

Social Media Law: Significant Developments

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I. INTRODUCTION

“Social media law” is not a monolith. It is, instead, an amalgam of constitutional law, employment law, criminal law, administrative law, intellectual property law, tort law, and even the rules of discovery as applied to the ubiquitous—and relatively recent—presence and use of online and mobile platforms for sharing and creating content. Individuals use social media—Facebook, LinkedIn, Twitter, among other platforms—to keep in touch with friends and family, make professional connections, and communicate their personal, political, religious, or other views. Institutions use social media to extend their brand, recruit talent, sell their products, or communicate their message. One’s “online presence” can be a consequential factor in his or her ability to be hired. Groups of people can turn to social media to organize political protests or campaigns. Law enforcement can turn to social media as part of an investigation. And would-be fraudsters, hackers, or cyberterrorists can seek the private information embedded in users’ online accounts to carry out their schemes. The reach of social media in ordinary citizens’ lives is surprisingly vast—so too can be the reach of law into the use of social media.

Despite not being, strictly speaking, its own area of law, the term “social media law” usefully captures this complex interplay between different areas of law and social media platforms. This survey provides an overview of significant developments in social media law over the past year, concerning multiple categories: copyright, fair competition, First Amendment (including its intersection with criminal law), and employment. While these areas of law do not together comprise the universe of topics implicated by the use of social media, they are among the ones that most frequently arise in litigation.

One important takeaway from the cases examined below is the clear evidence that social media spaces, while relatively new and technologically unique, are treated similarly to other real-world spaces. Courts have not created brand new rules and paradigms to grapple with social media ubiquity and complexity, but rather have consistently applied existing legal standards to the social media space. Whether they have done so well is a separate issue, but they have done so consistently. If nothing else, this consistent application of well-established prin-

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ciples suggests that, at least in the legal world, there is little difference between online and offline conduct.

II. COPYRIGHT: CAN I MARKET YOUR PICTURES IF SOMEONE ELSE POSTS THEM ON INSTAGRAM?

Social media can raise a host of questions regarding intellectual property, including copyright. One high-profile case bears watching. According to a complaint filed in the U.S. District Court for the Southern District of New York in December 2015, artist Richard Prince took photographs that had been posted on Instagram accounts without the copyright owner's permission, enlarged and printed the photos together with the text that appeared above and below them on Instagram, displayed them at the Gagosian Gallery in New York, and sold them.¹ He was sued by Donald Graham, the author of one of the appropriated photographs, who claimed copyright infringement and requested injunctive relief (in the form of forcing Prince and the gallery to cease displaying the repurposed work) and damages. As of this writing, defendants have filed a motion to dismiss and briefing is pending.

The central question in the motion to dismiss is whether Prince's use of the photos is protected use as "appropriation art." Relying on the Second Circuit case *Cariou v. Prince*,² in which Richard Prince was also a defendant, Prince argued that "appropriation art can be considered 'transformative' as a matter of law and, therefore, make fair use of copyrighted material."³ In response, Graham argued that, even where *Cariou* did not find fair use, Prince had "copied far less and added far more" of the appropriated art.⁴

The case bears watching for several reasons. First will be the court's legal reasoning on the motion to dismiss: whether *Cariou* (and other cases) effectively foreclose a copyright infringement action on "appropriation art"—making the decision potentially generalizable and thus far-reaching—or whether, as Graham argues, more facts are needed before a disposition can be reached. Second, should the case go forward, the court will decide whether Prince's method of using the appropriated art was sufficiently "transformative" to permit a finding of fair use. And third, regardless of the outcome in the district court, the Second Circuit will almost certainly weigh in on this question, further defining the use of publicly available content on social media sites and what constitutes fair use of such content.

1. See Corrected Amended Complaint & Jury Trial Demand at 1–3, 10, *Graham v. Prince*, No. 1:15-cv-10160-SHS (S.D.N.Y. Mar. 25, 2016).

2. 714 F.3d 694, 705–06 (2d Cir. 2013) ("Transformative works . . . lie at the heart of the fair use doctrine . . .") (citation omitted).

3. Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiff's Corrected Amended Complaint at 1, *Graham v. Prince*, No. 1:15-cv-10160-SHS (S.D.N.Y. Apr. 20, 2016).

4. Plaintiff's Memorandum of Law in Opposition to Motion to Dismiss at 3, *Graham v. Prince*, No. 1:15-cv-10160-SHS (S.D.N.Y. June 3, 2016).

III. FAIR COMPETITION: WHAT IS FAIR, AND WHAT IS DECEPTIVE, IN ONLINE ADVERTISING?

The Federal Trade Commission (“FTC”) has been actively involved in defining what constitutes fair advertising in social media spaces. In December 2015, the FTC issued a policy statement addressing certain types of advertising commonly appearing in social media spaces.⁵ Relying on its broad section 5 powers, which allow it to prevent “unfair or deceptive acts or practices in or affecting commerce,”⁶ the FTC took aim at so-called “native advertising” and “sponsored content,” which, in the FTC’s view, are “often indistinguishable from news, feature articles, product reviews, editorial, entertainment, and other regular content.”⁷

The *Policy Statement* follows certain important cases, such as *In re Machinima, Inc.*,⁸ in which the FTC complained that Machinima was “paying influencers to post YouTube videos endorsing Microsoft’s Xbox One system and several games,” and that those paid “failed to adequately disclose that they were being paid for their seemingly objective opinions.”⁹ The FTC’s final consent order with Machinima (which neither admitted nor denied the FTC’s allegations) prohibits Machinima from “misrepresenting in any influencer campaign that the endorser is an independent user of the product or service being promoted.”¹⁰ The FTC cited this case in its *Policy Statement*, and it set forth various factors that it will use in determining whether online digital advertisement is misleading—that is, to determine “the net impression the advertisement conveys to reasonable consumers.”¹¹ Among those factors are (1) an ad’s “overall appearance,” (2) “the similarity of its written, spoken, or visual style to non-advertising content offered on a publisher’s site,” and (3) “the degree to which it is distinguishable from such other content.”¹² The touchstone for the FTC is “how reasonable consumers would interpret the ad in a particular situation.”¹³ Reasonableness, in turn, means that “an interpretation or response of consumers to a particular ad need not be the only one nor be shared by a majority of consumers.”¹⁴ Assisting the FTC in communicating what kind of ads will be considered fair and deceptive is the FTC’s

5. FED. TRADE COMM’N, ENFORCEMENT POLICY STATEMENT ON DECEPTIVELY FORMATTED ADVERTISEMENTS (2015) [hereinafter *POLICY STATEMENT*], https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf; see Press Release, Fed. Trade Comm’n, FTC Issues Enforcement Policy Statement Addressing “Native” Advertising and Deceptively Formatted Advertisements (Dec. 22, 2015), <https://www.ftc.gov/news-events/press-releases/2015/12/ftc-issues-enforcement-policy-statement-addressing-native>.

6. 15 U.S.C. § 45 (2012).

7. *POLICY STATEMENT*, *supra* note 5, at 2.

8. No. C-4569 (F.T.C. Mar. 16, 2016), <https://www.ftc.gov/system/files/documents/cases/160317machinimado.pdf>.

9. Press Release, Fed. Trade Comm’n, FTC Approves Final Order Prohibiting Machinima, Inc. from Misrepresenting that Paid Endorsers in Influencer Campaigns are Independent Reviewers (Mar. 17, 2016), <https://www.ftc.gov/news-events/press-releases/2016/03/ftc-approves-final-order-prohibiting-machinima-inc>.

10. *Id.*

11. *POLICY STATEMENT*, *supra* note 5, at 11.

12. *Id.*

13. *Id.*

14. *Id.*

Guide for Businesses, which contains seventeen specific examples of how content can be deceptive, and how deception can be prevented by use of appropriate disclosures.¹⁵ From a reading of the *Policy Statement*'s discussion of the factors it will use, as well as a review of the examples it provides in its *Guide for Businesses*, the FTC clearly will consider the nature of online advertisements on a fact-intensive, case-by-case basis.

IV. FIRST AMENDMENT

A. SELFIES AT THE BALLOT BOX

Social media has created rich new avenues for ordinary citizens, employers, institutions, and the government to speak. Whether this represents promise or peril for American democracy remains to be seen. As the cases below demonstrate, courts have used traditional ways of thinking about the First Amendment in social media spaces, suggesting that social media will also be a rich medium for development in First Amendment law.

In 2014, New Hampshire enacted an amendment to a voting law, specifying the illegality of voters posting pictures of their ballots in online media.¹⁶ The U.S. District Court for the District of New Hampshire struck down the law in *Rideout v. Gardner*,¹⁷ holding that the law was content-based and failed the strict-scrutiny test. The law is content-based because, according to the court, “it requires regulators to examine the content of the speech to determine whether it includes impermissible subject matter.”¹⁸ The court held that the defendant had failed to show that the law addresses “an actual problem” and therefore failed to carry his burden of showing that it promotes a compelling state interest.¹⁹ The problem that the law purportedly addressed was that of vote-buying or voter coercion, but there was no evidence that photographic images of ballots were being used for that purpose.²⁰ The court also found that the statute was not narrowly tailored because it was “vastly overinclusive,” applying almost exclusively to “those who wish to use images of their completed ballots to make a political point.”²¹

B. CYBERBULLYING LAWS

In *State v. Bishop*,²² the Supreme Court of North Carolina held that the state's cyberbullying statute violated the First Amendment. The case involved a high

15. FED. TRADE COMM'N, NATIVE ADVERTISING: A GUIDE FOR BUSINESSES (2015), <https://www.ftc.gov/tips-advice/busin.ness-center/guidance/native-advertising-guide-businesses>.

16. N.H. REV. STAT. ANN. § 659:35(I) (Supp. 2015).

17. 123 F. Supp. 3d 218 (D.N.H. 2015).

18. *Id.* at 229.

19. *Id.* at 231.

20. *Id.* at 231–33.

21. *Id.* at 234.

22. No. 223PA15, 2016 WL 3221098 (N.C. June 10, 2016) (analyzing N.C. GEN. STAT. § 14-458.1(a)(1)(D)).

school student who was being tormented by classmates in Facebook posts, often sexual in nature. The defendant was convicted under North Carolina's cyberbullying statute. Disagreeing with the courts below, the North Carolina Supreme Court held that the statute prohibited not the non-expressive conduct of the "act" of posting online, but the speech itself. In making this determination, the court reasoned that there is no substantive distinction between posting online and other traditional forms of protected speech.²³ "Such communication does not lose protection," the court opined, "merely because it involves the 'act' of posting information online, for much speech requires an 'act' of some variety—whether putting ink to paper or paint to canvas, or hoisting a picket sign, or donning a message-bearing jacket."²⁴

Moreover, the court determined that the law was a content-based restriction on speech, and that it failed strict scrutiny. Although it was undisputed that the state had a compelling interest in protecting children from online bullying, the court determined that the statute was not the least restrictive means to achieve that end. The language of the statute, the court observed, did not specify that the target of the posting must suffer an injury, or even that the target must be aware of the posting, before criminal penalties could apply.²⁵ Moreover, the statute was filled with such undefined, and thus potentially expansive, language (for example, the state offered that the word "torment" in the statute could be construed to include "annoy") that the court concluded the statute was unnecessarily broad.²⁶

C. COMMENTS AS PROTECTED SPEECH

James Plowman is the Commonwealth's Attorney in Loudoun County, Virginia, and was charged with overseeing a profile page about the Office of the Commonwealth's Attorney on social networking sites, including Facebook. The plaintiff, Brian Davison, posted a comment on the office's Facebook page, complaining about a dispute he had with members of Loudoun County Public Schools. Plowman deleted Davison's comment and blocked him from posting any additional comments. After Davison filed a lawsuit, claiming that blocking the comments violated his First Amendment rights, the office restored Davison's ability to comment and reinstated the deleted post. Plowman then moved to dismiss the complaint as moot. In *Davison v. Plowman*,²⁷ the U.S. District Court for the Eastern District of Virginia denied the motion, on the ground that voluntary cessation of the challenged conduct did not moot the case because there is a reasonable expectation that the conduct will resume. If the case moves forward, the central issue will be whether Plowman violated Davison's First Amendment right to free speech by deleting his Facebook comment and blocking further postings.

23. *Id.* at *3.

24. *Id.*

25. *Id.* at *6.

26. *Id.*

27. No. 1:16-cv-0180, 2016 WL 3167394 (E.D. Va. June 6, 2016).

By contrast, in *White v. Ortiz*,²⁸ the court denied a motion to dismiss claims of invasion of privacy and defamation where the defendant allegedly used fake Twitter handles and other online identifiers to post, putting it mildly, negatively (and often viciously) about the plaintiff. The defendant argued, among other things, that the postings were protected by the First Amendment. The court disagreed, noting that the First Amendment was not so expansive as to protect all of the defendant's Twitter content. The court otherwise applied New Hampshire law on privacy and defamation and allowed the claims to proceed.²⁹

All of these cases suggest that conduct that employs social media—posting a photograph of a ballot, engaging in harassing speech online, and censoring online speech—will be evaluated under traditional legal standards.

V. EMPLOYMENT: ONLINE CONDUCT AS PROTECTED CONCERTED ACTIVITY

In *Three D, LLC v. NLRB*,³⁰ the Second Circuit affirmed an NLRB determination that an employer committed an unfair labor practice in violation of the National Labor Relations Act (“NLRA”) when the employer, Triple Play, discharged employees for their Facebook conduct. The employee conduct at issue in the case was (1) an employee's “like” of another employee's Facebook post critical of Triple Play and (2) another employee's comment expressing agreement with the criticism. All comments concerned the employer's claimed errors in tax withholding, a subject that was also discussed by employees within the workplace. The court upheld the NLRB's determinations that the Facebook activity was protected concerted activity and therefore within the scope of the NLRA, and that the employees' actions were not “so disloyal or defamatory as to lose the protection of the Act.”³¹ The court also upheld the board's determination that the company's online communication policy, which prohibited employees from engaging in “inappropriate discussions,” could reasonably be construed by employees as prohibiting protected activity and, therefore, violated the NLRA.³²

This case is of a piece with other NLRB actions in the social media space, which are highly protective of workers' rights to engage in concerted activity. The case demonstrates that the NLRB has adapted to the ubiquitous use of social media by employees, and that, while employers may create reasonable policies to protect a company's products, services, brand, and reputation from harm and

28. No. 13-cv-251-SM, 2015 WL 5331279 (D.N.H. Sept. 14, 2015).

29. *Id.* at *4–6. Also in the realm of tort law, the U.S. District Court for the Southern District of Florida allowed multiple tort claims to proceed in *Binion v. O'Neal*, No. 15-60869-CIV-COHN/SELTZER, 2016 WL 111344 (S.D. Fla. Jan. 11, 2016), arising from former NBA star Shaquille O'Neal posting pictures, in humiliating fashion, of the plaintiff on Twitter and Instagram.

30. 629 F. App'x 33 (2d Cir. 2015). The NLRB's decision is discussed more fully in last year's survey. See Charles J. Stiegler, *Developments in Employment Law and Social Media*, 71 *BUS. LAW.* 321, 323–25 (2015).

31. *Three D, LLC*, 629 F. App'x at 36.

32. *Id.* at 38.

disparagement, a court will strike a balance in favor of employee's rights to speak critically within certain limits.

VI. LITIGATION: ARE YOUR FACEBOOK POSTS DISCOVERABLE?

In general, there are no special rules for discoverable content within social media. Like e-discovery rules in general, whether social media content is discoverable depends on general standards of reasonableness, so long as the applicable civil rules otherwise permit such discovery.

In one case that has garnered attention, *Forman v. Henkin*,³³ the New York State Appellate Division rejected a defendant's request, in a personal injury case, to private photos of plaintiff and messages by plaintiff posted on Facebook—that is, to non-public social media information. Discovery of the social media photos was prompted, at least in part, by the plaintiff's allegation that, prior to the injury, she had led an active life that was reflected in her Facebook postings, but that her activities were severely inhibited as a result of the injury. The majority held that the requests amounted to a fishing expedition because the broad requests for texts and photographs posted to friends and families were not tethered to anything other than speculation as to their relevance: that is, that the ordinary rules applied and there was nothing special in discovery about social media. But in dissent, one justice argued the opposite: that in fact there is a complex web of rules regarding discovery for social media content that simply does not exist for other kinds of documents, and that this complex web should be dismantled. As one example, New York case law provides that, at least in some circumstances, a request for private social media content must be predicated on the existence of public content, and then the private content must be examined *in camera*.³⁴ As the dissent argued: "There is no reason why the traditional discovery process cannot be used equally well where a defendant wants disclosure of information in digital form and under the plaintiff's control There is no particular difficulty in applying our traditional approach to discovery requests for information posted on social networking sites."³⁵

VII. CONCLUSION

Social media presents a rich avenue for the development of law in numerous fields. So long as it maintains its ubiquity—where generating and being exposed to content is as simple as a swipe of a thumb on a wearable device—questions regarding its use will continue to wend their way through the courts. But as the above cases demonstrate, social media is not working a revolution in the law, but rather is part of the law's slow, steady evolution.

33. 22 N.Y.S.3d 178 (App. Div. 2015).

34. *Id.* at 184–87 (Saxe, J., dissenting) (citing *Spearin v. Linmar, L.P.*, 11 N.Y.S.3d 156 (App. Div. 2015); *Richards v. Hertz Corp.*, 953 N.Y.S.2d 654 (App. Div. 2012); *Patterson v. Turner Constr. Co.*, 931 N.Y.S.2d 311 (App. Div. 2011)).

35. *Id.* at 188 (Saxe, J., dissenting).

