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Want To Be My Friend? Social Networking, Ethics & Discovery

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Discussion Overview

- Why Care?
- Case Law Developments
- Challenges Posed by Social Media
- Managing Social Media



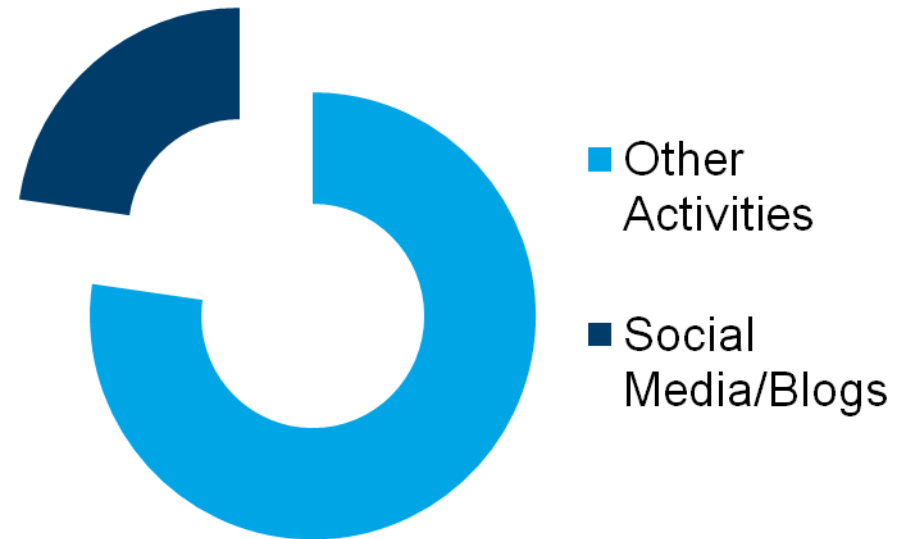


Why Care?

Why Care?

- **Social media use is becoming increasingly pervasive in our society**
- Americans **spent 22.7%** of their time online using social networking sites and blogs as of June 2010
 - » **Represents a 43% increase** from June 2009

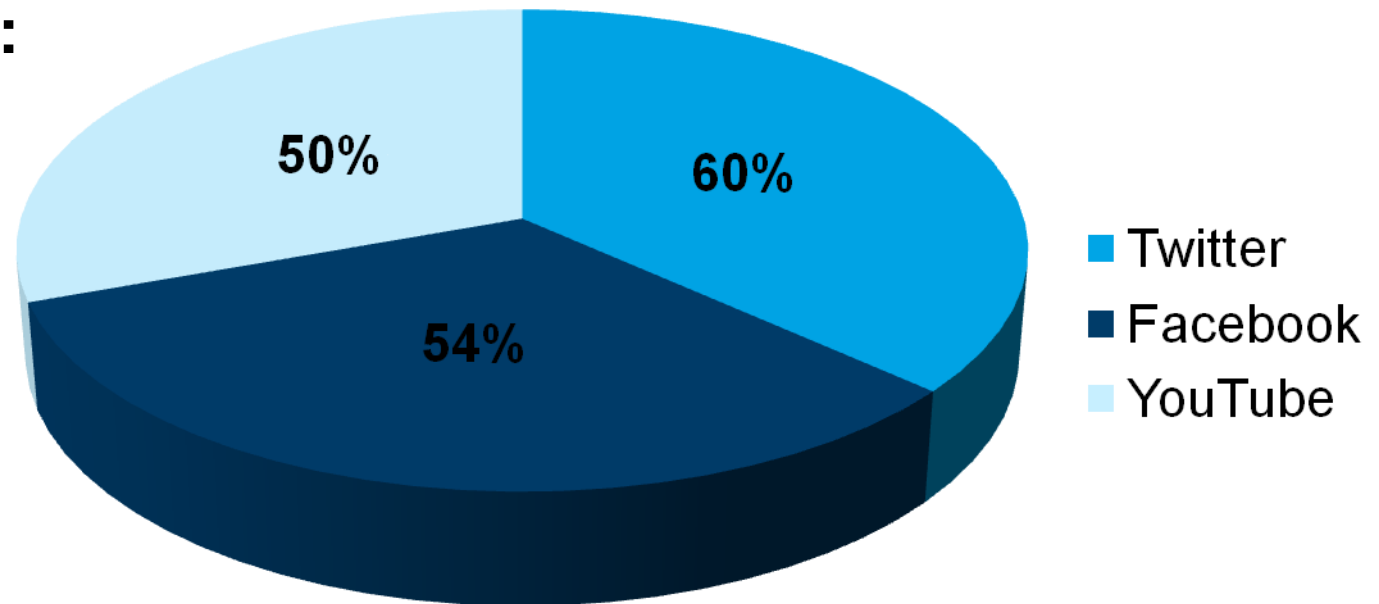
Internet Usage



The Nielsen Company,
http://blog.nielsen.com/nielsenwire/online_mobile/what-americans-do-online-social-media-and-games-dominate-activity/.

Why Care?

- **80% of Fortune Global 100 companies use some form of social media**
- **Most used:**



Source: Burson-Marsteller Fortune Global 100 Social Media Survey 2/2010

Why Care?

- **78% of respondents to a 2010 survey disagree that social media was simply “hype”**
 - » Majority of companies surveyed saw demonstrated value in using the medium to drive business and customer relations

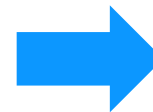
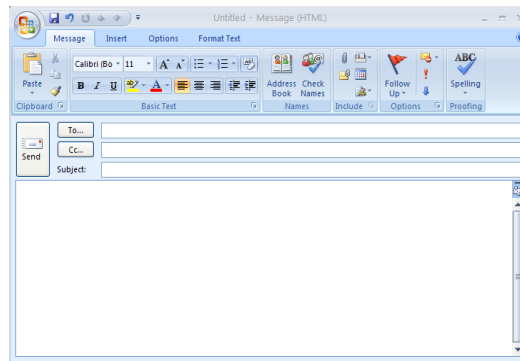
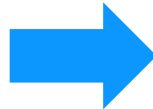
Source: Cyance, “Social Media in Business Census 2011”. Available at, <http://www.cyance.com/rsc/2011CyanceIDMSocialMediaCensus.pdf>.

Why Care?

- **Gartner advises against banning social media**, except in a very small percentage of cases where faced with security risks or clear regulation
 - » Social Media Governance: An Ounce of Prevention (December 17, 2010).
- Financial Industry Regulatory Authority (FINRA) issued Regulatory Notice 10-06 in January 2010
 - » Firms regulated by Rules 17a-3 and 17a-4 under Securities Exchange Act of 1934 **must ensure they can retain social media communications as business records**

Why Care?

- **Social media is predicted to replace e-mail as the dominant form of communication by 2014**
 - » *Gartner Predicts Social Networking to Overtake E-Mail*, Computerworld.com, July 8, 2010.



Why Care? Presents Significant Security Threats

- **Towards end of 2008, virus named “Koobface” hit Facebook and spread to several other social networking sites**
 - » Sent messages to infected users’ friends with a clickable link
 - » Once the link was clicked, the friend’s computer became infected and directed web traffic to contaminated sites which posed risks for such calamities as identity theft



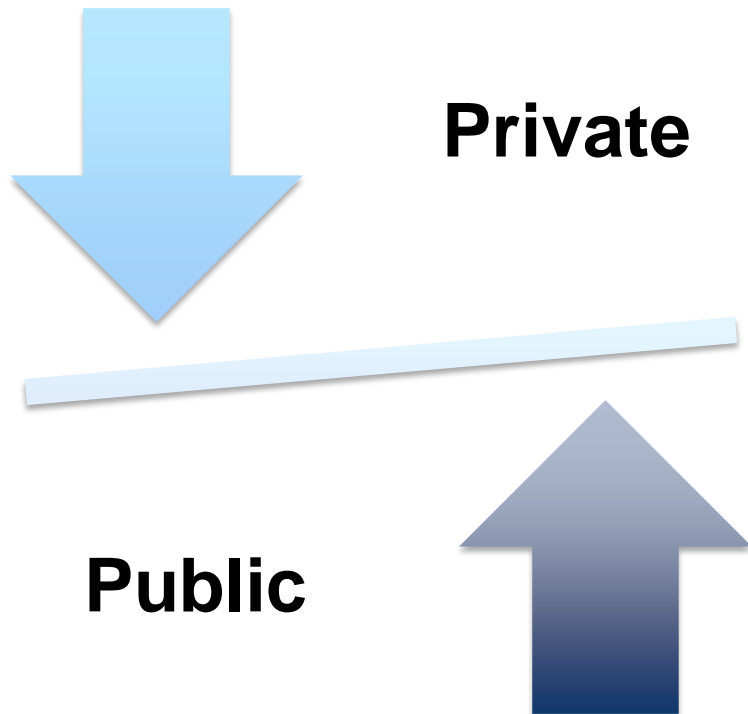
Case Law Developments

Discoverability: Social Media

- Federal Rules of Civil Procedure 26(b)(1) permits discovery of electronically stored information (ESI) “regarding any non-privileged matter that is relevant to a any party’s claim or defense.”
 - » **Information contained on social media is ESI, and therefore generally discoverable**



Discoverability: Social Media



- Social media discovery disputes often focus on this distinction
- Most courts have so far considered private material within the scope of discovery
 - » Must be relevant to the matter

Discoverability: Social Media as Evidence

- **Court ordered production of data from Facebook and MySpace account; privacy is “wishful thinking”**
 - » *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650 (Sept. 21, 2010).
- **Plaintiff ordered to preserve existing information on MySpace and Facebook; provide user names and passwords to opposing counsel**
 - » *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD (C.P. Jefferson Sept. 9, 2010).
- **Court finds private portions of Facebook and MySpace accounts to be “fair game”; orders production of user names and passwords**
 - » *Zimmerman v. Weis Markets, Inc.*, No. CV-09-1535 (C.P. Northumberland May 19, 2011).

Discoverability: Stored Communications Act

Does the Stored Communications Act prohibit production of social media?

- Stored Communications Act (SCA) prohibits Electronic Communication Service (ECS) and Remote Computing Service (RCS) providers from knowingly divulging the contents of a communication it stores unless the divulgence is to an intended recipient of such communication or express permission from the sender is obtained

Discoverability: Stored Communications Act

United States District Court,
C.D. California.
Buckley H. CRISPIN, an individual, Plaintiff,
v.
CHRISTIAN AUDIGIER, INC., a California corporation; Nervous Tattoo, Inc., a California corporation; Shop on Stage, Inc., a California corporation; Christian Audigier, an individual; 3A Watch, LLC, a Cali-

- **Plaintiff moved to quash subpoenas for private information contained on his various social networking site accounts.**
- **Court found that with respect to private messages, social networking sites acted as both ECS and RCS providers, and the SCA prohibited disclosure of privately stored information.**

-Crispin v. Audigier, Inc., 2010 WL 2293238 (C.D. Cal. May 26, 2010).



Challenges Posed by Social Media

Social Media: Preservation

- **All the discovery obligations apply, including the duty to preserve**
- **Problem...**
 - » Changes very frequently
 - » Stored on third-party servers
 - » Security and privacy settings block access
 - » Few technologies available for social media preservation



Social Media: Preservation

How do you preserve social media that is stored in the cloud by a third party service provider?

Consider issuing a litigation hold to third party service providers whenever litigation is anticipated so the evidence is preserved. However, many social media companies seem to ignore the notice.



Social Media Collection Challenges

- **Other than what might be located in browser cache files, social media data is retained by the social media service provider (e.g., MySpace, Facebook, Twitter, etc.)**
 - » If you try to get it without the consent of the owner (e.g. - found password?) your actions may violate federal (and state) wiretapping laws (“Title III” - 18 U.S.C. § § 2510-2522)



Social Media Collection: What To Do

- **Capture publicly viewable information**
 - » Investigators can freely search and extract information from an open, public page
 - » Capturing software is preferred method in recording user's internet activities by investigators
 - » Entity capturing the information must familiarize themselves with the Terms of Service for each site
- **Enlist the help of an investigator or service provider**



Ethical Challenges: Social Media

■ “False friending”

- » **New York State Bar Association; Formal Opinion 2010-2:** A lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent
 - Sept. 2010, Opinion 843: lawyer representing a client in pending litigation may access public pages of another party’s social networking website to obtain possible impeachment material
- » **Philadelphia Bar Association Professional Guidance Committee – Ethics Opinion No. 2009-02**
 - Opinion held that an attorney must disclose his true intentions when attempting to access social media, noting other ethical rules prohibit attorneys from engaging in dishonesty, fraud, deceit or misrepresentation

Ethical Challenges: Social Media & Blogs

- As an example, the Florida Bar reprimanded and **fined an attorney \$1,200 for violating ethics rules**, by writing on a courthouse blog the judge was an “evil, unfair witch” with an “ugly, condescending attitude”





Managing Social Media

Managing Social Media: Best Practices

- **Onus is on organizations to set policies regarding use in the workplace**
- **Organizations should:**
 - » Control access
 - » Monitor usage
 - » Articulate clear policies
 - » Ensure understanding
 - » Update, disseminate and make information accessible



Managing Social Media: Usage Policies

- **Develop a social media policy that clearly identifies what is and is not acceptable communication**
- **No “one size fits all” approach**
 - » Policy is as much a reflection of corporate culture as law; Must understand your company’s brand, tolerance for dissent and risk, relationship with workforce and balance that with what the law allows

Managing Social Media: Usage Policies

- **Possible policy elements include:**
 - » Clear guidelines on proper social media use
 - » Consequences of non-compliance
 - » Employee training
 - » Specifics on what employees can and cannot divulge

Managing Social Media: Usage Policies

- **Employee education and awareness are critical**
 - » Best policies are useless if employees aren't aware or don't understand them
 - » Translation to electronic space not always intuitive
- **Expect and plan for a crisis**
 - » Identify a team and a plan before disaster strikes

Managing Social Media: Challenges & Questions

- Can an employer regulate employee conduct when employee is out of the office?
- Does it matter whether the device used is personal versus company-issued?
- What confidentiality concerns may exist?



Social Media Reminder

- **As a final reminder, and perhaps a rule of thumb for all:**
 - » If you wouldn't divulge something in normal conversation with a stranger, don't share it online
 - » In the world of social media, conversations live on forever, so it's especially important to practice prudent posting!





Parting Thoughts & Questions
