

**BE CAREFUL WHAT YOU TWEET: SOCIAL NETWORKING
LEGAL ISSUES**

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Bennett Law Office, PC is a boutique trademark, copyright and entertainment law firm located in a historic two-story building in Old Town Lewisville. The firm is a woman-owned business and is certified by The Texas Building & Procurement Commission as a State of Texas Historically Underutilized Business (HUB).

Our clients range from established multi-million dollar a year service businesses to entrepreneurs launching a new product. A common trend in our client base is the need for providing guidance related to the development and licensing of materials to third parties. In addition to trademark application prosecution and licensing agreements, we advise clients on co-branding, product placement, endorsement and sponsorship agreements.

The primary focus of the firm's entertainment practice is music publishing catalog administration. The firm works extensively with "estate" clients in reclamation of copyrights under the 1909 Copyright Act and licensing of song and master catalogs.

Tamera H. Bennett, nicknamed by her clients as the IP quarterback, works closely with her clients to implement customized brand management programs. Her clients range from rock star to leadership coach and financial guru to custom motorcycle designer.

Prepared with an undergraduate degree in Recording Industry Studies and a law degree from Texas Wesleyan University School of Law, Tamera represents clients throughout Texas and Tennessee in trademark, copyright and entertainment law related matters.

Visit Tamera's blog at www.createprotect.com and keep up with current entertainment law legal issues with Tamera as she co-hosts the entertainment law update podcast at www.entertainmentlawupdate.com.

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BE CAREFUL WHAT YOU TWEET: SOCIAL NETWORKING LEGAL ISSUES

I. INTRODUCTION

In the age when seven percent of Americans use Twitter.com and a whopping 41 percent of Americans maintain a page on Facebook.com, it is not hard to believe the trending area of social networking will begin generating disputes and litigation. *Twitter Usage In America: 2010*, Edison Research (visited Aug. 23, 2010) http://www.edisonresearch.com/twitter_usage_2010.php

Just as commentators cried the U.S. Copyright Act was out of date and un-equipped to address the legal issues in the Internet Age, will we start to hear that traditional tort causes of action are inappropriate for addressing social networking "wrongs?"

We will first take a look at cases in the tort law areas of defamation and right of privacy. Then a look at whether or not "in-action" via social networking is a crime. Your client might just use social networking so effectively they get a TV deal like the creator of the Twitter account "shitmydadsays." Finally, as attorneys we need to be careful what we Tweet so as not to trigger advertising concerns and/or ethical violations.

II. DEFAMATION

Defamation is the act of injuring a person's reputation by making a false statement. The two prongs to defamation are libel – a defaming statement published in printed form, or slander – a defaming statement published orally. See TEX. CIV. PRAC. & REM. CODE § 73.001; *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995).

In Texas, libel is a defamation expressed in written or other graphic form that tends to blacken the memory of the dead or that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury.

§ 73.001.

A defamation claim is fact intensive and the court must consider whether the plaintiff is public or private, is the statement involving a public or private

matter, is the defendant a media or non-media defendant. Under Texas common law, a defamation cause of action contains the following elements:

1. The defendant published a statement of fact;
2. The statement referred to the plaintiff;
3. The statement was defamatory;
4. The statement was false;
5. With regard to the truth of the statement, the defendant was:
 - i) acting with actual malice; ii) negligent, or iii) liable without regard to fault; and
6. The plaintiff suffered pecuniary injury.

N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964); *Bently v. Bunton*, 94 S.W. 3d 561, 579, 586, 590 (Tex. 2002)(elements 1, 3-5); *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998)(elements 1-5); *Leyendecker & Assocs. v. Wechter*, 683 S.W.2d 369, 373 (Tex. 1984)(element 6).

Defamation causes of action seem to be the most prolific in the social networking lawsuit arena.

A. Defamatory Statements on Blogs

We even have a defamation case in Texas against a blogger. Plaintiff Eric Albritton alleged that Defendant Richard Frenkel published a false and defamatory statement that Plaintiff had conspired with the Clerk of the US District Court for the Eastern District of Texas to feloniously alter official documents. *Albritton v. Cisco Systems, Inc.*, 6:2008cv00089, Pla's Compl. (E.D. Tex. filed Nov. 5, 2009). The alleged defamatory statements were found on the Defendant's Patent Troll Tracker blog. The case settled after presentation of evidence but before a verdict was reached.

B. Defamatory Statements on Twitter

Courtney Love was sued in Los Angeles Superior Court in March 2009 based on the theory her Tweets were libelous to her former fashion designer. According to the complaint, Love used Twitter to disseminate "an obsessive and delusional crusade" of malicious libel. The complaint goes on to state "Love's approach is not subtle. In particular, Love publicly made the menacing and disturbing statement that [Plaintiff] will be **'hunted til your dead.'**"(bold in complaint) Love also tweeted, "the Austin police will be happy to pick her up, **'she has a history of dealing cocaine, lost all custody of her child, assault and burglary.'**" (bold in complaint) *Simorangkir v. Love*, BC410593, Pla's Compl. (Cal. Sup Ct. LA filed March

26, 2009). In October 2009, Love lost her motion for summary judgment when the judge ruled the plaintiff had a probability of succeeding on her claim that Love's tweets were malicious statements. As of August 2010, the case is still in the discovery phase.

Kim Kardashian faces charges of defamation in a Miami court for tweets disclaiming her affiliation with Dr. Siegel's Cookie Diet. Kardashian believed Dr. Siegel's social networking and website linking raised an inappropriate appearance of her endorsing his diet so she tweeted:

Dr. Siegel's Cookie Diet is falsely promoting that I'm on this diet. NOT TRUE! I would never do this unhealthy diet! I do QuickTrim!

If this Dr. Siegel is lying about me being on this diet, what else are they lying about? Not cool!

Siegel v. Kardashian, 13-2009-CA-093439-0000-01, Pla.'s Compl. (Fla. Cir. Ct. Miami-Dade County filed Dec. 28, 2009).

A search of the court docket in August 2010 reflects the case is still pending but no answer was filed.

Kim Kardashian has over 4.5 million followers on Twitter and reportedly receives \$10,000 for each tweet related to a sponsorship/endorsement deal. Advertisers clearly see the value in what Kim has to say/tweet.

After a tenant tweeted "...who said sleeping in a moldy apartment was bad for you," the landlord filed a business disparagement lawsuit. *Horizon Group Management, LLC v. Bonnen*, 2009L00685, Pla.'s Compl. (Ill. Cir. Ct. Cook Co. filed July 20, 2009). The judge granted a motion to dismiss stating the complaint "was too vague." This case also did not play well in the media, which is practice take-away to consider in these types of cases.

III. RIGHT OF PRIVACY

Under Texas common law, the elements of a claim for invasion of privacy are (1) The defendant intentionally intruded on the plaintiff's solitude, seclusion, or private affairs; (2) The intrusion would be highly offensive to a reasonable person; and (3) The plaintiff suffered an injury as a result of the defendant's intrusion. *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex.1993); *Clayton v. Wisener*, 190 S.W.3d 685, 696 (Tex.App. – Tyler 2005, pet. denied). When assessing the offensive nature of the invasion, courts have required the intrusion be unreasonable,

unjustified, or unwarranted. *Billings v. Atkinson*, 489 S.W.2d 858, 860 (Tex.1973).

Should a civil suit or criminal action be taken against Justin Bieber for "tweeting" the phone number of somebody Bieber does not like? See *Justin Bieber's Evil Prank*, THE WEEK (visited Aug. 23, 2010) <http://theweek.com/article/index/206135/justin-biebers-evil-prank>. Bieber's tweet generated thousands of unsolicited calls and text messages to the recipient.

What would be the bases for any civil or criminal action? Bad taste and general rudeness do not rise to a cause of action. Could there be a right of privacy/invasion of privacy action? The cell phone number of the recipient would most likely be unpublished – an intrusion upon private affairs; and such intrusion would most likely be offensive to a reasonable person. The big question is damages. What, if any, injury was suffered and how do you place a monetary value on such injury? Watch to see if this develops into a lawsuit.

Keep in mind there is no "right to privacy" in postings on Myspace, Facebook, Twitter and other social networking sites where the post can be seen by "anyone with internet access." A college student in California learned this lesson the hard way when her hometown newspaper reprinted comments from her MySpace page "trashing" the town. *Moreno v. Hanford Sentinel Inc.*, 09 C.D.O.S. 4208, (Cal. CD Fresno 2009).

IV. CRIMINAL CHARGES

Justin Bieber's manager did not send out "Tweets" soon enough to cancel a mall appearance and control the crowd, and now faces criminal charges. It is alleged the manager's inaction, or slow reaction, contributed to endangering fans of being trampled. Bieber's manager pleaded not guilty to charges of second-degree reckless endangerment and one count of second-degree criminal nuisance. He faces up to one year in jail. Russell Wetanson, *Crime Time: Should Justin Bieber's Manager Be Prosecuted For A Mall Riot?* THR, ESQ. BLOG (visited Aug. 22, 2010) <http://thresq.hollywoodreporter.com/2010/03/should-justin-biebers-manager-really-be-prosecuted-for-a-mall-riot.html>.

V. CONTRACT PROVISIONS

As reported by *The Hollywood Reported ESQ Blog*, movie studios are including "no tweet" clauses in their contracts:

A recent talent contract from Disney includes a new clause forbidding confidentiality breaches via "interactive media such as

Facebook, Twitter, or any other interactive social network or personal blog.”

Over at DreamWorks, a writer’s deal cautions not to jump the gun on studio press releases via “a social networking site, blog or other Internet-type site.” An agent spotted a talent deal with a stricture that forbids bashing any element of a production with social media.

Andrew Wallenstein and Matthew Belloni, *Hey Showbiz Folks: Check Your Contract Before Your Next Tweet*, THR, ESQ. BLOG (visited Aug. 22, 2010) <http://thresq.hollywoodreporter.com/2009/10/check-your-contract-before-your-next-tweet.html>

The practice tip on this is to review any proposed language closely and make sure your client realizes there may be limitations on what can be conveyed via social networking sites. It is one thing for Paula Abdul to announce via Twitter her retirement from “American Idol” and another to announce the cast has Swine Flu. Show producers may find certain information too sensitive to be released by cast and crew members.

VI. YOUR CLIENT MIGHT GET A DEAL

Two new TV shows are in production that originally started as internet properties. Here is a new and viable twist on how our clients find production outlets. The creator of the Twitter feed “shitmydadsays” has signed a book deal with Harper Collins and a TV show deal based on the twitter feed, starring William Shatner, slated to air Fall 2010 on CBS. Fox is developing a comedy based on the website TextsFromLastNight, with Sony TV and Happy Madison producing.

VII. HOW DO THE ADVERTISING RULES APPLY TO SOCIAL NETWORKING?

Is your blog or Facebook page an advertisement? Blogs, Facebook, Twitter, LinkedIn and other social networking pages do not need to be submitted to the Advertising Review Department so long as 1) the information is educational or editorial in nature, and 2) people read the blog/site for educational or editorial purposes. You may wish to take a closer look at recently revised Internal Interpretive Comments 17 from the Advertising Review Committee. D. Todd Smith, *Advertising Rules and Social Media: Texas Style*, LTN LAW TECHNOLOGY NEWS BLOG (visited Aug. 24, 2010) <http://www.law.com/jsp/lawtechnologynews/PubArticl>

eLTN.jsp?id=1202463462492&Advertising_Rules_and_Social_Media_Texas_Style.

Make sure all communication stays within the Rule 7.07(d) filing exemptions to avoid your social networking presences being considered an “advertisement:”

(1) an advertisement in the public media that contains only part or all of the following information, provided the information is not false or misleading:

(i) the name of a lawyer or firm and lawyers associated with the firm, with office addresses, telephone numbers, office and telephone service hours, telecopier numbers, and a designation of the profession such as “attorney,” “lawyer,” “law office,” or “firm”;

(ii) the fields of law in which the lawyer or firm advertises specialization and the statements required by Rule 7.04 (a) through (c);

(iii) the date of admission of the lawyer or lawyers to the State Bar of Texas, to particular federal courts, and to the bars of other jurisdictions;

(iv) technical and professional licenses granted by this state and other recognized licensing authorities;

(v) foreign language ability;

(vi) fields of law in which one or more lawyers are certified or designated, provided the statement of this information is in compliance with Rule 7.02 (a) through (c);

(vii) identification of prepaid or group legal service plans in which the lawyer participates;

(viii) the acceptance or nonacceptance of credit cards;

(ix) any fee for initial consultation and fee schedule;

(x) that the lawyer or firm is a sponsor of a charitable, civic, or community program or

event, or is a sponsor of a public service announcement;

(xi) any disclosure or statement required by these rules; and

(xii) any other information specified from time to time in orders promulgated by the Supreme Court of Texas

TEX. DISCIPLINARY R. PROF. CONDUCT 7.07(d).

Keep in mind that purchasing an "ad" on Facebook, or any other social networking site, requires compliance with the Advertising Review Department filing procedures. *See id.*

VIII. CONCLUSION

As social networking grows we can anticipate, 1) increased litigation; and 2) contract changes that will attempt to preempt the release of information via social networking sites. Although the predominant causes of actions discussed in this paper arise under tort law, I anticipate there will be claims arising under contract law as part of enforcing the "new" provisions. Not pertinent to this paper but as a practice tip, if you practice criminal law, family law or personal injury law, there is a separate body of case law quickly developing around using what a person posts on their social networking sites to catch criminals, catch cheating spouses, and catch insurance fraud in the act.

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