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Socially Aware:
The Social Media Law Update

IN THIS ISSUE

Welcome to the second issue of *Socially Aware*, our guide to the law and business of social media. In this issue, we highlight a recent decision finding Facebook's business practices not to be anticompetitive, take a look at the dismissal of a defamation claim involving a Facebook Group page, and note the impact of the social media boom on IT infrastructure spending. We also profile Groupon's innovative model for marketing to social network communities, and summarize a key Ninth Circuit decision involving discovery of the identities of anonymous bloggers. Plus, a list of the top 10 countries represented on Facebook (numbers 3 and 4 will surprise you).

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Court Finds Facebook Business Practices Not to Be "Anticompetitive"

On July 20, 2010, the U.S. District Court for the Northern District of California handed Facebook a partial victory in its litigation against Power Ventures, Inc. ("Power.com"), declaring certain Facebook business practices not to be "anticompetitive."

Power.com provides an **online "social media aggregation" service** that enables Internet users to manage content and messages across various social networks (including Twitter, Hi5, and Orkut) via a single log-in process. Facebook sued Power.com in **December 2008**, alleging that Power.com had violated Facebook's online **terms and conditions of use** by enabling Facebook users to access their Facebook accounts through Power.com's service. Power.com removed Facebook from its service shortly after Facebook filed its lawsuit. (See Fig. 1 below for a screenshot of the Power.com homepage before Facebook filed its lawsuit.)

In July 2009, Power.com **countersued Facebook**, alleging that Facebook was engaging in "anticompetitive" practices in violation of federal antirust laws and state unfair competition laws by prohibiting users from accessing their Facebook accounts through Power.com's service. The **July 20 decision** rejected Power.com's allegation of anticompetitive activity, including its claim that Facebook had sought to maintain market power in an anticompetitive manner by prohibiting services such as Power.com from "**scraping**" data from the Facebook website for use in their own services. Although the opinion acknowledged that certain other well-known third-party service providers permit Facebook to collect user information from their services via automated means similar to scraping, the court disagreed with the notion that "Facebook is somehow obligated to allow third-party websites unfettered access to its own website simply because some other third-party websites grant that privilege to Facebook." The court also rejected Power.com's allegation that Facebook competed unfairly by threatening companies such as Power.com with "baseless intellectual property claims" in order to discourage new market entry, stating, "If Facebook has the right to manage access to and use of its website, then there can be nothing anticompetitive about taking legal action to enforce that right."

FIG. 1: POWER.COM HOMEPAGE PRIOR TO FACEBOOK LAWSUIT

The July 20 decision also addressed Facebook's claim against Power.com under California's computer crime statute, **Section 502** of the California Penal Code. Among other things, Section 502 imposes liability on any person who "[k]nowingly and *without permission* accesses or causes to be accessed any computer, computer system, or computer network." Facebook argued that Power.com accessed the Facebook website in violation of Facebook's terms and conditions of use and thus "without permission." In denying Facebook's motion on the pleadings with respect to its Section 502 claim, the court held that Power.com's violation of Facebook's terms and conditions of use did not constitute access "without permission" for Section 502 purposes. Further, the court required Facebook to show that Power.com circumvented "the technical barriers that Facebook put in place to block Power's access to the Facebook website." In reaching the foregoing conclusion, the court declined to adopt a 2007 decision from the same court in *Facebook v. ConnectU*, which held that a terms of use violation could satisfy the "without permission" requirement of Section 502. As at least **one commentator** has noted, it remains to be seen how other courts will reconcile the Section 502-related aspects of the *Power.com* decision and the earlier *Facebook v. ConnectU* holding.

Defamation Suit Concerning Facebook Group Dismissed

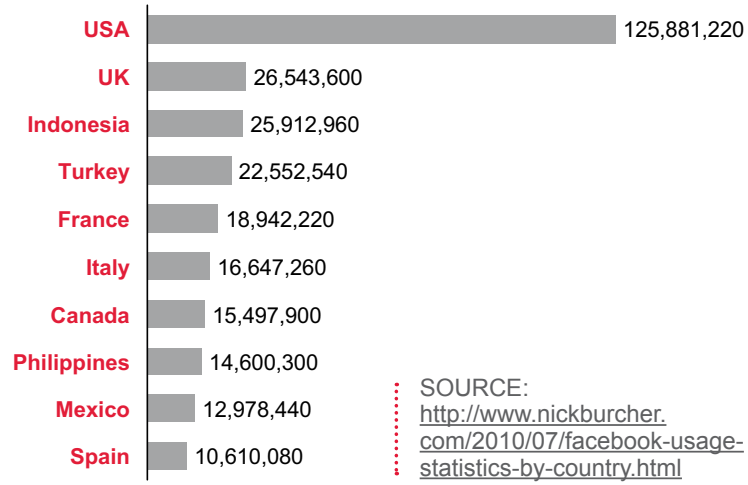
A New York Supreme Court recently **dismissed a $6 million defamation suit** against four teenagers who posted "vulgar" and "puerile" statements about a classmate's morality, drug use, sexuality, and character on a private Facebook Group page in 2009. As noted in an **Ars Technica article**, although the privacy setting on the Facebook Group's page was set to "private"—only invited Facebook Group members could view and post on the page—and the page's contents were not otherwise publicly available, the victim learned of the posts when they were leaked by one of the Group's members.

The recent ruling noted that no reasonable person would have found the insulting statements to be true, and that "taken together, the statements can only be read as inconsequential attempts by adolescents to outdo each other." The court also rejected a negligent supervision claim against the posters' parents, which alleged that the parents had entrusted their children with "dangerous

instruments"—in particular, the computers through which the teenagers accessed the Facebook site. The judge concluded that a computer is not "a dangerous instrument" under New York law, stating that, "to declare a computer a dangerous instrument in the hands of teenagers in an age of ubiquitous computer ownership would create an exception that would engulf the rule against parental liability." Although Facebook was originally named as a defendant in the case, **its motion to dismiss was granted** by the State Supreme Court in Manhattan in 2009, based on **Section 230 of the Communications Decency Act**, which provides a broad safe harbor for website operators and other "interactive computer service" providers from liability for, among other things, defamatory statements posted to such websites by third parties.

SOCIAL MEDIA STATS: TOP 10 COUNTRIES REPRESENTED ON Facebook

Number of Facebook Users (July 2010)



SOURCE: http://www.nickburcher.com/2010/07/facebook-usage-statistics-by-country.html

Growth in Social Media Drives Infrastructure Spending

Despite a weak economy, spending on servers—the backbone of the Internet—has been growing at an **explosive rate**. While much of that growth is due to the increasing popularity of cloud computing, a rising appetite for video and social networking functionality has also contributed to the need for more servers. Facebook **broke ground** on its first custom data center (a 147,000 square-foot facility) in January of this year. Only six short months later, Facebook has announced that it has decided to **double** the size of that data center (which isn't even built yet!). In January, when Facebook began work on the data center, it was looking at 400 million users. Now, it has more than 500 million users, and is adding new users every day. More computing capacity is necessary to provide service to all current and future users, particularly as the amount of data users consume—in the form of videos and games—eats up more bandwidth.

Another rapidly growing social media company, Twitter, has also announced plans for a custom data center. In an effort to alleviate its reported **growing pains**, on July 21, 2010, Twitter **announced its plans** to transition to its own dedicated, custom-built data center this coming fall. The popular service's engineering blog notes that it has been challenging for Twitter to keep pace with rapidly-growing demand, comparing "the tasks of scaling, maintaining, and tweaking Twitter to building a rocket in mid-flight." Twitter hopes that the new Salt Lake City-area facility will allow the service to perform with greater reliability, capacity, **availability and redundancy**, and other **anticipated improvements** include an increase in internal network capacity, enhancements to its ability to monitor its network, and improved page-load times. The service plans to bring additional data centers online over the next two years, and is seeking applicants to fill **more than 20 open engineering posts**. This is a testament to Twitter's explosive growth—according to a recent presentation by COO Dick Costolo, Twitter, which launched a little more than four years ago, **now receives 190 million visitors each month and processes 65 million Tweets each day**.

Social Media Provides Unique Marketing Launch Pad

Although online marketing has been around for a long time, marketers are increasingly leveraging social media as a key component of their marketing strategies. For example, **Ford recently used Facebook** to unveil its newest Ford Explorer. Not surprisingly, innovative new marketing companies are emerging to help companies promote their goods and services to social media communities. One such company is **Groupon**—a "deal of the day" community website that has experienced **rapid growth**, and

has been described as "a group-based social e-commerce buying service." The premise is simple; each day, Groupon features a city-specific deal of the day, which typically provides a steep discount on the standard price for the subject of the deal. If a specified minimum number of people sign up for the deal , then the deal (or the "Groupon") is activated; if not, the deal is cancelled. **According to Groupon**, it gets discounts that "you won't find anywhere else" by providing businesses with a guaranteed a minimum number of customers.

While deals on Groupon have involved discounts on everything from **spas** to **restaurants**, recently, the independent documentary "***Ready, Set, Bag!***" has made innovative use of the service. According to **Mashable**, the creators of the documentary **leveraged Groupon** to promote the film's initial theatrical launch. The first Groupon for the film recently went live in Seattle. Mashable notes that the use of Groupons to promote films—particularly if the sale of a minimum number of tickets can be required for the film to even screen—could enable filmmakers to guarantee a minimum level of attendance to a theatre, which, in turn, would reduce theatre owners' risk in screening independent films that otherwise would have been passed over for less risky films. We expect to see even heavier use of social media to launch products and services in the near future, as more and more people turn to social media to gain the most up-to-date information about their interests.

Anonymous Online Postings and the First Amendment

In *Quixtar, Inc. v. Signature Management TEAM, LLC*, the U.S. Court of Appeals for the Ninth Circuit recently denied a petition for writ of mandamus brought by a group of anonymous bloggers who had posted allegedly false and disparaging statements regarding Quixtar Inc. (now known as Amway) on the Internet and then sought to prevent Amway from obtaining their identities. Amway sought the bloggers' identities in order to tie their statements to the defendant in an ongoing lawsuit with a company that convinced a large group of Amway's former distributors to move to an Amway competitor. The issue arrived at the Ninth Circuit following a lengthy, two-year battle in the district court. The anonymous bloggers argued that the First Amendment protected their right to post statements anonymously; Amway responded that (1) the statements were commercial speech and thus subject to a lesser degree of First Amendment protection, (2) the substantial governmental interest in allowing parties to obtain discovery in civil lawsuits outweighed any First Amendment interest, and (3) the statements at issue were defamatory and thus not entitled to any protection.

The Ninth Circuit agreed with Amway that the statements constituted commercial speech. It then found that the district court had applied a standard that was too strict for commercial, as opposed to political or other highly protected, speech.

The ruling is significant because it is one of the first federal circuit decisions that articulates clearly that companies injured in commercial settings by anonymous speakers on the Internet can use civil discovery to learn the identities of the speakers under a more relaxed standard than was traditionally applied when political or religious speech or significant public comment was at issue. The ruling also makes clear that the strict standards applied when a plaintiff sues an Internet service provider to learn the identity of anonymous bloggers do not apply when the plaintiff already knows the identity of the defendant and is trying to tie additional harmful speech to the original defendant. The decision can be found **here**.

Amway was represented at the Ninth Circuit oral argument by Morrison & Foerster partner **Cedric Chao**, with **Maria Chedid** and **Raj Chatterjee** on the briefs.

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