

Chapter 8.2

Legal Issues Associated with Emerging Social Interaction Technologies

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ABSTRACT

This chapter focuses on legal issues that may arise from the increasing use of social interaction technologies: prospective employers searching the Internet to discover information from candidates' blogs, personal web pages, or social networking profiles; employees being fired because of blog comments; a still-evolving federal law granting online service providers sweeping immunity from liability for user-published content; and attempts to apply the federal computer crime law to conduct on social networking sites. The U.S. legal system has been slow to adapt to the rapid proliferation of social interaction technologies. This paradox of rapid technological change and slow legal development can sometimes cause unfairness and uncertainty. Until the U.S. legal system begins to adapt to the growing use of these technologies, there will be no change.

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INTRODUCTION

This chapter focuses on legal issues that may arise from the increasing use of two specific types of social interaction technologies: blogs and social networking sites. These two Web 2.0 applications are emphasized due to a particular paradox: while there has been tremendous growth of blogs and social networking sites during the first part of the twenty-first century, rules of law develop slowly. Within this gap, laws regulating online conduct are continuing to evolve, leaving the exact status of certain activities in limbo.

BACKGROUND

The promise of the Internet as an information sharing platform (Leiner et al., 2003) has been fulfilled to a large extent in the twenty-first century by the emergence of Weblogs or blogs and social networking sites. Blogs, which originated as online diaries in which authors published information of interest

for themselves and their few readers, usually in reverse chronological order, now number over 70 million (Sifry, 2007), covering just about every conceivable topic. Blogs are interactive because they link to other content on the Internet and many have the capability for readers to post their own comments, creating the possibility for ongoing dialog.

Social networking sites allow individuals to create online profiles (also referred to as *pages*) providing information about themselves and their interests, create lists of users (often referred to as *friends*) with whom they wish to share information, and to view information published within the network by their friends (Boyd & Ellison, 2007). The two most popular social networking sites, Facebook and MySpace, together boast nearly 100 million users (Stone, 2007).

As blogs and the use of social networking sites have proliferated, so too have potential legal problems. Prospective employers are reviewing job applicants' social networking profiles to glean information not contained in résumés. Employees have been fired as a result of their personal blogs. Online services, including social networking sites, have been sued based on content provided by users. Criminal conduct has been partially extended to violating the terms of service required to join interactive sites. These situations present challenges to a legal system which historically has been slow to adapt to new technologies. As a result, many of these legal issues remain unsettled.

LEGAL ISSUES BROUGHT TO LIGHT BY EMERGING SOCIAL INTERACTION TECHNOLOGIES

Googling Job Applicants

Many employers wish to know more about job applicants than what can be discerned from a résumé and interview—and for good reason. Surveys have indicated that nearly half of job

applicants mislead employers about their work history and education (How to ferret out instances of résumé padding and fraud, 2006). Employers also seek to find individuals who will work and perform well within the organization (Piotrowski & Armstrong, 2006).

Employers are compelled to investigate the backgrounds of prospective employees because of the negligent hiring doctrine, which will impose liability on an employer when it “places an unfit person in an employment situation that entails an unreasonable risk of harm to others” (Lienhard, 1996, p. 389). Negligent hiring occurs when, prior to the time the employee is actually hired, the employer knew or should have known of the employee's unfitness. Liability is focused on the adequacy of the employer's pre-employment investigation into the employee's background (*Ponticas v. K.M.S. Invs.*, 1983). But employers' ability to investigate applicants is hindered by the reluctance of former employers to provide letters of reference in fear of defamation suits from former employees (Finkin, 2000). Traditional pre-screening techniques are also restricted by various laws. For example, an employer may not ask questions which would allow the employer to screen applicants based on a protected class (race, color, national origin, religion, or gender) under Title VII of the Civil Rights Act of 1964. The Equal Employment Opportunity Commission has issued a number of guidelines on what employers can and cannot ask in an employment interview to help ensure that employers do not discriminate on the basis of religion (29 C.F.R. § 1605.3), national origin (29 C.F.R. § 1606.6), or sex (29 C.F.R. § 1604.7).

Prospective employers are finding that with a quick search on Google, they can discover a substantial amount of additional information from a candidate's blog, personal web page, or social networking profile. Unfortunately for the candidate, some of that information may be embarrassing, or even frightening—eliminating the candidate from further consideration (Finder,

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