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Socially Aware:
The Social Media Law Update

In this issue of *Socially Aware*, our guide to the law and business of social media, we take a look at Facebook's trademark disputes with Lamebook, Teachbook and Placebook. We highlight a number of countries where the leading social media provider is a company other than Facebook. We examine employment law issues in connection with an employee's derogatory remarks on her Facebook page, and we review a recent California district court decision rejecting a website operator's unilateral modification of an online user agreement. We ponder the relationship between social media and cloud computing, perhaps the two most significant information technology developments of recent years. We discuss the Poland Data Protection Authority's rejection of Facebook's position that its operations are not subject to that country's data protection laws. Finally, we examine the rise of social media spam, and Facebook's efforts to combat such spam.

IN THIS ISSUE

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When in Rome: Regional Social Media Providers Fend Off Facebook

Facebook not only is the most popular social media service in the United States, but has been wildly successful in many other countries; for example, Indonesia has recently surpassed the United Kingdom as the second-most represented country on Facebook (the United States remains in first place), and, as shown in our accompanying graphic, there are at least six countries—Iceland, Qatar, Norway, Singapore, Hong Kong and Canada—in which *over fifty percent* of the population claim Facebook membership.

Despite such success, there are many countries in which Facebook plays second fiddle to more popular, local social media providers. Although Facebook may eventually oust weaker local players, as happened with Skyrock in France and invitation-only Tuenti in Spain (and as currently may be happening to Orkut in India, as discussed below), many of these regional providers have tightened their grip on their local markets by focusing on country-specific trends and events, partnering with locally-recognizable celebrities and advertisers, and, perhaps most importantly, providing a service that reflects local culture and tastes, thereby ensuring a level of user comfort and relevance that may be hard for outsider networks to replicate.

The following is a look at the dominant social media services in Japan, China, India, Brazil, Russia and the Netherlands—countries that have yet to fully embrace Facebook, and may never do so.

Japan: Since launching its Japanese user interface in 2008, Facebook has experienced slow growth within the country. Indeed, Facebook's Japanese presence lags significantly behind that of Gree and Mixi, Japan's two leading social networking sites. Mixi launched in February 2004 and claims over 20 million predominantly Japanese users, and, in August 2010, Gree announced that it had overtaken Mixi regarding total number of users. While Gree's focus appears to be on mobile games, with about four-fifths of its revenue reportedly derived from sales of virtual clothing and accessories that online users purchase for their avatars, Mixi's sales are reported to come primarily from advertising. Mixi is particularly community-centric (it includes over one million communities), its users lean toward using nicknames rather than real names, and its "footprint" (*ashiato*) functionality allows users to see which other Mixi users have visited their respective profiles. Participation in Mixi requires a user to own a Japanese mobile phone, which effectively precludes users

COUNTRIES WITH THE HIGHEST PERCENTAGE OF FACEBOOK USERS*
(as of November 2010)

COUNTRY	PENETRATION RATE
Iceland	68.49%
Qatar	60.89%
Norway	52.71%
Singapore	52.27%
Hong Kong	52.27%
Canada	51.90%
Denmark	47.48%
United States	47.32%
United Kingdom	45.98%
Australia	45.87%

* Excludes countries with populations under 200,000 people.
Source: http://www.socialbakers.com/facebook-statistics/?orderBy=penetration

COUNTRIES WITH A LOW PERCENTAGE OF FACEBOOK USERS*
(as of November 2010)

COUNTRY	PENETRATION RATE
China	0.01%
Japan	1.43%
India	1.47%
Russia	2.31%
Brazil	4.25%
South Korea	5.13%

* Source: http://www.socialbakers.com/facebook-statistics/?orderBy=penetration

who do not reside or have not resided in Japan. These and other factors have led to the evolution of a platform that expands the scope of local users' interactions in a less direct and more private manner than other well-known social media sites.

China: Renren, Qzone and Kaixin001 comprise three of the more popular Chinese social media services. Renren, primarily popular with students, leverages an interface similar to Facebook's; indeed, some commentators note that it has closely tracked Facebook's updates to its own interface. (Interestingly, German PR firm Storymaker reports that RenRen charges €60,000 to host corporate pages.) Qzone claims nearly 400 million user accounts (although, reportedly, only a smaller number of those accounts may in fact be active). China's social media sites tend to focus on online entertainment and casual gaming, such as Happy Farm and Qiang Chewei, a popular parking space-stealing game. Commentators note that China's social gaming landscape "is developing at an extremely rapid pace, with competition growing increasingly fierce by the day." (We note that the Chinese government has generally blocked access to Facebook for over a year.)

India and Brazil: Orkut, a social media service launched in 2004 and owned and operated by Google, is well-visited in both India and Brazil (where it has been highly popular for several years). As noted above, however, the *Wall Street Journal* reports that Facebook appears to have overtaken Orkut in India, and Facebook recently expanded its footprint in India by opening an office in Hyderabad.

Russia: Vkontakte is currently one of the most popular social networks in Russia. Vkontakte claims over 75 million users, compared to around two million Russian Facebook users. Vkontakte's user interface appears to be modeled closely on Facebook's. Local marketing and PR, as well as support by the local mainstream media and blogosphere, are key factors that may give Vkontakte its edge over Facebook in Russia. In October 2010, Vkontakte announced a partnership with Yandex, a dominant Russian search engine, and it has been reported that this partnership will result in public-facing elements of VKontakte users' profiles being integrated into Yandex's real-time search results.

The Netherlands: Hyves currently dominates social networking in Netherlands. By mid-2010, Hyves claimed more than 10.3 million accounts—a number roughly equal to two-thirds of the Dutch population. According to Edelman Digital, what differentiates Hyves is "its talent for making the most out of local trends and current events such as elections, national holidays and sports highlights," as well as key partnerships with Dutch television stations, brands, and sports teams.

Battle of the Books: Lamebook Sues Facebook in Trademark Dispute

In response to a cease and desist letter received from Facebook, Lamebook has filed suit against Facebook in the U.S. District Court for the Western District of Texas, seeking a declaratory judgment that its Lamebook.com site and associated trademark *Lamebook* "do not infringe, dilute or otherwise violate the rights of Facebook."

Lamebook enables users to post on its Lamebook.com site humorous pictures, status updates, comments and other content taken directly from the Facebook site, and allows other users to comment on such posted items. In connection with its site, Lamebook uses a logo with a font and color scheme similar to Facebook's logo, as well as a "thumbs-down" symbol reminiscent of Facebook's thumbs-up "like" button. Facebook's cease and desist letter alleged that both the Lamebook site and the term *Lamebook* violate Section 43(a) of the Lanham Act "by causing a likelihood of consumer confusion and a likelihood of mistake as to the affiliation, connection or association of [the Lamebook site] with the famous Facebook website," and demanded that Lamebook not only change its name, but "permanently cease use of Facebook trade dress" as well.

Lamebook, in its pre-emptive complaint, notes that its site "serves as a humorous parody of the Facebook website and the role it plays in society," rather than functioning as a social networking site, and asserts that the Lamebook site and name are protected speech under the First Amendment. Although Facebook has yet to formally respond to Lamebook's complaint, commentators have noted that, in the wake of Lamebook's lawsuit, Facebook appears to have shut down Lamebook's Facebook Page and to have blocked outgoing links from the Facebook site to the Lamebook.com site. According to the TechCrunch blog, Facebook has defended its actions, noting that Lamebook's actions violate Facebook's Statement of Rights and Responsibilities (SRR); according to Facebook, "Our terms prohibit the posting of material or other activities on Facebook that infringe the rights of others. We reserve the right to pull down any content we believe is infringing. We also specifically prohibit use of any Facebook or confusingly similar marks (See SRR Sec. 5.1, 5.2 & 5.6 http://www.facebook.com/terms.php)." The extent to which Facebook's self-help measures remain in place is unclear.

Lamebook is not the only Internet company to have been accused of trademark infringement by Facebook for incorporating the word "book" into a trade name. In August 2010, Facebook brought suit against Teachbook.com in the U.S. District Court for the Northern District of California, alleging that Teachbook's use of the word "book" in its name constituted trademark infringement, trademark dilution, false designation of origin and cybersquatting. Unlike Lamebook, Teachbook is a social networking site, created specifically for teachers. According to Facebook's complaint, Teachbook had described itself as a "substitute for Facebook," for example, in school settings where teachers may be prohibited from

using Facebook. Facebook's complaint alleged that the *Teachbook* mark created "a false suggestion of an affiliation or connection between Teachbook and Facebook." Teachbook has stated publicly that it will fight Facebook's infringement suit.

Similarly, Placebook.com reports that, in May 2010, Facebook requested that Placebook cease using the term "book" in its name and on its site in order to avoid legal action. Although Placebook's operators have noted that their site is not a social network but, rather, a place to "book travel" and "make photobooks of trips," they have since renamed the site as "TripTrace". One TripTrace blog post notes, "[A]s a start-up we were in no position to fight. So we changed our name."

Facebook is the current assignee of an application filed with the U.S. Patent and Trademark Office to register the mark "FACE" in connection with "telecommunication services, namely, providing online chat rooms and electronic bulletin boards for transmission of messages among computer users in the field of general interest and concerning social and entertainment subject matter, none primarily featuring or relating to motoring or to cars." That application appears to have been filed originally in December 2005, by a company named CIS Internet Ltd, for use in connection with UK-based Faceparty.com. On September 22, 2010, Think Computer Corporation applied for an extension to file an opposition to Facebook's "FACE" trademark application, but the USPTO denied the request, and the application—which went unopposed—was allowed on November 22, 2010.

Protected Employee Speech and Social Media: Old Wine in a New Bottle

A recent complaint issued by the National Labor Relations Board ("NLRB" or "Board") is a reminder to employers that federal labor law policy, created in the first half of the 20th century, still has relevance in the first half of the 21st century.

The NLRB is the agency that administers federal law dealing with the rights of employees, employers and unions. In a complaint filed in Connecticut, the Board charged that an employer illegally terminated an employee for making derogatory remarks about her supervisor on her Facebook page. The Board also alleged that the company's Social Media Policy is "overly broad" and violates federal labor law.

WHAT'S NEW IS THAT, RATHER THAN BASHING A BOSS OVER LUNCH IN THE CAFETERIA, THE EMPLOYEE HERE USED A FACEBOOK PAGE TO DO IT.

The National Labor Relations Act protects the rights of workers—whether their employers are union or non-union. Those rights include the right to communicate with each other about wages, hours and other terms and conditions of employment. When two or more employees communicate with each other about their hours, their pay, or, as in this case, their boss, they are likely engaged in protected concerted activity. The scope of this protection is quite broad. The courts and the Board have found an unlawful interference with concerted protected activity when an employee was fired for discussing wages and rates of pay with another employee, when an employee was terminated because he objected to a pay cut, and when an employer maintained a rule that could "reasonably tend to chill employees in the exercise of their… rights". Generally, criticism of a supervisor that is false and defamatory or unrelated to work is not protected.

The employer's Social Media Policy is alleged to be unlawful because it contains provisions that prohibit employees from depicting the company in any way, without first obtaining approval from the company. The policy also prohibits employees from making "disparaging, discriminatory or defamatory comments when discussing the company or the employee's superiors, co-workers and/or competitors." The Board's complaint alleges that when the employee posted negative remarks about her supervisor on her Facebook page that could be read by other employees, she was engaged in protected concerted activity. The complaint also alleges that the company's Social Media Policy is "overly broad" because of its prohibition against employees posting disparaging remarks about the company, and that its supervisors interfere with the employees' exercise of their rights to engage in protected concerted activity.

The NLRB's legal theory in this case is not new. The right of employees to engage in this type of concerted activity is long settled. What's new is that, rather than bashing a boss over lunch in the cafeteria, the employee here used a Facebook page to do it. The employer involved in this case vehemently denies the allegations of the complaint and the accuracy of the facts described in it.

The significance of the complaint in this case is evident from the fact that the NLRB issued a news release about the complaint, something it rarely does. Employers should pay attention to this case because of the message it sends—employers should carefully examine their social media policies and determine whether they might be construed to interfere with employees' protected rights. This warning applies as equally to non-union companies as it does to union companies.

For additional information about developing a legally-compliant social media policy, please refer to "Employees and Social Media: What is Your Company's Policy?" from Morrison & Foerster's August 2010 Employment Law Commentary. Additional discussion is available in "Social Media in the Workplace" from Morrison

& Foerster's January 2010 Employment Law Commentary.

District Court Rejects Unilateral Modification of Online User Agreement

A number of recent cases, including the Texas district court opinion in *Harris v. Blockbuster Inc.*, and the Ninth Circuit's opinion in *Douglas v. Talk America*, have called into question the common practice of inserting unilateral modification provisions into website end-user agreements. In these decisions, such provisions—which purport to allow the website operator to amend the terms of its user agreement without the assent of the affected users—have been held to be unenforceable. Judge Patel's decision in *Roling v. E*Trade Securities, LLC*, No. C 10-0488 MHP (N.D. Cal. November 22, 2010), continues this trend.

The plaintiffs in *Roling* objected to E*Trade's unilateral imposition of an account maintenance fee on users for each fiscal quarter in which they did not make at least one trade. E*Trade's user agreement, pursuant to which the fees at issue were imposed, included the following language: "I understand that this Agreement may be amended from time to time by E*TRADE Securities, with revised terms posted on the E*TRADE Financial Web site. I agree to check for updates to this Agreement. I understand that by continuing to maintain my Securities Brokerage Account without objecting to revised terms of this Agreement, I am accepting the terms of the Revised Agreement and I will be legally bound by its terms and conditions."

In refusing to dismiss the plaintiff's unjust enrichment claim, Judge Patel noted that "E*Trade is unable to cite to any case, whether under New York law or California law, that undercuts plaintiffs' allegation that a contractual provision that allows a party to unilaterally change the terms of the contract without notice is unenforceable." Although Judge Patel did not cite either *Harris* or *Douglas* in support of this holding, the *Roling* decision appears to be consistent with those prior cases.

Cases such as *Harris*, *Douglas*, and now *Roling* suggest that website and blog operators may need to be careful with respect to use of unilateral modification provisions in their end-user "terms of use" and other end-user agreements, at least to the extent that the provision at issue relates to a consumer's payment obligations (at issue in *Douglas and Roling*) or dispute resolution obligations (at issue in *Douglas and Harris*). Further, although the desire to retain some flexibility regarding modifications to online terms is understandable, website and blog operators may wish to consider revising their user agreements to make clear that any material unilateral modifications will apply only prospectively, and should give careful thought to notice and acceptance issues in connection with such modifications.

For more information on this subject, please refer to our Client Alert on the *Harris* decision.

The Cloud and the Crowd

Which came first, the chicken or the egg? This well-worn riddle may apply to two of most significant information technology developments in the past decade—the explosion of social networking applications and the large-scale adoption of cloud computing models. Is it just coincidence that these two dominant trends have emerged at the same time? As noted in TechCrunchIT, cloud computing and social networks are two of the more powerful movements in the Web 2.0 space, begging the question: *Which came first, the Cloud or the Crowd?*

Cloud computing's underlying technology—the delivery of infrastructure, platform or software-as-a-service using immense data centers with massively dynamically-deployed servers, storage and bandwidth—has developed in large part as a response to the continuous need to process wildly-fluctuating volumes of mobile-and Internet-generated transactional traffic. As a result, cloud computing and social media are closely interrelated: social networking depends on cloud computing technologies in order to process the considerable quantity of data involved, as noted in the story from our August 2010 issue titled, *"Growth in Social Media Drives Infrastructure Spending."* The creation of Web 2.0, the development of server virtualization and similar tools and strategies, and the build-out of ubiquitous mobile platforms made it possible (indeed, inevitable) for social networking applications to grow exponentially. The growth of social media, both in sophistication and popularity, creates the impetus for further maturation of cloud computing technology in a feedback loop of continuous enhancement—witness, for example, the development of cloud-based customer relationship management (CRM) applications devoted to social media activity.

As technologies continue to advance, both cloud computing and social networking will need to deal with risks and policy choices that could inhibit growth. Companies need to manage the heightened risks that arise from the combination of cloud computing and social networking, including the potential

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for data leakage and more frequent hacking. On the flip side, compliance with laws protecting privacy and data security can be one of the most challenging aspects of enterprise use of both of these technologies. Commentators note that "regulatory compliance is becoming the most vexing issue facing the cloud computing industry," and, particularly in Europe, regulators are more closely scrutinizing the privacy and data security practices of both social media companies and cloud computing providers.

Legal regimes will need to adapt, or be adopted, in order to cope with the massive growth in both cloud computing and social networking. These laws must protect consumers from abusive use of their information, while accommodating consumers' headlong rush to share torrents of personal information with their online "friends." It remains to be determined how so-called "public cloud" models, which make the most efficient use of computer resources and on which social networks are based, will accommodate steadily-growing obligations to protect sensitive private information.

For additional information regarding cloud computing and related legal issues, please refer to "Get Your Head in the Cloud," a fall 2010 supplement to Morrison & Foerster's quarterly magazine, *MoFo Tech*.

Long Arm Jurisdiction: Polish Data Protection Authority Challenges Facebook Privacy Practices

In a recent press interview, Poland's Inspector General for the Protection of Personal Data challenged Facebook's position that it can make its U.S.-based services available to Polish residents without becoming subject to Polish data protection law.

The Polish Inspector General referred to the position of the Office of the Privacy Commissioner of Canada, which conducted an investigation in 2009 into Facebook's practices and found that Facebook needed to "take greater responsibility for the personal information in its care" to comply with Canadian law. In response to that Canadian investigation, Facebook agreed in August 2009 to "add significant new privacy safeguards and make other changes."

The Polish Inspector General noted that arguments similar to those made by Canada's Office of the Privacy Commissioner could be applied in Poland, and questioned Facebook's privacy policy, stating that it did not comply with Polish notice and security standards. The Inspector General particularly objected to the "imprecise" and "ambiguous" language used in Facebook's privacy policy. He also stated that European online services must meet stricter criteria with respect to data security and requirements for online privacy policies and notifications, which gives Facebook an unfair advantage in the European market.

We note that, traditionally, online data protection laws and regulations *apply based on where the entity controlling the website at issue is established*; in targeting Facebook, the Polish Inspector General is seeking to impose jurisdiction *based on where a website's users are located*. This represents a significant change in jurisdictional reach and, if broadly adopted, could cause every website to be subject to the privacy and security laws of every jurisdiction from which a user elects to access the website.

The Polish Inspector General's comments come just months after Facebook received a letter from the EU Data Protection Working Party stating that certain changes that Facebook had made to its services concerning private information were unacceptable. At the same time, Reuters is reporting that the EU is pushing for stronger privacy legislation that will give users more control over the use of their personal information by both search engines such as Google, and social networking services such as Facebook.

In a future issue of *Socially Aware*, we will provide a report on the recent complaint filed by the German Federal Consumer Protection Association alleging that Facebook violates German privacy and consumer protection laws. Stay tuned!

Social Media Conference: Morrison & Foerster has helped to organize Practising Law Institute's upcoming conference, *Social Media 2011: Addressing Corporate Risks*, to be held in San Francisco on February 9, 2011, and in New York City on March 2, 2011. There will be a live webcast of the San Francisco event. The conference will include participants from leading social media providers and from corporations using social media to build closer relationships with consumers, and promises to become the leading conference devoted to the emerging law of social media. For more information, please click here.

Social Media Spam: Facebook Gears Up Anti-Spam Activities

On October 20, 2010, Facebook posted a notice on the Wall of its own Facebook Security page announcing the filing of three separate anti-spam lawsuits in San Jose District Court—one each against Steven Richter and Jason Swan (both of whom are associated with affiliate marketing firm CPALead), and one against MaxBounty, Inc. In each of the three lawsuits, Facebook's claims that the applicable defendant has engaged in trademark infringement, fraud, breach of Facebook's terms of use and violations of both the Computer Fraud and Abuse Act and the CAN-SPAM Act, which provides for a limited private right of action for "Internet access services" as defined in 47 U.S.C. 231(e)(4). In its Wall post, Facebook claims to hold the record for the two largest judgments in the history of CAN-SPAM: an $873 million judgment against Adam Guerbez and Atlantis Blue Capital, and a $711 million judgment against Sanford Wallace, often referred to in the press as the "Spam King."

Facebook alleges in all three suits that the defendant instituted campaigns or created ads that falsely claimed an affiliation with Facebook. For example, Facebook complains that MaxBounty, Inc. and its CEO, J.P. Suave, recruited affiliates to produce "Facebook-sponsored" campaigns when, in fact, no such sponsorship existed. MaxBounty's CEO noted in an email to ZDNet that the company "does not control the content of its affiliates' websites, the style of affiliate campaigns, or where affiliate web pages are hosted," and "merely acts as a traffic broker and statistical tracking system between affiliates and advertisers." Facebook also alleges that Richter and Swan created ads offering users upgrades to spurious "Facebook Gold" accounts, promoted a non-existent Facebook "dislike" button functionality, and offered quizzes—at times disguised as Facebook security forms—designed to gather information from unwitting users.

EXPLOITING USERS' TRUST VIA CLAIMED ASSOCIATIONS WITH SOCIAL MEDIA SITES—INDEED, WITH ANY WELL-KNOWN WEBSITE—IS AN INCREASINGLY COMMON AND EXTRAORDINARILY LUCRATIVE TACTIC FOR SPAMMERS.

Exploiting users' trust via claimed associations with social media sites—indeed, with any well-known website—is an increasingly common and extraordinarily lucrative tactic for spammers. Security firm F-Secure estimates that the conversion rate of certain Facebook spam, that is, the rate of participation among individuals who actually "clicked" the spam link, is around forty percent. To put that in context, researchers have estimated typical email spam conversion rates at approximately 0.000008%. Facebook asserts that from December 2009 through March 2010, Steven Richter's ads converted more then 388,000 Facebook users. At a commission of 44 cents per conversion, that would result in a return of approximately $170,000 for such four-month period. In light of this, some are speculating that Facebook's forthcoming hybrid email/messaging system, known as "Messages," could become a popular target for spammers. Facebook notes that Messages will include "robust spam and virus protection."

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