

SOCIAL MEDIA LAW  
Summer 2019  
Professor Thaddeus Hoffmeister

**My Information**

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**Course Description:** This course examines the legal issues that arise when entities and individuals use social media platforms to exchange vast amounts of information. The primary focus of this course is to explore the various methods by which state actors, social media providers, users, and third parties exercise control over social media. A secondary emphasis is social media in the courtroom. Here, the course examines the impact of social media on jurisdiction, evidence, discovery, and ethics.

**Course Structure**

Most classes will be conducted in the classroom. When I have to be away from campus because of a presentation or a litigation matter, I will conduct the class online via Isidore. These classes will be either synchronous or asynchronous.

**Attendance**

You can miss 2 classes for any reason. Every missed class thereafter results in a reduction of 5 points. After 6 absences and the deduction of 20 points, you are unlikely to pass this course.

You can never miss a day where you are designated to lead the class.

**Credits:** 3 Credits (Credit Type A)

**Prerequisites:** None

**Required Text and Materials**

Ryan Garcia and Thaddeus Hoffmeister, *Social Media Law in a Nutshell*. Additional statutes, law review articles, and cases are assigned in the syllabus.

**Grading**

20%: Class participation. Each student must sign up, on Isidore, for chapters or parts of chapters e.g., a, b, c, etc. The student will be responsible for leading the class discussion for those particular chapters or parts of chapters.

20%: Weekly blog posts that start the first week of class. Blog posts are made on Isidore and must be related to the course material. In addition to weekly blog posts, students must make regular comments on the posts of other students. The posts should be between 250-500 words. A-H (last name) post must be made by 5:00 pm on Monday. I-P (last name) post must be made by 5:00 pm on Wednesday. Q-Z (last name) post must be made by 5:00 pm on Thursday.

60%: 15+ page paper on a topic related to the course material. This paper should be of publishable quality.

### **Topics Due**

May 15th

### **Outline Due**

June 1st

### **Rough Draft Due**

July 1st

### **Final**

July 15th (Physically hand in the paper and upload a version of the paper to Isidore)

### **University Policies**

All students are subject to UD's policies on academic honesty and computing ethics. Students are also reminded that as future attorneys their actions or omissions may be reported to the State Bar.

Disabilities: "Law students wishing to request a disability related accommodation must submit the request in writing to Brenda Cooper, Program Coordinator: Disability Services for the University's Learning Enhancement & Academic Development (LEAD) Office in the Ryan C. Harris Learning Teaching Center (937.229.2066) and provide a copy of the request to Shannon Penn, Assistant Dean for Student Affairs. If you have already secured a current Self-Identification Form indicating a disability which requires academic accommodations, please present the form to me so I can provide the appropriate accommodations needed in this class."

### **Law Student Conduct Affecting Admission to the Bar**

*Friedman v. Connecticut Bar Examining Commission*, 824 A.2d 866 (Conn. App. 2003)  
State Bar Admissions Committee denied application for admission and court affirmed.  
Applicant had been charged with academic dishonesty in law school for cheating on a final exam. The Law Student Discipline Committee found conduct code violation, Dean reversed for committee's delay to notify student and to bring charges, but noted that he was obligated to annotate charges in student's record and transmit them to appropriate bar admission board.

*Doe v. Connecticut Bar Examining Committee*, 818 A.2d 14 (Conn. 2003)  
Applicant deemed to lack good moral character based, in part, on evidence that he committed plagiarism with respect to a research paper that he submitted to a professor during law school.

*In the Matter of the Application of Otion Gjini to the Bar of Maryland*, Misc. No. 32, Sept. Term, 2015 (oral arguments available [here](#))  
Applicant was denied admission to the bar primarily because of his frequent DUIs and lack of candor to the Board. However, the Maryland Character Committee (MCC) also made note of his online posts which were offensive and vulgar.

- "This guy is a dipshit."
- "Yo, shut the f#@k up so we can watch the video."
- "They both fight like hoes."
- "The bully kid was a pussie."
- "That girl is hot as f#@k."
- "Who is the faggot that made this video?"
- "Just keep games like they are with a PS3 controller. None of this gay shit."
- "Straight NUTT in that b@#\$h."

Don't be that law student!

Yes, I am somewhat familiar with the First Amendment. However, your constitutional arguments regarding free speech will be much more persuasive after you have been admitted to the bar.

For more information about the role of social media in bar admission see the following: Jessica Belle, *Social Media Policies for Character and Fitness Evaluations*, 8 Wash J.L. Tech. & Arts 107 (2012).

## Course Outline

### **Part I Background**

- A. Introduction
- B. History of the Internet and Social Media
- C. Teaching Social Media Law

### **Part II Controlling and Regulating Social Media**

- A. State Actors
- B. Providers
- C. Users
- D. Third Parties

### **Part III Practicing Law in a Social Media World**

- A. Jurisdiction
- B. Judges and Jurors
- C. Evidence
- D. Ethics

**At the conclusion of this course students should be able to answer these questions**

1. Can anyone prevent a user from accessing or using social media to include the government, an employer, or a school?
2. Can anyone access or monitor a user's account to include the government, a school, or an employer?
3. How can a social media account be used? Can a user post any content she wants? Can a user advertise or promote content on her account? If yes, what restrictions, if any, must a user abide by? Can a user sell goods?
4. Does a user own the content in her social media account? If yes, can a user sell her content or give it to others?
5. What liabilities, if any, does a user incur by using social media? May a user be sued for defamation or IP infringement? What criminal actions can be taken against a user? Will a user's account be grounds for the court to obtain jurisdiction? Can the content of a user's account be used in court?
6. Is the user responsible for the actions of others on her account?
7. What new crimes were created by social media?
8. Should social media be a stand alone course or incorporated into more traditional courses?

## PART I: BACKGROUND

### Prior to the start of class watch

Two episodes of [MTV's Catfish](#)

&

May 7, 2015 [Senate Social Media Terrorism Hearing](#)

### Prior to the start of class read

Jon Ronson, *How One Stupid Tweet Blew Up Justine Sacco's Life*, NY Times (Feb. 12, 2015)

### Chapter 1: Introduction

Discuss the syllabus

Go over the structure of the class and the previously assigned videos

Social Media Law Nutshell pgs. 1-24

Ryan Garcia, *What the Heck Does a Social Media Lawyer Do Anyway?*

Somelaw.wordpress.com, Blog Post (Sep. 4, 2012)

Jeff Overley, *Law Firms Taking a Liking to Social Media Practice Group*, Law 360 (April 23, 2013)

Brad Reid, *Ways Social Media Impacts Law*, Huff Post (March 3, 2016)

Amy Harmon, *The Law Where There is no Law*, NY Times (Mar 16, 1998)

### Chapter 2: Student Presentations

Each student must demonstrate (5-10 minutes) one social media platform to the class. Sign up on Isidore.

### Chapter 3: History and Definitions

- a. **History** Monica Riese, *The Definitive History of Social Media*, The Daily Dot (Feb 24. 2017)  
Rustad and D'Angelo, *The Path of the Internet: An Annotated Guide to Legal Landmarks*, 2011 Duke L & Tech. Rev. 12 1-19 (2011)  
*ACLU v. Reno*, 929 F. Supp. 824, 831-839 (1996)  
David Kala, *Nervous System: The First Social Network*, LegalTechNews (April 1, 2019)
- b. **Definitions** Boyd and Ellison, *Social Networking Sites: Definition, History and Scholarship*, 13 J. Computer Mediated Communication 210 (2007)  
*People v. Vasquez* March 07, 2016 Not Reported in Cal.Rptr.3d 2016 WL 861245  
<https://heidicohen.com/social-media-definition/>

## Chapter 4: Teaching Social Media Law

- a. **Law of the Horse** Eric Goldman, *Teaching Cyberlaw*, 52 St. Louis U. L. J. 749 (2008)  
Judge Easterbrook, *Law of the Horse*, University of Chicago 1996
- b. **Why Social Media Law** Jennifer Murphy Romig, *Legal Blogging and the Rhetorical Genre of Public Legal Writing*, JALWD, Vol. 12, 2015  
John Browning, *Facing Up to Facebook in the Classroom* ABA Volume 43 Issue 3 (2012)  
Nicole Black, *Should Law Students Blog and Use Social Media?* (June 29, 2017)  
Thaddeus Hoffmeister, *Law Students and Social Media*, ABA For Law Students (July 11, 2018)  
Roberta Studwell, *Isn't it Time to Establish Library Related Social Media Best Practice Guidelines* 17 AALL Spectrum Magazine, December 2012 (no. 3)

## PART II: REGULATING AND CONTROLLING SOCIAL MEDIA

### Chapter IV. Government

- a. **Consumer Protection**
  - i. **Advertising** Social Media Law Nutshell pgs. 55-105  
Thaddeus Hoffmeister and Jessica Bernard, *Why Kanye West's New Instagram Campaign Could Be Illegal*, FORTUNE, February 5, 2018  
David Streitfeld, *Give Yourself 5 Stars? Online, It Might Cost You*, NEW YORK TIMES (Sep. 22, 2013)  
The Social Media DISCLOSE Act (AB 2188)
  - ii. **Antitrust** Charles Duhigg, *The Case Against Google*, NY Times (February 25, 2018)  
Natasha Singer, *Germany Restricts Facebook's Data Gathering*, NY Times (February 7, 2019)  
Dina Srinivasa, *Antitrust Case Against Facebook*, Berkeley Business Law Journal Vol. 16, Issue I
  - iii. **Financial Regulation** U.S. Securities and Exchange Commission v. Elon Musk, Civil Action No. 1:18-cv-8865  
Carmen Lawrence, Richard Walker, Alana L. Griffin, Nicole Pereira, Michelle Jacoba, *To Tweet or Not to Tweet, Lessons in Careful Use of Social Media*, 31 No. 2 Intell. Prop. & Tech. L.J. 3 (Feb. 2019)
- b. **Criminal Law** Social Media Law in a Nutshell pgs. 259-309

i. **Traditional Crimes** Thaddeus Hoffmeister, *The Challenges of Preventing and Prosecuting Social Media Crimes*, 35 Pace L. Rev. 114 (2014)

(a). **Social Media Enhancements**

(b). **Terrorism** Emily Knox, *The Slippery Slope of Material Support Prosecutions: Social Media Support Prosecutions: Social Media Support to Terrorists*, 66 Hastings L. J. 295 (2014)

Erich Ferrari, *#Material Support: Is Hamas' Twitter Account a Problem?* SANCTION LAW (Nov. 23, 2012)

<https://sanctionlaw.com/materialsupport-is-hamas-twitter-account-a-problem/>

David Kravets, *Senators Revive Bill Requiring Tech Sector to Report Online Terror Activity* ARSTECHNICA, (Dec. 8, 2015)

Read H.R. 3654 (114th Congress) and watch the U.S. House of Representatives Debate on the bill

<http://www.c-span.org/video/?402087-101/us-house-legislative-business>

ii. **New Social Media Crimes** Adi Robertson, *A New Internet Safety Bill Would Ban Swatting, Doxing, and Sextortion All at Once* (June 29, 2017)

H.R. 3067 Online Safety Modernization Act of 2017

Max Ehrenfreund and Antonio Olivo, *Seizure Inducing Tweet Leads to a New Kind of Prosecution* (Mar. 19, 2017)

Sarah Jeong, *Revenge Porn is Bad. Criminalizing it is Worse*, Wired (10-28-13), California Penal Law 647.4(j)(4)(A) (Revenge Porn)

Venkat Balasubramani, *When Does A Parody Twitter Account Constitute Criminal Identity Theft?-Sims v. Monaghan*, TECHNOLOGY & MARKETING LAW BLOG (Dec. 23, 2015)

c. **Constitutional Limitations**

i. **Civil** *Reno v. ACLU*, 521 U.S. 844 (1997) (Majority Opinions Sections I, V, VII, IX, XI and concurring opinion)

*Bland v. Roberts*, Pgs. 3-13 and 36-44 (Sep. 23, 2013) (4th Cir)

*Johnson v. Arlotta*, 2011 WL 6141651 (Minn. App. Ct. Dec. 12, 2011)

National Center for State Legislatures, *Secrecy of the Ballot and Ballot Selfies* (2-23-17)

David Hudson, *Public Employees, Private Speech: 1st Amendment Doesn't Always Protect Government Workers* (May 1, 2017)

*Backpage.com v. Dart*, 807 F. 3d 229 (7th Cir. 2015, Posner J)



## ii. Criminal Law/Pro

- (a). **Investigating/Monitoring** Justin Jouvenal, *The New Way Police Are Surveilling you: Calculating your “threat” Score*, Washington Post (Jan. 10, 2016)  
*In re: 381 Search Warrants Directed to Facebook Inc*, New York State Court of Appeals, No. 16  
Professor Orin Kerr, *Facebook Cannot Challenge Warrant on Behalf of Its Users*, Washington Post (July 22, 2015)  
*U.S. v. Meregildo*, 883 F. Supp. 2d 523 (S.D.N.Y 2012)  
Dave Mass, *Facebook Warns Memphis Police: No More Fake “Bob Smith” Accounts* (Sep. 24, 2018)
- (b). **Limiting Access** *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017)
- (c). **Revealing Information** David Brown, *Scarlet-Letter Status: Should Sex Offenders Admit Crimes on Facebook?*, The Atlantic (June 22, 2012).

## Chapter V. Providers

- a. **Terms of Service** Social Media Law in a Nutshell pgs. 25-55  
Nick Hopkins, *Facebook’s Internal Rulebook on Sex, Terrorism and Violence* (May 21, 2017)  
Jessica Lingel, *What Facebook Can Learn from Craigslist* (July 3, 2017)  
Jacquelyn Fradette, *Online Terms of Service: A Shield for First Amendment Scrutiny of Government Action*  
Roger McNamee, *How to Fix Facebook: Make Users Pay for it*, WASHINGTON POST, (February 21, 2018)  
Daphne Keller, *Internet Platforms Observations on Speech, Danger and Money* pgs. 3-21
- b. **DMCA & CDA** Social Media Law in a Nutshell pgs. 180-184
  - i. **DMCA** *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Ca. 2008)  
*Mavrix Photographs v. Livejournal*, No. 14-56596 (9th Cir. 2017)
  - ii. **CDA** Social Media Law in a Nutshell pgs. 218-226  
Eric Goldman, *Senate’s “Stop Enabling Sex Traffickers Act of 2017”-and Section 230’s Imminent Evisceration*, July 31, 2017 (Blog Post)  
*Hassell v. Bird*, 234 Cal. Rptr. 3d 867 (2018)

c. **Restricting Outside Users**

i. **Accessing Information** Social Media Law in a Nutshell pgs. 208-211

*Facebook Inc. v. MaxBounty* No. CV-10-4712-JF, 2011 WL 1120046 (N.D. Cal. Mar. 28, 2011)

*Facebook v. Power Ventures, Inc.* Case No. 08-cv-05780-JF (N.D. Cal. Oct. 22, 2009)

*hiQ Labs v. LinkedIn*, No. 3:17-cv-03301 (N.D. Cal. 2017)

ii. **Obtaining Information**

Chapter VI. **Users and Non-Users**

a. **Privacy Protections From** Social Media Law in a Nutshell pgs. 191-216

i. **Providers**

Jeffrey Tobin, *Solace of the Oblivion*, NEW YORKER (Sep. 29, 2014)

Shanikar Vendantam, *To Read All Those Web Privacy Policies, Just Take a Month Off Work*, National Public Radio (Apr. 19, 2012)

Theodore Claypoole, *Privacy and Social Media*, BUSINESS LAW TODAY (Jan. 3, 2014)

Social Media Privacy and Consumer Rights Act S. 2728 115th Congress

ii. **3rd Parties** Professor Goldman, *California's New 'Online Eraser' Law Should be Erased*, Forbes Sep 24, 2013

California Eraser Law 26.13[6][F] California Bus. & Prof. Code § 22580

Hannah L. Cook, Comment, *#Liability: Avoiding the Lanham Act and the Right of Publicity on Social Media*, 83 U. CHI. L. REV. 457 (2016)

b. **Right to Use, Own, and Transfer**

i. **Right to Use** *Nyabwa v. Facebook*, 2017 LEXIS 216738

Robert Krotoszynski, *The First Amendment as a Source of Positive Rights: The Warren Court and First Amendment Easements in Private Property*

Daphne Keller, *Who do you Sue*, Pgs. 11-27

ii. **Right to Own** Jasmine McNealy, *Who Owns Your Friends?: Phonedog v.*

*Kravitz and Business Claims of Trade Secret in Social Media Information*,

RUTGERS UNIVERSITY COMPUTER & TECHNOLOGY LAW JOURNAL, Vol. 39, pp. 30-55, 2013

*Eagle v. Morgan*, No 11-4303, 2013 WL 943350 (E.D. Pa. Mar. 12, 2013)

*Mattocks v. BET*, 2014 WL 4101594 (S.D. Fl. Aug. 20, 2014)

Joe Mullin, *Dad who Live-Streamed His Son's Birth on Facebook Loses in Court* (Feb 26, 2016)

*Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593

iii. **Right to Transfer** Jamie Patrick Hopkins and Ilya Lipin, *Viable Solutions to the Digital Estate Planning Dilemma*, IOWA LAW REVIEW BULLETIN, Vol. 99, p. 61 (2014)

Uniform Fiduciary Access to Digital Assets Act of 2014

Skim the Blog of DigitalPassing.com

Ricky Rash, *A Burden No Grieving Family Should Have*, VIRGINIA PILOT (Mar. 15, 2015)

Michigan Public Law Act 59 of 2016 ("Fiduciary Access to Digital Assets Act")

c. **Freedom of Expression** Social Media Law in a Nutshell pgs. 217-257

i. **Online Reviews** California AB 2365

Anti-Disparagement Bill. H.R. 5499 Consumer Review Freedom Act

*Palmer v. Kleargear*, no. 13-cv-00175 (D. Utah, filed Dec. 18, 2013)

ii. **Defamation** Katrease Stafford, *Oakland County Woman Gets \$500k in Revenge Porn Case* (Aug. 25, 2016)

*Forinash v. Weber* 2017 Ohio 1076)

*Obsidian Finance Group v. Cox*, 740 F.3d 1284 (2014)

*Adelson v. Harris*, 2013 WL 5420973 (S.D.N.Y. Sept. 30, 2013)

*Feld v. Conway*, 2014 WL 1478702 (D. Mass. Apr. 14, 2013)

(a). **Anonymity** *Doe v. Hickman*, 2015-SC-000408-MR (Sept. 22, 2016)

(b). **Unmasking** *Hadeed v. Yelp*, Supreme Court of Virginia (April 16, 2015)

(c). **SLAPP** *Wong v. Jing*, 189 Cal. App. 4th 1354 (Nov. 9, 2010)

iii. **Right of Publicity** Deidre A. Keller, *Will I be the Next of Hashtag: Can the Right of Publicity and or Privacy Protect Those Killed Extralegally from Internet Infamy*

d. **Elected Officials** *Davison v. Loudoun County Board of Supervisors*, 2017 LEXIS 116208

*Hargis v. Bevin*, 2018 U.S. District LEXIS 54423

Dawn Carla Nunziato, *From Town Square to Twittersphere: The Public Forum Doctrine Goes Digital*,

Chapter VII. **Third Parties**

- a. **Employers** Social Media Law in a Nutshell pgs. 105-129
  - i. **Pre-employment** Noam Scheiber, *Facebook Accused of Allowing Bias Against Women in Job Ads*, NY Times (Sep. 18, 2018)  
Robert Sprague, *No Surfing Allowed: A Review and Analysis of Legislation Prohibiting Employers from Demanding Access to Employees' and Job Applicants' Social Media Accounts*, Albany Law Journal of Science and Technology, Vol. 24(3), 481-513 (2014).
  - ii. **Employment** Lafe Solomon, *Report of the General Counsel, Memorandum OM 12-59* (May 30, 2012)  
*Chipotle and Pennsylvania Workers Organizing* 04-CA-147314  
Richard Albert, *NLRB Continues to "Click" Dislike on Social Media Policies* (Nov. 7, 2016)  
Matt Heller, *Inappropriate employee social media activity as a defense against employment discrimination claims*, Social Media Law Bulletin (Dec. 20, 2018)
  - iii. **Post-Employment** James Patton Tae Phillips, *Nonsolicitation Agreements in the Social Media Age* (May 16, 2017)  
Matthew Marmolejo, *Addressing Social Media in Restrictive Covenants* (June 1, 2015)
- b. **Academic Institutions**
  - i. **K-12** Philip Shen v. Albany Unified School District, 17-cv.02478-JD  
*Bell v. Itawamba County School Board*, 799 F. 3d 379  
California SB 30/14 (Educational Institutions-Personal Electronic Account-Privacy Protection)
  - ii. **Colleges and Universities** Tehrim Umar, *Total Eclipse of the Tweet: How Social Media Restrictions on Students and Professional Athletes Affect Free Speech*, 22 JEFFREY S. MOORAD SPORTS L.J. 311  
Valentina Palladino, *UCF Kicker Ruled Ineligible, Loses Scholarship after Monetizing YouTube* (August 1, 2017)  
Katie Mettler, *A Student Graded his Ex's Apology Note D Minus--then Tweeted It. He Got Suspended* (July 19, 2017)  
Roberta Studwell, *The Notion and Practice of Reputation and Professional Identity in Social Networking: From K-12 Through Law School*, pgs. 1-31

### **PART III: PRACTICING LAW IN A SOCIAL MEDIA WORLD**

#### **Chapter VIII: Jurisdiction and Service Social Media Law in a Nutshell** pgs. 311-318

Hoffmeister and Hardisky, *Service of Process Through Facebook Getting “Likes” From Courts* (Aug. 31, 2017)

Venkat Balasubramani, *Federal Court Authorizes Service of Process via Twitter* (Oct. 1, 2016), *Douez v. Facebook, Inc.*, 2017 SCC 3 (Canadian Case)

*Burdick . Superior Court of Orange Cty.*, Case No. G049107 (Jan. 14, 2015)

#### **Chapter IX: Jurors and Judges Social Media Law in a Nutshell** pgs. 399-414

Caleb Segrest, *Use of Twitter to Broadcast Courtroom Proceedings* (June 1, 2017)

*United States v. Sierra Pacific*, No. 15-15799

Thaddeus Hoffmeister, *Google Gadgets and Guit: Juror Misconduct in the Digital Age*, 83 Univ. of Col. Law. Rev. 409 (2012)

Amended Public Reprimand and Order of Additional Education Honorable James Oakley  
*Law Offices of Herssein and Herssein v. USAA*

#### **Chapter X: Discovery and the Rules of Evidence Social Media Law in a Nutshell** pgs. 337-356

Jennifer Ellis, *3rd Circuit Uses Preponderance for Facebook Chat Admission* (Sep. 6, 2016)

Molly McPartland, *An Analysis of Facebook Likes and Other Nonverbal Internet Communication Under the Federal Rules of Evidence*

*Tennessee v. Alexander Johnson and Michael Williams*, E2015-02486-CCA-R9-CD (Tenn. Crim. App. 2017)

*Facebook, Inc. v. Superior Court* (2015) 240 Cal. App. 4th 203

*Facebook v. Derrick Hunter*

#### **Section XI: Ethics Social Media Law in a Nutshell** pgs. 357-398

California Standing Committee on Professional Responsibility and Conduct issued Formal Opinion No. 2016-196 (PDF)

D.C. Bar Ethics Opinion 371 Social Media II: Use of Social Media in Providing Legal Services

Ben Hancock, *Should You Facebook the Jury? Yes. No. Probably.* (Apr. 26, 2017)

Agnieszka McPeak, *Social Media Snooping and its Ethical Bounds*

David Hricik, *Technology and Judicial Ethics*