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The Social Network:

Strategies for Coping with Social Media in Litigation

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“The scope of discovery into social media sites requires the application of basic discovery principles in a novel context.”

Offenback v. L.M. Bowman, Inc., 2011 WL 2491371 (M.D. Pa., June 22, 2011)

What Is Social Media?

- **Social Media Defined...by Social Media***
 - “The use of web-based and mobile technologies to turn communication into interactive dialogue.”
- **Characteristics of Social Media**
 - Social interaction
 - Consumer-generated media
 - Third-party content hosting
 - Inexpensive and accessible content sharing
 - Always changing

*http://en.wikipedia.org/wiki/Social_media

What Is Social Media?

- Types of Social Media*
 - Collaborative projects (Wikipedia)
 - Blogs and microblogs (Twitter)
 - Content communities (YouTube)
 - Social networking sites (Facebook)
 - Virtual game worlds (World of Warcraft)
 - Virtual social worlds (Second Life)

*Kaplan, Andreas M.; Michael Haenlein (2010). "Users of the world, unite! The challenges and opportunities of Social Media". *Business Horizons* 53(1): 59-68.

What Is Social Media?*

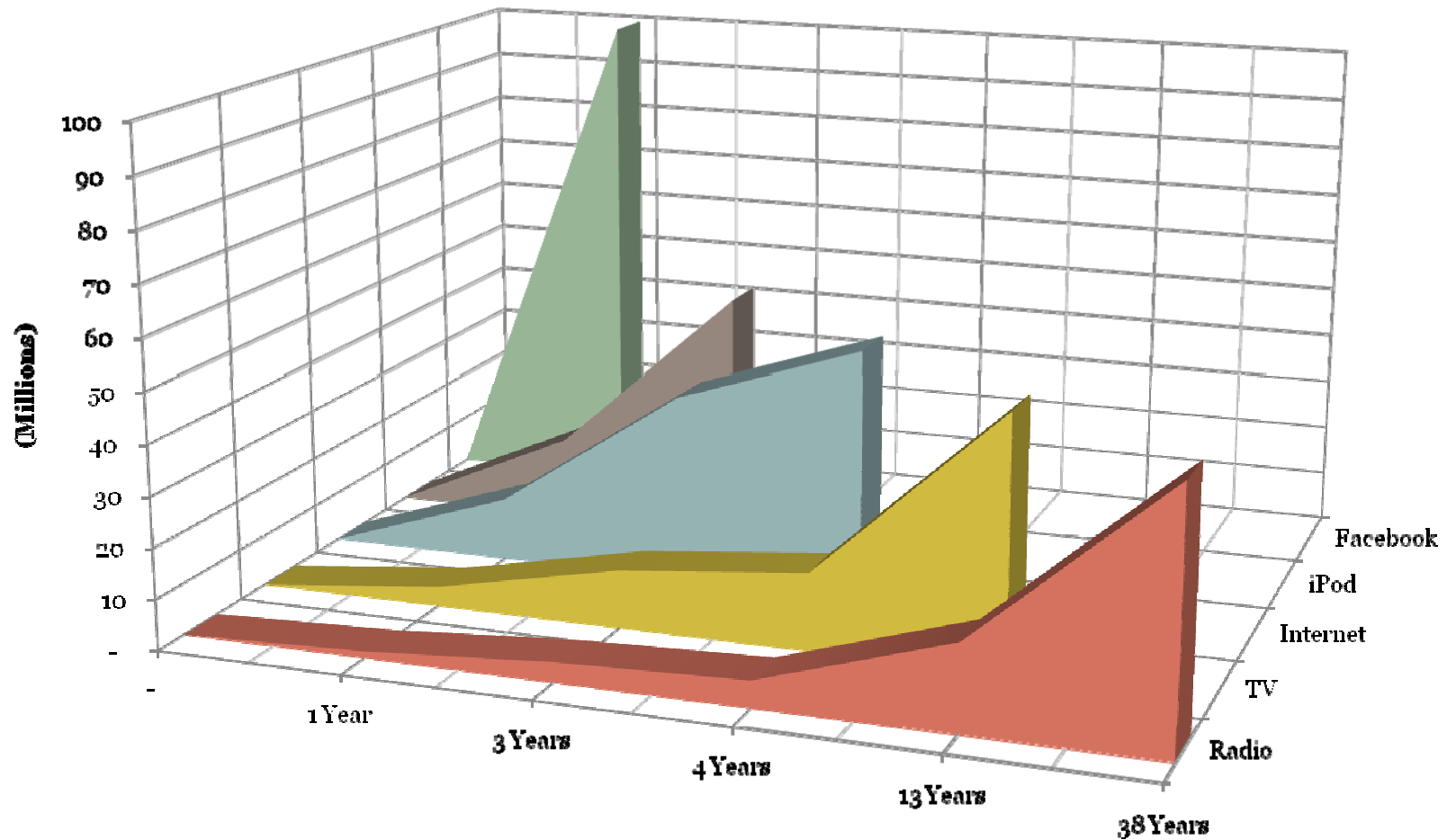


*Neal Lawson, et al, "Social Media: Very loud, very effective or very dangerous," 2011 Masters Conference for Legal Professionals – New York (permission for use granted)

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User Adoption*



*Neal Lawson, et al, "Social Media: Very loud, very effective or very dangerous," 2011 Masters Conference for Legal Professionals – New York (citing *socialnomics.com*; Facebook timeline <http://www.facebook.com/press/info.php?timeline>) (permission for use granted)

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Increasingly Utilized By Companies

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The screenshot displays the Pfizer Facebook page interface. The top navigation bar includes the Facebook logo, a search bar, and links for Home, Profile, and Account. The Pfizer logo and name are prominently displayed at the top of the page content, along with a 'Like' button and the location 'New York, New York'. The main content area features a 'Wall' section with three posts from Pfizer. The first post is titled 'Risks Associated with Aspirin Discontinuation' and includes a link to 'Pfizer Think Science Now'. The second post is titled 'Family Health Center Kalamazoo' and discusses a nursing student's blog. The third post is titled '...And we're back' and mentions a page compromise. To the right of the main content, there are sections for 'Recommendations' (featuring Gayle Getty Cook), 'Birthdays' (featuring Ross Weingarten and Sarah Morrill), and 'Sponsored' content (featuring 'Our Part-Time Business' and 'CEOs Escape the Spotlight'). The left sidebar contains navigation links for Wall, Info, Friend Activity, Responsibility, News, Your Health, Science, and Careers, along with an 'About' section and a 'Likes' section.

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The Truth About Social Media

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- Use of social media is exploding
- Your employees likely use social media at home and at work
 - Employees may share confidential company information online
- Your company may use social media to advertise and connect with clients and consumers
- Consequently...

Social Media in Litigation

- Social media plays an increasing role in litigation
 - By the end of 2013, **half** of all companies will have been asked to produce material from social media websites for eDiscovery*
- You may be required to preserve social media in anticipation of litigation
- You may be required to produce current and historical social media in litigation

*www.ama.org

Trends in Social Media Cases

- **Preserving and Producing Social Media**
 - Variety of rules and statutes to consider
 - Technical challenges -- difficult to preserve; difficult to retrieve
- **Scope of Discovering Social Media**
 - Disagreement between jurisdictions
 - Privacy issues (party and non party)
- **Other Issues**
 - Ethical considerations
 - Increasing regulatory activity

Preservation and Production: Relevant Rules and Statutes

- Federal Rule of Civil Procedure 26:
 - “Parties may obtain discovery regarding any nonprivileged matter that is **relevant** to any party’s claim or defense” FRCP 26(b)(1)
 - “A party must, without awaiting a discovery request, provide to the other parties: a copy – or a description by category and location – of all documents, **electronically stored information**, and tangible things that the disclosing party has in its **possession, custody, or control** and may use to support its claims or defenses, unless the use would be solely for impeachment.” FRCP 26(a)(1)(A)(ii)
 - “*Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as **not reasonably accessible because of undue burden or cost.**” FRCP 26(b)(2)(B).

Preservation and Production: Relevant Rules and Statutes

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- Texas Rule of Civil Procedure 196.4:
 - “The responding party must produce the electronic or magnetic data that is responsive to the request and is **reasonably available** to the responding party in its ordinary course of business. If the responding party cannot – through reasonable efforts – retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the **requesting party pay the reasonable expenses** of any extraordinary steps required to retrieve and produce the information.”

Preservation and Production: Relevant Rules and Statutes

- **Stored Communications Act (SCA)**
 - Segment of Electronic Communications Privacy Act
 - Enacted in 1986 to address gaps in Fourth Amendment privacy coverage
 - “Complex, often convoluted, area of the law.”*
 - Enacted before Internet, social networks, etc.
 - Limits communication service providers’ disclosure of parties’ private communications
 - Must obtain consent to disclose to person other than “intended recipient”

**United States v. Smith*, 155 F.3d 1051, 1055 (9th Cir. 1998).

Production: Technical Challenges

Download Your Information

Get a copy of the data you've put on Facebook.

This tool lets you download a copy of your information, including your photos and videos, posts on your Wall, all of your messages, your friend list and other content you have shared on your profile. Within this zip file you will have access to your data in a simple, browseable manner. [Learn More](#) about downloading a copy of your information.

Security

This is a copy of all of the personal information you've shared on Facebook. In order to protect your information, we will ask for authentication to verify your identity.

WARNING: This file contains sensitive information. Because this download contains your profile information, you should keep it secure and take precautions when storing, sending or uploading it to any other services.

[Download](#)



Preservation Concerns

- Duty to Preserve
 - Sanctions for failure to preserve evidence
 - Spoliation of evidence
 - Degrees of culpability

- Disagreement among courts on permissible scope of discovery of social media
 - *Crispin v. Christian Audigier, Inc.*
 - *Romano v. Steelcase Inc.*
 - *EEOC v. Simply Storage Management*

Crispin v. Christian Audigier, Inc.

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- 717 F. Supp. 2d 965 (C.D. Cal. 2010)
- Denied Defendant's discovery request for private messages on Facebook and MySpace
 - Private messages are "private communications" under SCA; not discoverable
 - Wall posts and comments may be discoverable
- Distinguished "wall posts" and "comments" from private messages
- Interpreted social media communications under SCA
 - SCA applies to Facebook and MySpace

Romano v. Steelcase Inc.

- 2010 NY Slip Op 20388, 2 (N.Y. Sup. Ct. 2010)
- Plaintiff ordered by court to give consent to Facebook and MySpace to produce materials to Defendant
 - “Production of Plaintiff’s entries on her Facebook and MySpace accounts would not be violative of her right to privacy, and any such concerns are outweighed by Defendant’s need for the information”
 - Applies both to current and deleted content
- No reasonable expectation of privacy
 - Social networking sites privacy policies state that users post information at their own risk
- SCA

Example Social Media Terms and Conditions

- LinkedIn
 - “By joining LinkedIn, you voluntarily and willingly provide LinkedIn Corporation in Mountain View California, USA, certain information, including personally identifiable information, which we collect in order to provide the Services. If you have any hesitation about providing information to us and/or having your information displayed on the LinkedIn website or otherwise used in any manner permitted in this Privacy Policy and the User Agreement, you should not become a member of the LinkedIn community; and, if you are already a member, you should close your account.”

EEOC v. Simply Storage Mgmt.

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- 270 F.R.D. 430 (S.D. Ind. 2010)
- Social networking content is not shielded from discovery simply because it is “locked” or “private”
 - Expectation and intent that communication be private not a legitimate basis to shield those communications from discovery
 - Privacy concerns may be relevant to whether discovery is burdensome or has been sought for a proper purpose
- Social networking content must be produced when it is relevant to a claim or defense in the case
 - Relevance determined by substance of communication
 - Profiles, posts, private messages, pictures, videos all discoverable
 - Presumption in favor of disclosure

Other Litigation Issues

- Judges may “friend” parties to a lawsuit to determine relevant evidence
 - *Barnes v. CUS Nashville, LLC*, 2011 U.S. Dist. LEXIS 46457 (M.D. Tenn. Apr. 29, 2011)
- Several jurisdictions have identified potential ethical concerns when contacting adversaries on social media
 - Unethical for attorney to “friend” an unrepresented person under false pretenses to gain litigation information (ABCNY Formal Opinion 2010-2)
 - Unethical for attorney to request third party to “friend” a represented party (The Philadelphia Bar Association Professional Guidance Committee: Opinion 2009-02 (March 2009))

Increasing Regulatory Activity

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- **FINRA:** FINRA Notice 10-06 (recordkeeping, supervision)
- **SEC:** Social media outlets may constitute corporate communications subject to antifraud provisions
- **FTC:** Bloggers who endorse but receive gifts
- **FDA:** In progress

Strategies and Practical Tips

- Develop appropriate policies and procedures addressing use of social media
- Develop appropriate records retention policy addressing social media ESI
- Using social media in litigation

Develop Appropriate Policies and Procedures Addressing Use of Social Media

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- Develop appropriate policies and procedures addressing employees' use of social media
 - Educate employees on responsible social media use
 - Include social media policy in employee handbook
 - Consider restricting access on company premises
- Social media postings should be subject to prior review and approval

Develop Appropriate Records Retention Policy Addressing Social Media ESI

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- Create and enforce a written retention policy
 - Preserve company-sponsored social media internally
 - Act in good faith and avoid negligent failure to retain ESI
- Know relevant case law in your jurisdiction
 - Frequently revise findings; courts are increasingly addressing eDiscovery, ESI, and social media issues
- Consider employing eDiscovery experts

Using Social Media in Litigation

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- Ensure outside counsel is aware of social media implications in litigation -- affirmative and defensive uses
 - E.g., using relevant social media to discredit plaintiffs' claims
- Use caution when considering whether to “friend” or otherwise contact (prospective) adversaries via social media
 - Potential ethical implications
- Narrowly tailor requests for social media production

Q&A

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- Questions?