



## Ten Social Media Legal Myths

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Social media platforms, smart phones, tablets, and applications are changing the way we conduct business and interact socially with friends, family, and colleagues. Today, discussions involving Facebook®, Android®, Words with Friends® and Angry Birds® are common. But it is not all fun and games. The financial payouts and consequences of social media for those involved, including vendors, developers, and clients, are becoming more apparent. New cases emphasizing social media mistakes costing reputations, resources, and jobs are becoming just as common as new releases of applications and putting everyone on alert.

### 1. Social Media is Free and Should be let Free...

Social media is not as expensive as traditional media, but it does have a cost – the cost of time and resources (including staff) to apply it correctly and to protect the most valuable thing your company owns – its reputation! As for letting it be free, employees and customers can be wonderful ambassadors for your brand – but do you know what they are saying? Do they rave or do they rant? Are you part of the conversation? Are you responding in a way consistent with the law? Make sure you have the right legal guidelines, policies, and protocols in place to help you maximize your social media benefits and minimize your risks such as a potential PR crisis.

### 2. Anyone Can Do It...

Would you let a techie balance your company books? Would you let your accountant do your marketing? Would you let your lawyer design your logo? Unless those professionals have these other skills, the answer is probably a resounding NO! Everyone has specialized skills, job description and a role to play to get your company the success it is aiming for in cyber space. So make sure to get the right professional to help you with your social media strategies and make sure to get the right lawyer with the right expertise – who understands social media and knows the law – to make sure you are protected against liability in this digital environment.

### 3. Do it Now and Do it Fast...

It takes less than 5 minutes to set up a Twitter® Account, a little longer for a Facebook® Fan Page. The technical logistics are 1-2-3. But before you do (even if you've done so already) think about what you are trying to achieve with social media? Is it more customers, more exposure, more sales? Do all your social media accounts have the same name? Do they relate to your company name? Are you protecting your trademark as you create these different accounts? Thinking about these questions is one thing, but you need to take some time to answer and reflect on your responses. Then you need to put the answers in a central location that you and your company can refer to keep you on track [and legal]. You need a social media plan that is feasible, effective, and in compliance with professional, ethical, and legal rules (such as with the National Labor Relations Board Memorandums in regards to employee termination in social media cases). Make sure you seek guidance from the right professional(s).

#### 4. No One Needs to Know Who I Really Am

In the beginning of the World Wide Web the magazine, *The New Yorker*, published a cartoon depicting a dog on a computer speaking to another dog at its side. The caption read “On the Internet nobody knows you’re a dog.”<sup>1</sup> In today’s socially connected world, not only does everybody know you’re a dog, but they also know what breed you are and if you’ve gotten your shots! “Anonymous” has taken on a new connotation in the digital era – indicating that someone has something to hide – whether an agenda or a private vendetta – or is a “troll” – an individual who wants to create trouble for trouble’s sake. Today, people who are avid social media users apply the principal of transparency in order to build trust with their constituents, clients, and colleagues. They put out there who they are with their credentials. Their social media profiles offer more than just standard resume particulars, including details of achievements, community engagement, and samples of their work (i.e. Slide Share app on LinkedIn, etc.). Key item to remember is to make sure you are who you say you are. The Federal Trade Commission (FTC) issued a notice in December of 2011 that they would begin to crack down on fraudulent credentials listed on social media profiles as false advertising. Also important is disclosing any affiliation or sponsorship (like being given a product for free to review it) when blogging or posting about a product or company. “Astroturfing,” giving a review under a false identification, is considered an ethical violation and can have certain financial consequences. Whole Foods CEO John Mackey - widely regarded as a leader in business ethics - was posting 'anonymously' on Yahoo message boards for two years under the username "Rahobed." Rahobed frequently bashed Whole Foods' competition, Wild Oats. This all came to light under Securities and Exchange Commission scrutiny when Whole Foods was attempting to BUY Wild Oats. By the way, “Rahobed” is Mackey’s wife’s name, Deborah, spelled backwards. And last, don’t forget “twitterjacking,” impersonating someone else through a Twitter® Account. It is illegal and against Twitter’s Terms of Service<sup>2</sup>.

#### 5. Privacy is Automatic

It’s mentioned on the news, in broadcast, in print and online almost every day, sometimes every hour. It has brought Facebook® under FTC scrutiny for the next 20 years, and Google® to revise and consolidate its policies into one simple declaration. It is – privacy. But as we continue to talk about it, what exactly is it? A clear definition for us to use as it relates to social media would be that privacy is “a person's right to control access to his or her personal information.”<sup>3</sup> The legal concern would be invasion of privacy: “intrusion into the personal life of another, without just cause, which can give the person whose privacy has been invaded a right to bring a lawsuit for damages against the person or entity that intruded. It encompasses workplace monitoring, Internet privacy, data collection, and other means of disseminating private information.”<sup>4</sup> The concern about what information is collected on us and how it is used has led to some interesting developments and catch-22’s. The marketing and public relations industries struggle with how to use data available in the open graph and not violate their customers’ privacy (such as in contests and sweepstakes). For those in the healthcare, medical and

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<sup>1</sup> <http://www.unc.edu/depts/jomc/academics/dri/idog.html>

<sup>2</sup> <https://twitter.com/tos>

<sup>3</sup> <http://www.duhaime.org/LegalDictionary/P/Privacy.aspx>

<sup>4</sup> <http://definitions.uslegal.com/i/invasion-of-privacy/>

pharmaceutical industries, complying with the Health Insurance Portability and Accountability Act of 1996 (HIPPA) is priority. However, what about insurance companies using publicly accessible social media data to determine insurance rates and/or coverage? Institutions of education have their own regulation to deal with – the Family Educational Rights and Privacy Act of 1974 (FERPA) – which has led to many college athletic departments banning student athlete use of social media. It is estimated that a single tweet can violate up to 17 federal privacy laws and over 100 state privacy laws (88 of them in California alone!). As an individual are you using your privacy settings and opting out of your personal data being used to socially market the social media platforms you are using? As a social media platform, are your privacy policies in compliance?

## **6. I Can Put Up Anything and I Can Take Down Anything**

This may be tempting to believe, but may be a wrong assumption on your part that can lead to being sued for violation of the First Amendment and Freedom of Speech. If you allow your customers to post comments on your site (user-generated content) have you put up guidelines so they know the purpose of the forum, what they can and cannot post, what would be considered offensive, that the forum is moderated, and that you reserve the right to delete such comments<sup>5</sup>? If you have not, you have created a “public forum” and you have no right to just delete information posted there that you do not like. It is a “free speech zone” and the only way to remove something is to have a compelling reason to regulate and take down. Also, if your customers notice that you take down all the negative comments about yourself and/or your company, your credibility is reduced greatly. Also keep in mind that Freedom of Speech is not absolute and never was in this country. It is counter-balanced by factors such as national security, personal safety and public interest. For example, hate speech or speech that incites violence is never tolerated and in the UK, it can lead to imprisonment, as it did for two young gentlemen who were convicted of inciting riots through Blackberry® messages and Facebook® posts. They are both serving 4-year sentences.

## **7. Don't Tout Your Success...Everyone Will See It...**

You've heard about them, and probably seen a few – viral videos – the funny brothers pulling an ear, the playful kitten that stops wiggling in mid-air, the airline that broke a guitar and wouldn't compensate its owner. The list goes on and on. But these are just a select few of the millions of videos that are uploaded to YouTube everyday! You use social media to market your brand and you can use other media to market your social media presence and you use social media to loop back to your website, etc., etc., etc. So, you have to shout about your success – and that's fine. Just make sure you get everyone's permission – especially your customers' if you are using their name or photo – and don't violate anyone's privacy, publicity, or intellectual property rights.

## **8. Information Expires**

The European Union is fighting for what it believes is a basic right being threatened by today's digital and social media giants – the Right to be Forgotten (in French *le droit à l'oubli*—or the “right of oblivion”). It is based on the idea that people may put something up that they later regret and should have the right to delete it – or more to a public interest concern – that criminal records and really, really bad mistakes that people commit should be “forgiven” and “forgotten” and deleted from the Internet. *The Stanford Review* gave an example of a possible effect of the law if passed: “The right to be forgotten could make Facebook and Google, for example, liable for up to two percent of their global income if they fail to remove photos that people post about themselves and later regret, even if the photos have been widely distributed already.”<sup>6</sup> This proposed law, more

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<sup>5</sup> Look at CNN's iReport Community Guidelines as an example of a great set of guidelines:

<http://ireport.cnn.com/guidelines.jspa>

<sup>6</sup> <http://www.stanfordlawreview.org/online/privacy-paradox/right-to-be-forgotten>

than any other, really brings to light the clash between the US and the rest of the world in terms of privacy and free speech. For now, the rule in the US is that what you post and put out there is permanent. There are back-ups to back-ups, memory caches, copies sent to friends, etc. As they say “What happens in Vegas ends up on Facebook” – and most times it’s because we put it there. Don’t want people to see it – don’t put it up.

## **9. My Data Makes Me Immortal**

Do you want to be immortal? And just how will your immortal digital self be represented? Your digital legacy is the combination of your many points of digital interaction in the online space – including financial accounts, social media accounts, content you posted online, online subscriptions, online photo collections, and more. Do you know the access information to all these accounts? Does your spouse know for the personal accounts and/or does your partner know for the business accounts or will it all be lost when you are no longer around? When you are gone who will inherit your digital property? Do you want to control who does and what they do with it? It is estimated that most individuals in developed countries will create approximately 88 GB of data in their lifetime. This includes Twitter tweets, Facebook posts, bookmarks, photos, artwork, logos, videos, blogs, email, etc. It is also estimated that less than 35% of Americans have a will, trust or power of attorney, to take care of their things when they pass. What then will happen to all this digital property? If not prepared for, these digital possessions, expressions, artifacts, become lost, closed down, deleted, or removed. We don’t want that because these digital assets chronicle life, history, identity, and wealth. They have value – some financial, some chronological, and some emotional. But value is something YOU want to protect.

A note of caution – there may be a lot of YOU out there. Consider doing some “curating” of your online presence – both for you and your company. Clean up some of the digital litter now to make it easier for others later. Evan Carroll and John Romano put it nicely in their book, Your Digital Afterlife, “the things you value simply may not be valuable to your heirs.” However, if you are currently in the middle or about to initiate a lawsuit, do not touch anything online. It could be considered “spoliation of evidence.”

## **10. There are No Rules and Current Laws Don’t Apply**

There are rules in the social media world – unwritten cultural norms in this digital environment. There is a language that the insiders know and there is a protocol to the conversation. Social media is about currency (what is important at this moment), authenticity (credibility and trust), and relevancy (to who is reading or interacting). Violating any of these rules can lead to a slippery slope of legal violations. Current laws do apply – because they are the laws that we have. But these laws are being challenged, changed, modified, and recreated, with new laws proposed every day – including two new laws on privacy introduced in 2011. Which ones apply to your company, your business, and your industry? Are you a regulated industry such as medical, healthcare, financial, insurance? Then compliance is even more important! Knowing is important so you can take the steps necessary to protect your company and your success including getting the right people involved at the right time.

Remember, social media is public, permanent and powerful. Have you spoke with your social media lawyer today?

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