

# Social Media: Implications for Intellectual Property Law

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# What Is Social Media?

- ▶ “Social Media” is a term used to describe the online interaction of individuals and exchange of user-generated content/information
- ▶ Examples of social media sites:
  - Microblogging (Twitter®)
  - Social networking (LinkedIn®, Facebook®)
  - Social bookmarking (Del.icio.us®, StumbleUpon®)
  - Social News (Digg®, Reddit®)
  - Multimedia (Flickr®, YouTube®)

twitter

Home Profile Find People Settings Help Sign out



Home



Groups

American Society of Human Genetics (ASHG)  
Human Genome Organisation (HUGO)  
International Society of Genetic Genealogy  
See all »



Profile

Edit My Profile  
View My Profile  
Recommendations



Contacts

Connections  
Imported Contacts  
Profile Organizer  
Network Statistics



Inbox



Applications

Add Connections



**Blaine Bettinger,**  
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What are you working on?

What are you doing

**Latest:** Relative Finder reports 1  
@dgmcarthur: RT @jasonbobe

Home



**benotforgot** #  
with Footnote.c  
#genealogy

2 minutes ago from v



**news scientist** T  
has arrived, and  
http://bit.ly/1Ar5

2 minutes ago from l



**cityspur** Santa  
http://short.to/v

2 minutes ago from /



**Quirkles** Aster  
not get more m  
@SchwartzNow

5 minutes ago from /



**timjennion** Twi  
http://bit.ly/CO1

6 minutes ago from t



**David Airey** 52

8 minutes ago from v

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**Extreme interviewing! Digg Dialogg with Tony Hawk**

Kevin Rose sat down with The Birdman & asked him your top questions. [Catch the full interview](#) on Monday, November 2nd!

138  
diggs



**Stressful jobs that pay badly**

money.cnn.com — High stress and a meager paycheck are just another day at the office for fundraisers, therapists and probation officers. Here are 15 of the most overworked and underpaid professions out there according to those surveyed by PayScale.com. (Submitted by NBCLocal)

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**Lieberman Steps Up: Opposing Reid's Public Option Gambit**

online.wsj.com — "We're trying to do too much at once," Mr. Lieberman said. "To put this government-created insurance company on top of everything else is just asking for trouble for the taxpayers, for the premium payers and for the national debt. I don't think we need it now." (Submitted by Blinker1315)

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**Do you believe the 2012 Mayan Prophecy?**

whowillsurvive2012.com - The Mayan Calendar predicts the end of time: 2012. See the trailer for 2012, opening 13.

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**Are We Really Coming Out of the Recession? (GRAPHIC)**

mint.com — Ask the US government if the recession is ending and you'll hear a resounding yes as the Obama administration rushes to ... (Submitted by archivedigger)

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# Rapid Growth of Social Media

As of April 2010:

- ▶ Facebook - >400 million users
- ▶ Twitter – ~106 million users
- ▶ LinkedIn – >65 million users
- ▶ Myspace - >100 million accounts



# Rapid Growth of Social Media

- ▶ As of April 2010, actor Ashton Kutcher has the largest Twitter following with 4.7 million followers:
  - Larger population than 50% of the world's countries
- ▶ 50 million Tweets a day (600/second)
- ▶ More than 8 billion minutes (195 lifetimes) are spent on Facebook each day

# Social Media and Intellectual Property Issues

## Areas of concern:

- ▶ Defamation
- ▶ Patent
- ▶ Copyright
- ▶ Trademark
- ▶ Trade Secret

# Social Media & IP

## Defamation



# Social Media & IP: Defamation

## Elements of Defamation:

1. A false statement;
2. Published to a third party without privilege or authorization;
3. With fault amounting to at least negligence; and
4. Causing special harm or constituting defamation per se.

# Social Media & IP: Defamation

- ▶ The Citizen Media Law Center tracks lawsuits involving social media
- ▶ Currently several cases involving social media and defamation
  - Twitter & defamation – 9 pending cases
  - Facebook & defamation – 9 pending cases
  - MySpace & defamation – 6 pending cases

# Social Media & IP: Defamation

## ► Example #1:

- July '09 - Tenant sued for defamation by realty company after tweeting:

@[JessB123](#) You should just come anyway. Who said sleeping in a moldy apartment was bad for you? Horizon realty thinks it's okay.

11:08 AM May 12th from web in reply to JessBergman

- Bonnen had just 20 Twitter followers
- Current status: Dismissed with prejudice; tweets were too vague
- Bonnen's Twitter account was later deleted

# Social Media & IP: Defamation

## ► Example #1 (con'td):

- Appendix A to Horizon Realty's complaint has several of Bonnen's other tweets:

6. Top five of worst flights ever. Never again spirit air.3:45

7. All of these people eating McDonalds is making me want to hurl.12:28 PM Jul 9th from mobile web

- Spirit Airlines and McDonalds didn't sue
- Emphasizes need to monitor brand while being aware of possible repercussions



# Social Media & IP: Defamation

## ► The "Streisand Effect":

- Attempt to block or remove online information results in greater dissemination of the information
  - In 2003, Barbra Streisand sued Pictopia.com for \$50 million to have aerial photos of her mansion removed from the website. Hits increased to over 420,000 over the next month
- Horizon Realty v. Bonnen:
  - Before Horizon acted, Bonnen had just 20 Twitter followers
  - After filing, the story was picked up by journalists and "Horizon Realty" hit No. 3 on Twitter's list of trending topics

# Social Media & IP: Defamation

## ► Example #2:

- Dec '09 – Hyundai Dealer sends c&d letter after reading an unhappy customer's tweets:

Route 60 hyundia in vero beach. There is not a worse call dealership on the planet. in Vero Beach, FL <http://loopt.us/mliz0g.t>  
10:20 AM Oct 8th, 2009 via Loopt

Skate factory tonight with Kman. Btw. Route 60 Hyundai sucks. @27th Ave & 5th St <http://loopt.us/U-A9iQ.t>  
3:26 PM Oct 8th, 2009 via Loopt

- Alascio has just 174 followers on Twitter

# Social Media & IP: Defamation

## ► Example #2 (cont'd):

- Attorney responded with letter pointing out protected speech and lack of injury; mentioned the "Streisand Effect"

► "You may wish to do some research on a concept known as the 'Streisand Effect,' before advising your client further, or simply include the dealership's marketing manager in on any strategy meetings before taking further action."

# Social Media & IP: Defamation

## ► Example #3:

- Oct '09 – Kim Kardashian tweets the following:

Dr. Siegal's Cookie Diet is falsely promoting that I'm on this diet. NOT TRUE! I would never do this unhealthy diet! I do QuickTrim! . . .

If this Dr. Siegal is lying about me being on this diet, what else are they lying about? Not cool! . . .

- Kardashian had 2.7 million followers
- Status: Pending

# Social Media & IP: Defamation

- ▶ Is it defamation if someone shares or re-tweets the original tweet?
  - Likely depends on element #3: "with fault amounting to at least negligence"
  - Is the re-tweet or posting negligent?

# Social Media & IP: Defamation (§230 of the CDA)

## ► CDA - Communications Decency Act:

- 230(c)(1) – “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”
- Provider of an “interactive computer service” includes social media sites, & users are “information content provider[s]”
- Encourages providers to create forums for online interaction and provides protection against liability for defamation, breach of contract, emotional distress, negligent misrepresentation, etc...
- Although CDA was later held to be unconstitutional, section 230 survived



# Social Media & IP: Defamation (§230 of the CDA)

## ► Example #1 - Doe v. MySpace (2007):

- 13-year-old created MySpace account and reported her age as 18. She met a 19-year-old through the account who later assaulted her. She sued MySpace for negligence, fraud, and negligent misrepresentation.
- The court held that the case was actually a content case although defamation was not a claim, and thus §230 immunized MySpace.
- Current status: dismissed



# Social Media & IP: Defamation (§230 of the CDA)

## ► Example #2 - Doe v. Friendfinder Network (2008):

- Friendfinder Network was sued for an allegedly false account created for Doe on the site
- Most claims were dismissed under §230, leaving only a state intellectual property claim and a Lanham Act claim.
- But the Ninth Circuit had previously held that §230 immunized against state intellectual property claims (Perfect 10, Inc. v. CC Bill, LLC)

# Social Media & IP: Defamation

## ► CDA - Communications Decency Act:

- Section 230 does NOT protect against federal criminal or intellectual property (copyright, trademark, etc) claims!
- Circuit split? Might not protect against state intellectual property claims

# Social Media & IP

Endorsements:  
Defamation's Mirror Image



# FTC Guidelines

- ▶ Effective December 1, 2009 – New FTC guidelines: “endorsers” must disclose any connections with advertisers (including on social media)
- ▶ Addresses:
  - ▶ Disingenuous positive product reviews
  - ▶ Astroturfing
  - ▶ Flogs

# FTC Guidelines

## ► Who is an “endorser”?

“For purposes of this part, an endorsement means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. **The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the ENDORSER and may be an individual, group, or institution.**”

# FTC Guidelines

- ▶ Advertisers (or employers) might be liable for misleading claims made by third-party endorsers
- ▶ Therefore a duty to educate paid endorsers, celebrities, or giveaway recipients about the FTC guidelines

# FTC Guidelines

## ► Best Practices Tip:

- Twitter – use hashtags:
  - #spon (sponsored)
  - #paid (paid)
  - #samp (sample)
- Example: We love the new & improved Widgets! Only \$9.99/per month at [www.widgets.com](http://www.widgets.com) #sponsored



# FTC Guidelines

## ► Best Practices Tip:

### ■ Blogs, Facebook, etc:

- Clearly disclose any material connection with advertisers/sponsors

### **Personal and Editorial Blogs**

- *I received* \_\_\_\_\_ *product or sample* \_\_\_\_\_ *from* \_\_\_\_\_ *company name* \_\_\_\_\_  
\_\_\_\_\_ *company name* \_\_\_\_\_ *sent me* \_\_\_\_\_ *product or sample* \_\_\_\_\_

### **Product Review Blogs**

- *I received* \_\_\_\_\_ *product or sample* \_\_\_\_\_ *from* \_\_\_\_\_ *company name* \_\_\_\_\_ *to review*
- *I was paid by* \_\_\_\_\_ *company name* \_\_\_\_\_ *to review*

- Recommendations from the Word of Mouth Marketing Association ("WOMMA")

# Social Media & IP

## Patents



# Social Media & IP: Patents

## ► Public Disclosure Via Social Media

- U.S. – 1 year to file after invention first described in a “printed publication”
- MPEP §2128: “An electronic publication, including an on-line database or Internet publication, is considered to be a ‘printed publication’...”
- BUT note: publication must be sufficiently enabling & must be accessible to those in the relevant art

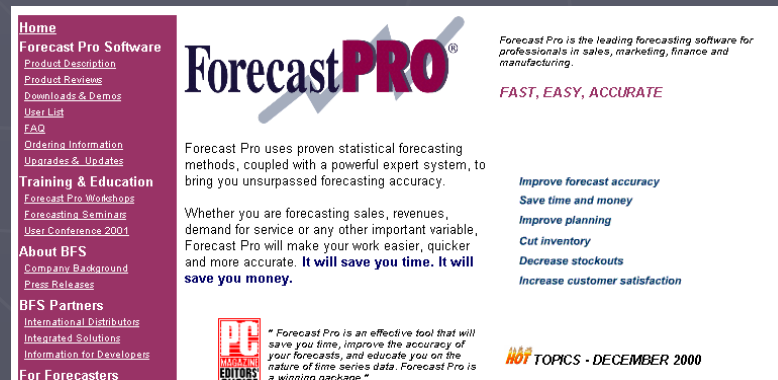
# Social Media & IP: Patents

- ▶ Examples of Possible Public Disclosure of an Invention via Social Media:
  - A shared picture of the invention
  - A blog post or Facebook note
  - Facebook or Twitter statuses (must be enabling)

# Social Media & IP: Patents

## ► Ex parte Shaouy:

- Examiner relied on a 2000 copy of a website cached in the "Wayback Machine"



- BPAI held that the reference was indeed valid prior art
- Example of an Internet reference (no social media examples...yet)

# Social Media & IP: Patents

## ► Best Practices Tip:

- Avoid posting enabling disclosures through social media
  - Educate employees
  - Monitor & remedy disclosures – the 1-year clock starts ticking!

# Social Media & IP

Copyright





# Social Media & IP: Copyright

## ► Issues:

1. Protecting the User's Content
2. Protecting the Content of Others

# Social Media & IP: Copyright

## 1. Protecting the User's Content:

- The content creator is the copyright holder of posted material under two conditions:
  1. The content is original
  2. Content satisfies the "threshold of originality"

# Social Media & IP: Copyright

## Twitter's Policy:

### **Your Rights**

You retain your rights to any Content you submit, post or display on or through the Services. By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed).

**TIP** This license is you authorizing us to make your Tweets available to the rest of the world and to let others do the same. But what's yours is yours – you own your content.

# Social Media & IP: Copyright

## Facebook's Policy:

### 2. Sharing Your Content and Information

You own all of the content and information you post on Facebook, and you can control how it is shared through your [privacy](#) and [application settings](#). In addition:

1. For content that is covered by intellectual property rights, like photos and videos ("IP content"), you specifically give us the following permission, subject to your [privacy](#) and [application settings](#): you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook ("IP License"). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.

# Social Media & IP: Copyright

## MySpace's Policy:

6.1 MySpace does not claim any ownership rights in the text, files, images, photos, video, sounds, musical works, works of authorship, applications, or any other materials (collectively, "Content") that you transmit, submit, display or publish ("post") on, through or in connection with the MySpace Services. After posting your Content on, through or in connection with the MySpace Services, you continue to retain any such rights that you may have in your Content, subject to the limited license herein. By posting any Content on, through or in connection with the MySpace Services, you hereby grant to MySpace a limited license to use, modify, delete from, add to, publicly perform, publicly display, reproduce, and distribute such Content solely on, through or in connection with the MySpace

# Social Media & IP: Copyright

## Protecting the User's Content:

- Issue #1: Can a single Tweet or a Facebook status update satisfy the threshold of originality?
  - ▶ Maybe, but Tweets for example are limited to just 140 characters
  - ▶ However, one of the world's most famous short stories (usually attributed to Ernest Hemingway) is only 33 characters:

"For sale: baby shoes, never worn."

# Social Media & IP: Copyright

## Protecting the User's Content- Questions:

- Issue #2: Can a series of postings satisfy the threshold?
- Issue #3: Is a re-tweet (a word-for-word copy of the original tweet) fair use or a violation of copyright?



# Social Media & IP: Copyright

## Protecting the User's Content:

### Twitter and the Library of Congress:

- On April 14, 2010, the LoC announced (via Twitter) that it would archive and make available for research EVERY public tweet

Library to acquire ENTIRE Twitter archive -- ALL public tweets, ever, since March 2006! Details to follow.

11:36 AM Apr 14th via web

 Reply  Retweet 

# Social Media & IP: Copyright

## Protecting the User's Content:

### Twitter and the Library of Congress:

- Under Twitter TOS, users grant Twitter a "worldwide, non-exclusive, royalty-free license (with a right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such content in any and all media or distribution methods (now known or later developed)."
- The license includes "the right for Twitter to make such Content available to other companies, organizations or individuals who partner with Twitter for the syndication, broadcast, distribution or publication of such Content on other media and services, subject to our terms and conditions for such Content use."

# Social Media & IP: Copyright

## Protecting the User's Content:

### Twitter and the Library of Congress:

- Further, the LoC falls under the library exception of section 108:
  - ▶ "it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy...of a work...if:"
    - 1. the reproduction/distribution is without a commercial purpose;
    - 2. the library is open to the public and the collections are available
    - 3. the notice of copyright in the original work remains intact or there's a legend stating that it may be protected under copyright.

# Social Media & IP: Copyright

Protecting the User's Content:

Twitter and the Library of Congress:

- Archiving Tweets at LoC is almost certainly permissible under the Copyright Act
- But what about the actions of researchers who use/reproduce/distribute those archived tweets?

# Social Media & IP: Copyright

## 2. Protecting the content of others:

- Terms of Service
- The Digital Millennium Copyright Act

# Social Media & IP: Copyright

## ► Twitter's Copyright Policy:

- "Twitter respects the intellectual property rights of others and expects users of the Services to do the same. We will respond to notices of alleged copyright infringement that comply with applicable law and are properly provided to us...We reserve the right to remove Content alleged to be infringing without prior notice and at our sole discretion..."



# Social Media & IP: Copyright

## ► Facebook's Copyright Policy:

- "We respect other people's rights, and expect you to do the same.
  1. You will not post content or take any action on Facebook that infringes or violates someone else's rights or otherwise violates the law.
  2. We can remove any content or information you post on Facebook if we believe that it violates this Statement.
  3. We will provide you with tools to help you protect your intellectual property rights. To learn more, visit our [How to Report Claims of Intellectual Property Infringement](#) page."



# Social Media & IP: Copyright

- ▶ DMCA - Digital Millennium Copyright Act:
  - Remember: Section 230 of Communications Decency Act does not apply to intellectual property claims
  - The Digital Millennium Copyright Act (DMCA) in 1998 acts as a gap filler by creating copyright safe harbors

# Social Media & IP: Copyright

## DMCA - Digital Millennium Copyright Act:

- Safe harbors created for:
  1. Provider of conduit communications (ex. ISP, telephone company)
  2. Those who cache content hosted by another (ex. Google caching)
  3. Those who host content provided by another (ex. social media websites)
  4. Search engines (Google)

# Social Media & IP: Copyright

## DMCA Procedure:

1. Copyright holder discovers allegedly protected work posted to a social media site
2. Copyright holder files a DMCA takedown notice with the site (with the required detailed information)
3. The site takes down the content

# Social Media & IP: Copyright

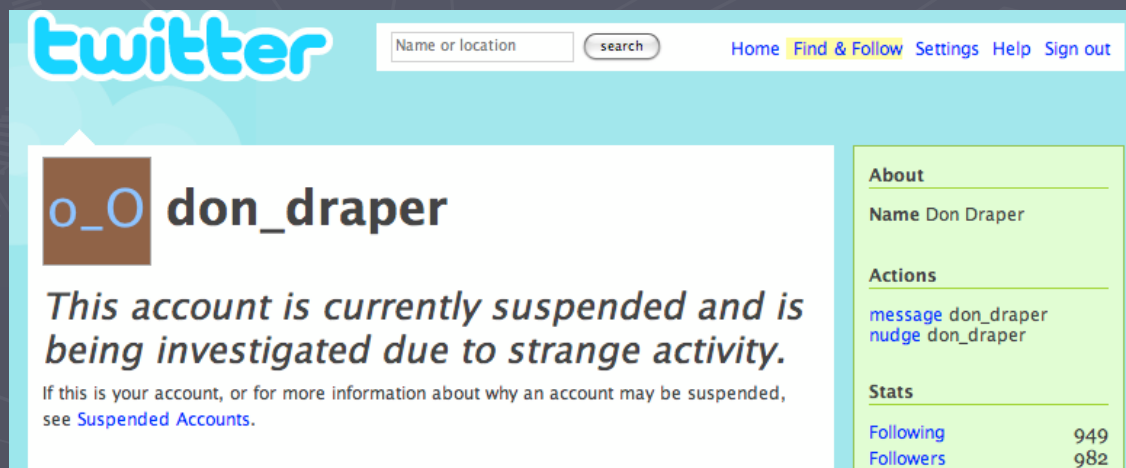
## DMCA Procedure Continued:

4. The user can file a counter-notice if he feels the content was wrongly taken down (it was original, fair use, etc...)
5. Copyright holder then has 14 days to file a lawsuit in district court
6. If no lawsuit is filed, the site must restore the removed content

# Social Media & IP: Copyright

## ► Example #1:

- August '08 – Cable channel AMC filed DMCA takedown notices with Twitter to remove accounts of users posting in voice of characters from “Mad Men”
- AMC (upon advice from marketing) later rescinded



# Social Media & IP: Copyright

## ► Example #2:

**scrabulous.™**

- 2008 - Hasbro filed DMCA takedown notice with Facebook to remove Scrabulous
- July 2008 - Facebook forwarded notice to the makers of Scrabulous, who removed the content
- Scrabulous had 500,000 daily users and was generating at least \$25,000/month
- Later re-launched as:

**lexulous.**



# Social Media & IP: Copyright

## Issue - DMCA Abuse:

- In March '09, Google reported statistics about DMCA takedown notices for its sites (including social media site YouTube):
  - 57% of notices were sent by business competitors
  - 37% of notices were not valid copyright claims



# Social Media & IP: Copyright

## ► Tweet Compilations

- Even if a single tweet is not protectable under copyright law, a gathering of tweets will likely be protectable
- Tweet compilation services

# Social Media & IP: Copyright

## ► TweetNotebook:

- A 320-page notebook containing 320 random tweets from a Twitter account
- Whose Twitter account?
  - "I agree with the Terms and Conditions and confirm I own the rights to use the tweets of this user."
    - TOS: "The Buyer agrees that as an express condition of the holding of an account with the Seller the Buyer shall not use the service offered by the Seller to infringe the intellectual property rights of others in any way."
- Will this policy be effective?





## ► But see TweetBookz:

- Posted to forum by Tweetbookz:
  - "We at [www.TweetBookz.com](http://www.TweetBookz.com) also faced this same exact issue - whether to let people access everyone's Twitter history or just their own...We chose the safer route and only allow people to print books composed of tweets from their own Twitter account."

# Social Media & IP: Copyright

## ► Live-Tweeting or Live-Blogging:

- Tweeting/writing about an event in real-time
- Legal & ethical issues
- Does the event have rules/regulations regarding media access and/or social media use?

# Social Media & IP: Copyright

## ► Live-Tweeting or Live-Blogging:

- In 2009, CSHL revised its Reporting Policy following a complaint from a news service that attendees were live-tweeting and live-blogging without having to register or obtain permission from the speaker
- All attendees now required to obtain permission from the speaker before communicating results to third-parties

# Social Media & IP: Copyright

## ► CSHL's New Policy:

**By registering for the meeting, you agree to abide by the following policy.**

Any participant intending to blog, twitter or otherwise communicate or disseminate results or discussion presented at the meeting to anonymous third parties must obtain permission from the relevant presenting author BEFORE communicating any results or discussion to third party groups, message boards, blogs or other online resources (other than your own lab or departments).



# Social Media & IP: Copyright

## ► Best Practices Tip:

Before live-tweeting or live-blogging, check the event's policy and/or confirm with organizers



# Social Media & IP

## Trademarks



# Social Media & IP: Trademarks

## ► Issues:

- Trademark Infringement
- Impersonation
- Parody
- Name Squatting

# Social Media & IP: Trademarks

## ► Trademark infringement

- The use of a mark that is identical or confusingly similar to a mark owned by another party



# Social Media & IP: Trademarks

## ► Trademark infringement

### ■ Twitter's Policy:

- "Using a company or business name, logo, or other trademark-protected materials in a manner that may mislead or confuse others or be used for financial gain may be considered a trademark policy violation. Accounts with clear intent to mislead others will be suspended; even if there is not an explicit trademark policy violation, attempts to mislead others may result in suspension."

# Social Media & IP: Trademarks

## ► Example – Oneok, Inc. & Twitter:

- Oneok, Inc. of Oklahoma sued Twitter for trademark infringement in Sept. '09 over user account "Oneok\_i" which used the company's logo
- Suit dropped the next day when Twitter suspended account
- Oneok's real Twitter account:



# Social Media & IP: Trademarks

## ► Impersonation:

- User names – possible liability for user names that confuse others about source or dilutes a trademark

# Social Media & IP: Trademarks

## ► Twitter's Impersonation Policy:

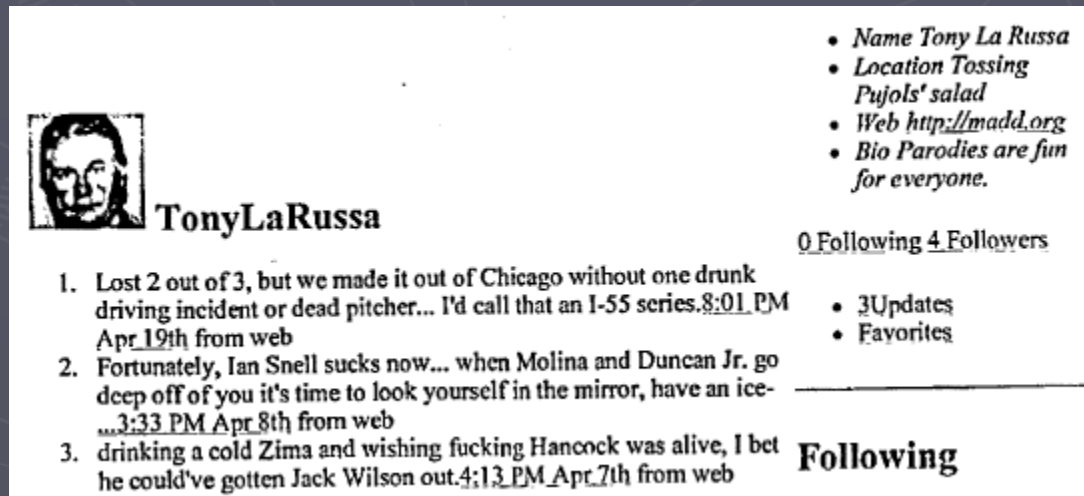
- "Impersonation is pretending to be another person or entity in order to deceive. Impersonation is a violation of the Twitter Rules and may result in permanent account suspension."




# Social Media & IP: Trademarks

## ► Example #1 – Tony LaRussa & Twitter:

- Tony LaRussa sued Twitter for trademark infringement (& other claims) in May '09 over user account "TonyLaRussa" which included LaRussa's photo
- Twitter suspended the account and the case settled



The image is a screenshot of a Twitter profile page for the user "TonyLaRussa". On the left, there is a small, pixelated black and white profile picture of a man. To the right of the picture, the name "TonyLaRussa" is displayed. Further to the right, a list of bio information is shown: "Name Tony La Russa", "Location Tossing Pujols' salad", "Web <http://madd.org>", and "Bio Parodies are fun for everyone.". Below the bio, it says "0 Following 4 Followers". Underneath this, there are two links: "3 Updates" and "Favorites". At the bottom of the profile section, the word "Following" is visible. Below the profile information, there is a list of three tweets. Each tweet starts with a number (1, 2, or 3) and contains text about baseball, including mentions of Chicago, Ian Snell, Molina, Duncan Jr., and Hancock. Each tweet also includes a timestamp and a source (e.g., "8:01 PM Apr 19th from web").

 **TonyLaRussa**

- Name Tony La Russa
- Location Tossing Pujols' salad
- Web <http://madd.org>
- Bio Parodies are fun for everyone.

0 Following 4 Followers

- 3 Updates
- Favorites

---

**Following**

1. Lost 2 out of 3, but we made it out of Chicago without one drunk driving incident or dead pitcher... I'd call that an I-55 series.8:01 PM Apr 19th from web
2. Fortunately, Ian Snell sucks now... when Molina and Duncan Jr. go deep off of you it's time to look yourself in the mirror, have an ice-...3:33 PM Apr 8th from web
3. drinking a cold Zima and wishing fucking Hancock was alive, I bet he could've gotten Jack Wilson out.4:13 PM Apr 7th from web

# Social Media & IP: Trademarks

## ► BUT See Twitter's PARODY Policy:

- "Twitter users are allowed to create parody, commentary, or fan accounts. Twitter provides a platform for its users to share and receive a wide range of ideas and content, and we greatly value and respect our users' expression. Because of these principles, we do not actively monitor users' content and will not edit or remove user content, except in cases of violations of our Terms of Service."

# Social Media & IP: Trademarks

## ► Example of a Parody Impersonation Account:

- Danyelle Freeman: restaurant critic for New York Daily News
- Twitter account "restaurantgirl" parodies Freeman

**RG restaurantgirl**

How can the iPhone be compatible with thousands of different apps, but not potato skins?

about 18 hours ago from web

**Name** Danyelle Freeman

**Location** New York

**Web** <http://www.thelif...>

**Bio** This Twitter is an unaffiliated parody of Danyelle Freeman, the real Restaurant Girl who can be found at restaurantgirl.com. She's not this clever or ambitious.

**55** **1,085**  
following followers

**Tweets**

**334**

# Social Media & IP: Trademarks

## ► Freeman Parody Continued:

- In April '09, Freeman sent cease & desist letter to imposter; account still active as of October
- In August '09, Freeman was let go by the Daily News
- Current status: Pending

# Social Media & IP: Trademarks

## ► Twitter Parody Example #2:



Home Profile Find People Settings Help Sign out

**chucknorris\_**

[+ Follow](#) [Lists](#) [Settings](#)

There are only two things that can cut diamonds: other diamonds, and Chuck Norris.

1:17 PM Apr 13th via Seismic

When Chuck Norris goes to donate blood, he declines the syringe, and instead requests a hand gun and a bucket.

1:36 AM Jan 14th via Seismic

**Name** chucknorris\_  
**Location** Chuck Norris  
**Web** <http://www.guilhe...>  
**Bio** Watch your teeth.

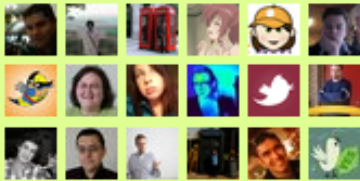
6,754 following 15,920 followers 520 listed

**Tweets** 174

**Favorites**

**Actions**  
[block chucknorris\\_](#)  
[report for spam](#)

**Following**



# Social Media & IP: Trademarks

## ► Username Squatting:

- Registering or using a user name with a bad faith intent to profit from goodwill belonging to someone else.

# Social Media & IP: Trademarks

## ► Username Squatting:

### ■ Facebook's Policy:

- "If you select a username for your account we reserve the right to remove or reclaim it if we believe appropriate (such as when a trademark owner complains about a username that does not closely relate to a user's actual name)."



# Social Media & IP: Trademarks

## ► Username Squatting:

- Twitter's Policy:

- Username squatting is prohibited by the Twitter Rules:

- "Name Squatting: You may not engage in name squatting. Accounts that are inactive for more than 6 months may also be removed without further notice."

# Social Media & IP: Trademarks

## ► Twitter-Squatting:

- Many major brands subject to brand squatting
- In 2009, Michael Werch conducted an experiment to test brand squatting via Twitter:
  - Dec. 1, 2009 – set up account “@HJ\_Heinz”
  - Tweeted 175 times, gathered 367 followers
  - Dec. 14, 2009 – account changed to “@NOThj\_Heinz”

# Social Media & IP: Trademarks

## ► Twitter-Squatting:

- Welch received an email from Twitter:
  - "It has come to our attention that your Twitter account, @username, is in violation of the Twitter Rules, specifically the section on Trademark. ...To avoid confusion regarding brand and/or official affiliation with the business or company in question, we've made the following changes to your account..."
- Damage could have been extensive

# Social Media & IP: Trademarks

## ► Twitter-Squatting:

- Lessons learned:

- Monitor your brand!

- Prevent brand squatting by engaging with social media

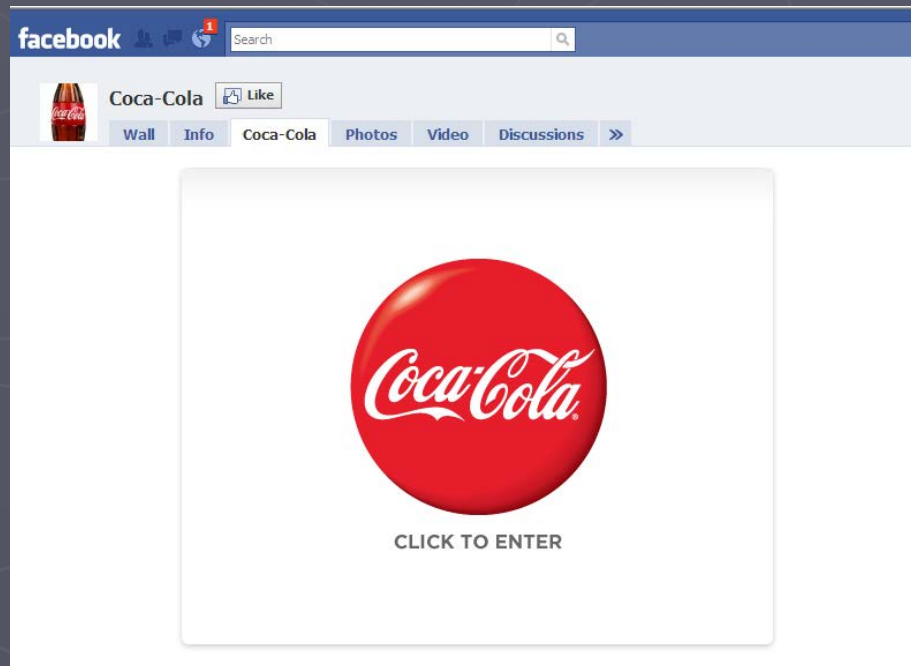
# Social Media & IP: Trademarks

## ► Engaging With Social Media:

- In August 2008, two individuals started a Coca-Cola fan page on Facebook
- In November 2008, a new Facebook policy required all pages to be authorized by or associated with the brand
- Coca-Cola asked Facebook to let the individuals keep the page as long as they shared it with Coca-Cola

# Social Media & IP: Trademarks

- ▶ Engaging With Social Media (cont'd):
  - The Coca-Cola page now has over 5 million members



# Social Media & IP

## Trade Secrets





# Social Media & IP: Trade Secrets

## ► Elements of Trade Secret Misappropriation:

1. Existence of a valid trade secret
2. Secret disclosed or used without consent
3. Defendant knew, or should have known, that the trade secret was acquired by improper means
4. Harm to the owner of the trade secret

# Social Media & IP: Trade Secrets

- ▶ Examples of Possible Trade Secret Misappropriation via Social Media:
  - A shared or posted picture of the trade secret subject matter
  - A blog post or Facebook note
  - A video posted to YouTube
  - Facebook or Twitter statuses –
    - ▶ Example from a fictional KFC employee: “just ordered the following 11 herbs and spices for delivery next Tuesday: marjoram, basil,…”

# Social Media & IP: Trade Secrets

- ▶ But what about a friend who re-posts or re-tweets the KFC tweet?
  - Likely depends upon element #3 of misappropriation claim: Defendant knew, or should have known, that the trade secret was acquired by improper means
  - And when does widely disseminated content make a trade secret no longer secret?

# Social Media & IP: Trade Secrets

- ▶ DVD Copy Control Association, Inc. v. Bunner:
  - The DVD CCA sued Bunner and several others alleging misappropriation of trade secrets under California law
  - DVD CCA was the sole licensor of DVD encryption technology
  - Decryption software (reverse engineered) appeared online & was quickly disseminated, including by Bunner

# Social Media & IP: Trade Secrets

- ▶ DVD Copy Control Association, Inc. v. Bunner:
  - CA Appellate Court:
    - ▶ Lack of evidence that the program was still a trade secret by the time Bunner posted it to his website
      - Although posting to the Internet does not automatically make a trade secret no longer a secret, this trade secret was quickly disseminated to millions
    - ▶ Lack of evidence that the decryption software was generated by improper means



# Social Media & IP: Trade Secrets

## ► DVD Copy Control Association, Inc. v. Bunner:

- Assuming that it WAS improper means:
- "it does not necessarily follow that once the information became *publicly* available that everyone else would be liable under the trade secret laws for re-publishing it simply because they knew about its unethical origins. In a case that receives widespread publicity, just about anyone who becomes aware of the contested information would also know that it was allegedly created by improper means. Under DVD CCA's construction of the law, in such a case the general public could theoretically be liable for misappropriation simply by disclosing it to someone else. This is not what trade secret law is designed to do.

# Social Media & IP: Trade Secrets

## ► DVD Copy Control Association, Inc. v. Bunner:

- Balancing the Peril and the Promise of the Internet
- Quoting District Judge Ronald Whyte:

"The court is troubled by the notion that any Internet user...can destroy valuable intellectual property rights by posting them over the Internet, especially given the fact that there is little opportunity to screen postings before they are made. Nonetheless, one of the Internet's virtues, that it gives even the poorest individuals the power to publish to millions of readers, can also be a detriment to the value of intellectual property rights. The anonymous (or judgment proof) defendant can permanently destroy valuable trade secrets, leaving no one to hold liable for the misappropriation."



# Social Media & IP: Policies

## Social Media Policy



# Social Media & IP: Policies

## ► Why it matters:

- Even if your company or organization doesn't use social media, your employees, customers, and constituents will...
- Therefore you need a risk management strategy

# Social Media & IP: Policies

## ► Today:

- Only 29% of companies have an official social media policy (Source: 2009 Manpower Survey)

# Social Media & IP: Policies

## ► Step #1 – Minimize Liability by Protecting the IP of Others:

- Educate employees and clients to recognize and respect the intellectual property of others
- Establish and enforce a social media policy that prohibits at least the following conduct:
  - Defamatory statements
  - Copyright and Trademark infringement
  - Endorsing goods without revealing material connections

# Social Media & IP: Policies

## ► Step #2 – Protect YOUR IP:

- Educate employees and clients about social media and intellectual property issues
- Monitor your brand (including copyrights, trademarks)
- Establish and enforce a social media policy that prohibits at least the following conduct:
  - Disclosure of proprietary or confidential information
  - Misuse of Trademarks

# Questions?

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