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## Balance And Clarity: The Emerging Guideposts In Social Media Policy-Making

The Editor interviews **Andrea L. Calvaruso**, a Partner in Kelley Drye's New York office and Chair of the Trademark and Copyright practice group, **Barbara E. Hoey**, a Partner in the firm's New York office and Chair of the Labor and Employment practice group and **Gonzalo E. Mon**, a Partner in the firm's Washington, DC office and a member of the Advertising and Marketing practice group.



**Andrea L.  
Calvaruso**



**Barbara E.  
Hoey**



**Gonzalo E.  
Mon**

**Editor:** What criteria should a company's media policy follow?

**Mon:** There is no one-size-fits-all social media policy, and some companies even have different policies for different activities. What's appropriate for a policy that governs employees who engage in social media on a company's behalf may not be appropriate for a policy that governs what employees do on their own time. As an advertising lawyer, I'm often focused on the first category. In that category, whatever an employee posts is likely to fall under the scope of advertising law, so you should treat those posts the same as you treat your company's other ads. In the second category, I'm frequently concerned with ensuring that employees don't write about a company or its products without disclosing their connection to the company.

**Hoey:** Social media is a huge part of life and work today for most employees. For that reason, and notwithstanding the limitations being imposed by the NLRB, a company must have a social media policy and ensure it is enforced consistently. The policy should be clear and easy to understand; employees must be able to easily discern what is and is not prohibited by the policy. The policy should also be very clear that a violation can subject an employee to discipline. Using specific examples of what

is and is not prohibited under the policy can go a long way in avoiding misunderstandings and possibly prohibiting protected activities.

My practice on any employment policy is "less is more" – meaning the shorter and simpler the policy is, the better for the employer. At the end of the day, your goal is to create a policy that every employee, at every level of the organization, can read and understand. Those rules should also apply to your social media policy.

**Editor:** Please discuss recent case law that has focused heavily on social media.

**Calvaruso:** When it comes to intellectual property rights, in general, if something is an infringement in the "real world," it is an infringement in the virtual or online world – trademarks and copyrights enjoy the same protection online and offline. Likewise, the same defenses, such as fair use and others, also apply online. However, anything posted to a social media page is instant and has the potential of becoming very wide-reaching very fast, which has both risks and rewards.

There have not been any groundbreaking cases that apply trademark or copyright laws in a new or different way because the use was made via a social media plat-

form. Some examples of traditional claims arising in the social media context include the *AFP v. Morel* case, which involved the application of copyright and contract laws in the social media context. In that case, a photog-

rapher covering the devastating earthquake in Haiti uploaded photographs to his Twitter account with attribution that they were his photos. Another Twitter user named Suero copied the photos, posted them on his own site and held himself out as the photographer and owner of copyrights in the photos. Several news agencies copied, distributed and displayed the photos pursuant to a purported license from Morel and were later found liable for copyright infringement. One of the defenses raised was that Morel's license to Twitter pursuant to the sites' terms of use provided users of the site and third-party beneficiaries with a license to use anything the plaintiff uploaded to his Twitpic account. This argument was rejected, and the defendants were found liable for a \$1.2 million damage award. A copyright holder's grant of a license to Twitter or another social media platform does not automatically grant a user the right to reproduce or display the work.

In another case, in January 2014, *Playboy* sued Hearst publications in the Southern District of New York because *Harper's Bazaar* published a story about the 60th Anniversary edition of *Playboy* that contained a link to a third-party website displaying unauthorized copies of the images of Kate Moss from the *Playboy* edition. The suit settled on undisclosed terms in March 2014.

*Please email the interviewees at [acalvaruso@kelleydrye.com](mailto:acalvaruso@kelleydrye.com), [bhoey@kelleydrye.com](mailto:bhoey@kelleydrye.com), or [gmon@kelleydrye.com](mailto:gmon@kelleydrye.com) with questions about this interview.*

**Hoey:** Recent decisions issued by the NLRB provide some window into what the NLRB considers to be a lawful social media policy, which is one that “avoids the appearance” of restricting their employees’ rights to protected activities under the NLRB.

In *Kroger Co. v. Granger* (April 2014), an NLRB Administrative Law Judge (ALJ) struck down several provisions of the supermarket chain’s social media policy:

The first provision he found unlawful required employees to use a specific disclaimer stating that their comments were “not the opinions of the company” when identifying themselves as employees and publishing work-related information online.

The second provision he invalidated required employees to seek permission before using Kroger’s copyrights, trademarks, patents, or trade secrets, including logos and banners. The Board found the Kroger provision to be overbroad because it also restricted lawful, non-commercial use which would not violate intellectual property law, like using the company logo on a picket sign.

Another provision of the Kroger policy, prohibiting employees from commenting on “rumors or speculation related to the Company’s business plans,” was also deemed unlawful because it would also deter employees from communicating about personnel issues or business plans that affected their rights under the Act, like company layoffs, shutdowns or transfers.

In another recent decision, *Hooters of Ontario Mills*, issued in May 2014, an ALJ found that employer policies forbidding employees from posting negative comments about the company and from posting any information regarding a coworker on social media to be overbroad and in violation of the NLRA. Limiting language, such as excluding employee communications protected by Section 7 of the NLRA from the rule, could have gone a long way in ensuring the Board that the provision was not infringing on protected employee activities.

These decisions, I believe, go too far in protecting the employee and forget about other legal protections. In the *Kroger* case, what about the company’s right to protect its brand and logo, and its obligation to prevent confusion among consumers and the public as to who is speaking for the company? In the *Hooters* case, what about a company’s obligation to protect employees (and managers) who may not wish to have their personal or work-related information splashed across a social media platform?

**Mon:** The Federal Trade Commission has

investigated a number of companies over product reviews in social media. If a company provides incentives for consumers to write reviews, those consumers have to disclose the incentives. The FTC’s investigations in this area hold at least two valuable lessons. First, when the FTC thinks about incentives, they’re not just thinking about money or free products – even a chance to win a prize is an incentive that may have to be disclosed. Second, the FTC expects companies to play a role in ensuring these disclosures are made. Not only should you inform consumers about any disclosure requirements, you should monitor to ensure compliance. Having the right procedures in place can make a big difference in the outcome of a regulatory investigation.

**Editor: Where does NLRB come into play on social media? Is more guidance needed at a federal or state level?**

**Hoey:** There is no question that in recent years the NLRB has become increasingly focused on social media policies and their implications for employee rights under the National Labor Relations Act (NLRA). At the core of the NLRB’s rulings is its belief that employee chats and postings on social media are the present equivalent of “chatter at the water cooler,” and that when employees “chat” on Facebook about terms and conditions of employment, those posts or chats should be “protected.” Thus, any policy or work rule that might “reasonably intend to chill employees in their exercise of their Section 7 rights” could be struck down as unlawful. The primary issue is with overbroad policies – which would lead employees to conclude that they cannot post comments that are critical of the company or management. Such policies, if challenged, may be struck down by the NLRB, and even employers that do not have unions must be mindful of the NLRB’s pronouncements.

There are many frustrations with the Board’s rulings. For one, the NLRB has struck down policies that companies promulgated to protect workers’ privacy and in order to comply with other laws. In addition, and despite NLRB efforts to issue guidance on how to develop and implement social media policies, NLRB decisions are subjective and strike down policies that on their face seem to make perfect sense – in order to “protect” the rights of a hypothetical employee.

- For instance, the Board has taken the position that a policy *cannot* prohibit “offensive, demeaning, abusive or inappropriate remarks” about other employees. Of course, remarks like that online can

be very harmful, can spark violence, and could violate discrimination laws. Also, one might question why the use of such language should ever be “protected,” as one can complain about terms of employment without being abusive to others.

- The Board also takes the position that a policy *cannot* prohibit an employee from using the company logo in posts. As my colleagues in our Advertising group will tell you, this creates issues for the company and its use of its brand.

- The Board also takes the position that a policy *cannot* prohibit an employee from posting photos, videos and other “personal information” about other employees and managers. Again, with the increasing threat of identity theft and concerns about privacy, it seems that the NLRB is trying to prevent a company from taking steps to protect its employees from unwanted publicity.

I do think federal guidance is needed from one agency or a consortium of agencies that come together and issue one set of consistent guidelines. While we need to be respectful of the right to unionize, the law also needs to be mindful of a company’s obligation to protect its employees from abuse and harassment, to protect its brand and logo and to protect privacy. I am not sure that the NLRB has successfully balanced those concerns in its rulings.

**Editor: The NLRB has stated that social media policies must address specific issues and not be structured as broad blanket statements. Can you provide an example of how a company might take a statement deemed broad by the NLRB and make it specific enough to be in compliance with the NLRB recommendations?**

**Hoey:** The language the NLRB has often found to be unlawfully “overbroad” may be found in any company’s social media policy. The Board’s recent decisions, however, leave behind a few tips on how employers can develop social media policies that do not infringe on the protected rights of their employees.

Instead of: “Post no negative or disparaging comments about coworkers.”

• Try: “If you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably would be viewed as malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying.” Be sure to define terms like “inappropriate,” “negative,” or “disparaging” as “offensive, demeaning, [and] abusive.”

Instead of: “Any postings about the company must include a disclaimer that the opinion shared is not that of the company.”

- Try: “You may not represent any opinion or statement as the policy or view of the company or of any individual in their capacity as an employee or otherwise on behalf of the company.” Employees would not reasonably construe this rule to prohibit them from speaking about their terms and conditions of employment.

Instead of: “Be sure your posts are completely accurate and not misleading.”

- Try: “Make sure you are honest and accurate when posting information or news, and if you make a mistake, correct it quickly.”

Instead of: “Do not comment on rumors or speculation about the company or coworkers.”

- Try: “Never post any information that you know to be false about the company, fellow associates, members, customers, suppliers, people working on behalf of the company or competitors.”

- Be sure to provide specific examples or limit the term “posts” as not applying to posts about protected activity.

Avoid any of the following:

- “Report any unusual or inappropriate internal social media activity.” To the extent such activity is protected, the Board has held that an employer’s requirement or encouragement of employees to report union activities of other employees to management violates the Act.

- “Think twice about ‘friending’ a coworker on social media sites.” The Board has interpreted such language to chill employees from engaging in protected activity.

- “When in doubt about whether or not a post is appropriate, check with HR.” The Board interprets this language as requiring employees to secure permission from an employer as a precondition to engaging in Section 7 activities, and has held such requirements violate the Act.

**Editor: Is it sufficient to apply traditional rules about employee rights to our new working environment that relies so heavily on social media and new forms of technology?**

**Hoey:** Social media is very new and constantly evolving technology, and the traditional rules of law are not easily applied to this new medium. For one, it is extremely broad in reach – a posting on Facebook right now could be read by thousands of people all over the world. It is just not the same as a verbal conversation, or even a sign on a picket line. Social media is also

forever, as we all know the challenges of getting posted information taken down or erased. The bottom line is that social media is very different and potentially more “dangerous” than other types of communications, and I do not think that the NLRB has thought all of those issues through.

Social media can thus easily be abused – by an employee looking to strike out at a manager who has just disciplined him, embarrass a coworker who has reported him or harm the company which has just fired him.

I understand what the NLRB has been trying to do with its rules and pronouncements. What I think the Board has failed to do is balance the right of employees to engage in protected activity with other rights.

As we move forward, employers must comply with the law, but also issue a policy that they feel is best for their employees and their business. My hope is that legal principles will evolve to consider the implications of this emerging technology, ultimately resulting in a comprehensive scheme that balances the rights and sometimes diverging interests of employees and employers.

**Editor: How can a company balance the opportunities available from social media with the risks?**

**Mon:** Some of the risks in social media stem from the fact that a company can get in trouble for what others – employees, agents, and even consumers – do on its behalf, even if the company didn’t approve it. Although you may not be able to eliminate these risks, there are at least three things you can do to reduce them. First, consider whether your campaign is likely to solicit problematic content, such as content that infringes on third-party rights. If so, you may want to rethink your strategy. Second, provide guidelines about what people can and can’t do. For example, warn people against infringing IP rights and tell them if they are required to make specific disclosures. Third, monitor your campaign, and move quickly to address problems.

**Editor: What are the differences between advertising in social media and other media?**

**Mon:** Two basic principles of advertising law apply to all ads. First, advertisers must have a reasonable basis to substantiate any claims they make. Second, if an advertiser needs to disclose information to prevent an ad from being misleading, that disclosure must appear in a clear and conspicuous

manner. These principles don’t change in social media, even though compliance could be harder. In recent years, the National Advertising Division of the Advertising Self-Regulatory Council, a self-regulatory body that hears advertising disputes, has issued various decisions that involve social media ads. In these decisions, the NAD applied the same standards it has applied in other contexts. And the FTC has stated that if a company can’t effectively communicate the necessary information in social media, it shouldn’t advertise there.

**Editor: What are the top issues to consider when using a third party in social media marketing efforts? How can a company prepare for exposure and potential reputation damage associated with user-generated content/comments?**

**Calvaruso:** There is a distinction to be drawn between user comments or posts to a company’s social media sites that are made without prompting or involvement from a brand owner (such as a comment or tweet) on the one hand, and user-generated content that is solicited by a company (such as a company inviting users to create and upload videos for a contest to create a new advertisement for the brand), on the other. In the first instance, there is a good argument to be made that the company is not hosting the content (that would be the social media company who provides the platform) and doesn’t even have the power to remove it. In the second, the company may be liable for direct and/or contributory infringement claims if the content elicits objection from a third party. Of course, the real and interesting questions lie in the grey area between such examples and are determined by a very fact-specific analysis.

Companies may take steps to reduce risk of liability for user-generated content by preparing and enforcing terms of use for third-party submissions to their social media pages/websites. For example, require users who submit content to: (1) provide the company a broad license to use the content; (2) warrant and represent that the content they provide will not infringe third-party rights; and (3) indemnify the company for any breach of these representations. While such terms are not likely to avoid all liability, as it requires regular users to understand what infringes third-party rights and have the resources to indemnify the company, it demonstrates the company is acting in good faith by setting rules for users and attempting to protect the rights of others. The terms should also provide for the right to remove any content deemed inappropriate or in violation of your terms of use and follow

the other Digital Millennium Copyright Act (DMCA) requirements.

Also, designate a DMCA agent with the U.S. Copyright Office so that if user-generated content is posted somewhere under the company's control, the company will have the *potential* to take advantage of the DMCA Safe Harbor. It is important to note that the DMCA Safe Harbor only provides safe harbor for copyright claims and does not apply to shield liability in all instances. There are limits to application of the DMCA Safe Harbor that require a fact-specific analysis of the particular uses. In very general terms, the company must avoid active participation in creation or development of the user-generated content in order to take advantage of the safe harbor.

**Mon:** Companies can get in trouble for what their agencies do, so it's a good idea to approach any campaign run by an agency the same as if you were running it yourself. Although many agencies come up with brilliant ideas for social media campaigns, they don't all appreciate the legal issues. It's important to ensure that your legal team is involved early in the planning of the campaign to spot and address these issues. You also need to have an agreement with the agency that includes the proper representations, warranties, and indemnifications. Don't rely too much on indemnification, though. Ultimately, it's your company's name on the line, and there are some things that indemnification won't cover.

**Editor:** It's difficult to fit content created and shared on social media into traditional copyright language. What guidelines can a company follow to ensure that it's protecting its own content and that

**of others when using social media platforms? Can we expect any new guidance in this area?**

**Calvaruso:** Thanks to the DMCA, most social media sites will respond quickly to copyright infringement claims. However, the social media sites have a higher standard for disabling or removing content on the basis of other allegations, such as trademark infringement. Social media sites typically require specific proof of rights and an allegation that the trademark or name is used in connection with the promotion of goods or services – use of the name alone will prompt a request for more information from the platform. Similarly, there is a higher standard to convince social media sites to remove user names based upon rights of publicity claims.

Steps brand owners can take to help protect their rights include ensuring that the company obtains work for hire, assignment or at least a right to enforce copyrights in key images used in the company's promotional materials so that you can use the DMCA procedure to object to others' unauthorized use of content associated with the brand. While registration of a copyright is not necessary merely to file a DMCA notice, consider U.S. Copyright Applications for website/key images.

Companies must understand that objections regarding third-party unauthorized use of their intellectual property don't always fall into traditional infringement claims in the social media context. Therefore, reading and understanding takedown rules for particular social media sites is often key. All of the major social media platforms have procedures for reporting the violation of a brand's intellectual property rights. However, social media platforms are sensi-

tive to free speech concerns and will typically require one of the following to justify removing content based upon allegations other than copyright infringement: (1) Use of the name or content to promote or sell goods or services; (2) Impersonation of the identity of another; or (3) Abusive behavior, such as harassment, spam or any criminal activity.

For example, Twitter allows users to create parody, newsfeed, commentary, and fan accounts, provided that the accounts don't use avatars or account names that consist of the exact trademark or logo of the account subject. The inclusion of words such as "not," "fake," or "fan" to a trademark in the username (i.e. "Fake Pepsi" or "Pepsifan"), or disclaimers in the account's "bio" that distinguish it from the account subject, such as "This is a parody," "This is a fan page," or "This is not affiliated with . . ." may be sufficient to overcome a brand owner objection according to Twitter rules.

Brand owners may guard against such issues by registering "official" social media sites for brands that use a common designation such as "official" or "the real" to identify authorized social media pages, linking social media pages to the company's official brand website, and limiting those authorized to post/tweet/comment on behalf of the brand to those trained in best practices.

Given how damaging social media backlash may be to a brand, companies should carefully consider what objections they make to social media content that references, criticizes or makes other non-commercial use of company intellectual property. For example, the makers of the popular game CANDY CRUSH received social media backlash for taking an aggressive position regarding its objections to any mobile apps that include the word CANDY.