Social Media Law in a Nutshell

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CHAPTER 1
WHY SOCIAL MEDIA LAW MATTERS

Social media has exploded into our culture and embedded itself into our daily lives. In 2006, Facebook first opened itself to the public instead of just college students and a few companies. Since that time, the platform has grown to over a billion users. While Facebook is the most dominant success story in social media it is far from the only one.

When social media established itself as a cultural phenomenon, the implications of this technological revolution were felt in virtually every industry. Marketing, sales, research, education, medicine, entrepreneurship, military—every aspect of our world has been impacted. The legal field is no exception. Social media has changed both the way lawyers practice and apply existing laws.

Social media law is less a distinct body of case law and statutes such as copyright or employment but rather a manner of influencing or impacting existing areas of law. Every legal practitioner has had to accommodate social media, whether using new standards to search for relevant documents during electronic discovery or determining how to apply old marketing rules to new social media ad campaigns.

The social media revolution is still a new phenomenon and is rapidly evolving. Still, there are trends and patterns we can pull out from this new generation of network communications that provide valuable legal lessons to practitioners and their
clients. This book explores the high level risks and concerns that social media raises and will provide a framework for thinking about these problems and potential solutions. But to begin this conversation we must first understand what social media means.

§ 1.01 DEFINING SOCIAL MEDIA

A. SOCIAL MEDIA IS ABOUT CONVERSATIONS

In order to discuss social media we must first define it. Many believe that social media is limited to the large social platforms: Facebook, Twitter, LinkedIn, and the like. The truth is that social media is far larger. These sites are social networking platforms and merely one part of social media.

Black’s Law Dictionary defines social media as “Any cell phone or internet based tools and applications that are used to share and distribute information.” At first glance this definition would appear to include any information connected to the Internet since distribution is the primary reason for putting information online. But there is one additional element that makes information, services, and sites fall under the umbrella of social media: conversation. The social in social media is the ability for communities to be formed and individuals to exchange content around the information that is posted. Conversation is the seed that has transformed the Internet and the World Wide Web into social media.
B. SOCIAL MEDIA IS BIGGER THAN SOCIAL NETWORKING

Social media is much larger than Facebook and Twitter, although those platforms alone are large and significant. Those sites are classified as social networking platforms and tend to include a particular set of functions (profile creation, content posting, ability to connect with other profiles, etc.).

Social networking is a huge part of social media, but it is still just one part. Social media is any technology that allows online conversations. This includes Facebook and Twitter but it also includes blogs, wikis, chat rooms, YouTube comments, and more. If you have visited a web page with a comments section, you have been on a social media community. If you have visited a community-run site where fans of a TV show collaborate to document every facet of their beloved televised world then you have visited a social media site. Similarly, if you browse a web page where a group of people are trying to raise funds to start a new business, interacting with their backers while trying to raise money, then you have spent time on a social media group. These are all examples of sites and pages that fall outside social networking but are certainly part of social media.

In fact, it is difficult these days to find a website or information service that is not social media. There are still older websites that simply present static information but the odds of a typical Internet user returning to that website, let alone remembering any of its content, are incredibly low. Instead, today’s information consumers expect content to be
interactive. Articles are expected to have a comments section and readers may view an article with skepticism if that comments section is disabled. Sites such as wikis that collect information around topics, both broad and focused, are expected to allow members of the public to make changes or corrections. Visitors to a site where a group is raising funds for a new product, a movie, or a community event expect to be able to ask questions of the people requesting money and may base their decision to contribute on the answer they receive. This is all social media. And it is very different from the previous generation of the Internet.

C. UNDERSTANDING SOCIAL MEDIA FUNCTIONALITY

There are hundreds of social media platforms and trying to list, let alone understand, all of them in a print publication is an exercise in futility. Instead, to discuss the impact on legal topics and the risks it carries, there are certain core functions that should be understood in relation to social media.

1. Posting

Central to all social media platforms is the ability for a user to post original content. This can take the form of a large or virtually unlimited amount of text like a blog (a word that derives its definition from people who started journaling on websites by creating a web log, later shortened to blog) or a small amount of text like Twitter’s limit of 140 characters, sometimes referred to as a microblog.
Social media users can also post pictures or videos, whether captured spontaneously or prepared ahead of time. Instagram, a photo and video sharing service owned by Facebook, currently allows sixty seconds of raw or edited footage to be shared while services such as Periscope or Facebook Live allow live streaming of video from a person to other users around the world.

2. Hashtags (#)

While ordinarily a hashtag(#) is part of a social media post, its role is significant enough to call out separately. Hashtags in social media grew out of the first wave of Twitter users. Twitter, for the most part, is a single community of people not separated by topics or locations. Although Twitter users can choose to immediately see only content from accounts they follow, virtually all Twitter content is visible to all other users (the exception being protected Twitter accounts). This can make for a robust community to discuss certain topics. It can also make it incredibly difficult to follow a particular thread as users are presented with so many people discussing so many different topics.

Early adopters of Twitter settled on using the hashtag to mark certain topics and as a way of including a marker for people to follow a single conversation. This meant that if a group of Twitter users were discussing the latest full moon, they could include #moon in their tweets and then search by that hashtag to see the entire conversation by participants.
Hashtags had the extra advantage of allowing people to contribute to conversations without making their content explicitly about the topic at hand. It would be obvious to a reader that the tweet “This is the largest full #moon I have ever seen!” that the user was discussing the moon even without the hashtag symbol. But the tweet “That’s the biggest one I’ve ever seen! #moon” might be undiscovered or misinterpreted without the accompanying hashtag.

Hashtags grew beyond Twitter and are now supported on virtually all social platforms. Not only do they serve as a way to search for specific topics or keywords but they also provide a way for organizations to interact with individuals. Commercials, advertisements, or general notices will now typically include a hashtag allowing individuals to interact around a brand or event no matter which platform they use.

3. Engagement

Because social media is about conversations, posting content is only the first step in creating a social platform. To have a dialogue of any kind there must be some kind of engagement with content posted by users. That engagement can range from simple one-click engagements to more complicated forms of content interaction.

a. One-Click Engagement

The simplest form of social media content engagement involves a single click or action. On Facebook, users can click the Like button to interact
with text, photos, videos, or links. On Instagram, users can quickly double-tap on a photo to give it a heart. On Twitter, users can click a heart button associated with a tweet.

All of these engagements are indications that the user has seen the content and appreciates or recognizes it in some way. Yet the simplicity of the engagement can lead to complications based on its context. When a Facebook user posts that a parent has died, their connections may want to interact with that post but may not be willing to click the Like button on the announcement. For this reason, Facebook has expanded its simple engagement to include more than just Likes by presenting five additional simple reactions to content: Love, Haha, Sad, Angry, and Wow. Whether other platforms follow remains to be seen but it does show an increasing comfort and complexity social media users have when engaging with content.

**b. Responses**

More complicated engagement includes the ability to respond to a particular piece of content. On Facebook, users are typically allowed to post a comment to a piece of content. That response can include text, photos, or other graphics but the entire response becomes part of the conversation attached to the content posted by the original user.

On Twitter, LinkedIn, or other platforms, users can also enter a response to a piece of content. Some platforms display responses only when viewing the original piece of content. Other sites may allow the
response itself to be seen independent of the original content—although the responses are frequently linked in such a way that another user can quickly visit the original content providing the context of the post.

c. **Tagging**

An even more sophisticated form of engagement includes Tagging. This occurs when one user of the social platform intentionally includes another user in the conversation or content. For example, User A could post a group photo and tag User B as also being in that photo. This may bring more attention to the photo by explicitly including User B and User B's connections in the conversation. Tagging can also take place inside comments or other social media activities as a way of intentionally connecting with other people and their networks.

4. **Sharing**

Sharing is what enables content to go viral on social media. A piece of content is initially visible to users who are connected to the original author—by sharing the content with their network a new audience can see the content and potentially share it with their own network as well. Social media is not just limited to an individual’s network but also includes their network’s network. Sharing is what allows the network of networks to distribute information. Facebook, for example, has a Share button which allows a user to post the original
poster's content while also optionally adding their own comments.

Similarly, Twitter's Retweet button allows User A to share User B's tweet. User B's tweet will now be seen by people connected to User A even if those people are not connected to User B. This kind of sharing is what enables content to quickly spread from one network to another to yet another and it is this powerful feature that can allow a message initially seen by a few dozen to quickly be seen by a million or more people.

§ 1.02 WHAT MAKES SOCIAL MEDIA DIFFERENT

Before social media, the world went online and found information on the World Wide Web. Search engines and web indexes had come and gone. Emails were crossing the globe at the speed of light. Information was being exchanged on the Internet in a way never before imagined. Then social media came and changed everything by turning static information into a conversation.

The aspect of adding conversations to the information already online has fundamentally changed how we interact with online content. Whether as a by-product of social media functionality or as the core reason for its success, social media has created a different relationship between users and the underlying technology and information. This relationship both drives the social media explosion and also forms the foundation of various legal risks created by social media.
A. PERSONAL CONNECTIONS

Social media is deeply personal. Because social media is built around conversations, the first thing a typical social media user will do after setting up their account is to connect with their friends and family. In many cases, an offline request from a friend or family member is what brought a new user onto a social media platform in the first place. Once connected, the new social media user will consume content written by their friends, shared by their family members, or recommended by both. Social media is the ultimate dinner party and you don’t even have to do dishes.

Because users are connected to friends and family on social media, users are drawn back to the platform to interact with these people. It is no longer a matter of arranging a time and place to meet face to face—social media users go online and are instantly connected with their friends and families. This brings users back. And back again. This is why the average American spent over 40 minutes a day on Facebook back in 2014. By 2016, that number was up to 50 minutes a day when counting Facebook, Instagram, and Messenger, all Facebook properties.

This connection with friends and family members also puts a personal perspective on the otherwise faceless Internet. Before social media, people interacted with soulless websites. Now users have forgotten about the technology itself and instead interact with people. It could be the stories they tell, the photos they’ve posted, or the articles they’ve shared, but each time an individual views a piece of information on their computer screen or smartphone
they are not just interacting with a piece of data—they are interacting with the person who wrote that content. Every conversation is personal and much more impactful than the same information presented on a website without a face.

B. NETWORK OF NETWORKS

Another key component of the social media explosion is the network that it has created. A social media user has their own network of connections—people, interests (Movies, Reading, etc.), brands (Starbucks, Game of Thrones, etc.), and groups they have joined are all branches of their personal network (also called a social graph). By connecting to the particular people and subjects users want to see on their social platforms, every platform user creates their own private curated network of desired content. But each connection a user makes is not just a single source of content—that connection is also a network itself. Social media users are not hubs in a wheel with spokes connecting them to other people and topics—this visual implies that the connections stop after one step. Instead, those connections do not stop. Every social media user is a leaf connected to a branch with other leaves, a branch which is itself connected to bigger branches with more leaves, and all of those branches are connected to other trees with more branches and leaves.

This network of networks employed by social media has two enormous benefits. First, it keeps a steady stream of content coming to individual users which, in turn, encourages them to return to social
media platforms over and over for more content. Second, it also allows information that originates with a single person to spread not only to their network of connections but also to the networks attached to their connections. When a piece of content spreads widely and quickly enough, we refer to that content as going viral.

In 1929 a now infamous theory posited the entire population of the planet was separated by only six degrees. In 2008, Facebook determined that 99.6% of its users were connected by only five degrees of separation. By 2016, that number had dropped to an average of 3.5 degrees of separation. But these are just numbers. The stories behind how information can employ these connections and go viral are far more interesting.

C. SOCIAL MEDIA CONTENT CAN GO VIRAL

Thanks to the personal aspect of social media and the network of networks, any piece of content posted on social media can go viral in minutes. Take, for example, the story of Stefanie Gordon. In 2011, Ms. Gordon was a former meeting planner for a non-profit organization. She was unemployed when she took a flight from New York City to West Palm Beach, Florida to visit family. While approaching her destination the pilot announced that passengers could see the space shuttle Endeavour launch outside of the plane (a very safe distance away). The normally impressive sight of a space shuttle launching into space was made even more significant by the fact that this was the second to last space
shuttle launch, as the fleet was being retired. Stefanie readied her iPhone and watched as the shuttle appeared with a white trail breaking through the clouds. She caught several seconds of video and three still images of the launch.

When Stefanie landed she tweeted one of the photos, then proceeded to claim her bags and meet her family. Within minutes she reported her phone “going crazy” with alerts from the hundreds, then thousands, then tens and hundreds of thousands of shares, retweets, and messages Stefanie received. Major media outlets contacted her for permission to use the photo.

When Stefanie originally tweeted the photo and video she had 1,800 followers. By the end of the day the photo had been seen hundreds of thousands of times, her name had been mentioned on NBC Nightly News, her video had been shown on CNN, and several newspapers were set to publish the picture on the front page the next day. Stefanie took advantage of her newfound popularity to tweet out her LinkedIn profile and to say she was looking for a job.

While the personal connections keep users visiting social media sites more than the previous generation of Internet sites, it is the network of networks that allows information to spread faster and wider than ever before. These two elements make social media different and also create some significant legal risks.
§ 1.03 LEGAL RISKS FOR SOCIAL MEDIA

Social media law is less a discrete set of rules and cases that apply to social media but more about how the social media revolution has impacted the entire legal field. Every substantive area of law has been impacted by the rise of social media: electronic evidence, employment, free speech, marketing, and beyond.

While this book addresses many of the major areas where social media has created the largest legal impact, social media is both too large and too fast to cover it all. Instead, the co-authors intend for this book to give readers the tools to evaluate potential risks and a framework for identifying problem areas before they strike.

Just as two distinct features, viral content and personal connections, make social media different from previous generations of the Internet, so too do those two features give rise to significant high-level risks of social media across all topics. These high level risks can carry consequences ranging from regulatory breaches to brand or personal backlash but all of them show the power and danger of social media.

A. THE RISKS BEHIND VIRAL CONTENT

Having content go viral can be a thrilling experience for an individual or a brand. Having a person write a message or post a picture that is seen by thousands or millions of people can be an exciting adventure. Having a brand or organization post
content for (almost) free that is then seen by more people than a Super Bowl commercial can be a huge success. Or can end up as a nightmare.

1. Personal Viral Nightmares

Justine Sacco worked as a public relations executive for a company that owned several well-known websites in 2013. For her winter holiday, she booked a trip to South Africa. Ms. Sacco was about to depart for her vacation when she sent the tweet “Going to Africa. Hope I don’t get AIDS. Just kidding, I’m white!”

During the dozen or so hours Ms. Sacco was on the plane without Internet access, her tweet went viral. It ended up on the front page of most mainstream media news sources and on televised news as well. Her employer publicly distanced itself from her statement. Rumors circulated that she would be fired as soon as she landed causing a small group of Internet users to locate her gate in the Johannesburg airport. Another group physically went to the gate and waited to try and get a picture of the moment she was terminated. (They got the picture.)

While having a tweet like that go viral and carry such harsh consequences can be a nightmare, consider one additional point: Ms. Sacco had only a few hundred followers on Twitter when she sent the tweet. She was not an Internet celebrity with thousands or tens of thousands of fans waiting on her every post. She was just a regular Twitter user whose bad post made it to the front page of every US news
site in a matter of hours. Having content go viral can happen to anyone.

2. Brand Viral Nightmares

While brands and organizations love taking advantage of social media so that their content may reach thousands or millions of potential customers they want that content to be positive. A single piece of negative content reaching that many people can have dire consequences for any organization. Take, for example, the case of Honda Eddie.

In 2009, Honda was set to release a new car model named the Crosstour. Early photos of the car generated intense negative buzz among Honda fans. According to the popular car website Autoblog, "81.7% of you feel the Crosstour should be killed with fire, and just 3.1% of you think it is good looking."

Honda decided to release some photos on its Facebook page to fans, perhaps hoping to generate some positive commentary from supporters. The result was the same as the Autoblog poll with numerous highly critical posts and negative responses about the new car.

Among the negative posts came one that was decidedly less negative. A user by the name of Eddie Okubo posted "Interesting design. I would get this car in a heartbeat. I may be the older crowd with my kids out of the house and still need some space and performance. Don’t need anything big."
Within two minutes of Mr. Okubo’s post came a response: “[S]ounds like you are trying to save your job at Honda?”

Approximately five minutes later came a second response: “Maybe you like it Eddie because you’re the MANAGER OF PRODUCT PLANNING at Honda (light trucks in particular)?” This second response included links to Mr. Okubo’s LinkedIn profile verifying his position as well as a link to an interview he had given to an industry publication about his role in the Crosstour launch.

Being optimistic for a brief period, pretend that Mr. Okubo, in his excitement over the launch of a product he was intimately involved with for years, simply forgot to mention that he happened to work at Honda and the Crosstour launch was part of his job. Unfortunately, that optimistic view looks the same on social media as the pessimistic view most experience when hearing this story: Eddie was trying to pull a fast one.

With social media providing greater access to information comes the opposing risk: that information can go viral and its impact is negative. In this case, when information is withheld from social media most users will assume the omission is intentional. The viral backlash against that content is then impossible to control.

The speed of such a viral backlash cannot be handled by any corporation or organization. Honda likely had no idea that Eddie was posting on their Facebook page. Less than eight minutes after posting
his neutral-to-slightly-positive review, Eddie’s post on the Honda Facebook page was a major news story.

B. THE RISKS BEHIND PERSONAL CONNECTIONS

The vast majority of content consumed and interacted with online comes from personal connections. Both the number of connections and the filtering algorithms used by major platforms ensure individuals are far more likely to see baby pictures posted by their friends than an announcement by a local store about a new sale. As users consume all of this personal social media content with sporadic commercial content, many people may find themselves thinking that they are participating in a platform populated solely by friends and family rather than a large community filled with co-workers and the press. This can cause social media users to lower their guard and behave as they would when out to dinner rather than at a large business meeting.

But in reality, social media users are participating on a platform filled with more strangers than friends. If a reporter for a major newspaper happens to see an off-color comment made by an employee on an online story, that employee (and their employer) can end up on the front page of the newspaper even if that comment never went viral. Similarly, an employee might make a scathing comment about their manager on a social media platform forgetting that they were already connected to their manager who may have just read it.
Social media’s informal tone causes users to treat social media informally and behave a particular way on most platforms. This can directly impact individuals’ use of social media on the job whether intentionally or not by exposing individuals and their employers to increased social media risk. The very element that causes people to come back and engage in social media can also turn its head and bite them with negative repercussions.

1. The Social Media Reply All

Anyone who has used email for at least a few years has encountered the reply all mistake. The problem begins when a group of people are emailed, then someone wants to make a private reply but instead accidentally hits reply all instead of reply. Hitting that one button can lead to embarrassing—or worse—consequences.

The social media equivalent of the reply all mistake can occur when people post content intended for a private audience but unintentionally post for a much broader audience. This mistake can happen even to professional social networking computer engineers. Take, for example, the case of Steve Yegge, an engineer at Google. After many years at Google, he decided to lash out against some frustrating mistakes he felt his company was making by writing a 4,500 word essay comparing Google to his former employer, Amazon. He intended to post the note to his fellow Google engineers but instead posted the note publicly for the world to read.
While Mr. Yegge may have faced initial embarrassment, he did keep the note posted publicly and it generated numerous responses—both from his fellow workers and other people outside the company. If this mistake can happen to a professional engineer who works on social networks, it can happen to anyone.

And while such a mistake can have embarrassing consequences, it can also have more serious ramifications. Take, for example, an instance in November, 2014 when the Chief Financial Officer for Twitter inadvertently sent a public tweet discussing how Twitter should buy another company and that they needed to be sold on the idea during an upcoming meeting. While the target company wasn’t explicitly named, tech insiders quickly spread rumors causing larger issues for a Twitter user that certainly should have known better.

2. The Casual Good Day

Any social platform that allows status updates or quick notes will certainly contain posts by individuals expressing opinions about their day. Perhaps it was a good day because of the weather or bad because of the traffic. Being exposed to these kinds of notes can lead some people to share their own feelings about the day even when perhaps they shouldn’t.

Gene Morphis was the Chief Financial Officer for Francesca Holdings Corp, a publicly traded company that owned retail clothing stores across the country. In March of 2012, Mr. Morphis presented his
company’s financial information to the Board of Directors in anticipation of their upcoming public earnings announcement. After the meeting he tweeted “Board meeting. Good numbers = Happy Board.” While certainly a true feeling for Mr. Morphis, he was also the Chief Financial Officer of a publicly traded company and, as such, knew that the disclosure of financial results ahead of designated filings is not only a breach of securities regulations but also a breach of an officer’s fiduciary duty to protect the company.

Mr. Morphis was fired from his job within days of the company discovering this and other social media transgressions. While Mr. Morphis did lose his job he kept his sense of humor, tweeting after the firing and subsequent press “There has to be an easier and cheaper way to create followers than that was...”

3. Jumping on a Trending Topic

Several social media platforms will identify topics or keywords that are currently being discussed by a large number of people. While these topics can be easy to identify just by their hashtag or description, sometimes the actual context of those trending topics may be hidden. If a company, brand, or individual incorrectly guesses at the meaning and wrongly inserts themselves into the conversation, the results can be incredibly harmful.

On July 20, 2012, Batman fans around the country flocked to movie theaters to see special midnight showings of the eagerly anticipated conclusion to the Christopher Nolan Batman movie trilogy, *The Dark*
Knight Rises. One showing in Aurora, Colorado ended in tragedy as a gunman burst into the theater with several weapons killing 12 people and injuring another 58.

As the attack took place at a late night movie screening many people first discovered the news when they awoke the next morning. Various keywords around the incident were trending on Twitter including the word “Aurora.” An online fashion store, CelebBoutique.com, tweeted out a message early the next morning: “#Aurora is trending, clearly about our Kim K[ardashian] inspired #Aurora dress.” The tweet also included an emoticon for a wink and a link to purchase the dress from their online store.

Amidst a flood of negative responses, the company later revealed that much of their public relations work is handled by an international company. That company saw the trending topic but did not investigate the origins of the topic and posted the controversial tweet. The company apologized repeatedly but the damage had been done—more people knew this company for its tasteless tweet than for any celebrity-inspired clothing.

And while the #Aurora tweet is a well-known example, the lesson it teaches has still not been learned by all major brands. In 2014, a video was released showing a famous professional athlete striking his then fiancée in the face. The release of the video made immediate national news and also triggered a series of discussions on social media concerning domestic violence. On Twitter,
conversations for #WhyIStayed and #WhyILeft became a national trend as former and current domestic violence victims shared their personal experiences.

Amidst these serious and difficult posts on the topics came a tweet from DiGiorno Pizza, a company that markets frozen pizza and pizza products. Their tweet, "#WhyIStayed You had pizza," was inappropriate for the serious conversation. It was immediately called out and the tweet was taken down within seconds as the original poster realized the mistake he had made. Seconds was all it took for the tweet to be shared and copied. It continued to be broadcast long after the company had deleted the tweet. DiGiorno pizza later confirmed the mistake by posting a follow-up tweet "A million apologies. Did not read what the hashtag was about before posting."

A million apologies is only a slight exaggeration as the team behind the @DiGiornoPizza twitter account spent the next day personally responding to every tweet sent to their account. The responses were not a copy and paste of a generic apology—each response was customized. And if the individual responded back then DiGiorno kept the conversation going. One errant tweet, one fleeting moment, is all it takes today to force a major brand into hours or days of damage control by involving themselves in a conversation without understanding the context.
§ 1.04 HIGH-LEVEL RISKS VERSUS TOPIC SPECIFIC RISKS

These high-level social media behaviors can create a variety of risks for organizations and individuals in unpredictable ways. Beyond these high-level risks, however, a number of specific topics carry their own risks or concerns because of the social media revolution. Subsequent chapters in this book will explore these risks so that brands and users alike can avoid them or develop plans to address them if they occur.