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# “Liking” the Social Media Revolution

*Thaddeus Hoffmeister\**

As in other areas of society, social media has significantly influenced the law. Currently, civil and criminal cases can, and often do, turn on an attorney’s understanding and use of social media. In the realm of family law, most practitioners view social media as an essential tool—one that could serve as grounds for malpractice if ignored.<sup>1</sup> Even in legal academia—an area long resistant to change—law schools are starting to understand the impact of social media on the law and offer courses like *Social Media and Criminal Law* and *Law and Social Media*.<sup>2</sup>

The goal of this essay is not to address the myriad ways social media has influenced the legal field. It could not adequately do so, because there are now entire books examining social media’s role in such areas as criminal law and litigation.<sup>3</sup> Instead, this essay has a much more narrow focus; it will examine one feature of one social media platform to illustrate how the legal system has addressed the ever expanding role of social media within the law. More specifically, this essay will explore Facebook’s “Like” button and look at its impact on constitutional issues<sup>4</sup> as well as labor, property, and evidentiary laws.<sup>5</sup>

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\* Thaddeus Hoffmeister is a professor at the University of Dayton School of Law. He is also an author and a blog editor. *See generally* THADDEUS HOFFMEISTER, *SOCIAL MEDIA IN THE COURTROOM: A NEW ERA IN CRIMINAL JUSTICE* (2014); *see also* *Law and Social Media: Impact of Social Media on the Law*, WORDPRESS.COM, <http://lawandsocialmedia.wordpress.com/> (last updated Nov. 26, 2014, 9:26 PM).

1. *See generally* Meghan Gulczynski, *Don’t Let Social Media Derail Your Family Law Case*, NEW JERSEY L.J., Aug. 27, 2014, *available at* [http://www.njlawjournal.com/id=12026682\\_82601/Dont-Let-Social-Media-Derail-Your-Family-Law-Case](http://www.njlawjournal.com/id=12026682_82601/Dont-Let-Social-Media-Derail-Your-Family-Law-Case).
2. Currently twenty-six law schools offer courses relating to social media and its impact on the legal field. *See Law and Social Media: Impact of Social Media on the Law*, WORDPRESS.COM, <http://lawandsocialmedia.wordpress.com/law-schools/> (last updated Nov. 26, 2014, 9:26 PM).
3. *See generally* HOFFMEISTER, *supra* note 1.
4. It should be noted that other social media platforms have similar features. For example, Twitter has a Follow button and Google+ has +1 button.
5. *See generally* *Third Party Buttons*, ADDTHIS.COM, <http://support.addthis.com/customer/portal/articles/381237-third-party-buttons> (last visited, Feb. 15, 2015).

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## I. BACKGROUND

The Like button or feature first appeared on the website FriendFeed on October 23, 2007.<sup>6</sup> Facebook acquired FriendFeed and started using the button on February 9, 2009.<sup>7</sup> The Like button is symbolized by a universally recognized blue and white thumbs-up sign.<sup>8</sup> Facebook developers define the Like button as a tool that allows users to express their enjoyment, support, or approval of certain content, people, activities, or ideas.<sup>9</sup> The official Facebook description of the button is as follows:

The Like button is the quickest way for people to share content with their friends. A single click on the Like button will “like” pieces of content on the web and share them on Facebook. You can display a Share button next to the Like button to let people add a personal message and customize who they share with.<sup>10</sup>

Similarly, courts have defined “Liking” content on social media as:

[A] way for Facebook users to share information with each other . . . Liking something on Facebook “is an easy way to let someone know that you enjoy it.” . . . Liking a Facebook Page “means you are connecting to that Page. When you connect to a Page, it will appear in your timeline and you will appear on the Page as a person who likes that Page. The Page will also be able to post content into your News Feed.”<sup>11</sup>

If a user grows disenchanted with something he or she Likes, the user can Unlike the page or content. The courts have noted this fact.<sup>12</sup>

Facebook’s implementation of the Like button has stirred both positive and negative interest. Generally, many businesses and individuals promote their pages or interests in hopes of receiving a reciprocal Like. Having a large number of Likes can be a status symbol or demonstrate popularity and interest by others. As a result, many people and companies expend efforts and resources in hopes of an increased number of Likes. In fact, some com-

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6. Bret Taylor, *I Like It, I Like It*, FRIENDBLOG (Oct. 30, 2007), <http://blog.friendfeed.com/2007/10/i-like-it-i-like-it.html>.

7. Steven Musil, *Facebook Turns on Its “Like” Button*, CNET (Feb 9, 2009, 9:00 PM), <http://www.cnet.com/news/facebook-turns-on-its-like-button/>.

8. *Id.*

9. *Facebook Social Plugin*, FACEBOOK DEVELOPERS, <https://developers.facebook.com/docs/plugins/> (last visited Nov. 24, 2014).

10. *Facebook Like Button for the Web*, FACEBOOK DEVELOPERS, <https://developers.facebook.com/docs/plugins/like-button> (last visited Feb. 15, 2015).

11. *Bland v. Roberts (Bland I)*, 730 F.3d 368, 385 (4th Cir. 2013).

12. *Mattocks v. Black Entm’t Television L.L.C.*, No. 13-61582-CIV, 2014 WL 4101594, \*2 (S.D. Fla. Aug. 20, 2014).

panies offer users incentives, while others purchase Likes from websites such as WeSellLikes.com.<sup>13</sup>

Facebook banned the practice of offering incentives in exchange for Likes in 2014,<sup>14</sup> rationalizing that this decision would "ensure quality connections and help businesses reach the people who matter to them,"<sup>15</sup> and because they "want people to like Pages because they want to connect and hear from the business, not because of artificial incentives."<sup>16</sup> Facebook "believe[s] this update will benefit people and advertisers alike."<sup>17</sup>

Additional concerns surrounding the Like button arose in 2010 when a group of plaintiffs sued Facebook claiming that children should not be allowed to Like advertisements.<sup>18</sup> In 2013, Facebook faced another lawsuit over the Like button.<sup>19</sup> This time, the plaintiffs asserted that Facebook constructed its Like button using patents issued to a Dutch programmer without receiving permission.<sup>20</sup>

Finally, some assert that the Like button raises problems with user privacy. The argument here is that a user's Likes reveal too much personal information to the online community.<sup>21</sup> For example, one British study found that a user's "race, age, IQ, sexuality, personality, substance use and political views" could all be determined by examining the user's Likes.<sup>22</sup>

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13. Martha Mendoza, *How Facebook Likes Get Bought and Sold*, HUFFINGTON POST (Jan. 5, 2014, 9:41 AM), [http://www.huffingtonpost.com/2014/01/05/buy-facebook-likes\\_n\\_4544800.html](http://www.huffingtonpost.com/2014/01/05/buy-facebook-likes_n_4544800.html).
  14. Jon Loomer, *No More Facebook Like-Gating: What it Means and Why You Should Care*, JON LOOMER (Dec. 2, 2014, 3:54 PM), <http://www.jonloomer.com/2014/08/11/facebook-like-gating/>.
  15. Harshdeep Singh, *Graph API v2.1 and Updated iOS and Android SDKs*, FACEBOOK DEVELOPERS BLOG (Aug. 7, 2014, 10:15 AM), <https://developers.facebook.com/blog/post/2014/08/07/Graph-API-v2.1/>.
  16. *Id.*
  17. *Id.*
  18. Class Action Complaint, *Cohen v. Facebook*, BC444482 (Cal. App. Dep't Super. Ct., Aug. 26, 2010).
  19. *Facebook Sued Over 'Like' Button*, BBC NEWS (Feb. 11, 2013, 6:53 AM), <http://www.bbc.com/news/technology-21411622>.
  20. *Id.*
  21. See Michal Kosinski et al., *Private Traits and Attributes Are Predictable from Digital Records of Human Behavior*, 110 PROC. NAT'L ACAD. SCI. U.S. AM. 5802, 5802-05 (2013), available at <http://www.pnas.org/content/110/15/5802.full.pdf+html>.
  22. Sharon Jayson, *Facebook "Likes" Reveal More About You than You Think*, USA TODAY (Mar. 12, 2013, 9:01 AM), <http://www.usatoday.com/story/news/nation/2013/03/11/facebook-likes-predictions-privacy/1975777/>.

While all of the aforementioned issues are important, they are beyond the scope of this brief essay, because they relate primarily to Facebook's internal operations. This essay will focus less on general issues surrounding Facebook and more on the Like button's impact on specific areas of law such as free speech, labor rights, property rights, and litigation.

## II. "LIKE" AS FREE SPEECH

The First Amendment of the U.S. Constitution states that "Congress shall make no law . . . abridging the freedom of speech, or of the press."<sup>23</sup> Among other things, the First Amendment protects the rights of individuals to speak freely. The Supreme Court held that these protections apply equally to speech occurring both offline and online.<sup>24</sup> To date, several lower courts have applied First Amendment safeguards to statements made on social media.<sup>25</sup> However, prior to *Bland v. Roberts*, no court had examined the issue of whether Liking something on Facebook constitutes a statement and thus implicates First Amendment protections.<sup>26</sup> On this question, the *Bland* court ultimately held that Liking content, similar to making a statement, raised First Amendment concerns.<sup>27</sup>

*Bland* involved a contested sheriff's election in Hampton, Virginia.<sup>28</sup> The defendant was B.J. Roberts, the city sheriff of Hampton, who was running for reelection against Jim Adams.<sup>29</sup> The plaintiffs were employees of the

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23. U.S. CONST. amend. I.

24. See *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997).

25. See, e.g., *Mattingly v. Milligan*, No. 4:11CV00215 JLH, 2011 WL 5184283, at \*2-4 (E.D. Ark. Nov. 1, 2011) (Mattingly referred directly to the firing of various employees on her Facebook wall. "Two minutes after this post, Mattingly posted another comment: 'I am trying [sic] my heart goes out to the ladies in my office that were told by letter they were no longer needed . . . It's sad.'" There, the court held that Mattingly's specific post was an expression of constitutionally protected speech.); *Gresham v. City of Atlanta*, 1:10-CV-1301-RWS-ECS, 2011 WL 4601022, at \*2 (N.D. Ga. Aug. 29, 2011), report and recommendation adopted in part, rejected in part on other grounds by No. 1:10-CV-1301-RWS, 2011 WL 4601020 (N.D. Ga. Sep. 30, 2011) (noting that the plaintiff posted: "Who would like to hear the story of how I arrested a forgery perp [sic] at Best Buy online to find out later at the precinct that he was the nephew of an Atlanta Police Investigator . . . ?" The district court adopted the Magistrate Judge's recommendation that although the statement was a close question, it constituted enough speech to be considered speaking out as a matter of public concern.).

26. *Bland I*, 730 F.3d 368, 384-85 (4th Cir. 2013).

27. *Id.* at 386.

28. *Id.* at 385-86.

29. *Id.* at 371-72.

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sheriff's office who supported Adams during the election.<sup>30</sup> Upon his reelection, Roberts fired the Adams supporters in his office and they subsequently brought suit against him in federal court.<sup>31</sup> The plaintiffs claimed Roberts retaliated against them for supporting his electoral opponent, which violated their First Amendment rights.<sup>32</sup>

One of the key issues was whether Liking a Facebook page was sufficient speech to merit constitutional protection.<sup>33</sup> This issue arose because two of the six plaintiffs demonstrated their support of Adams by Liking his campaign's Facebook page.<sup>34</sup>

In addressing the question of whether a Like constituted a statement, the trial judge said it did not and granted the defendant's motion for summary judgment.<sup>35</sup> The trial judge took a very narrow and restrictive approach to defining a statement on social media<sup>36</sup> and did not view a Like as a statement, in the literal sense. According to the trial judge, "[i]n cases where courts have found constitutional speech protections extended to Facebook posts, *actual statements* existed within the record."<sup>37</sup> The trial judge then went on to explain that when someone clicks the Like button, it is not exactly clear why or what message he or she is trying to convey.<sup>38</sup> As discussed in the Background section of this essay, people Like things for different reasons. Here, the trial court said that it "will not attempt to infer the actual content of [the deputy sheriff's] posts from one click of a button . . . ."<sup>39</sup>

It appears that the trial judge was not entirely clear on how the Like button functioned, which may be one reason why the appellate court spent a portion of its opinion explaining both Facebook and the Like button.<sup>40</sup> During the subsequent appeal to the Fourth Circuit Court of Appeals, counsel for the appellee attempted to bolster the lower court's decision by suggesting that Liking something on Facebook has different connotations depending on the person.<sup>41</sup> Thus, one could not be sure that someone who clicked on the

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30. *Id.* at 372–73.

31. *Id.*

32. *Bland I*, 730 F.3d. at 372–73.

33. *Id.* at 386.

34. *Id.*

35. *See id.*

36. *See Bland v. Roberts (Bland II)*, 857 F. Supp. 2d 599, 603 (E.D. Va. 2012).

37. *Id.* (emphasis in original).

38. *See id.* at 604.

39. *Id.*

40. *See Bland I*, 730 F.3d at 385.

41. Oral Argument at 23:52, *Bland I*, 730 F.3d 368 (No. 12-1671), available at <http://coop.ca4.uscourts.gov/OAarchive/mp3/12-1671-20130516.mp3>.

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Like button was expressing an opinion.<sup>42</sup> By way of example, counsel for the appellee asserted that people Like things for a variety of reasons.<sup>43</sup> Some do it by mistake; others do it in order to receive an award or coupon.<sup>44</sup> The Fourth Circuit found appellee's argument unpersuasive and overturned the trial judge.<sup>45</sup>

Furthermore, the appellate court determined that Liking a campaign page was not only pure speech but also symbolic expression.<sup>46</sup> The court stated that, "[t]he distribution of the universally understood 'thumbs up' symbol in association with [the] campaign page, like the actual text that liking the page produced, conveyed that [the plaintiffs] supported [the opposing party's] candidacy."<sup>47</sup>

In making its ruling in *Bland*, the Fourth Circuit Court of Appeals began by first discussing Facebook and the Like button.<sup>48</sup> The appellate court stated that "[o]nce one understands the nature of what [the plaintiff] did by [L]iking the Campaign Page, it becomes apparent that his conduct qualifies as speech."<sup>49</sup> Next, the court discussed what occurs when a user Likes something, stating that, "on the most basic level, clicking on the '[L]ike' button literally causes to be published the statement that the User '[L]ikes' something, which is itself a substantive statement."<sup>50</sup>

Finally, the court moved to the main argument and drew an analogy between online and offline conduct. Here, the court stated that "[L]iking a political candidate's campaign page communicates the user's approval of the candidate and supports the campaign by associating the user with it. In this way, it is the internet equivalent of displaying a political sign in one's front yard, which the Supreme Court has held is substantive speech."<sup>51</sup> While other courts had previously found that social media posts were protected speech, the *Bland* decision was the first to extend that protection to the Like button.<sup>52</sup>

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42. *Id.* at 22:11-22:15.

43. *Id.* at 23:52.

44. *See id.* 22:14, 26:05 (explaining that one can receive a coupon from Target for using the Like button).

45. *See Bland II*, 730 F.3d 368 at 395.

46. *Id.* at 386 (noting that prior examples of symbolic speech include wearing black armbands in *Tinker v. Des Moines*, 393 U.S. 503 (1969) and burning the American flag in *Texas v. Johnson*, 491 U.S. 397 (1989)).

47. *Id.*

48. *See id.* at 385.

49. *Id.* at 386.

50. *Id.*

51. *Bland II*, 730 F.3d 368 at 386.

52. *Mattingly v. Milligan*, No. 4:11CV00215 JLH, 2011 WL 5184283, at \*4 (E.D. Ark. Nov. 1, 2011).

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### III. “LIKE” AS CONCERTED ACTIVITY

In 1935, Congress enacted the National Labor Relations Act (NLRA)<sup>53</sup> to safeguard the rights of both employees and employers and to prevent certain detrimental labor practices from obstructing the free flow of commerce.<sup>54</sup> Among other things, the NLRA protects the rights of private sector employees to engage in “concerted activity.”<sup>55</sup> Courts have interpreted “concerted activity” as conduct in which employees band together to address terms and conditions of their employment.<sup>56</sup> Examples of concerted activity include employee discussions about wages, hours, and work conditions.<sup>57</sup>

The National Labor Relations Board (NLRB), which prevents and remedies unfair private sector labor practices, has previously determined that statements on social media fit the definition of concerted activity.<sup>58</sup> For example, in *Pier Sixty L.L.C.*, an administrative law judge found that a Facebook posting about a supervisor constituted concerted activity—even though it contained obscene language.<sup>59</sup> However, it was not until the case of *Three D, L.L.C.* that the NLRB was faced with the question of whether a Like constitutes concerted activity.<sup>60</sup> To this question, the NLRB answered in the affirmative.

In *Three D, L.L.C.*, Jamie LaFrance, a former employee of the Triple Play Sports Bar and Grille, posted the following statement on Facebook: “Maybe someone should do the owners of Triple Play a favor and buy it from them. They can’t even do the tax paperwork correctly!!! Now I OWE money . . . Wtf!!!! [sic]”<sup>61</sup> Three current employees of the sports bar commented on that post: (1) “I F\_ING OWE MONEY TOO!”; (2) “I owe too. Such an a\_hole”; and (3) “I have never had to owe money at any jobs . . . i hope i wont [sic] have to at TP . . . probably will have to seeing as everyone else does!”<sup>62</sup> A fourth employee made no comment but Liked the initial post.<sup>63</sup>

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53. National Labor Relations Act, 29 U.S.C. § 157 (2014).

54. *Id.* § 151.

55. *Id.* § 157.

56. *See, e.g.,* Mobil Exploration & Producing U.S., Inc. v. NLRB, 200 F.3d 230, 238 (5th Cir. 1999).

57. *See* Joanna Cotton Mills Co. v. NLRB, 176 F.2d 749, 753 (4th Cir. 1949); *see also* Union Carbide Corp. v. NLRB, 714 F.2d 657, 663 (6th Cir. 1983).

58. *See* National Labor Relations Act, 29 U.S.C.A. § 160 (2014).

59. *Pier Sixty, L.L.C.*, No. 2-CA-068612, 2013 WL 1702462, at \*23 (N.L.R.B. Apr. 18, 2013).

60. *Three D, L.L.C.*, 361 N.L.R.B. 31, at \*7 (2014).

61. *Id.* at \*2.

62. *Id.*

63. *Id.*

A sister of one of the sports bar's owners, who was Facebook friends with LaFrance, discovered the posts.<sup>64</sup> She alerted her brother, who subsequently fired Jillian Sanzone, the employee who posted the second comment, and Vincent Spinella, who Liked the original post.<sup>65</sup> Prior to Spinella's termination, the sports bar's owners questioned Spinella about his use of the Like button.<sup>66</sup>

Sanzone and Spinella subsequently brought an action against the owners, alleging that they had violated Section 8(a)(1) of the NLRA for terminating them in retaliation for protected activities.<sup>67</sup> The owners claimed they terminated the two employees for violating the business's internet/bloggging policy.<sup>68</sup> The Administrative Law Judge (ALJ) who first heard this case determined that Sanzone and Spinella's actions were protected concerted activity, and thus, could not serve as the basis for termination.<sup>69</sup> With respect to Spinella, the judge found that his use of the Like button was protected because it demonstrated his support for his fellow employees who were sharing their workplace concerns.<sup>70</sup>

In their appeal to the NLRB, the sports bar owners did not dispute that the employees' Facebook activity was concerted activity.<sup>71</sup> Instead, they rested their claims on the idea that Sanzone and Spinella adopted the defamatory and disparaging comments of the initial post, thus losing the NLRA's protection.<sup>72</sup> The NLRB disagreed with those arguments and upheld the ALJ's decision.<sup>73</sup> However, the NLRB did overrule the ALJ with respect to the sport bar's internet/bloggging policy.<sup>74</sup> Here, the NLRB found the policy unlawful because it was too imprecise and restrictive such that "employees would reasonably interpret it to prohibit protected activities."<sup>75</sup>

#### IV. "LIKE" AS PROPRIETARY INFORMATION

Due to the increased importance and value placed on Likes, it was inevitable that a dispute would arise over ownership. This section will briefly discuss whether a Like can be owned and, if so, by whom: the person who

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64. *Id.* at \*3.

65. *Id.*

66. *Three D, L.L.C.*, 361 N.L.R.B. 31, at \*3.

67. *Id.* at \*11 (Statement of the Case).

68. *Id.* at \*9.

69. *Id.* at \*1.

70. *Id.* at \*6.

71. *Id.* at \*1.

72. *Three D, L.L.C.*, 361 N.L.R.B. 31, at \*1.

73. *Id.*

74. *Id.* at \*8.

75. *Id.* at \*9.

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created the Like, or the person on whose page it appears? In addressing these questions, at least one federal judge in Florida has determined that a Like belongs to the individual who created it, not the person who collected it.<sup>76</sup>

*Mattocks v. Black Entertainment Television*<sup>77</sup> arose from a dispute between Stacey Mattocks, an insurance agent, and Black Entertainment Television (BET) Network.<sup>78</sup> In 2008, Mattocks developed an unofficial Facebook Page about *The Game*, a television show that chronicles the lives of professional football players and their significant others.<sup>79</sup> The series, which initially ran on the CW Network, was canceled in 2009.<sup>80</sup> Yet, Mattocks continued to showcase her interest in the program through her unofficial Facebook Page dedicated to *The Game*.<sup>81</sup>

BET bought the rights to the series and began to re-air it in 2010.<sup>82</sup> BET also hired Mattocks at thirty dollars an hour to manage the Facebook page.<sup>83</sup> In 2011, BET and Mattocks entered into a letter of agreement in which Mattocks agreed to grant BET full administrative access to the Facebook Page.<sup>84</sup> While Mattocks worked for BET, the Facebook page grew from two million to six million Likes.<sup>85</sup> Also, during this time, BET turned it into an official page displaying the company's logos and trademarks,<sup>86</sup> and allowing other BET employees to contribute content to the page.<sup>87</sup>

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76. See Thaddeus Hoffmeister, *Can You Own a Facebook "Like"?* *Mattocks v. BET*, LAW & SOC. MEDIA: IMPACT SOC. MEDIA ON L. (Aug. 28, 2014, 9:37 PM), <http://lawandsocialmedia.wordpress.com/2014/08/28/can-you-own-a-facebook-like-mattocks-v-bet/>.

77. *Mattocks v. Black Entm't Tele., LLC*, No. 13-61582-CIV, 2014 WL 4101594, at \*3 (S.D. Fla. Aug. 20, 2014).

78. Hoffmeister, *supra* note 76.

79. *Id.*

80. *Id.*

81. See *id.* According to Facebook's Terms of Service, "[a]ny user may create a Page to express support for or interest in a brand, entity (place or organization), or public figure, provided that it does not mislead others into thinking it is an official Page, or violate someone's rights." *Pages Terms*, FACEBOOK, <https://www.facebook.com/legal/terms>.

82. *Id.*

83. *Id.*

84. Hoffmeister, *supra* note 76.

85. *Id.*

86. *Id.*

87. *Id.*

Sometime in 2012, Mattocks restricted BET's access to the Facebook page<sup>88</sup> in order to strengthen her bargaining position during employment contract negotiations with BET. Unfortunately for Mattocks, her tactics proved unsuccessful because BET created a new Facebook Page for *The Game* and asked Facebook to migrate the fans from the existing Facebook Page to the new one.<sup>89</sup> BET then terminated its letter of agreement with Mattocks and Facebook shut down Mattocks's original Facebook Page.<sup>90</sup>

In 2013, Mattocks sued BET on three theories of liability—tortious interference with contract, breach of contract, and conversion—none of which were successful as the court granted BET's motion for summary judgment and dismissed Mattocks's suit.<sup>91</sup> Under her conversion claim, Mattocks asserted that BET deprived her of the substantial interest in the Facebook Page and the significant number of Likes generated by it.<sup>92</sup> In Florida, conversion involves an unauthorized act that leads to the deprivation of another's property.<sup>93</sup> Thus, to be successful under this claim, Mattocks had to prove that migrating the Likes was unauthorized and that she owned the Likes.

With respect to ownership, the court stated that Mattocks did not have a proprietary interest in the Likes.<sup>94</sup> According to the trial judge:

“[L]iking” a Facebook Page simply means that the user is expressing his or her enjoyment or approval of the content. At any time, moreover, the user is free to revoke the “[L]ike” by clicking an “[U]nlike” button. So if anyone can be deemed to own the “[L]ikes” on a Page, it is the individual users responsible for them.<sup>95</sup> Given the tenuous relationship between “[L]ikes” on a Facebook Page and the creator of the Page, the “[L]ikes” cannot be converted in the same manner as goodwill or other intangible business interests.<sup>96</sup>

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88. *Mattocks v. Black Entm't Tele., LLC*, No. 13-61582-CIV, 2014 WL 4101594, at \*3 (S.D. Fla. Aug. 20, 2014).

89. *Id.*

90. *Id.*

91. *Id.* at \*4.

92. *Id.* at \*8.

93. *Id.*

94. *Mattocks*, 2014 WL 4101594, at \*8.

95. *Id.* (citing *Bland I*, 730 F.3d 368, 385–86 (4th Cir. 2013) for its holding that a public employee's “[L]ike” of political-campaign page was a protected form of free speech and expression).

96. *Mattocks*, 2014 WL 4101594, at \*8.

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The judge also found that even if Mattocks could prove ownership of the Likes, she could not prove that BET's migration request was unauthorized.<sup>97</sup> This was because Mattocks breached her letter of agreement with BET.<sup>98</sup>

The *Mattocks* opinion probably raises more questions than it answers. First, if Facebook users actually own Likes, then other parties should not be allowed to exercise control over them. Under this analysis Facebook should have denied BET's request to migrate the Likes. Instead, the individual users should have been given the choice of whether to Like the new Facebook Page for *The Game*.

Second, if Likes cannot be treated as business goodwill or intangible business interest, a significant gap in coverage exists with respect to protecting the business interests of those who use social media. Likes are valuable and highly sought after.<sup>99</sup> For example, the U.S. State Department between 2011 and 2013 spent approximately 630,000 dollars in advertising to increase the number of Likes on its social media sites.<sup>100</sup> This opinion leaves those who spend the time, energy, and money to acquire Likes unprotected, which will, in turn, discourage growth and development in this area.

Finally, the court missed an opportunity to clarify the growing and important area of social media asset ownership. For example, the court could have achieved the same result through different reasoning. Here, the court could have found that the Likes were initially owned by Mattocks but became the property of BET when she started to work for the company.

## V. "LIKE" AS A CRIMINAL TOOL

Generally speaking, social media crimes fall into two categories.<sup>101</sup> Category I crimes involve the defendant employing social media "to relay information to victims, co-conspirators, or the general public."<sup>102</sup> Category II crimes "involve the defendant using social media to gather information about

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97. *Id.*

98. *Id.*

99. Joshua Brustein, *Does a Company Own Its Facebook Likes?*, BLOOMBERG BUSINESSWEEK (Aug. 26, 2014), <http://www.businessweek.com/articles/2014-08-26/judge-rules-creators-of-facebook-pages-dont-own-their-likes>.

100. Josh Hicks, *IG Report: State Department Spent \$630,000 To Increase Facebook "Likes"*, WASH. POST (July 3, 2013), <http://www.washingtonpost.com/blogs/federal-eye/wp/2013/07/03/ig-report-state-department-spent-630000-to-increase-facebook-likes/>.

101. THADDEUS HOFFMEISTER, SOCIAL MEDIA IN THE COURTROOM: A NEW ERA IN CRIMINAL JUSTICE 14 (2014).

102. *Id.*

victims. . . .”<sup>103</sup> With respect to Category I crimes, “the term *relay* applies to any method by which an individual may deliver information to another.”<sup>104</sup>

As discussed above, the Like feature is a tool for Facebook users to express their approval to other users. Users may run afoul of the law if, for some reason, they cannot lawfully contact or interact with the person whose content they have Liked. For example, this will be the case when a restraining or protective order is in effect. Generally speaking, these orders prohibit any contact between the parties whether it occurs online or offline.

In Tennessee, radio host Thaddeus Matthews faces criminal charges for his improper use of the Like button.<sup>105</sup> Police charged Matthews after he Liked a video posted on Facebook by a former colleague.<sup>106</sup> Unfortunately for Matthews, the owner of the video had previously obtained a restraining order against him.<sup>107</sup> In this case, the victim gave the police screenshots of her video post and Matthews’s subsequent Like, which violated the order against him and resulted in his arrest.<sup>108</sup>

## VI. “LIKE” AS A PARTY ADMISSION

Court systems around the world, including the United States, have rules governing the admissibility of evidence during trial. The purpose of these rules is to ensure that the fact finder relies only on certain information that the Rules deem admissible when deciding liability, guilt, or innocence. In the federal court system, the Federal Rules of Evidence regulate the admission of evidence. States have similar rules that govern admission of evidence in state courts. Judges must apply these rules to the information that is submitted by attorneys and offered by testifying witnesses to determine whether such information should be admissible.

To date, no reported cases have cited the Like button as it relates to the Federal Rules of Evidence. However, this is not to say that the Like button has not impacted this area of the law. For instance, one interesting development has occurred with respect to hearsay. As some are aware, hearsay is an out-of-court statement offered into evidence to prove the truth of the matter asserted in the statement.<sup>109</sup> Generally speaking, hearsay evidence is inadmissible at trial because the Rules establish a preference that witnesses only testify about things that they have personally observed.

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103. *Id.*

104. *Id.*

105. *See Tennessee Man Arrested for Facebook Like*, RT (Jan. 17, 2014, 6:47 PM), <http://rt.com/usa/man-arrested-facebook-like-790/>.

106. *Id.*

107. *Id.*

108. *Id.*

109. *See* FED. R. EVID. 801(c).

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However, there are several exemptions to the hearsay rule that allow seemingly secondhand information to be admitted. For example, pursuant to Federal Rule of Evidence 801(d)(2), admissions by party opponents are excluded from the definition of hearsay.<sup>110</sup> Thus, if a party opponent makes an admission, that statement can be admitted into evidence even if the party does not testify.<sup>111</sup> This has led one legal commentator to argue that Liking something on Facebook is a tacit admission that a user enjoys or approves of the content.<sup>112</sup> Thus, arguably, a Like in and of itself could be deemed a party admission and introduced into evidence against the user regardless of whether the user ever testifies.<sup>113</sup>

## VII. CONCLUSION

Historically, the legal system, especially the courts, has struggled at times with understanding and applying technological innovations. For example, the U.S. Supreme Court, in *Olmstead v. United States* refused to extend Fourth Amendment protections to wiretapping.<sup>114</sup> It took the Supreme Court forty years to abandon its notion of spatial privacy and find that wiretapping although occurring outside of the home could violate an individual's reasonable expectation of privacy.

Fortunately, it appears that the legal system has absorbed the impact of social media, at least with respect to the Like button, without too much difficulty. The holding in *Bland* that a Like is a statement subject to constitutional protections appears to be a natural evolution of First Amendment jurisprudence. In the labor law case of *Three D, L.L.C.*, even the losing side conceded that a Like was concerted activity.

With respect to criminal law, few blinked an eye when a defendant was charged with violating a protection order for Liking someone's video. Prior defendants have been prosecuted for sending a "poke" or "friend request" to those who have restraining orders against them. All of these actions constitute some form of prohibited social media contact. As for the rules of evidence, it remains to be seen whether the court will expand party admissions to include Likes.

Of the areas discussed in this essay, intellectual property is the one area of law where the rules are not as clear. In addition, it appears to be the ripest field for further discussion and future legislation. This is especially true for determining ownership of content created on social media.

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110. See FED. R. EVID. 801(d)(2).

111. See *id.*

112. Molly D. McPartland, *An Analysis of Facebook "Likes" and Other Nonverbal Internet Communication Under the Federal Rules of Evidence*, 99 IOWA L. REV. 445, 448 (2013).

113. See *id.*

114. See *Katz v. United States*, 389 U.S. 347, 357–59 (1967).