

ONE WORLD  
ONE PROFESSION  
ONE DESTINATION

*An Introduction to Legal Issues  
Surrounding Social Media  
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# About Saper Law:

- Saper Law Offices, LLC is an intellectual property, media, and business law firm with significant transactional and both federal and state litigation experience. We primarily specialize in the following areas of law:

- Trademarks
- Copyrights
- Trade Secrets
- Corporate Matters
- Internet
- Entertainment
- Defamation
- IP Licensing
- Advertising
- Media
- Sponsorship Agreements
- Business Contracts

# What is “Social Media”?

“Social Media” typically refers to *any* web based platform or site that is based on user participation and user-generated content.

As lawyers, we encompass “social media” with the term “new media.” Our licensing contracts all refer to: “in ***any*** and all ***media now known or hereafter devised ...***”

# Benefits of Social Media

- Can market to a broad audience quickly and economically
- Engage with and monitor conversations with target consumer, client, end user, etc.
- Benefit from “viral” nature of the internet—reaching an audience you may never have anticipated/expected

# Examples of Social Media

- LinkedIn
- Facebook
- Twitter
- Instagram
- Pinterest
- Youtube
- Ning
- Foursquare
- Blogs
- Wikis

Who knows what's  
next... 😊

# What social media platform do you use most frequently?

- A. Facebook
- B. Twitter
- C. Instagram
- D. YouTube
- E. LinkedIn

# What can your company sue or be sued for?

Causes of Action can include:

- **Copyright infringement:** using/sharing something that's not yours.
- **Defamation:** and false light family of claims
- **Trademark infringement:** confusing consumers about a brand or source of products
- **Interference with Business Relations, Unfair Competition**
- **Negligence:** assuming a duty, inadequate data security.
- **Contract:** ending up in an enforceable agreement ( bad terms of use)
- **Discrimination:** especially as to hiring practices
- **Invasion of Privacy/ Confidentiality breaches:** see non exhaustive list

# Privacy Acts That Your Employees Could Potentially Violate With the Wrong “Tweet”

- **Health privacy laws**
  - 1974—The National Research Act
  - 1996—Health Insurance Portability and Accountability Act (HIPAA)
- **Financial privacy laws**
  - 1970—Bank Secrecy Act
  - 1998—Federal Trade Commission
  - 1999—Gramm-Leach-Bliley Act (GLB)
  - 2002—Sarbanes-Oxley Act (SOX)
  - 2003—Fair and Accurate Credit Transactions Act
- **Online privacy laws**
  - 1986—Electronic Communications Privacy Act ([ECPA](#)), pen registers
  - 1986—Stored Communications Act (SCA)

# Privacy Acts That Your Employees Could Potentially Violate With the Wrong “Tweet”

- **Communication privacy laws**
  - 1978—Foreign Intelligence Surveillance Act ([FISA](#))
  - 1984—Cable Communications Policy Act
  - 1986—Electronic Communications Privacy Act (ECPA)
  - 1994—Digital Telephony Act - [Communications Assistance for Law Enforcement Act](#) (CALEA), 18 USC 2510-2522
- **Education privacy laws**
  - 1974—Family Educational Rights and Privacy Act (FERPA)
- **Information privacy laws**
  - 2001—USA [Patriot Act](#), expanded pen registers
- **Other**
  - 1974—**Privacy Act**
  - 2005—**Privacy Act**, sale of online PII data for marketing
- State Privacy Laws: for example, California alone has over 88 data privacy laws

# Most traditional laws are the same but....

- The context is different
  - Explaining the nuance of the context poses challenges
    - Dinolova case example
    - Trespass to Chattels example
- Legislatures are trying to keep up by creating new laws

**Is it lawful for an employer to request an employee's social media account password?**

A. Yes

B. No

# Illinois' Social Media Privacy Law: An Example

- Illinois Right to Privacy in the Workplace Act (820 ILCS 55/10)
  - “It shall be unlawful for any employer to request or require any employee or prospective employee to provide any password or other related account information in order to gain access to the employee's or prospective employee's account or profile on a social networking website or to demand access in any manner to an employee's or prospective employee's account or profile on a social networking website.”

# Education is key

- Social Media Policies can't replace good judgment and oversight.
  - Some companies don't have them
  - Some have been deemed overbroad
  - Some merely serve as guidelines
- Better to understand the implications of certain behaviors.
- Know the laws!

# Copyright Case Scenario

- Your company is looking to update its website. One of your employees goes out and finds a great image via a Google search. He “right clicks” and saves the image for insertion into your website. If its easily “right clickable” it must be “public domain”, right?

# Copyright

- **Copyright 101**

- the right to reproduce the copyrighted work;
- the right to prepare derivative works based upon the work;
- the right to distribute copies of the work to the public;
- the right to perform the copyrighted work publicly; and
- the right to display the copyrighted work publicly

– *Do social media sites own your uploaded content?*

- **Work For Hire Doctrine**

- **Public Domain**

- **Fair Use**

- the purpose and character of the use
- the nature of the copyrighted work
- the amount and substantiality used
- the effect of the use upon the potential market for or value of the copyrighted work.

- **DMCA** Learn how to utilize take down notice procedures

# Defamation Case Scenario

- Your company has spent a lot of energy into building its reputation. Unfortunately, a rouge consumer, or perhaps a competitor (you're not sure) has started to post disparaging comments about your company on BigCorporationsSuck.com. What do you do?

# “Online Reputation Management”

- **Direct to PR or Legal?**
  - Are the statements true?
  - Obviously a joke?
  - Obviously an opinion?
  - What would be the consumer backlash for challenging?
  - Are there non legal remedies?
- **Challenges**
  - Communications Decency Act
  - Anonymity
  - Statute of Limitations
  - Jurisdiction

# What is the statute of limitations for filing a defamation claim?

- A. 1 year
- B. 2 years
- C. 3 years
- D. 4 years
- E. 5 years

# Advertising Case Scenario

- Your company wants to run a contest on Facebook and hire some bloggers to promote it. You plan on compensating the bloggers for writing about the promotion by giving them free (your company's product) for a year.

# Advertising Issues

- **Run Legal Contests/ Sweepstakes**
  - Check if you have followed the social media platform’s advertising policies.
  - Check state contest and sweepstakes rules
- **Abide by FTC disclosure rules**
  - Clear and conspicuous disclosure of material connections, even on sites like Twitter
  - Monitor bloggers/affiliate marketers for false claims
  - No “astroturfing” (advertising, or public relations campaigns that are designed to mask the sponsors of the message to give the appearance of coming from a disinterested, grassroots participant.)

# Trademark Case Scenario

- Someone has created several profiles on various social media sites with your company's trademark.
- They have also created a YOURCOMPANYSUCKS.com domain name.

# Which of the following can be considered trademarks?

- A. Logos
- B. Sounds
- C. Slogans
- D. Smells
- E. All of the above

# Trademarks

- **Trademark 101**
  - Trademarks are source identifiers
    - Logos, slogans, colors, smells, sounds, packaging can all be considered trademarks
  - Register all brands with the USPTO/ Enforce
- **Domain name/ User Name squatting**
  - Claim all versions of brand on social media platforms
  - Buy disparaging versions of domain names
  - Challenge domain name/ user name squatting (need bad faith or to submit proof of registration to social media sites.
- **Google Keywords v Adwords**
  - Make sure you only use competitors trademarks for comparison purposes

# Employment Scenario

- You are thinking about hiring Bobby because he has a lot of followers on Twitter.
- Your search of his Facebook account shows that he is regularly out drinking but you suspect there may be other photos hidden from public view

# Employment Issues

- **Uniform Background Checks**
  - Defend against accusations of discrimination in hiring employees when social media sites are reviewed;
- **Social Media Account ownership**
  - Who owns an employees followers? Define in employee contracts.
- **Privacy considerations**
  - Check laws against demanding social media passwords

# Social Media Policies-- revisited

- Right now there are several different stances employers can take on Social Media:
  - Tell employees they are not allowed to discuss anything related to the company
    - See NLRB opinions/ can't restrict conversations related to workplace conditions
  - Counsel employees on what is appropriate, how to use better judgment, and if confused, talk to a manager
  - Designate a gatekeeper to be responsible for posts online or on the employer's website, instead of any employee posting anything, anytime

# More tips

- Update company policies for e-mail, internet usage, and other social media to accommodate changes in technology
- Counsel employees on appropriate and inappropriate use of company equipment, i.e. computers, cell phones, and blackberries
- Have designated Corporate social media accounts
- Counsel employees on appropriate postings and the consequences of inappropriate postings

# Famous Tweets

- "Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work."
- Ketchum public-relations exec who said of client FedEx's hometown: "I would die if I had to live here!"

# Data Breach Scenario

- In 2012, LinkedIn was hacked and over 6 million user passwords were posted online
- In a class action suit, LinkedIn was challenged on multiple legal claims, including unfair competition, violations of California's Consumers Legal Remedies Act, Breach of Contract, Breach of Covenant of Good Faith and Fair Dealing, Breach of Implied Contracts, and Negligence, and Negligence Per Se
- The main issues revolve around whether LinkedIn did enough to protect user's account information and whether it did enough to notify users of the hacking attack

# Data Security Takeaways

- Most claims against a social media website for data security breaches will look at contract breaches (for failing to adhere to the website's privacy policies) or will be analyzed as a general negligence lawsuit
- Educate your employees about phishing scams and inadequate passwords
- Discuss appropriate security measures with IT department

# Questions?

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