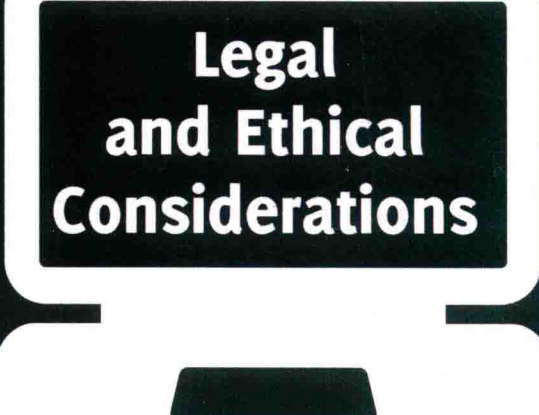


A network diagram with orange circular nodes connected by lines, each containing a white icon representing various digital and legal concepts. The icons include: a document with a pencil, a hand, a laptop, a globe, a house, a bird (Twitter), a person, a gear, a smartphone, a scales of justice, a magnifying glass with a plus sign, a star, a copyright symbol (C), a Wi-Fi symbol, a link, a hand pointing at a screen, a star, a speech bubble, an @ symbol, a play button, a gavel, a musical note, an envelope, a telephone, two people, a registered trademark symbol (R), a person, a TM symbol, an eye, and a hand.



**Legal
and Ethical
Considerations**

Regulating Social Media

Legal and Ethical Considerations

EDITED BY **Susan J. Drucker** AND **Gary Gumpert**



PETER LANG

New York • Washington, D.C./Baltimore • Bern
Frankfurt • Berlin • Brussels • Vienna • Oxford

Library of Congress Cataloging-in-Publication Data

Regulating social media: legal and ethical considerations /
edited by Susan J. Drucker, Gary Gumpert.
pages cm. — (Communication law; vol. 2)

Includes bibliographical references and index.

1. Social media—Law and legislation—United States.

I. Drucker, Susan J., editor of compilation.

II. Gumpert, Gary, editor of compilation.

KF390.5.C6.R44 343.7309'99—dc23 2012042558

ISBN 978-1-4331-1484-7 (hardcover)

ISBN 978-1-4331-1483-0 (paperback)

ISBN 978-1-4539-0972-0 (e-book)

ISSN 2153-1390

Bibliographic information published by **Die Deutsche Nationalbibliothek**.

Die Deutsche Nationalbibliothek lists this publication in the "Deutsche
Nationalbibliografie"; detailed bibliographic data is available
on the Internet at <http://dnb.d-nb.de/>.

The paper in this book meets the guidelines for permanence and durability
of the Committee on Production Guidelines for Book Longevity
of the Council of Library Resources.



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29 Broadway, 18th floor, New York, NY 10006
www.peterlang.com

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Printed in the United States of America

Regulating Social Media

COMMUNICATION LAW

Susan Drucker
General Editor

Vol. 2

The Communication Law series
is part of the Peter Lang Media and Communication list.

Every volume is peer reviewed and meets
the highest quality standards for content and production.



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Preface

A preface is somewhat of an anomaly as it is an introductory or preliminary statement to a work, but it is probably always written at the end after the authors have learned about what they intended to do and perhaps did . . . or did not. As Alice in Wonderland discovered, it's confusing to think backwards, but any book is confusing in conception because the end has first to be discovered before the beginning can be written.

A volume composed of splendid and valued contributors is a challenge sometimes difficult to complete as an overall forward-looking vision often has to be reconsidered as each chapter assumes a personality of its own and provides insights and data not considered in the beginning.

Many, in frustration, have noted that the Law always plays catch-up and Ethics is by definition, a reaction to behavior and conduct and thus a murky, but rich setting, but with the addition of Social Media, the playground gets a bit overcrowded. The combination is pushed into new vistas with the constant acceleration of Social Media—a communal collective pushed to the edges by changing and convergent communication technologies.

To attempt to keep up with technological innovation in the communication world is to assume the role of the “cockeyed optimist,” because it simply

can't be done in the understanding sense. The acceleration of technology is bewildering and the pace extraordinary. One of the Drucker-Gumpert team is reaching "four score" years—born into a world without television, computer, Internet, CD, or DVD and more. In those days our communication consciousness consisted of telegraph, radio, wired recorders, 78-rpm records, and newspapers. Over thirty years ago that co-editor wrote of "media grammar and generation gaps" in which the thesis was espoused that each of us is shaped, in part, by the technology into which we emerge from the womb; that the media environment defines our generation. We now live among the Twitter generation with a consciousness of 140-characters able to connect with virtually anyone in the world equipped with a multi-functional mobile device and a short-term memory but accompanied with a global curiosity. What are the implications of "I am therefore I Tweet?"

This media generation has nimble fingers and the ability to make a smart phone sing. When faced with technological frustration we seek anyone below the age of 12 who will miraculously know what to do. We marvel at the sense of direction of these digital natives until we realize they are, at all times, "GPS guided." . . . lost without a technological mentor or companion. Our closest relationships are reshaped by social media encounters. The engagement is a public event negotiated on-line. Pregnancies are discovered; births announced. Family feuds fueled by Facebook postings. As we go to press over 1 billion users have joined Facebook.

In short we are in a state of constant redefinition interacting with a ceaseless shifting technological environment. This volume attempts to address the complex interaction of ethics, law, and social media. We hope that we have raised fundamental questions that will remain relevant at least for several years.

It is customary to thank those innocent individuals who helped us assemble this volume and, of course, we are grateful to them and their insightful analysis. One of us also suggested that we thank our mentors beginning with Aristotle and Plato, but we desisted going in that direction because it would make the Preface too long. We thought of thanking all of our "Facebook Friends." But that would have insulted our "Linkedin" colleagues. We could thank those patient souls who have helped us enter and navigate the social media world, but we can do that online. We also thought of thanking our families, but they have suffered through those clichés before. The possibility also arose to thank our editor at Lang, but Mary Savigar and her colleagues have undergone such pledges of fealty before. We finally concluded that while there

were too many to whom we owed too much, that we would thank our parents who allowed us to enter this tumultuous world in which there is too much to learn, but which we persist on seeking to understand without any hope in sight.

Susan J. Drucker

Gary Gumpert

Great Neck, New York, Oct. 2012

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Introduction

Thoughts on Social Media, Law, and Ethics

SUSAN J. DRUCKER & GARY GUMPERT

The introduction to any volume is a strange exercise generally conceived of after the body of work has been written. By that time, hopefully, the editor(s) or author(s) are aware of the scope and vision of the work. What has emerged in the case of *Regulating Social Media: Laws and Ethics* is the complexity and immensity of trying to define the term in question. In the spirit and hope of achieving some clarity, we began the task of definition after the completion of the book.

We would, in all probability, agree on three definitional statements.

1. All media of communication are social.
2. All social media are either public and/or private, although the distinction is increasingly blurred.
3. All social media are, by definition, regulated institutionally and/or by tacitly agreed upon cultural values.

All of this assumes that we know what a social medium is—that we recognize it when it is encountered and/or when it is imposed upon us. The definitions abound.

The Merriam-Webster online dictionary defines social media as “forms of electronic communication (as Web sites for social networking and microblogging) through which users create online communities to share information,

ideas, personal messages, and other content (as videos)"(*Merriam-Webster Dictionary*, 2012). It attributes the first usage of the term to 2004.

Dictionary.com defines social media as "Web sites and other online means of communication that are used by large groups of people to share information and to develop social and professional contacts"(Dictionary.com, 2012).

Researcher danah m. boyd defines social media "as web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system. The nature and nomenclature of these connections may vary from site to site" (boyd & Ellison, 2007).

It is curious that the current usage of the term *social media* is directly linked to the Internet, but certainly the degree to which the electronic world of social communication has grown is staggering. Blogger Jeff Bullas's (2012) figures are amazing:

1. One in every nine people on Earth is on Facebook. (This number is calculated by dividing the planet's 6.94 billion people by Facebook's 750 million users.)
2. People spend 700 billion minutes per month on Facebook.
3. Each Facebook user spends on average 15 hours and 33 minutes a month on the site.
4. More than 250 million people access Facebook through their mobile devices.
5. More than 2.5 million Web sites have integrated with Facebook.
6. 30 billion pieces of content are shared on Facebook each month.
7. 300,000 users helped translate Facebook into 70 languages.

Yet the definition of social media is surprisingly elusive. One of our industry contacts, when asked for a simple definition, stated the following: "The simplest definition of 'social media' is 'any form of communication that allows many members of a community to interact freely with each other to share observations, opinions, and other nonsense'" (Cohen, 2012).

Along this line of thought, we began to reflect upon appropriate criteria that defined in and defined out the nature of social media. In the pursuit of a family history on a totally unrelated project, we came across a set of postcards, one of which has a painting on it of three 19th-century ladies sitting on a village street knitting. On the other side was a note written by the mother of one of the editors of this volume, dated December 16, 1915, and addressed to her mother.

We began to wonder who else had read these words written almost 100 years ago. It suddenly occurred to us that this was an example of an early social medium.

The postcard emerged out of Austria and Germany in the mid-19th century and became a “social craze” by the beginning of the 20th century. The early postcard included room for a handwritten message and an address on one side with a painting and later a photograph on the reverse side. The selection of the postcard required the choice of an appropriate artistic expression plus a personal, carefully handwritten message. The art of the handwritten message, of penmanship, was a direct expression of one’s persona. The postcard constituted an advertisement of the self—an interpersonal medium open to public inspection and perusal. The postcard was not simply a private means of communication but served as, and continues to be, albeit in a dwindling fashion, a public social medium. To some extent, the postcard has been driven into obsolescence by the newer technology. The iPhone camera documents each and every moment, transporting the self onto the other or the many others of Facebook.

This side excursion into the past helps define the scope of this volume—because any medium of communication defined by its publicness, its sharedness, invites, probably requires, some element of regulation or ethical monitoring. Even the postcard had to be regulated. The United States issued prestamped postal cards in 1873.

The United States Postal Service was the only one allowed to print the cards until May 19, 1898 when Congress passed the Private Mailing Card Act which then allowed private firms to produce cards. The private mailing cards cost one cent to mail instead of the letter rate which was two cents. The term “Private Mailing Card” was required to be printed on cards that were not printed by the United States Postal Service. (*The History of Postcards*)

The more interesting question was how the content of postcards was regulated. Certainly, in addition to the operational requirements—placement of the address and space given to the message, the postal authorities were the arbiters of good taste. Some degree of regulation was necessary, but with the introduction of electronic technology communication, from the telegraph onward, communication had to be regulated in order to avoid traffic chaos. Concomitantly, independent of electronic traffic control, the more public the medium becomes, the more prevalent the ethical and moral issues become.

The matter of control of communication that is simultaneously private and public is fascinating. The postcard, in contrast to its relative, the sealed letter, consisted of a personal message imbedded in a visible public conveyance. In ret-

respect, the media of personal communication can be divided into private, public, and private-public variations. With the rise of digital communication and the Internet, this division of openness or privacy becomes rather complicated. Even the relatively simple e-mail becomes a convoluted phenomenon. Is it private or public? Is it private and secure or is it available to others for inspection? Does the individual have control of his or her privacy? On the other hand, when is Facebook private and when is it public? Is to be “friended” a public act or is “unfriending” a personal denial of existence? Social media represents a multifaceted regulatory landscape influenced and determined by a *mélange* of legal, social, ethical, and often hidden dimensions.

Having said that, we return to our earlier observation that all media of communication—even those prior to the Internet—are and have been social. No medium is “un” or “not” social. All media bridge and connect, but the social nature of a medium can be and is limited by number and context.

It may be helpful to reflect upon three influential factors that have shaped and delineated the social medium milieu: convergence, community, and globalization.

Convergence refers to the merging nature of the Internet and digital technology. Watching a television program on a computer redefines what is television. Using the iPad as a book redefines the process of reading and therefore the book. Previously thought of separate and discrete media become fused with each other, and the individual platform of dissemination then serves multiple functions, thereby redefining the platform itself as a unique multifunctional medium. Diverse definitions and conceptualizations of convergence are useful, with some addressing the content, some featuring the business or corporate mergers of media industries, and some highlighting interactivity of users. “Media convergence embraces both technological and organizational convergence” (Fishman, 2010, p. 124). In his volume, *Convergence Culture*, MIT Media Studies Professor Henry Jenkins (2006) notes that, “convergence is a word...that manages to describe technological, industrial, cultural, and social changes depending on who’s speaking and what they think they are talking about” (pp. 2–3). He emphasizes resulting media trends such as unprecedented audience participation and the distribution of a single franchise through diverse forms of media. Digitalization is central to convergence. The functions once relegated to distinct silos now bleed across media. Print, photos, video, and sound are transported across the same channels and reside in the same media environments, rendering almost obsolete old distinctions long essential to regulatory and ethical considerations. Social media support text, audio, video, and images accessible via personal computer, handheld device, smart phone, or

Internet-enabled television. Convergence dissolves the limits associated with media governance.

Traditionally, the limits of free expression evolved with due consideration to the nature of the media/medium to be regulated. Social media environments are classic exemplars of convergent media. Convergent media defy traditional categorization by fusing distinct media, each with its unique grammar, syntax, and conventions. The personal letter, radio, television, sound recordings, motion pictures, telephone, facsimile, etc. are now transmitted, received, experienced through common delivery services. Social Web sites are by definition converged media environments accessible via personal computer, handheld device television set and smart phone. The content is a *mélange* of text, audio, photograph, and video. Convergence involves inter-site linking. Yet old regulatory issues of transmission and content persist (Drucker, Gumpert, & Cohen, 2010, p. 67).

Increasingly, conventional mass media and interpersonal media environments merge into a single media environment facilitated by convergence, offering infinite digital media choices. Users have been empowered by digital media to select, demand, and filter at will, thereby transforming old media and patterns of use. Production and consumption are seamlessly reversed. Consumer production becomes the norm. Social media are inherently networking platforms that serve as forms of self-expression and self-promotion, allowing individuals to broadcast news about themselves. Tweeting assumes the need or wish to receive such information and in so doing, the individual achieves public persona or celebrity status. Ultimately, this egocentric worldview is cultivated. According to a study conducted by "Crowd Science" calculating measured attitudes toward social media, particularly Myspace, Facebook, and Twitter, the attraction of social media is the emphasis on "'me' that unites fa'me' and social 'me'dia" (Solis, 2011). Lives of selectivity reshape conceptions of and commitments to community.

Community implies relationships existing in one or more sites. With increasing dependence on mediated communication, social relationships once thought of requiring contiguity are redefined to transcend location. The community of place is potentially transformed into a community of places—individual and definable sites of relationships connected through a medium of communication. The elimination of place as a requirement of community and relationship is achievable through convergent technology. The nonpropinquitous community, one not defined by the physical notion of nearness, creates a supramobile mentality. "*Me media*" offer the choice of community based on similarity, common interests, values, and relevance.

Globalization accompanies spatial redefinition and adds the complexity of governance and administration. Some element of policy and regulation accompanies communication, transcending, independent of place. An integrated world economy, technologically connected, requires a regulated system in which connection transcends place and site. Globalization of media has often been cast as a world becoming a more integrated market, an age of global technical linkage, in which old concepts of media and cultural imperialism, homogenization, and hybridization are shaped by media technologies. But media and communication industries go beyond merely facilitating overall globalization. International media and global civil society have been credited with the new insurgencies of the Arab Spring of 2011 and other instances of political contention. Media are instrumental in the transformation of social, cultural, and political structures, sometimes opening cultures for consumerism, sometimes protest, sometimes self-promotion or selective interest-based connectivity, irrespective of physical boundaries. Globalization beyond markets, goods, and services initiates the exchange of ideas. Castells's model of a space of flows asserts that material and immaterial flows have created a new spatial logic that has overtaken the historically accepted "space of places" (Castells, 1989).

The physical parameters of space are no longer a constraint to connection. Mobile devices have ushered in an era of media consumption irrespective of space. Social networking by way of mobile devices is enabling connection to social media anywhere, anytime, spread throughout the day or continuously and obsessively. Over 1.3 billion users are expected to access social media from mobile devices by 2016, almost doubling the figures for 2011, according to a report published by Juniper Research (Agarwal, 2011). By mid-2011, more than 72 million Americans had accessed social networking sites or blogs via their mobile devices, a figure representing a 126% increase in one year (Van Grove, 2011). According to a study conducted by comScore, nearly one third of all U.S. mobile users now access social media services (i.e., 40 million Americans) on an almost daily basis. comScore reports online social networking via mobile devices is growing rapidly in Europe—a 44% increase in one year in the UK, France, Germany, Italy, and Spain (comScore, 2011). The regularity of access increased as well with a 67% growth in "almost daily" mobile access to social media, an increase largely attributable to the availability of apps (comScore, 2011). In Germany, a 2012 survey revealed that 77% of Internet users in that country access social media via a mobile device occasionally, with regular or heavy usage via mobile devices more prevalent among young adults and teens (McNaughton, 2012). The Juniper report noted the following:

The trend to integrate social, local and mobile experiences is driving the geosocial phenomena. People want to find out not only what their friends are doing, but also their location and other available activities in the area. Geosocial networks are particularly suited to the mobile space as most smartphones now include GPS, and have an “always on, always connected” experience. (Agarwal, 2011)

Mobile media feeds constant connection, a trend documented in “The World Unplugged Project,” published by the International Center for Media & the Public Agenda (the world UNPLUGGED, 2012). The study documents behavior and reactions in 10 countries to the absence of mobile connection. The noted reactions include the following: “Fretful, Confused, Anxious, Irritable, Insecure, Nervous, Restless, Crazy, Addicted, Panicked, Jealous, Angry, Lonely, Dependent, Depressed, Jittery and Paranoid” (Alleyne, 2011).

The Regulatory Environment

Social media space presents a staggering breadth of legal and ethical matters to consider: copyright and trademark, along with defamation, privacy, harassment, stalking, contracts, advertising, and censorship issues, to name a few. Myriad standards of professional ethics command compliance in order for various media industries to function.

Frequently, the terms *social media* and *social network* are used interchangeably, but there is a difference between the terms, which may be significant when considered from a regulatory perspective.

Adding to the complexities of the regulatory environment is a lack of clarity with regard to the nature of communication subject to governance or sanction. Social media is a way to transmit or share information with a broad audience. Users have the ability and opportunity to produce and disseminate content. Social networking is about engagement or association with individuals sharing, based on some common interest. Most social networks require mutual consent before members are considered “connected.” Social networks feature relationships and community building. Social media, like other channels of communication, feature the delivery of information, whereas social networking foregrounds interaction and conversation. Social networking offers direct communication between those who choose to connect with each other and other like-minded people introduced in these environments. Social media is more akin to an outlet for broadcasting, while social networking is a utility for connecting with others.