Chapter 1

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.”\(^1\) Since the introduction of the first social networking site in 1997,\(^2\) the use of social media has grown steadily. As of October 2015, 65% of American adults use at least one social media site.\(^3\) Facebook remains the most popular, with use by 72% of American adult Internet users, followed by Pinterest, at 31%.\(^4\)

Unlike a static website, 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 retracted.\(^5\) These characteristics become important when considering more specific ways that individuals and businesses 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.

§ 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,\(^6\) LinkedIn,\(^7\)

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5. 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, effectively preventing the information from truly being deleted.
GooglePlus, GooglePlus, 8 Instagram, Instagram, 9 Twitter, Twitter, 10 and Pinterest, Pinterest 11 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 and comment on each other’s postings. The popularity of social networking sites is undeniable. Facebook claims to have 1.01 billion daily active users and 1.55 billion monthly active users as of September 2015. 12

Alternatively, users have the opportunity to send private 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 or a group just for extended family members to plan an upcoming reunion.

Beyond individual use, businesses can also establish profiles on social networking sites to which other users can become followers or “fans.” 13 Through its social networking pages, a business can promote its products and services, provide information about upcoming sales or events, gain valuable information about its consumers’ preferences, and address customer complaints or other issues in a real-time fashion.

There are also a number of specialized social networking sites, such as LinkedIn, LinkedIn 14 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. 15

Social networking sites are generally set up as being available to users at no charge. As a consequence of not charging user fees, many sites feature paid advertising that appears on a user’s page and news feed. Not charging user fees encourages greater participation. Various third-party applications, such as the game Candy Crush Saga on

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13. The term “fans” is used on Facebook. www.facebook.com [last visited Jan. 12, 2016].
15. See, e.g., QUANtIA MD, https://secure.quantiamd.com [last visited Jan. 12, 2016], a social networking site for practicing physicians.

(Social Media & Law, Rel. #3, 3/16) 1–3
Facebook, 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 form of social media. Microblog derives its name from “blog,” a “web site that contains online personal reflections, comments, and often hyperlinks provided by the writer.” A microblog is simply a condensed version of a blog. The best-known microblog is Twitter, a site allowing users to post updates that are up to 140 characters in length, known as “tweets.” 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.”

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.

Twitter users can use “hashtags,” so that their tweets can be found in searches conducted on the site. According to Twitter, “[t]he # symbol, called a hashtag, is used to mark keywords or topics in a Tweet. It was created organically by Twitter users as a way to categorize messages.” Clicking on a hashtag brings up all other tweets with hashtags in that category. Subsequently, other sites, like Facebook, began encouraging users to include hashtags in posts, but initially

16. Created in March 2011, Candy Crush Saga launched on Facebook in April 2012 and by fall of that year was the top game on Facebook, with over 500 million active users. The game integrates Facebook social media elements, such as being able to advance to the next level only by interacting with other players on Facebook. See Developer News: Game Spotlight: Candy Crush Saga, FACEBOOK FOR DEVELOPERS (June 15, 2012), https://developers.facebook.com/blog/post/2012/06/15/game-spotlight--candy-crush-saga/.


have not met with the same success as Twitter. Some tend to overuse hashtags, causing commentators to discourage users from “watering down” a topic by using more than two hashtags per post.

§ 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, 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 and Fark 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, 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.

§ 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 and Reddit. Social bookmarking sites

allow users to tag their bookmarks using their own descriptive terms. The home page of 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.  

§ 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 and Instagram. A very popular spin on a photo sharing site is Pinterest, 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. Sending photos by email can be more time-consuming and is subject to file size limitations associated with the sender’s or receiver’s email account. Sending photos by text can result in additional charges from the cell carrier, depending on the particular data plan. Photo sharing sites also offer users a safe place to store photos. Flickr offers users the opportunity to “get started with your free 1,000GB of photo storage” and to “never delete a photo again.”

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
A video that becomes extremely popular very quickly. A video that goes viral is typically shared over and over, perhaps millions of times.

The most renowned video sharing site is YouTube, which was started in early 2005. Not surprisingly, there are several videos on YouTube documenting the history of YouTube. 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.

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,” 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 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 and demographics. 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 afterwards on Facebook, Twitter,

34. YOUTUBE, www.youtube.com [last visited Jan. 12, 2016].
35. See, e.g., The History of YouTube, YOUTUBE [May 18, 2007], www.youtube.com/watch?v=x2NQiVcdZRY. As of this writing, this video has been viewed more than 358,000 times.
36. Attributable to Napoleon Bonaparte: Search Quotes, A picture is worth a thousand words, www.searchquotes.com/quotiation/A_picture_is_worth_a_thousand_words/1436/ [last visited Jan. 12, 2016].
or YouTube. In 2015, 50% of Super Bowl ads included hashtags, down from 57% in 2014.

[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 or survey 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. 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, during its bailout discussions in 2009, General Motors Corporation consistently posted tweets aimed at defusing negative comments being made by government officials and the media. Similarly, 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. 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.

37. Edward Boches, TV Advertising Is Back, Thanks to Social Media, CREATIVITY UNBOUND (Apr. 18, 2011), http://edwardboches.com/social-media-and-twitter-bring-back-tv-advertising [quoting tweet from @turnageb, “Once people watched the #SuperBowl for the game. Then they watched for the ads. Now we watch for the Tweets #brandbowl #sb45”].
40. Apparently, many companies are not taking advantage of this opportunity. See Boches, supra note 37.
41. How to Get Fired from Dominos Pizza, YOUTUBE (Apr. 13, 2009), www.youtube.com/watch?v=1D9PikBzNNo&feature=related.
42. Dominos President Responds to Prank Video, YOUTUBE (Apr. 18, 2009), 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.” 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.

§ 1:3.2 Networking
As described above, 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. Sending messages via social media is further 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.

45. See section 1:2.1, supra.
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.

In 2015, recruiting and job search site Glassdoor was utilized by 87% of Fortune 500 companies, allows users to “search millions of job listings, see real employee salaries and read reviews from employees.”

§ 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 employed by the individuals who are the subjects of these investigations are 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


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.

§ 1:4 Identifying Legal Issues

§ 1:4.1 Content Control and Ownership

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 sublicensable right to use, copy, modify, distribute, publish and process . . . without any further consent, notice and/or compensation to you or others.

Twitter’s terms contain a similar license and also include the prominent notice: “This license is you authorizing us to make your Tweets on the Twitter Services available to the rest of the world and to let others do the same.”

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.


51. See also chapter 3, infra.


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 U.S. Congressman Peter Hoekstra that he had just landed in Iraq for what was supposed to be a secret trip.\(^{55}\) Another congressman also fell victim to a major Twitter gaffe—in June 2011, U.S. Congressman Anthony Weiner admitted to sending inappropriate photos to several women after initially denying sending a nude photo of himself over Twitter.\(^{56}\)

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\(^ {57}\) or other sunshine law.\(^ {58}\)

§ 1:4.2 Privacy Considerations\(^ {59}\)

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.\(^ {60}\) 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


\(^ {59}\) See also chapter 2, infra.

\(^ {60}\) See Privacy Basics, FACEBOOK, www.facebook.com/about/basics/ [last visited Jan. 12, 2016].
information. Unfortunately, the application provider’s information sharing practices may not be fully disclosed.\footnote{61}

Using social media can 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.\footnote{62} 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.\footnote{63} In 2015, Facebook and Shutterfly were sued for alleged violations of the act.\footnote{64} It is anticipated that other states will follow suit by enacting similar laws. “Do Not Track” legislation has been proposed more than once on the federal level\footnote{65} 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.\footnote{66}

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.\footnote{67} Social


\footnote{63. 740 ILL. COMP. STAT. ANN. 14/1 et seq. (eff. Oct. 3, 2008).}

\footnote{64. 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., et al., No. 1:15-cv-05351 [N.D. Ill. June 17, 2015], http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1989&context=historical.}

\footnote{65. 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.}

\footnote{66. See, e.g., \textit{In re Google, Inc. Cookie Placement Consumer Privacy Litig.}, 806 F.3d 125 [3d Cir. 2015].}

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.

§ 1:4.3 Copyrights and Copyright Law

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.69

Most social networking sites address the use of third-party content in their terms of use. For example, Twitter’s “Basic Terms” define “Content” as “any information, text, graphics, photos or other materials uploaded, downloaded or appearing on the Services.”70 The Twitter terms further state that users are responsible for any Content posted to the Services. Under the “Copyright Policy” section of its terms, Twitter reserves the right to “remove Content alleged to be infringing without prior notice, at [its] sole discretion . . . .”71 The unauthorized use of third-party content also violates the terms of use 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,72 many social networks also provide a mechanism for users to notify 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.73


68. See also chapter 3, infra.


71. Id.


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, Griffin identified over 40,000 instances of infringement in the United States.\footnote{Comments on Remedies for Small Copyright Claims: Getty Images [Oct. 19, 2012], www.copyright.gov/docs/smallclaims/comments/noi_10112012/getty_images.pdf.} 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.\footnote{How Content ID Works, Google, https://support.google.com/youtube/answer/2797370?hl=en [last visited Jan. 12, 2016].}

\section{Brand Protection and Impersonation}\footnote{See also chapter 4, infra.}

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.\footnote{See Buckles v. Brides Club, Inc., 2010 WL 3190751 [D. Utah Aug. 11, 2010].} 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.\footnote{See Martha Neil, LinkedIn Sues Hackers, Says They Created Fake Accounts to Scrape Data, ABA J., 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.}

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” to promote competing goods? Courts addressing this type of situation undertake a traditional “likelihood of confusion” analysis under the federal Lanham Act.\footnote{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.}

Trademark issues may also arise for a social media site where another party is using a suffix or similar-sounding name. 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.80 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.81 Facebook had previously sought to prevent others from using the suffix “-book” in a website name.82 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.83

Whether hashtags themselves can serve as trademarks has yet to be fully determined. In 2013, the U.S. Patent and Trademark Office added a section to its Trademark Manual of Examination Procedure discussing the inclusion of hashtags in marks submitted for registration consideration.84 In March 2015, Fraternity Collection filed a trademark infringement case against Elise Fargnoli over Fargnoli’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.85

§ 1:4.5 Defamation and Other Torts86

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.87 Lawsuits alleging

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84. U.S PATENT & TRADEMARK OFFICE, TRADEMARK MANUAL OF EXAMINATION PROCEDURE, § 1202.18 [Hashtag Marks] [Oct. 2015], http://tmep.uspto.gov/RDMS/detail/manual/TMEP/current/d1e2.xml/#/manual/TMEP/current/ch1200_d1ff5e_1b5ad_3bc.xml.
86. See also chapter 5, infra.
defamation based on online content are not uncommon and are generally treated by 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.

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.

§ 1:4.6 Employment and Workplace Issues

As the case of the Domino’s employees who were terminated after posting the YouTube video, discussed above, demonstrates, employee


91. See also chapter 6, infra.

92. See section 1:3.1[C], supra.
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.

According to a 2015 survey conducted by Jobvite, 92% of recruiters use or plan to use social media in recruiting new employees and 56% have hired employees through social media. 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. A number of states prohibit employers from asking employees and job applicants for social media log-in information or passwords.

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 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. Finally, some states prohibit adverse employment actions based on political expression.

§ 1:4.7 Risks for Regulated Industries

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. The guidance recommends that financial institutions have a social media risk management program, and delineates the components that should be included in the program. The blur between employees’ business

96. See also chapter 7, infra.
98. Id.
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.\(^99\)

Another regulatory issue that can impact any publicly traded company using social media involves potential violations of Regulation FD.\(^100\) 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 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\(^101\) 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.

A newly 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.”\(^102\)

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In 2014, the SEC issued a preliminary interpretation touching on crowdfunding.\(^{103}\) In October 2015, the SEC adopted rules to permit companies to offer and sell securities via crowdfunding, to be effective May 16, 2016.\(^{104}\)

§ 1:4.8 Advertising Issues\(^{105}\)

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.\(^{106}\) The FTC has conducted investigations under the guidelines, but has not yet issued any fines.\(^ {107}\) In May 2015, the FTC updated its FAQs regarding the endorsement guides, confirming that the endorsement guides apply to all media, including social media.\(^ {108}\)

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.\(^ {109}\) It is not just social media hackers who may be responsible for spam.

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105. See also chapter 8, infra.
107. The FTC looked into Ann Taylor Stores Corporation’s LOFT Division, which provided gifts to bloggers who attended a January 2010 preview of the LOFT’s summer 2010 collection. Ultimately, the FTC did not recommend an enforcement action against the company. For a blogger’s perspective on the investigation, see Lauren Indvik, No Fines Levied in FTC’s First Blogger-Advertiser Investigation, MASHABLE [Apr. 30, 2010], http://mashable.com/2010/04/30/ann-taylor-ftc-investigation. In October 2012, the FTC closed its investigation into Hewlett-Packard for having allegedly provided gift certificates to bloggers and their visitors in exchange for positive reviews of a new HP product. See Richard Newman, FTC Gives HP a Pass for Endorsement Guideline Violations, PERFORMANCE MARKETING INSIDER [Oct. 28, 2012], http://performinsider.com/2012/10/ftc-gives-hp-a-pass-for-endorsement-guideline-violations.
Advertisers may also be violating the CAN-SPAM Act\textsuperscript{110} 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.”\textsuperscript{111}

\section*{§ 1:4.9 Crimes and Litigation\textsuperscript{112}}

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.\textsuperscript{113} Similarly, social media profiles can be useful in determining the identity of and/or locating the perpetrator of a crime.\textsuperscript{114}

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 computer fraud.\textsuperscript{115} In January 2009, a British man who killed his wife over her listing her Facebook status as “single” received a sentence of eighteen years.\textsuperscript{116}

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 \textit{United States v.}

\begin{enumerate}
\item\textsuperscript{110} 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).
\item\textsuperscript{111} See Facebook, Inc. v. MaxBounty, Inc., 274 F.R.D. 279 (N.D. Cal. 2001).
\item\textsuperscript{112} See also chapter 9, infra.
\item\textsuperscript{116} See Man Killed Wife in Facebook Row, BBC NEWS (Oct. 17, 2008), http://news.bbc.co.uk/2/hi/7676285.stm.
\end{enumerate}
Hernandez, 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, the U.S. Court of Appeals for the Eleventh Circuit 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.

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, 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.

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118. United States v. Siegelman, 561 F.3d 1215 (11th Cir. 2009).
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.\textsuperscript{122}

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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