.pdf>.
96. The most recent bill that failed to be enacted into law was S. 2404, Do Not Track Online Act of 2015 (introduced in the Senate on December 15, 2015), [www.congress.gov/bill/114th-congress/senate-bill/2404?q=%7B%22search%22%3A%5B%22not+track+online%22%5D%7D&resultIndex=4](http://www.congress.gov/bill/114th-congress/senate-bill/2404?q=%7B%22search%22%3A%5B%22not+track+online%22%5D%7D&resultIndex=4).
97. See, e.g., *In re Google, Inc. Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125 (3d Cir. 2015); Decision and Order, *In re Turn, Inc.*, FTC No. 1523099 (F.T.C. Dec. 20, 2016) (FTC alleged that California-based digital marketing company used “zombie” cookies from mobile apps without properly disclosing the practice), [www.ftc.gov/system/files/documents/cases/turn\\_decision\\_and\\_order.pdf](http://www.ftc.gov/system/files/documents/cases/turn_decision_and_order.pdf).
98. COPPA, Pub. L. No. 105-277, 112 Stat. 2581-728 (1998) (codified at 15 U.S.C. §§ 6501–06). The Federal Trade Commission revised COPPA rules, effective July 1, 2013, broadening the definition of children’s personal information and expanding the scope of the rules. Press Release, Fed. Trade Comm’n, Revised Children’s Online Privacy Protection Rules Goes into Effect Today (July 1, 2013), [www.ftc.gov/news-events/press-releases/2013/07/revised-childrens-online-privacy-protection-rule-goes-effect](http://www.ftc.gov/news-events/press-releases/2013/07/revised-childrens-online-privacy-protection-rule-goes-effect). In June 2017, the FTC issued an updated guidance on COPPA. *Children’s Online Privacy Protection Rule: A Six-Step Compliance Plan for Your Business*, FED. TRADE COMM’N GUIDANCE (June 2017).

WhatsApp terms of service and privacy policy. In November 2016, Facebook agreed to suspend its intended use of data of U.K. users of WhatsApp for advertising purposes, pending further discussion with U.K. regulators.<sup>99</sup> In May 2017, the European Union fined Facebook \$122 million for providing regulators with misleading information about the WhatsApp acquisition.<sup>100</sup>

### **§ 1:4.3 Copyrights and Copyright Law<sup>101</sup>**

The technology associated with the Internet easily allows text, graphics, photos, and logos to be copied and pasted. Doing so will, in many instances, violate U.S. copyright law. Using any third-party content without permission can result in both criminal and civil liability, including treble damages and attorney fees under the U.S. Copyright Act.<sup>102</sup>

Most social networking sites address the use of third-party content in their terms of use. For example, Twitter defines “Content” as “any information, text, links, graphics, photos, audio, videos, or other materials or arrangements of materials uploaded, downloaded or appearing on” the platform.<sup>103</sup> The Twitter terms further state that users are responsible for any Content posted to the Services. Twitter “reserve[s] the right to remove Content that [constitutes] copyright or trademark violations . . .”<sup>104</sup> The unauthorized use of third-party content also violates the terms of service of most social networking sites and could serve as an additional basis for liability.

Mindful that copyright infringement is a real possibility, and consistent with the Digital Millennium Copyright Act (or DMCA),<sup>105</sup> many social networks also provide a mechanism for users to notify

- 99. See Stephanie Bodoni, *Facebook Pauses Use of WhatsApp Data Amid U.K. Privacy Probe*, BLOOMBERG TECH. (Nov. 7, 2016), [www.bloomberg.com/news/articles/2016-11-07/facebook-agrees-to-pause-whatsapp-data-use-in-u-k-privacy-probe](http://www.bloomberg.com/news/articles/2016-11-07/facebook-agrees-to-pause-whatsapp-data-use-in-u-k-privacy-probe).
- 100. See *Mergers: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover*, EUROPEAN COMM’N PRESS RELEASE (May 18, 2017), [http://europa.eu/rapid/press-release\\_IP-17-1369\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1369_en.htm).
- 101. See also *infra* chapter 3.
- 102. 17 U.S.C. § 101 *et seq.*; see also U.S. COPYRIGHT OFFICE CIRCULAR 92, COPYRIGHT LAW OF THE UNITED STATES AND RELATED LAWS CONTAINED IN TITLE 17 OF THE UNITED STATES CODE (Dec. 2011), [www.copyright.gov/title17](http://www.copyright.gov/title17).
- 103. *Twitter Terms of Service*, TWITTER, <https://twitter.com/tos> (May 25, 2018).
- 104. *Id.*
- 105. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

them of infringing activities and what actions the company may take upon learning of the infringement. Facebook's Terms of Use link to an "About Copyright" section, with explicit directions on how to report incidents of copyright infringement and stating that after such claim is submitted, Facebook will process it, which may result in removing or disabling access to the infringing content.<sup>106</sup>

Copyright holders may take stringent measures to enforce their rights. Getty Images, Inc., the world's leading provider of visual content, states that it "fall[s] victim to tens of thousands of parties pirating [its] intellectual property." In 2012 alone, Getty Images identified over 40,000 instances of infringement in the United States.<sup>107</sup> YouTube offers a "Content ID" feature that allows copyright owners to submit files that YouTube adds to a database against which user-uploaded videos are checked; copyright owners then decide what steps YouTube should take regarding the content.<sup>108</sup> In 2016, Getty Images faced its own lawsuit by a photography agency alleging that Getty improperly copied over 47,000 of plaintiff's images and displayed them on Getty's website. In June 2017, the court dismissed some of the claims while allowing others to proceed.<sup>109</sup> In October, 2018, the court granted Getty's motion for summary judgment on equitable estoppel grounds.<sup>110</sup>

A new enforcement tool, in the form of image search technology, is making its way into use by both private and public entities.<sup>111</sup> Instructions for conducting a "reverse image search" are available throughout the Internet.<sup>112</sup>

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106. *Reporting Copyright Infringements*, FACEBOOK, <https://www.facebook.com/help/400287850027717> (last visited Dec. 30, 2018).
  107. Comments on Remedies for Small Copyright Claims: Getty Images (Oct. 19, 2012), [www.copyright.gov/docs/smallclaims/comments/noi\\_10112012/getty\\_images.pdf](http://www.copyright.gov/docs/smallclaims/comments/noi_10112012/getty_images.pdf).
  108. *How Content ID Works*, GOOGLE, <https://support.google.com/youtube/answer/2797370?hl=en> (last visited Dec. 30, 2018).
  109. Zuma Press, Inc. v. Getty Images (US), Inc., No. 16 Civ. 6110 (June 29, 2017), <https://www.leagle.com/decision/infco20170705g58>.
  110. Zuma Press v. Getty, *supra* note 109, Order and Opinion Granting Summary Judgment to Defendant (Oct. 4, 2018), <https://www.ipwatchdog.com/wp-content/uploads/2018/10/Getty-SJ-granted.pdf>.
  111. See Ira Boudway, *The Company That Cracked Image Search: Nervve's Image-Recognition Software Is Used by Everyone from the NBA to U.S. Intelligence Agencies*, BLOOMBERG BUSINESSWEEK (May 25, 2016), [www.bloomberg.com/news/articles/2016-05-25/the-company-that-cracked-image-search](http://www.bloomberg.com/news/articles/2016-05-25/the-company-that-cracked-image-search).
  112. See, e.g., Kevin Dupzyk, *How to Do a Reverse Image Search*, POPULAR MECHANICS (Nov. 20, 2018), <https://www.popularmechanics.com/technology/a25226475/how-to-do-a-reverse-image-search/>.

In *Mavrix v. LiveJournal*, the Ninth Circuit Court of Appeals addressed how the use of moderators could negatively impact a platform's ability to successfully defend itself against a copyright infringement claim under the DMCA. Mavrix alleged that LiveJournal infringed Mavrix's copyrights by posting twenty photographs (bearing Mavrix' watermark) from 2010 through 2014, including images of Beyoncé and Katy Perry. The photographs were submitted by LiveJournal users, then reviewed and approved by a LiveJournal moderator prior to posting. The trial court ruled in LiveJournal's favor. The Ninth Circuit remanded the case back to the trial court to determine: (a) whether the moderators' acts were extensive, manual and substantive activities beyond automatic and limited manual activities, (b) if it would be objectively obvious to a reasonable person that material bearing a generic or proprietary watermark was infringing, and (c) whether LiveJournal benefited financially from the infringement.<sup>113</sup>

#### **§ 1:4.4      Brand Protection and Impersonation<sup>114</sup>**

Blogging and social networking sites can be used by competitors and other third parties to impersonate another organization. There are many examples of impersonation and brand hijacking. A number of lawsuits have been filed raising allegations of impersonation and/or fake social networking profiles.<sup>115</sup> Impersonation may occur in conjunction with other attempted wrongful acts. In January 2014, LinkedIn sued a group of unknown hackers who allegedly created fake accounts in order to scrape data of LinkedIn members.<sup>116</sup> In 2017, ZeroFOX Research identified three prevalent forms of social media

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113. *Mavrix Photographs LLC v. LiveJournal Inc.*, No. 14-56596 (9th Cir. Apr. 7, 2017), <http://caselaw.findlaw.com/us-9th-circuit/1856011.html>.

114. See also *infra* chapter 4.

115. See, e.g., *Buckles v. Brides Club, Inc.*, 2010 WL 3190751 (D. Utah Aug. 11, 2010). In August, 2018, Miles Conway, an economist and management consultant, sued Facebook over a fake account allegedly engaging with Facebook users while pretending to be the plaintiff. Dr. Conway also claimed that he had notified Facebook in May, but that Facebook had taken no action to remove the fake account. *Miles Conway v. Facebook, Inc.*, No. 2:18-cv-14329-DMM (Complaint, Aug. 17, 2018), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2798&context=historical>.

116. See Martha Neil, *LinkedIn Sues Hackers, Says They Created Fake Accounts to Scrape Data*, ABA JOURNAL, Jan. 7, 2014, [www.abajournal.com/news/article/linkedin\\_sues\\_hackers\\_says\\_they\\_created\\_fake\\_accounts\\_to\\_scrape\\_data?utm\\_source=maestro&utm\\_medium=email&utm\\_campaign=tech\\_monthly](http://www.abajournal.com/news/article/linkedin_sues_hackers_says_they_created_fake_accounts_to_scrape_data?utm_source=maestro&utm_medium=email&utm_campaign=tech_monthly).

impersonation as verification phishing, paid advertisement impersonators, and customer support impersonators.<sup>117</sup>

Beyond protecting against outright impersonation, an entity also needs to police those who might misuse its brand identifiers. Are a company's trademarks being used as search "tags" or hashtags to promote competing goods? Courts addressing this type of situation undertake a traditional "likelihood of confusion" analysis under the federal Lanham Act.<sup>118</sup>

Trademark issues may also arise for a social media site where another party is using a suffix or similar-sounding name. In 2010, owners of the website Lamebook.com filed a lawsuit against Facebook, seeking a declaration that its site does not infringe Facebook's intellectual property rights.<sup>119</sup> One week later, Facebook filed its own lawsuit against Lamebook in federal court in California alleging trademark infringement, trademark dilution, and related claims. Lamebook argued that, as a parody site, its name and re-posting of Facebook posts constitute fair use.<sup>120</sup> Facebook had previously sought to prevent others from using the suffix "-book" in a website name.<sup>121</sup> In 2011, Facebook and Lamebook settled their dispute. Lamebook retained the right to use its name, but agreed to add a disclaimer to its site. Lamebook also agreed not to seek trademark registration of its name and not to comment on the terms of the settlement.<sup>122</sup>

In recent years, the U.S. Patent and Trademark Office (USPTO) has added two sections to its *Trademark Manual of Examination Procedure*

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117. See *Social Media Impersonators Go Phishing: 3 Emerging Tactics*, ZEROFOX BLOG (Feb. 15, 2017), <https://www.zerofox.com/blog/social-media-imperсонаторы-phishing/>.

118. Pub. L. No. 79-489, 60 Stat. 427 (1946); see, e.g., *Partners for Health & Home, L.P. v. Seung Wee Yang*, 2011 WL 5387075 (C.D. Cal. Oct. 28, 2011). Defendants were allegedly infringing plaintiff's federally registered trademark for stainless steel cookware to promote competing products. Among the ways in which PHH alleged that the defendants misused PHH's mark were as video tags for videos posted on YouTube.com.

119. Complaint, *Lamebook, LLC v. Facebook, Inc.*, No. 1:10-cv-00833 (W.D. Tex. Nov. 4, 2010).

120. Complaint, *Facebook, Inc. v. Lamebook, LLC*, No. 3:10-cv-05048 (N.D. Cal. Nov. 8, 2010).

121. See, e.g., *Facebook, Inc. v. Teachbook.com, LLC*, 2011 WL 1672464 (N.D. Cal. May 3, 2011); *Facebook, Inc. v. Teachbook.com LLC*, 819 F. Supp. 2d 764 (N.D. Ill. 2011).

122. See Regina Sinsky, *Facebook and Lamebook Quietly Settle Trademark Battle*, VENTUREBEAT (Aug. 31, 2011), <http://venturebeat.com/2011/08/31/facebook-and-lamebook-quietly-settle-trademark-battle/>.

discussing the inclusion of hashtags in marks submitted for registration consideration.<sup>123</sup> The USPTO states that “the addition of the term HASHTAG or the hash symbol (#) to an otherwise unregisterable mark will not render it registerable” and further advises that “if a mark consists of the hash symbol or the term HASHTAG combined with wording that is distinctive for the goods or services, the hash symbol or the term HASHTAG should be disclaimed.”<sup>124</sup> In August, 2018, the Trademark Trial and Appeal Board (TTAB) affirmed the refusal to register #WILLPOWER for apparel and, with respect to the hashtag, stated that “a hash symbol or the word HASHTAG generally adds little or no sourcing-indicating distinctiveness to a mark.”<sup>125</sup>

In March 2015, Fraternity Collection filed a trademark infringement case against Elise Farnoli over Farnoli’s use of the hashtags #fratcollection and #fraternitycollection. The case survived a motion to dismiss and was settled in June 2015 on non-public terms.<sup>126</sup>

### **§ 1:4.5    *Defamation and Other Torts***<sup>127</sup>

Social media sites generally prohibit the posting of defamatory content by members and reserve the right (while not assuming the obligation) to remove any such content.<sup>128</sup> Lawsuits alleging defamation based on online content are not uncommon<sup>129</sup> and are generally treated by

- 123. U.S. PATENT & TRADEMARK OFFICE, TRADEMARK MANUAL OF EXAMINATION PROCEDURE, § 1202.18 (Hashtag Marks) (Oct. 2018), [http://tmepp.uspto.gov/RDMS/detail/manual/TMEP/current/d1e2.xml#/manual/TMEP/current/ch1200\\_d1ff5e\\_1b5ad\\_3bc.xml](http://tmepp.uspto.gov/RDMS/detail/manual/TMEP/current/d1e2.xml#/manual/TMEP/current/ch1200_d1ff5e_1b5ad_3bc.xml).
- 124. *Id.* §§ 1202.18, 1202.18(a).
- 125. See John L. Welch, *Keeping Tabs on the TTAB*, THE TTABLOG (Aug. 22, 2018), [http://thettablog.blogspot.com/2018/08/precedential-no-27-ttab-affirms-2d.html?utm\\_source=Mondaq&utm\\_medium=syndication&utm\\_campaign=View-Original](http://thettablog.blogspot.com/2018/08/precedential-no-27-ttab-affirms-2d.html?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original).
- 126. Order, Fraternity Collection, LLC v. Farnoli, No. 3:13-CV-664-CWR-FKB (S.D. Miss. Mar. 31, 2015).
- 127. See also *infra* chapter 5.
- 128. See *Twitter Terms of Service*, TWITTER, <https://twitter.com/tos> (May 25, 2018).
- 129. For example, Canadian model Liskula Cohen sued Google over remarks made about her by an anonymous blogger using Google’s Blogger Service. See Robin Wauters, *Model Sues Google over Snarky Blogger Remarks*, TECHCRUNCH (Jan. 7, 2009), [www.techcrunch.com/2009/01/07/model-sues-google-over-snarky-blogger-remarks](http://www.techcrunch.com/2009/01/07/model-sues-google-over-snarky-blogger-remarks). More recently, James Woods filed a defamation suit involving anonymous tweets about him. Complaint, Woods v. Doe, No. BC589746 (Cal. Super. Ct. July 29, 2015), <https://popehat.com/wp-content/uploads/2015/07/ISeeNoWayThisCanGoWrong.pdf>. Woods dismissed the case after the death of the defendant. See Josh Feldman, *James Woods Reacted Pretty Nastily to the Death of Twitter User He Sued*, MEDIAITE (Oct. 22, 2016), [www.mediaite.com/online/james-woods-reacted-pretty-nastily-to-the-death-of-twitter-user-he-sued/](http://www.mediaite.com/online/james-woods-reacted-pretty-nastily-to-the-death-of-twitter-user-he-sued/).

courts in the same manner as those involving traditional offline defamation claims.

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

In January 2014, the first so-called Twibel case (libel via Twitter) went to trial. Singer Courtney Love was sued by her former attorney, Rhonda Holmes, based on Love's tweet that Holmes had been "bought off" from pursuing a matter on Love's behalf. The jury found that Holmes (whom the judge deemed a limited public figure) failed to demonstrate that Love knew the statement was false or made it with reckless disregard for the truth.<sup>130</sup> In 2017, a North Carolina woman received a half million dollar consent judgment based on a false remark in a Facebook post that implied she got drunk and caused the death of her child.<sup>131</sup> In September 2018, a former Trump campaign aide filed a defamation claim against SplinterNews.com, alleging that he lost his job at CNN after false reports that he drugged a woman he got pregnant with an abortion pill.<sup>132</sup>

Posting defamatory or other content that could form the basis for a tort action can flow not only to the individual poster but also, potentially, 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.

Content posted on social networking sites can also 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.<sup>133</sup>

In 2016, several lawsuits were instituted against social media platforms by victims of terrorist attacks, alleging that the social networks

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130. See *Gordon & Holmes v. Love*, No. BC462438 (Cal. Super. Ct. May 26, 2011).

131. *Dial v. Hammond*, No. 15 CV 05383 (N.C. Feb. 8, 2017); see also John Boyle, *Facebook defamation leads to \$500,000 settlement in Asheville*, CITIZEN TIMES (Feb. 11, 2017), <http://www.citizen-times.com/story/news/local/2017/02/11/facebook-defamation-leads-500000-settlement-asheville/97740206/>.

132. *Miller v. Gizmodo Media Grp., LLC*, No. 1:18-cv-24227 (Complaint filed Oct. 15, 2018), <https://www.courtlistener.com/docket/8031321/miller-v-gizmodo-media-group-llc/>.

133. See *About Cyber Harassment Laws*, NOBULLYING (May 13, 2015), <http://nobullying.com/cyber-harassment-laws/>.

knowingly permitted terrorist groups to use them as tools for propaganda, fundraising, and recruitment. A case filed against Twitter over the shooting of U.S. government workers by ISIS in Jordan was dismissed by a federal judge in California and is currently on appeal to the Ninth Circuit,<sup>134</sup> but other federal lawsuits remain pending against Twitter and Facebook relating to the Paris attack of November 13, 2015,<sup>135</sup> and the Orlando nightclub shooting of June 12, 2016.<sup>136</sup> In October 2017, the District Court for the Northern District of California dismissed the case brought against Google by the survivors of Reynaldo Gonzalez, the victim of a 2015 ISIS attack in Paris. The court held that Google was shielded from liability under section 230 of the Communications Decency Act.<sup>137</sup> In August 2018, the court dismissed the second amended complaint; plaintiffs have the right to file a third amended complaint.

In May 2016, Facebook, Twitter, YouTube, and Microsoft announced a code of conduct in the European Union, calling for, among other things, the removal or disabling of illegal hate speech within twenty-four hours of posting.<sup>138</sup> Some platforms introduced new filtering tools to help combat online abuse and harassment.<sup>139</sup> In 2017,

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- 134. Order Granting Motion to Dismiss, *Fields v. Twitter, Inc.*, No. 16-cv-00213-WHO [N.D. Cal. Aug. 10, 2016], <https://casetext.com/case/fields-v-twitter-inc>.
  - 135. Complaint, *Gonzalez v. Twitter, Inc.*, No. 3:16-cv-03282 [N.D. Cal. June 14, 2016], [www.scribd.com/document/31817773/Gonzalez-v-Twitter-Google-and-Facebook-ND-Cal](http://www.scribd.com/document/31817773/Gonzalez-v-Twitter-Google-and-Facebook-ND-Cal).
  - 136. Complaint, *Crosby v. Twitter*, No. 2:16-cv-14406-DML-DRG [E.D. Mich. Dec. 19, 2016], [www.mynews13.com/content/dam/news/images/2016/12/03/SocialMediaLawsuit.pdf](http://www.mynews13.com/content/dam/news/images/2016/12/03/SocialMediaLawsuit.pdf). In April 2018, the court dismissed the case with prejudice. *Crosby v. Twitter*, Corrected Opinion and Order Granting Motion to Dismiss and Dismissing Case with Prejudice [Apr. 2, 2018], [https://www.courthousenews.com/wp-content/uploads/2018/04/michigan-pulse-lawsuit-dismissed-1.pdf](http://www.courthousenews.com/wp-content/uploads/2018/04/michigan-pulse-lawsuit-dismissed-1.pdf).
  - 137. *Gonzalez v. Google*, No. 16-cv-03282-DMR [N.D. Cal. Oct. 23, 2017], <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2583&context=historical>.
  - 138. See Press Release No. IP/16/1937, European Comm'n, European Commission and IT Companies Announce Code of Conduct on Illegal Online Hate Speech (May 31, 2016) (including statements from representatives of Twitter, Google, Facebook and Microsoft), [http://europa.eu/rapid/press-release\\_IP-16-1937\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1937_en.htm).
  - 139. See, e.g., Sarah Frier, *Twitter Said to Work on Anti-Harassment Keyword Filtering Tool*, BLOOMBERG TECH. (Aug. 26, 2016), [www.bloomberg.com/news/articles/2016-08-26/twitter-said-to-work-on-anti-harassment-keyword-filtering-tool](http://www.bloomberg.com/news/articles/2016-08-26/twitter-said-to-work-on-anti-harassment-keyword-filtering-tool); Lauren Keating, *Instagram Is Now Letting Users Filter Out Mean Comments to Combat Trolling*, TECH TIMES (Sept. 12, 2016), [www.techtimes.com/articles/177277/20160912/instagram-now-letting-users-filter-out-mean-comments-combat-trolling.htm](http://www.techtimes.com/articles/177277/20160912/instagram-now-letting-users-filter-out-mean-comments-combat-trolling.htm).

Facebook revealed internal rules for censoring violence,<sup>140</sup> and Google announced a major crackdown on hate speech on YouTube.<sup>141</sup> In 2018, a proposed regulation was introduced in the European Union to require technology companies to remove terror-related content within one hour of being notified or face huge fines.<sup>142</sup>

### § 1:4.6 Employment and Workplace Issues<sup>143</sup>

As the case of the Domino's employees who were terminated after posting the YouTube video, discussed above, demonstrates,<sup>144</sup> employee use of social media can result in disciplinary action or even termination of employment. But the implications of social media use extend to potential employees and job applicants as well.

Individuals posting and maintaining profiles should keep this in mind before posting certain photos and content that could cost them a job in the future.<sup>145</sup> A number of states prohibit employers from asking employees and job applicants for social media log-in information or passwords.<sup>146</sup>

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? 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

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140. Nick Hopkins, *Revealed: Facebook's internal rulebook on sex, terrorism and violence*, THE GUARDIAN U.S. EDITION (May 21, 2017), <https://www.theguardian.com/news/2017/may/21/revealed-facebook-internal-rule-book-sex-terrorism-violence>.
141. Mark Bergen, *Google Begins Biggest Crackdown on Extremist YouTube Videos*, BLOOMBERG TECH. (Aug. 24, 2017), <https://www.bloomberg.com/news/articles/2017-08-24/google-rolls-out-its-biggest-crackdown-on-you-tube-hate-speech>.
142. EUROPEAN COMM'N, *Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online* (Sept. 12, 2018), [https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-preventing-terrorist-content-online-regulation-640\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-preventing-terrorist-content-online-regulation-640_en.pdf).
143. See also *infra* chapter 6.
144. See *supra* section 1:3.1[C].
145. Identified in a 2018 survey as things to avoid included applicant posts referencing marijuana, political rants, spelling and grammar mistakes, and photos of alcohol consumption. 2018 Recruiter Nation Survey, The Tipping Point, The Next Chapter in Recruiting, JOBVITE (Oct. 2018), <https://www.jobvite.com/wp-content/uploads/2018/11/2018-Recruiter-Nation-Study.pdf>.
146. See *Access to Social Media Usernames and Passwords*, NAT'L CONFERENCE OF STATE LEGISLATURES, [www.ncsl.org/issues-research/telecom/employer-access-to-social-media-passwords-2013.aspx](http://www.ncsl.org/issues-research/telecom/employer-access-to-social-media-passwords-2013.aspx) (Dec. 10, 2018).

revealed on the site puts the applicant in a protected class under federal or state laws? In addition, the applicant's conduct could be protected concerted activity under federal labor law.<sup>147</sup> Some states also prohibit adverse employment actions based on political expression.

### **§ 1:4.7 Risks for Regulated Industries<sup>148</sup>**

Banks and other financial service providers and other regulated industries have special challenges when it comes to using social media. In December 2013, the Federal Financial Institutions Examination Council (FFIEC) issued a final guidance on how various laws apply to financial institutions' use of social media.<sup>149</sup> The guidance recommends that financial institutions have a social media risk management program, and delineates the components that should be included in the program.<sup>150</sup> The blur between employees' business and personal use of social media can take on a greater impact for a company in a highly regulated industry. Along with greater risk comes a reputational threat to the institution.

Both the Securities and Exchange Commission (SEC) and the Financial Industry Regulatory Authority (FINRA) monitor investment advisory firms' use of social media. Specifically, the SEC and FINRA are interested in a broker's business and personal use of sites such as Facebook, Twitter, LinkedIn, Myspace, YouTube, and Flickr, as well as posting on blogs or microblogs; any communications made or received by an investment adviser on any social media site; and any policies or procedures concerning brokers' use of social media.<sup>151</sup>

Another regulatory issue that can impact any publicly traded company using social media involves potential violations of Regulation FD.<sup>152</sup> Using social media to disseminate information could also lead to an inadvertent violation of the SEC's disclosure rules. For example, if a corporate tweet contains discussion of an impending merger

147. See 29 U.S.C. § 157.

148. See also *infra* chapter 7.

149. Federal Financial Institutions Examination Council, Social Media: Consumer Compliance Risk Management Guidance (Dec. 11, 2013), [www.ffiec.gov/press/PDF/2013\\_Dec%20Final%20SMG%20attached%20to%2011Dec13%20press%20release.pdf](http://www.ffiec.gov/press/PDF/2013_Dec%20Final%20SMG%20attached%20to%2011Dec13%20press%20release.pdf).

150. *Id.*

151. See SEC Begins Sweep on Social Media and Networking, ACA COMPLIANCE GRP. (Jan. 24, 2011), <https://www.acacompliancegroup.com/news/compliance-alert/sec-begins-sweep-social-media-and-networking>.

152. Final Rule: Selective Disclosure and Insider Trading, 17 C.F.R. pts. 240, 243, and 249, Securities Act Release No. 7881 (Aug. 15, 2000), [www.sec.gov/rules/final/33-7881.htm](http://www.sec.gov/rules/final/33-7881.htm).

or acquisition or other material information that has not previously been disclosed publicly, there could be a Regulation FD violation. Also, federal and state securities laws generally require that any disclosure of material information not omit information necessary to keep the information that is disclosed from being misleading.

In April 2013, the SEC issued a report<sup>153</sup> on its investigation of a Facebook post by Netflix CEO Reed Hastings. In the report, the SEC concluded that publicly traded companies may use social media to communicate information to investors, so long as investors are first advised of the communication channels and that the communications themselves comply with Regulation FD. In September 2018, Tesla CEO Elon Musk settled a dispute with the SEC regarding his allegedly misleading Tweet about taking Tesla private at \$420 per share. The settlement included Musk paying \$40 million in penalties and stepping down as Chairman of Tesla (but remaining as CEO).<sup>154</sup>

Another regulated online activity is crowdfunding, or “the practice of funding a project or venture by raising many small amounts of money from a large number of people, typically via the Internet.”<sup>155</sup> In 2014, the SEC issued a preliminary interpretation touching on crowdfunding.<sup>156</sup> In October 2015, the SEC adopted rules to permit companies to offer and sell securities via crowdfunding, which took effect on May 16, 2016.<sup>157</sup>

Keeping sensitive information from being shared on social media remains a challenge. In June 2016, several hundred physician attendees at an American Diabetes Association conference were shown data on a not-yet-publicly-released diabetes treatment drug by Novo Nordisk A/S, a publicly traded company. The doctors were asked not to tweet or otherwise share the information; yet, within minutes, several doctor’s Twitter accounts included photos of the charts shown at the conference. The American Diabetes Association tweeted to

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153. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc. and Reed Hastings, Exchange Act Release No. 69,279 (Apr. 2, 2013), [www.sec.gov/litigation/investreport/34-69279.pdf](http://www.sec.gov/litigation/investreport/34-69279.pdf).

154. U.S. SEC. & EXCH. COMM’N, Press Release, Elon Musk Settles SEC Fraud Charges; Tesla Charged with and Resolves Securities Law Change (Sept. 29, 2018), <https://www.sec.gov/news/press-release/2018-226>.

155. OXFORD DICTIONARIES, *crowdfunding*, [www.oxforddictionaries.com/us/definition/american\\_english/crowdfunding](http://www.oxforddictionaries.com/us/definition/american_english/crowdfunding) (last visited Dec. 31, 2018).

156. SEC, Compliance and Disclosure Interpretation: Securities Act Rules, at Q 141.04 (Nov. 6, 2017), [www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm](http://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm).

157. Crowdfunding, 80 Fed. Reg. 71,388-01 (Nov. 16, 2015) (17 C.F.R. pts. 200, 227, 232, 239, 240, 249, 269, and 274).

each doctor to “please delete immediately.”<sup>158</sup> There continue to be firings of healthcare providers over inappropriate social media use with regard to patients.<sup>159</sup>

### **§ 1:4.8    Advertising Issues<sup>160</sup>**

Federal Trade Commission (FTC) guidelines require that a blogger engaged in “word-of-mouth” marketing of products or services disclose any payments or free products received by the blogger.<sup>161</sup> In May 2015, the FTC updated its FAQs regarding the endorsement guides, confirming that the endorsement guides apply to all media, including social media.<sup>162</sup> In September 2017, the FTC announced a settlement of charges against two social media influencers who endorsed an online gambling service while failing to disclose their ownership in the company. The FTC also announced that it sent warning letters to twenty-one other social media influencers regarding Instagram posts failing to comply with the guidance.<sup>163</sup>

Another advertising issue facing social media users is the proliferation of unsolicited commercial messages, or spam. In November 2011, Facebook was targeted by hackers spreading pornographic and violent images, prompting Facebook to issue a spam warning to its users.<sup>164</sup> It is not just social media hackers who may be responsible

- 158. Michelle Cortez, *Can a Bunch of Doctors Keep an \$8 Billion Secret? Not on Twitter*, BLOOMBERG [June 14, 2016], [www.bloomberg.com/news/articles/2016-06-14/can-hundreds-of-doctors-keep-an-8b-secret-not-on-twitter](http://www.bloomberg.com/news/articles/2016-06-14/can-hundreds-of-doctors-keep-an-8b-secret-not-on-twitter).
- 159. For example, in November 2017, nurses at a Glendale, Arizona, assisted living facility posted videos making fun of elderly patients on Snapchat. The facility administrators posted a statement apologizing for the incident. See Jason Volentine, *Nurses fired after posting video on social media mocking patients at Glendale Senior care facility*, ABC 15 ARIZONA [Nov. 7, 2017], <https://www.abc15.com/news/region-west-valley/glendale/nurses-posted-video-on-social-media-mocking-patients-at-glendale-senior-care-facility>.
- 160. See also *infra* chapter 8.
- 161. News Release, Fed. Trade Comm'n, FTC Publishes Final Guides Governing Endorsements Testimonials (Oct. 5, 2009), [www.ftc.gov/opa/2009/10/endortest.shtm](http://www.ftc.gov/opa/2009/10/endortest.shtm).
- 162. See Fed. Trade Comm'n, The FTC's Endorsement Guides: What People Are Asking [Sept. 2017], <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>.
- 163. FED. TRADE COMM'N, *CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers* (Sept. 7, 2017), <https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against>.
- 164. *Facebook Issues Spam Warning to Users*, CBS NEWS (Nov. 6, 2011), [www.cbsnews.com/videos/facebook-issues-spam-warning-to-users/](http://www.cbsnews.com/videos/facebook-issues-spam-warning-to-users/).

for spam. Advertisers may also be violating the CAN-SPAM Act<sup>165</sup> by sending unsolicited electronic messages to social media users “consistent with Congress’s intent to mitigate the number of misleading commercial communications overburdening the Internet.”<sup>166</sup>

In 2018, the National Advertising Division, which is part of the Better Business Bureau, concluded that a skincare shopping guide published on Buzzfeed did not constitute a national advertisement, but rather was of an editorial nature, as “[t]he retailer or brand did not have any say in whether the product was recommended or what was said about it.”<sup>167</sup>

### § 1:4.9 Crimes and Litigation<sup>168</sup>

Social networks are increasingly a source for the discovery and investigation of criminal activity by members. A New York judge ruled that what a criminal defendant posts on Facebook can be used as evidence against him or her.<sup>169</sup> Similarly, social media profiles can be useful in determining the identity of and/or locating the perpetrator of a crime.<sup>170</sup>

Social networking can itself constitute or lead to criminal activity. One widely reported case involved a Missouri woman, Lori Drew, who created a fictitious Myspace account to pose as a teenage boy pretending to be interested in a thirteen-year-old female acquaintance of her daughter. When the acquaintance discovered the ruse, she committed suicide. Drew was charged with various counts, including felonies. In November 2008, Drew was convicted of three misdemeanor counts of

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165. 15 U.S.C. § 7701. The CAN-SPAM Act prohibits “the transmission, to a protected computer, of a commercial electronic mail message, or a transaction or relationship message, that contains, or is accompanied by, header information that is materially false or materially misleading.” 15 U.S.C. § 7704(a)(1).

166. See *Facebook, Inc. v. MaxBounty, Inc.*, 274 F.R.D. 279 (N.D. Cal. 2001).

167. See Wendy Davis, *BuzzFeed Shopping Guide is ‘Editorial,’ Not ‘Advertising,’ Industry Watchdog Says*, MEDIAPOST POLICY BLOG (Sept. 20, 2018), <https://www.mediapost.com/publications/article/325403/buzzfeed-shopping-guide-is-editorial-not-adver.html>.

168. See also *infra* chapter 9.

169. See Doug Mataconis, *Judge Rules That What You Post on Facebook Can Be Used as Evidence Against You*, OUTSIDE THE BELTWAY (Aug. 19, 2012), <http://outsidethebeltway.com/judge-rules-that-what-you-post-on-facebook-can-be-used-as-evidence-against-you/>.

170. Erline Aguiluz, *Philadelphia Police Use Social Media to Find Potential Suspects*, PHILA. CRIM. L. NEWS (Mar. 3, 2011), <http://philadelphiacriminallawnews.com/2011/03/philadelphia-police-use-social-media-to-find-potential-suspects.html>.

computer fraud.<sup>171</sup> In January 2009, a British man who killed his wife over her listing her Facebook status as “single” received a sentence of eighteen years.<sup>172</sup>

In December 2016, the California Superior Court dismissed charges of pimping against the CEO of Backpage.com on First Amendment grounds and various civil actions have been filed against both Backpage and, more recently, Facebook, by alleged victims of sex trafficking.<sup>173</sup> In November 2017, the U.S. Senate Commerce Committee unanimously approved a bill known as the Stop Enabling Sex Traffickers Act of 2017.<sup>174</sup> The bill has broad bipartisan support for its goal of allowing civil and criminal actions against a website for “knowingly assisting, supporting or facilitating” sex trafficking through the site.

Several courts have 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. In *United States v. Hernandez*,<sup>175</sup> a federal court in Florida granted a motion for mistrial after learning that several members of the jury had located and read key information about the case online. In *United States v. Siegelman*,<sup>176</sup> the U.S. Court of Appeals for the Eleventh Circuit

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171. See Jennifer Steinhauer, *Verdict in MySpace Suicide Case*, N.Y. TIMES, Nov. 26, 2008, at A25, [www.nytimes.com/2008/11/27/us/27myspace.html](http://www.nytimes.com/2008/11/27/us/27myspace.html).
172. See *Man Killed Wife in Facebook Row*, BBC News (Oct. 17, 2008), <http://news.bbc.co.uk/2/hi/7676285.stm>.
173. California v. Ferrer, No. 16FE019224 (Cal. Super. Ct. Sacramento Cty. Dec. 9, 2016), <http://arstechnica.com/wp-content/uploads/2016/12/ferrer-latest.pdf>. A civil case alleging that “Backpage did more than simply maintain neutral policies prohibiting or limiting certain” but were entitled to discovery to “ascertain whether in fact Backpage designed its posting rules to induce sex trafficking” was brought before the U.S. Supreme Court. Reply Brief of Petitioners, Doe v. Backpage.com LLC, No. 16-276 (U.S. Dec. 2016), [www.scotusblog.com/wp-content/uploads/2016/12/16-276-pet-cert-reply.pdf](http://www.scotusblog.com/wp-content/uploads/2016/12/16-276-pet-cert-reply.pdf). The Supreme Court, however, denied certiorari and the case is now back before the U.S. District Court for the District of Massachusetts. In March 2018, the court dismissed part of the case. Doe v. Backpage.com, LLC, No. 17-11069-LTS, Order on Motion to Dismiss (Mar. 29, 2018), <https://www.leagle.com/decision/infco20180330c00>. See also Wendy Davis, *Facebook Sued by Sex Trafficking Victim*, MEDIA-POST DIGITAL NEWS DAILY (Oct. 8, 2018). Facebook’s response to the lawsuit is that sex trafficking is not allowed on Facebook. See Dan Whitcomb, *Facebook, responding to lawsuit, says sex trafficking banned on site*, REUTERS WORLD NEWS (Oct. 3, 2018).
174. S. 1693 (115th Congress 2017-2018), <https://www.congress.gov/bill/115th-congress/senate-bill/1693/text>.
175. See Criminal Minutes, United States v. Hernandez, No. 07-60027-CR (S.D. Fla. Mar. 10, 2009), [http://pub.bna.com/eclr/07cr60027\\_31009.pdf](http://pub.bna.com/eclr/07cr60027_31009.pdf).
176. United States v. Siegelman, 561 F.3d 1215 (11th Cir. 2009).

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 website. 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.

In June 2015, the U.S. Supreme Court issued an opinion that an individual's Facebook posts that included graphic, violent language did not rise to the level of criminal threats.<sup>177</sup>

During sentencing hearings, social networking sites can be used to locate less-than-flattering photos of defendants that are then offered as character evidence by prosecutors seeking harsher punishments.

As is the case in criminal matters, lawyers in civil matters also find social networking sites a fertile ground for information about adverse parties and witnesses. Because attorneys can assume that such an investigation of their clients and witnesses will be undertaken by opposing counsel, they should be prepared for what may be lurking on those parties' social networking profile pages.

As to whether social networking profiles are discoverable, a Canadian court has answered this question affirmatively. In *Leduc v. Roman*,<sup>178</sup> the court allowed pretrial discovery of a party's Facebook profile. 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 constituted "data and information in electronic form" discoverable under Canada's Rules of Civil Procedure. U.S. courts have also allowed discovery of a party's social media accounts where the information may be relevant to specific allegations or damages at issue in the case.<sup>179</sup>

A wrongful death plaintiff and his attorney were sanctioned for deleting photos and other content from the plaintiff's social media pages following the defendant's request for the pages.<sup>180</sup> President

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177. *Elonis v. United States*, 135 S. Ct. 2001 (2015).

178. *Leduc v. Roman*, No. 06-cv-3054666PD3, 2009 CarswellOnt 843 (Ont. Super. Ct. Feb. 20, 2009), <https://www.canlii.org/en/on/onsc/doc/2009/2009canlii6838/2009canlii6838.html>.

179. See, e.g., *Higgins v. Koch Dev. Corp.*, 2013 WL 3366278 (S.D. Ind. July 5, 2013) (permitting production of Facebook content, as it "may reveal information as to the extent [of claimed personal] injuries"); *Kear v. Kohl's Dep't Stores, Inc.*, 2013 WL 3088922 (D. Kan. June 18, 2013) (allowing employer discovery of "Plaintiff's Twitter and Facebook account data between her date of hire through present" relating to employment discrimination claims).

180. Final Order, *Lester v. Allied Concrete Co.*, 80 Va. Cir. 454 (Cir. Ct. Va. Oct. 21, 2011).

Trump's tweets have or are expected to be proffered as evidence in a number of lawsuits and investigations, including those that have challenged the administration's various travel bans<sup>181</sup> and in a potential obstruction of justice trial.<sup>182</sup>

The ever-advancing functionality of social media, and continued use and reliance on it by individuals and businesses, will impact the areas of law addressed in this and the following chapters.

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181. See Katelyn Polantz, *Trump's tweets central to legal cases on dossier, travel ban and more*, CNN POLITICS (Dec. 29, 2017), <http://www.cnn.com/2017/12/28/politics/trump-tweets-legal-cases-official-statements-index.html>.
182. See Jonathan Lemire & Zeke Miller, *Trump's seething Russia-probe tweets may return to haunt him as evidence in an obstruction trial*, BUSINESS INSIDER (Aug. 2, 2018).