

Social Media

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Social Media Revolution:

Socialnomics, 2009



What is Social Media?

- It is media for social interaction, using highly accessible and scalable publishing techniques.
- It uses web-based technologies to transform and broadcast media monologues into social media dialogues.
- It supports the democratization of knowledge and information and transform people from content consumers to content producers.
- "[A] group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of user-generated content."

Andreas M. Kaplan & Michael Haenlein, Users of the world, unite! The challenges and opportunities of social media, Business Horizons, Vol. 53, Issue 1, pp. 59-68 (2010).

- Businesses may refer to it as user-generated content (UGC) or consumer-generated media (CGM).
- It is believed to be a driving force in defining the current period as the Attention Age.

Source: Wikipedia



Common Forms of Social Media:

Social media can take many different forms, including Internet forums, weblogs, social blogs, microblogging, wikis, podcasts, pictures, video, rating and social bookmarking.

Kaplan and Haenlein created a classification scheme for different social media types by applying a set of theories in the field of media research (social presence, media richness) and social processes (self-presentation, self-disclosure) and concluded there six different types of social media:

- Collaborative projects
- Blogs and microblogs
- Content communities
- Social networking sites
- Virtual game worlds
- Virtual communities

Source: Wikipedia



Statistics On Use

- **Social networking presently accounts for 11 percent of time spent online in the U.S.**
- **Twitter processed more than one billion tweets in December 2009; it averages almost 40 million tweets per day.**
- **Over 25% of U.S. internet page views occurred at one of the top social networking sites in December 2009, up from 13.8% a year before.**



Distinct From Industrial Media

While both industrial media (*e.g.*, newspapers, television, film) and social media are capable of reaching both large and small audiences, social media tend to be less expensive and more accessible. Social media also tend to be more usable and “recent;” however, it is also far less permanent because it can be altered almost instantaneously via comments or edits.

Criticism For Social Media

“Out of this anarchy, it suddenly became clear that what was governing the infinite monkeys now inputting away on the Internet was the law of digital Darwinism, the survival of the loudest and most opinionated. Under these rules, the only way to intellectually prevail is by infinite filibustering.”

Andrew Keen, *The Cult of the Amateur*



Business Issues

- Need 25 fans to get vanity URL
(www.facebook.com/companyname)
- Facebook pages cannot be transferred
- Consider modifying Facebook's terms of service/privacy policy?
- Twitter imposters
- Facebook and Twitter self-help customer service
- Social media backlash
- All public tweets since Twitter's inception digitally archived at Library of Congress



Security Issues

- **Spam, malware and phishing through social media sites**
- **2010 FTC enforcement action against Twitter for data security**
- **Complaints to FTC about Facebook**



Company Use

- **Marketing versus legal/compliance**
- **Social media policies increasing**
- **Tailored to a particular company**
- **How does your company use social media?**
- **Company social media usage is being tracked and used for benchmarking**
- **Social media monitoring**
- **Use of social media in litigation**



Company Policies

- Often not publicly available
- Common elements of social media policies:
 - Identify yourself and make it clear when you are speaking on behalf of or about the company
 - Employee versus individual capacity (*e.g.*, are any employees executive officers?) – liability
 - Seek advice from the legal department or management when necessary (*e.g.*, permission to comment if the content is work-related)



Company Policies (cont'd)

- Information that can be disclosed
- Information should be accurate
- Personal liability for content
- Disclaimers are advisable, but not a shield from liability
- Do not disclose company's confidential or financial information
 - Is material, non-public information disclosed?
- Follow established company guidelines, policies and codes (*e.g.*, code of conduct/ethics, etc.)



Records Retention – What Is It?

Records retention refers to the length of time a record must be retained to satisfy the purpose for which it was created and to fulfill applicable legal requirements. While there is no general law governing document retention, there are statutory and regulatory requirements that govern the retention of certain documents in certain industries. There is also a common law duty to preserve records that arises with respect to litigation.



A records retention policy is typically comprised of a schedule setting forth the length of time documents must be retained, a framework for implementing that schedule, and a statement of the company's policy on retention.

To begin developing a document retention policy it is necessary to understand:

- **what types of records the corporation has;**
- **who controls those records;**
- **where the records are located;**
- **the types of litigation or enforcement action the company can expect; and**
- **when the records become obsolete so they can be destroyed.**



Identify The Records

While it may seem obvious, the first thing that must be done to develop a sound policy is identify the records that are regularly created and/or received by the company. A complete records inventory – which identifies the records, their location, and the format in which they are maintained – is the basis from which the records retention schedule is created.



Are Social Media “Records”?

The Federal Records Act defines a record as “recorded information, regardless of medium or characteristics, made or received by an organization that is evidence of its operations and has value regarding its retention for a specific period of time.”

Internationally, the International Standardization Organization defines records as “information created, received, and maintained as evidence and information by an organization or person, in pursuance of legal obligations or in the transaction of business.”



Content Controls, Not Media

When considering records management and social media, it is important to note that it is the content, not the media, that drives classification, retention, and disposition.



Sources of Corporate and Securities Law Requirements

- **Company policies**
 - Review existing company policies
 - Are there controls and procedures for monitoring?
- **Company agreements**
- **Antifraud provisions of the Securities Exchange Act of 1934**
- **Regulation FD (Fair Disclosure)**
- **SEC Release on Use of Company Web Sites**
- **Rule 14a-17**
- **Stock exchange requirements**



Federal Trade Commission Developments

- **FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising**
 - Advertiser liability for false or unsubstantiated statements made through endorsements
 - Advertiser liability for failure to fully disclose material connection between the advertiser and endorser that might materially affect the weight or credibility of the endorsement (*e.g.*, advertiser providing endorser with free products, employee of advertiser, etc.)
 - Endorser liability for statements made in the course of their endorsements (*e.g.*, bloggers)



Federal Trade Commission Developments (cont'd)

- **FAQs about Guides Concerning the Use of Endorsements and Testimonials in Advertising on FTC's Web site**
- **FTC's investigation of Ann Taylor's gifts to bloggers in 2010**
- **FTC review of Children's Online Privacy Protection Act**



Other Regulators

- **Financial Industry Regulatory Authority**
 - FINRA Regulatory Notice - Guidance on Blogs and Social Networking Web Sites
- **U.S. Food and Drug Administration**
 - Public Hearing on Promotion of FDA-Regulated Medical Products Using the Internet and Social Media Tools
- **U.S. Department of Defense**
 - Directive-Type Memorandum - Responsible and Effective Use of Internet-Based Capabilities



Overall Recommendations: Company Use

- Register key trademarks as Twitter usernames and Facebook vanity URLs
- Monitor social media
- Consider all disciplines/areas affected by social media
- Review company procedures and revise or establish new policies as needed
- Make sure company policies are consistent and integrated
- Train marketing, customer service, human resources, investor relations, and other employees who handle company's social media
- Take into account business considerations



Social Media and E-Discovery

- 66% of businesses are worried about eDiscovery risks posed by social networks
- 33% of businesses believe they are only partially prepared to handle these risks
- 25% of businesses admit they are not at all prepared to handle these risks
- 25% of businesses were unsure if c-level executives had any awareness of the risks associated with meeting e-Discovery requirements
- 16% of businesses admitted a total lack of e-Discovery awareness at the c-level
- Collaboration between legal and IT teams is poor, with only 13% of survey respondents claiming the two camps work “very well” together and 33% claiming they do not know *how* they work together
- 33% of companies lack a “discovery response team” that works together to fulfill e-Discovery requests

Source: Study conducted by the Economist Intelligence Unit for Deloitte Forensic Center



Litigation Risks

Numerous lawsuits have been filed in recent years related to the use of social media. As one example of potential liability exposure, several defamation suits have been filed based on internet postings. *See, e.g., Neiditch v. Acar*, N.Y. Super. Ct. July 28, 2009 (apartment building administrators brought libel suit against residents and former employees who tweeted that the administrators were involved in the death of the building's property manager); *Horizon Group Mgmt. LLC v. Bonnen*, Ill. Cir. Ct. July 20, 2009 (apartment management company brought libel suit against former resident who referred to her apartment as moldy in a tweet to her 20 followers).

Having a sound policy on social media use that is enforced may provide some protection from liability. *See, e.g., Yoder v. University of Louisville*, W.D. Ky. Aug. 3, 2009, nursing student did not violate school's confidentiality policy where she disclosed details regarding obstetric patient's labor in blog post, but did not disclose patient's name).



The Consequences For Failure To Suspend Destruction Can Be Severe

Spoliation occurs where evidence is destroyed or significantly altered when litigation or investigation is pending or reasonably foreseeable. As discussed above, a good record retention policy will address a company's obligations regarding record retention when litigation or investigation is reasonably foreseeable. Compliance with that policy can provide some protection in the event the company is accused of spoliation of evidence. The consequences of spoliation can be severe and may include criminal charges, monetary sanctions, dismissal, suppression or exclusion of evidence, or an adverse inference jury instruction.



Despite the potential for very serious consequences, recent studies have identified that many companies do not have policies in place that will adequately protect them from claims of spoliation, particularly with respect to electronic evidence and current technology.

For example, the 2009 Electronic Records Management Survey by Cohasset & Associates / ARMA, reveals the following:

- While the percentage of respondents (87%) that reported their organization's system for records hold orders includes electronic records had increased (from 57% in 2007), the majority (78%) do not have retention practices in place for emerging sources of records, including voice mail, instant messaging, blogs, social media, and web pages.
- A minority of respondents (36%) reported having formal procedures in place to ensure the appropriate destruction of electronic records.
- Only 64% have a formal system for ensuring that a hold is placed on records as may be required for litigation or investigation.
- A majority (65%) indicated that their organization had difficulty finding and retrieving information from backup and archived storage in response to court-ordered discovery.
- "Virtually all respondents (98%) now believe the process by which electronic records are managed will be 'very important', 'quite important' or 'important' in future litigation."

www.arma.org - 2009 Electronic Records Management Survey by Cohasset & Associates/ARMA



In its Third Annual ESI Trends Report, Kroll OnTrack identified the following issues:

- While most organizations have a document retention policy, a much smaller number have an ESI discovery readiness strategy and do not have a method to suspend destruction of electronic evidence.**
- Current statistics show that the vast majority of Fortune 100 companies use at least one social networking site.**

The failure to account for changing technology in records retention policies represents a significant risk.



The Basic Standard is One of Reasonableness

See Lewy v. Remington Arms Co., 836 F.2d 1104 (8th Cir. 1988) (applying a three-part test to determine whether a company's policy is reasonable. The three factors considered include whether the retention period is reasonable for the given record; whether other lawsuits been filed against the company involving similar complaints; and whether the policy was adopted in bad faith.).

As the *Lewy* case makes clear, a company is obligated to appropriately preserve documents that it knows or should know are material to litigation. A policy of wholesale document destruction is not appropriate and will not be defensible. *See Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472, 486 (S.D. Fla. 1984) (entering default judgment where the stated purpose of the document management policy was to destroy documents that might prove damaging in litigation).



Cooperation Regarding E-Discovery Is Expected

Courts expect parties to candidly communicate regarding discovery to avoid expensive and time-consuming discovery disputes. *See, e.g., Home Design Servs., Inc. v. Trumble*, 2010 WL 1435382, at *5 (D. Colo. Apr. 9, 2010) (quoting The Sedona Conference® Cooperation Proclamation and stating that counsel "bear a professional responsibility to conduct discovery in a diligent and candid manner"); *JSR Micro, Inc. v. QBE Ins. Corp.*, 2010 WL 1338152, at *3 (N.D. Cal. Apr. 5, 2010) (holding that proper response to uncertainty regarding the definition of a term in a 30(b)(6) notice would have been to meet and confer rather than to simply "assume a narrow interpretation"); *Bldg. Erection Servs. Co. v. Am. Bldgs. Co.*, 09-2104, 2010 WL 135213, *1 (D. Kan. Jan. 13, 2010) (directing counsel to read Cooperation Proclamation to understand their obligations to work cooperatively).



Cooperation (cont'd)

Agreement regarding form or production of ESI can prevent costly disputes and possible sanctions. *Compare, e.g., Secure Energy, Inc. v. Coal Synthetics*, 2010 WL 597388, at *4 (E.D. Mo. Feb. 17, 2010) (denying motion to compel production of engineering drawings in native format because plaintiff did not specify native production and defendants met discovery obligations by producing the documents in PDF) *with* . *Covad Commc'ns Co. v. Revonet, Inc.*, 2010 WL 1233501, at *3 (D.D.C. Mar. 31, 2010) (requiring re-production in native format where a party had produced spreadsheets and emails in a printed format "for no apparent reason other than to make searching their content much more difficult.").



Employee Expectations Of Privacy

Whether an employee has a reasonable expectation of privacy in electronic communications is fact-based and will likely depend on the employer's policy.

On June 17, 2010, the United States Supreme Court decided *City of Ontario v. Quon*, a case involving a SWAT-team member who had used his city-issued, text-messaging pager for personal communications. The city's general technology usage policy stated that e-mail and Internet usage would be monitored; however, there was an informal policy that supervisors would not audit employees' text messages as long as the employees paid any overage fees. Quon brought suit after a supervisor requested transcripts of his messages after noting Quon regularly had overages, even though Quon paid the overage fees. Quon claimed the City violated the Stored Communications Act and Fourth Amendment, among other claims, and the district court agreed.

The Ninth Circuit, however, reversed and held that users of text messages have a reasonable expectation of privacy in the content of their text messages and that the "operational realities" of the employer created a reasonable expectation of privacy for the employee. *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 907 (9th Cir. 2008).



***Quon* (cont'd)**

The Supreme Court reversed on narrow grounds, holding that the city's search of the text messages on the facts of this case was reasonable.

The Court, however, declined to address employee privacy expectations with respect to employer-provided communications devices, cautioning the judiciary against "elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." As the Court explained, "[r]apid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve."

While *Quon* does not offer guidance on best practices for technology use and related records management, it does highlight the importance of the employer's policies around technology use.



Employee Privacy (cont'd)

***See also Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650 (N.J. 2010) (holding e-mails sent by employee to her attorney on her work-issued laptop through a personal, web-based email account were protected by the attorney-client privilege where the employer's policy warned that e-mails were "not to be considered private or personal," but failed to address personal, web-based accounts and permitted occasional personal email use).**



Use of Social Media as Evidence

***In re S.A.*, 2010 WL 1881524 (Iowa Ct. App. May 12, 2010) (child's use of inappropriate language on Facebook after midnight offered as evidence of lack of parental supervision in termination of parental rights case).**

***Evans v. Bayer*, 684 F. Supp. 2d 1365 (S.D. Fla. 2010) (holding that student's right to off-campus free speech were violated where she was suspended for creating a group on Facebook entitled "Ms. Sarah Phelps is the worst teacher I've ever met.").**

***Sedie v. United States*, 2010 WL 1644252 (N.D. Cal. Apr. 21, 2010) (admitting evidence from MySpace and Facebook pages to dispute plaintiff's personal injury claims).**



Privacy Concerns In Litigation

EEOC v. Simply Storage Management, LLC, (S.D. Ind. May 11, 2010) (observing that "[i]t is reasonable to expect severe emotional or mental injury to manifest itself in some [social networking] content," and therefore allowing discovery of the plaintiffs' Facebook and MySpace accounts where "emotional health" was at issue. The parties disagreed on the scope of discovery, with plaintiffs fearing that the information discovered could embarrass them; however, the court discounted this concern because the information had already been shared "with at least one other person through private messages or a larger number of people through postings.")

Barnes v. CUS Nashville, LLC, 2010 WL 2265668 (M.D. Tenn. June 3, 2010) (magistrate judge offered to create a Facebook account for himself "[i]f [the parties] will accept the Magistrate Judge as a 'friend' on Facebook for the sole purpose of reviewing photographs and related comments *in camera*" in a case where plaintiff raised privacy concerns about the public dissemination of photographs posted to her Facebook account).



Questions? More Information?

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