



CHEAT SHEET

- *Way back when.* Find your past self online – even on defunct sites – with the “wayback machine,” a web service that archives internet history.
- *Analyze yourself.* Search your name and discover the footprint you have already left, and determine whether your online habits are in need of a change.
- *Nix career-inhibiting content.* Contain or remove content that could be harmful to your personal brand.
- *Know where to draw the line.* Divide public and the private social networks and keep tidy professional pages distinct from your everyday posts.

FINDING (AND CULTIVATING) YOUR DIGITAL FOOTPRINT:

Understanding How the Internet and Social Media Impact Professional Development

By Carl Peterson “When I was growing up, my mother would always say, ‘It will go on your permanent record.’ There was no ‘permanent record.’ If there were a ‘permanent record,’ I’d never be able to be a lawyer... There is a permanent record today, and it’s called the internet.” — Alan Dershowitz

Whether you are currently in the market for a new job or are coasting into your twilight years before retirement, it is important to be fully aware of your digital footprint — which carries your name or image and is etched into the walls of the internet until the end of time. Recruiters, employers, colleagues, adversaries, employees, friends, family — the universe of people who might search your name for any reason (or for no reason at all) is virtually limitless, so being cognizant of what exists and the sort of light that it casts upon you is vitally important.

Many will be tempted to shirk this task, believing it to be irrelevant because they are either a) diligent stewards of their own name, carefully navigating their internet usage in an effort to maintain positive visibility, or b) “off the grid” because they simply do not engage in social media activities. Unfortunately, such an approach is flawed. Not all internet content originates by their own hand. Before applying for your next job or promotion (or before making your next speaking event or otherwise putting yourself “out there” for public consideration), engage in some virtual house cleaning.

Search yourself

Start with the basics: Throw some quotation marks around your full name and put it in Google. See anything that relates to you? Depending on the commonality of your name, you might not... at least not yet, and possibly not on page one. Add the state or city in which you live or practice. Tinker with how you enter your name to reflect your most common usages. The results get a little more direct now. Any articles, links to web pages that have published your name, etc. should show up here. Additionally, any LinkedIn, Facebook, Twitter, Google+ profiles will also populate (at least the public versions), as will any forgotten and perhaps mostly defunct social media profiles from now obsolete

sites (anyone remember MySpace or Friendster?).

Many of the results should be expected, and most of them are likely benign. For some, however, that is not the case. You need not scour thousands of pages of results, but at least make note of anything that you see that might be troubling or inaccurate on the first eight or 10 pages. Click over to the “Image” tab and see if there are any additional images of you that have been immortalized. Thanks to the complex search algorithms employed here, you might see some things that failed to make the initial web search. Bookmark the results so you can carry out any follow up without having to rerun your searches.

Spend some time on the “Wayback Machine,” a nonprofit internet archive of publicly maintained websites.¹ The website boasts nearly half a *trillion* archived websites, many dating back to the late 1990s when the internet was in its infancy. Thankfully these archived websites do not show up on a standard Google search, so someone would really need to do some digging to unearth anything unless they knew exactly where to look — but know that it is possible. Understand that *anything* you put on the internet in any way, shape, or form is going to exist somewhere until the end of time. Someday soon there will be an entire generation of online commenters that will realize this.

While noting your presence, also consider your absence.

Contain or remove content that will inhibit career growth

Start with your own pages and be sure they are adequately locked down. Guides to tightening these pages can be found with a simple web search, even on Facebook itself.² In this age of identity theft, this is good practice regardless of career motivations — it is borderline terrifying what you can learn about someone thanks to

a freely accessible Facebook, Twitter, or Instagram feed. If dealing with Facebook or Twitter pages that are truly personal, then consider changing the name so that you are not using the same name as the one in your resume header. Many of my military, first responder, and politically sensitive friends do this as a matter of course so that even amongst friends they are not easily identifiable. Understand that the default security settings put all of this information online for public consumption. Thanks to Facebook’s constant updates, the website tends to reset to defaults periodically so vigilance regarding your own settings is key.

If you find anything untrue, inaccurate, or simply unacceptable, you may be able to contact the webmaster directly to have the content removed. Check the site for an email or telephone number. You may have to do some drilling down onto the site itself, but if the content is bad enough it is likely worth the research and potentially the time spent making contact with whoever is running the site. If an email or phone call fails to do the trick, consider something more formal (and potentially forceful, depending on the level of untruth or offensiveness). If you find something that is troubling but is also accurate, there might not be much you can do to have it deleted — but now that you have confirmed its existence, you can take steps to address it affirmatively and control the message before someone else finds it.

These steps should be undertaken by everyone with an account to protect themselves from unintentional exposure, but unfortunately doing so



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does not mean that you are entirely in control of your own likeness and name. Remember the family reunion at Aunt Gertrude's? Facebook does. A less-than-cautious cousin tagged you in photos and now those tacky plaid shorts are readily available via the embedded search engine. What about that time you won those Huey Lewis tickets by knowing the "Phrase that Pays" on WROK? Congratulations, Caller Number Seven — your name now appears on the station's public page right above a link to this week's "War of the Roses." Fraternity and sorority pages, neighborhood groups, and other social circles often times publish photos without fully vetting them through those who appear in them, so be mindful of this as you survey the landscape. Nobody needs to see your parachute pants from your 80s block party or that Walter White costume from Halloween 2011.

These examples are certainly not the most troublesome — but there might be something that does give rise to concern. If you come across something that is less-than-flattering, delete it on your own. If you are unable to do so, reach out to your offending friend or the group admin and ask them to delete it (or, at the very least, un-tag you or modify their settings so that it cannot be so easily accessed). If you find yourself dealing with a relic of a bygone era that cannot truly be deleted or something from college that has been long since abandoned, consider changing the name and personal information of the profile so that it will not be so easily traced back to you.

There are some items that simply cannot be deleted in the United States, for now. In Europe there has been development of what has been called the "Right to be Forgotten." The Court of Justice of the European Union recognized this right in 2014, stating that in certain instances, individuals maintain a right to request removal

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of links to freely accessible websites.³ This trend, which is still developing abroad, has not yet found its way ashore in the United States. Even if this idea were to gain momentum domestically, there would likely be significant resistance and questions over whether such a right would survive First Amendment scrutiny. Before creating any content, consider whether one day you may want it to be forgotten and place it accordingly.

Use positive social media positively

If the absence of "you" in your searches is notable to you, it may also be notable to future employers. Social media can be a great tool if used properly. While many people laud sites such as Facebook, Twitter, LinkedIn, and Google+ for their social and professional uses, it is also relevant to stop and think about the sort of information people are sharing with these sites... freely. Names, birthdays, contact information, media files, detailed information about family, schedules, vacations, etc. should be eliminated from these forums.

Media sharing sites such as Instagram, Snapchat, Tumblr, Vine, and the like are likely for private consumption. Twitter can be useful in certain realms, but be mindful of your history. If you think it does not matter, look back to the news stirred up by Trevor Noah's years old tweets after he was named the new host of *The Daily Show*.⁴ Social media tends not to demonstrate context, humor, or sarcasm very well, so think before you post.

Social media policies – The basics

First and foremost, develop, implement, and maintain a thorough social media policy governing employee use. Blocking access to these sites from corporate assets under the guise of productivity concerns isn't enough — nor is it productive. It's vital to recognize that employees will access these sites, whether via smartphone, tablet, or after hours. Rather than trying to limit and stifle employee activities, companies should consider adopting a broad policy, allowing for social media presence but subject to certain limitations. Your employees can be your best recruiters, marketers, and brand ambassadors. Be open to providing access, but be clear regarding expectations and terms of use. In addition to a social media policy, consider implementing social media training as well. In addition to a written policy consider an interactive training program.

Be cognizant of overreaching in your policy or approach. It's easy to sit back and tell employees that they shouldn't speak ill of the company or management, that they're representing the company and should keep in-house matters confined to the office. Such an approach, however, could lead to potential legal issues.

While an employer of course can seek to limit exposure of certain confidential company information, the definition of such information in any policy should be clearly stated and narrowly tailored so as not to chill employee discussion of protected "concerted activity." This would include terms of employment, wages, working conditions, etc., which have been recognized as protected speech.

The fact that these discussions are taking place online instead of the breakroom does not make them any less protected.¹ As NLRB Chairman Mark G. Pearce has been noted as

saying, "social media is the new water cooler."² This is important to consider not only when drafting the policy, but also when considering discipline for employee postings. Note that a policy can — and should — encourage employees to raise any issues with management rather than sharing on social media — encouraging in-house treatment does not run afoul of the law, but a bright line prohibition of social media postings may.

In 2015 the general counsel of the NLRB issued a report concerning employer rules that cites actual policy language and draws valuable distinctions between lawful and unlawful language — it can be used as a helpful guide when drafting or reviewing your own policy.³ Any policy should also be reviewed by a labor and employment expert prior to publication.

"BAD PRESS"

In addition to being aware of the social media messages sent by employees, it's also important to be cognizant of the messages being sent by the company on social media. Obviously there are positive ways to use it; in addition to promoting products, sales, and services, social media can be an asset as a customer service outlet and a means of communicating directly with consumers. There are, however, potential pitfalls to be aware of.

In addition to the employment and labor issues covered elsewhere in this article, in-house lawyers should also note that postings on social media regarding consumer complaints or issues with products or services — these can be used to show actual or constructive notice of issues or defects with company-provided goods or services. Thus, creation of the social media profile is simply not enough on its own — a company should also focus on monitoring the interactions the

public has with the company and responding to them in kind.

The company should have a clear approach for dealing with negative social media postings. Inherent with maintaining an online presence is the risk that unhappy consumers, disgruntled employees, or simply concerned citizens will see that presence as a platform to share their issues with the company. Responses to these negative comments should be responsive, both in time and in substance, and should seek to handle the issue without escalation. The messages posted by the company are representative not only of the company's reputation, but also will likely be discoverable in any litigation matters, so any response to negativity should be measured and passed through the proper channels.

Publicly-traded companies have their own unique issues related to social media, and as such should very carefully consider any and all messages published by the company on social media. Relevant securities laws restrict the method and substance of any such postings, such laws including Rule 10(b)(5), Regulation G and Regulation FD. In 2013 the SEC issued guidance regarding the method of disclosure, providing that disclosures shared on social media qualified as "public" and in compliance with Regulation FD so long as shareholders were adequately alerted that such outlets could potentially be used as a forum for the dissemination of information.⁴ With respect to substance, postings must not include any materially false or misleading statements⁵ or improper financial disclosures.⁶ As was the case regarding employment law, the substance of these disclosures is well-settled law. Public companies should engage specialized securities counsel before moving forward with any postings.

THE RIGHT TO BE FORGOTTEN

The case underlying “The Right to be Forgotten” involved a Spanish citizen who lodged a complaint against a Spanish newspaper and Google Spain regarding an auction notice of his repossessed home that appeared in search results when Googling his name. The proceeding had been resolved years before, and he felt that the results were no longer reflective of his current situation so he requested removal. In 2014, the European Court of Justice issued a ruling recognizing that in certain circumstances, individuals have the right to request that any search engine offering services to European consumers (whether or not the company itself is based in the European Union) remove links with any information deemed “inaccurate, inadequate, irrelevant, or excessive” for the purposes of data processing.⁷ Interestingly enough, the court did not recognize a similar obligation on the part of the newspaper to delete the information, citing the differences between a search engine simply processing data and a newspaper maintaining journalistic purposes.⁸

In recognizing this right, which finds its basis in the 1995 Data Protection Directive adopted by the European Parliament,⁹ the court also recognized a limitation. The right to be forgotten is not absolute, but rather must be balanced against other factors, including the freedom of expression and the freedom of the media. The court mandated that the search engine must undertake a case-by-case assessment of the circumstances, considering the type of information in question, the sensitivity of that information in light of the individual’s private life, and the interest of the public in having access to that information.¹⁰ While Google does have this obligation in the European Union, this obligation does not extend to Google’s worldwide websites — so although the EU versions of the website may be scrubbed, the American version is not similarly edited. Accordingly, some advocates (including

an EU watchdog panel) have pressed Google to provide for application of a similar rule on a worldwide basis.¹¹

It’s clear that the idea of this right is popular with individuals, as in the first six months following the ruling Google received approximately 175,000 requests for deletion of information from EU residents.¹² In the two years since its publication, however, the case has not yet led to action in American courts recognizing a similar right. While extension to the United States has some advocates, it seems that the recognition of the right of freedom of expression protected by the First Amendment has curtailed any serious movement toward recognition of the right to be Forgotten in the United States (at least for now).

NOTES

- 1 www.nlr.gov/news-outreach/factsheets/nlr-and-social-media.
- 2 www.nytimes.com/2013/01/22/technology/employers-social-media-policies-come-under-regulatory-scrutiny.html?pagewanted=all&_r=1&.
- 3 <http://apps.nlr.gov/link/document.aspx/09031d4581b37135>.
- 4 www.sec.gov/News/PressRelease/Detail/PressRelease/1365171513574.
- 5 17 C.F.R. § 240.10b-5.
- 6 17 C.F.R. §§ 244.100-102.
- 7 http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf.
- 8 Timberg, Craig and Sarah Halzack, Right to be forgotten vs. free speech, *The Washington Post*, available at www.washingtonpost.com/business/technology/right-to-be-forgotten-vs-free-speech/2014/05/14/53c9154c-db9d-11e3-bda1-9b46b2066796_story.html (last accessed June 3, 2016).
- 9 Directive 95/46/EC of the European Parliament and the Council of 24 October 1995.
- 10 *Id.* http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf.
- 11 Scott, Mark, The Right to Be Forgotten Should Be Extended Beyond Europe, E.U. Panel Says, *The New York Times*, available at www.nytimes.com/2014/11/27/technology/right-to-be-forgotten-should-be-extended-beyond-europe-eu-panel-says.html (last accessed June 3, 2016).
- 12 *Id.*

While many people laud sites such as Facebook, Twitter, LinkedIn, and Google+ for their social and professional uses, it is also relevant to stop and think about the sort of information people are sharing with these sites... freely.

Social and other digital media can be a powerful tool to help develop yourself and further your career, but everything is best in moderation. Relying too heavily on digital impressions alone can also be problematic. Employers and colleagues will look to you to back up what you have published. Go outside. Meet people. Attend events. Speak.

Starting your own website is easy and inexpensive if it is something that interests you. Blog about something relevant to the persona you are building. Craft your LinkedIn profile to create a virtual resume that is begging to be found by a would-be employer. If your work revolves around a specific practice area that regularly pops up in the news, then post about it wherever you feel comfortable. Share news articles and updates. Publish and share. You are your own most zealous representative, and if you are not willing to get yourself noticed, nobody else will do it for you.

Having spent some time seeing what is out there and what message your online presence conveys, the next step is how to tailor that presence to help you — how to untangle the web such that it can provide you some assistance in either building or maintaining your own “brand.”

Social and other digital media can be a powerful tool to help develop yourself and further your career, but everything is best in moderation. Relying too heavily on digital impressions alone can also be problematic. Employers and colleagues will look to you to back up what you have published. Go outside. Meet people. Attend events. Speak. Embrace traditional person to person interaction.

Be person the internet says you are. Or, in the case of those plaid shorts — perhaps be someone else. **ACC**

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- 1 Available online at <https://archive.org/web/>.
- 2 www.facebook.com/help/325807937506242/.
- 3 Case C-131/12 *Google Spain SL, Google Inc. v. Agencia Espanola de Proteccion de Datos, Mario Costeja Gonzales* [2014] ECLI:EU:C:2014:317. In the ruling, the Court identified that grounds for removal may include instances where the search results appear to be inadequate, irrelevant, or no longer relevant or excessive in the light of the time that had elapsed.
- 4 <http://time.com/3764913/trevor-noah-twitter-backlash/>.

ACC EXTRAS ON... Social media

ACC Docket

Social Media Marketing: Caging the Uncaged Tweeter (Nov. 2013). www.acc.com/legalresources/resource.cfm?show=1351515

Top Ten

Top 10 Do's and Don'ts for Managing Employee Social Media Use (Dec. 2014). www.acc.com/legalresources/publications/top10/managing-employee-social-media.cfm

Top Ten Considerations When Using Social Media in the Hiring Process (May 2014). www.acc.com/legalresources/publications/top10/ttcwusmithp.cfm

Top Ten Tips and Traps of Employee Policies (June 2012). www.acc.com/legalresources/resource.cfm?show=1314074

QuickCounsel

Social Media Endorsements and the use of Hashtags (Oct. 2014). www.acc.com/legalresources/quickcounsel/social-media-endorsements-and-the-use-of-hashtags.cfm

To Tweet or Not to Tweet: Critical Social Media and Data Privacy Issues for Companies in Today's Global Economy (May 2014). www.acc.com/legalresources/quickcounsel/tontt.cfm

Social Media Governance and Compliance Best Practices (Apr. 2012). www.acc.com/legalresources/quickcounsel/smgacbp.cfm

Practice Resource

Do's and Don'ts When Preparing Employer Code of Conduct & Social Media Policies (Oct. 2013). www.acc.com/legalresources/resource.cfm?show=1360206

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