



Duane Morris®



## Managing Legal Risks In Social Media

A review of uncharted legal waters—  
How to navigate uncertainty on the real-time Web.

# Introduction: “It Depends”



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

# Overview

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



# Old Wine In New Bottles



- “Are users liable for their tweets and posts?”
- Privacy and tort
  - Defamation
  - Invasion of privacy/false light
  - A/C, NDA and proprietary/confidential content
  - Legal ethics obligations (represented parties, judge/jurors, etc.)
- Others: cyber bullying, prostitution, child pornography, etc.
  - 19 Facebook posts that led to arrests
    - [http://www.huffingtonpost.com/2010/08/16/arrested-over-facebook-po\\_n\\_683160.html](http://www.huffingtonpost.com/2010/08/16/arrested-over-facebook-po_n_683160.html)
  - But see new Mass. law (5/2010) requiring public school officials to enforce anti-bullying rules also on email/social networks



# Social Media and IP



- Major issue is who owns user-generated content (UGC)?
  - Possession ≠ 90% of law
  - Different conclusions for TM, © and patents
  - No present consensus on what is protected, what is public domain and what is in between, e.g., Facebook 2009 “ToS” crisis
- Nature of expression AND nature of posting are both key factors
- Implied license for (some) “public” postings, depending on content, ToS and author/generator claim?
  - Tweets v. photos, for instance

# Social Media and IP (con't)

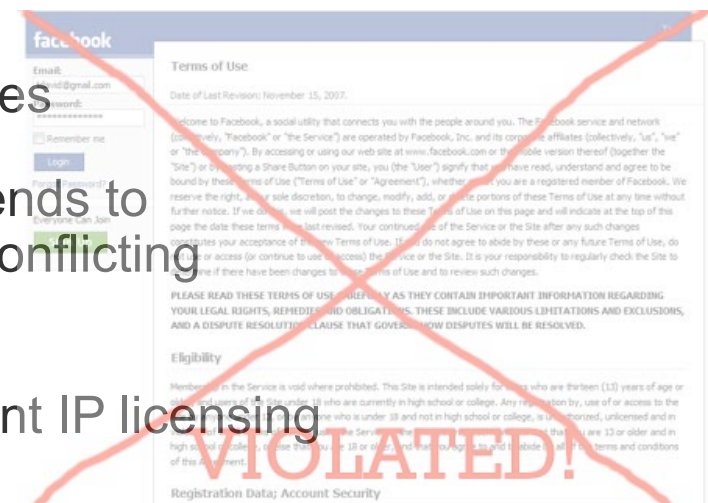


- Are Tweets copyrighted?
  - <http://blogmaverick.com/2009/03/29/are-tweets-copyrighted/>
  - Original expression v. opinion v. fact
  - Compare, e.g., “Three-peat”™
  - That Twitter ToS does not claim copyright is not dispositive
- ToS cannot create legal rights
- Public domain (implied license) IF unprotected...?
  - UK Press Complaint Commission says publishing socially-posted “epic boobs” photos permissible
  - <http://www.pcc.org.uk/cases/adjudicated.html?article=NjM5OA==>
- Tweets, fair use (CNN?) and “retweeting”

# ToS: Style or Substance?



- Twitter and Facebook present appearance of diametrically opposed approaches to IP ownership
  - Twitter: “This license is you authorizing us to make your Tweets available to the rest of the world and to let others do the same. But what’s yours is yours — you own your content.”
  - Twitter needs no license, Facebook does
- Thorny issues whether license grant extends to deceased users and how to harmonize conflicting claims to social stream
- Different business models compel different IP licensing regimes



# TMs, Genericide & Twittersquatting



- Aspirin on the real-time Web
  - Massive volume of UGC presents increased compliance burdens. Vexing customer relations issues from infringing brand “fans”
- User name infringement/dilution
  - Anti-Cybersquatting Act and DMCA notice-and-takedown procedures possibly inapplicable to social media. Personal names (unlike brands) have not usually achieved protected “secondary meaning.”
  - Parody and “gripe” usage likely not “in commerce”
- Deep pocket reality puts social networks in \$\$ center of disputes, with common law theories (conversion, negligence, defamation) akin to early domain name struggles



# Social Media & Employment



- Employers may use social media UGC for hiring/firing decisions
- Corporate “social media policy” can prohibit employee participation, e.g., DoD, WSJ, NFL player tweets, marks/logos, use of company IT
  - Unclear whether company “owns” employee UGC
  - Evolving common law right to workplace email privacy (e.g., New Jersey) may extend to UGC
  - Can employer meet out employee discipline for third-party comments (AP)?
    - <http://www.wired.com/threatlevel/2009/06/facebookfollow/>
- Marketing/PR positions present different rights & risks
- ECPA and/or CFAA may protect non-consensual intrusion into third-party employee accounts

# Social Media & Privacy

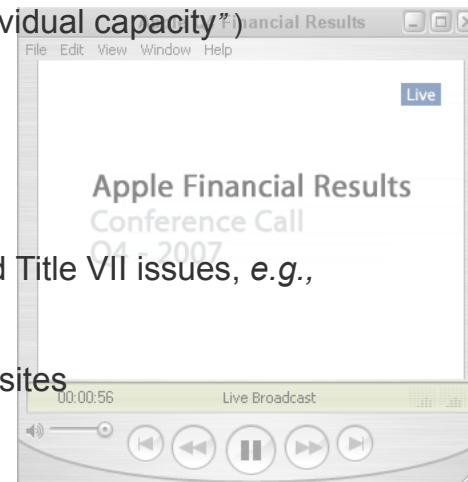


- No general privacy law, but sector-specific legislation (HIPAA, GLB, etc.) on info. security/privacy applies to social media
  - Boucher-Stearns draft “discussion” privacy bill (2010)
  - FTC and EU complaints against Facebook raise possibility of adjudicatory “rules” development
- CAN-SPAM likely inapplicable beyond “commercial email” (but see SMS/texts under TCPA)
  - Does “business relationship” safe harbor allow mobile wireless delivery?
  - Growing LBS technologies present new/different privacy issues
    - See, e.g., <http://blog.cdt.org/2009/06/19/the-dawn-of-the-location-enabled-web/>
- EC opines Data Protection Directive applies to social networks (WP 163 Opinion 5/2009)

# Corporate/Regulatory Compliance



- Traditional compliance issues (contracting, FCRA/FDCPA, trade secrets, etc.) also presented via social media
- Heavily regulated industries — pharmaceuticals, health care, financial services — face challenge of ensuring reg. compliance in “social stream,” especially re mandatory disclaimers
  - CDT petitions FDA to disallow pharmaceutical use of social media posts w/o sufficient space for risk disclaimers (5/2010)
  - FDA fines Novartis for socmedia marketing (8/2010)
- SEC Reg. FD always applicable to employee posts, not “individual capacity”
  - Public companies may rely on blogs for Reg. FD compliance (7/2008)
    - <http://www.sec.gov/rules/interp/2008/34-58288.pdf>
  - SEC 21st Century Disclosure Initiative
    - <http://www.sec.gov/disclosureinitiative>
- HR postings/practices on social media can create EEOC and Title VII issues, e.g., listing text, “friend/follower” selection, etc.
- User anonymity is different, but major issue for social media sites



# Managing Legal Risks

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



# Managing Legal Risks (con't)



- “Best Practices”—<http://snrcr.org/wp-content/uploads/2008/09/snrcr-social-media-policy-best-practices.pdf>
  - *Culture*—Foster corporate culture of openness. Listen to & respect opinions of employees, customers and other stakeholders.
  - *Trust*—Employees should be trusted to communicate and develop relationships with customers. Do not review content prior to posting.
  - *Training*—Provide employee training about how to blog; review legal issues with employees. Give employees option of participation for off-hours socmedia activities.
  - *Transparency*—Disclose connections with customers. Reveal commercial and sponsored relationships. Transparency and authenticity are key.
  - *Accuracy*—Confirm facts. Check with colleagues before publishing content that will affect them. If employees write about private matters, insist upon permission before postings.
  - *Comments*—Develop and clearly communicate SMP. Set expectations by clearly communicating what is (and what is not) allowed on enterprise blogs/posts. Permit both negative and positive comments, but restrict inappropriate comments.

# Potential Regulation



- Sponsored posts and PPT face FTC, state consumer protection, Lanham Act and tort exposure. ***Disclosure is best practice whether or not yet mandatory.***
- States developing laws specific to social media, e.g., North Carolina re sex offender access, New Jersey A-3757 re harassment/abuse, Calif. AB-632 re social photostream copy protection. Potential for federal preemption IF national standard established.
- Never underestimate ability of legislators to pass silly laws, e.g., prohibiting “silent” cell phone cameras
  - [http://www.pcworld.com/article/158444/congress\\_and\\_camera\\_phones\\_arent\\_clicking.html](http://www.pcworld.com/article/158444/congress_and_camera_phones_arent_clicking.html)



# Conclusions



- Little social media-specific judicial precedents & essentially no legislation. ***Don't expect short-term statutory resolution.***
- Legacy real-world rules apply, sometimes as adapted, to social stream. ***Otherwise unlawful practices are still illegal when online.***
  - Typical privacy rules (sector-specific) for social media, including EU Directive
  - UGC ownership is significant IP and corporate/HR issue
  - Special compliance concerns for regulated industries and Reg FD financial releases.
    - ***Pharma, banking, etc., need special SMPs.***
- Cauldron of litigation likely to yield confusing & conflicting precedents, more certainty for socmedia than corporate GCs