**Selected Papers of Internet Research 15:**
**The 15th Annual Meeting of the**
**Association of Internet Researchers**
Daegu, Korea, 22-24 October 2014

# REGULATING THE BOUNDARY BETWEEN WORK AND SELF: EMERGING LEGAL TENSIONS AROUND SOCIAL MEDIA IN THE WORKPLACE

Jacinta Buchbach
Queensland University of Technology

Both law and business practice are struggling to grapple with the blurred boundaries of identity in social media. The rapidly increasing importance of social media for both private and work purposes has led to the emergence of new legal challenges arising before, during, and after employment relationships. Existing legal frameworks, based predominantly on offline conceptions of private and public space, are unable to adequately balance the interests of employers in managing their risk and reputation against the legitimate interests of employees in their privacy, speech, and autonomy. The issues are further complicated by the involvement of social media platforms, private entities who play an increasingly important role in governing conduct but are generally not bound by standards of legitimacy or private duties to either employees or employers. This paper maps, evaluates, and explains current legal disputes in common law jurisdictions. I argue that the current legal context is fraught with uncertainty and generally fails to adequately protect the interests of individuals, who face a significant power imbalance against both employers and online intermediaries.

Before employment begins, employers are increasingly informing their hiring decisions by examining the social media profiles of potential employees. Up to 45% of hiring managers in the United States now use social networking sites to screen job candidates.[1] Some employers in the United States have been known to request potential employees to provide their password to their private social media accounts.[2] There is some anecdotal evidence that at job interviews, some employers have requested potential employees to ‘friend’ them on Facebook in order to gain access to their profiles.[3] From an employer's perspective, data obtained from a personal profile enables more informed decisions about identifying skill and organisational 'fit'.[4] This raises obvious concerns for employees, who may have no notice or knowledge that their profiles are being scrutinised for these purposes. It also gives rise to the potential for increased 'invisible discrimination' [5] based on attributes which are not traditionally disclosed in a resume or interview process, including religion, race, or sexual orientation. Because it is almost impossible to trace or prove this type of discrimination, conventional legislative protections are of very little use to job applicants.

Suggested Citation (APA): Buchbach, J. (2014, October 22-24). *Emerging legal tensions around social media in the workplace*. Paper presented at Internet Research 15: The 15th Annual Meeting of the Association of Internet Researchers. Daegu, Korea: AoIR. Retrieved from http://spir.aoir.org.

During the employment stage of the employment relationship, employees are increasingly subject to control over their 'off work' conversations. With the explosion in social media use, conversations that were traditionally regarded as 'private' – gripes in bars to friends and family – now potentially leak to a much larger audience, sometimes beyond the employee's control, in ways that can be linked to their work and may cause reputational harm[6] or other loss[7] to employers. In a series of recent cases, employers have been successful in terminating the employment of individuals for comments made online publicly – both pseudonymously[8] or as 'private individuals'[9] – and within ostensibly private social media networks.[10] For employees, privacy laws are largely ineffective in these contexts, and free speech concerns are generally inapplicable to the private employment relationship.[11]

Finally, in the post-employment phase, uncertainty surrounds who has ultimate control over social media accounts and contacts after termination of the employment relationship. Both employees and employers have strong incentives to retain control of accounts and associated relationships with clients and others built up during the course of employment.[12] Legal disputes about ownership are increasingly being raised,[13] but no coherent doctrine has emerged. Existing legal doctrines provide little assistance; these interests do not easily fit into the existing legal categories of recognised interests such as 'privacy', 'property', 'confidential information', or 'restraint of trade'.[14]

This paper presents a critical analysis of flash-points of tensions between employees and employers surrounding the use of social media. The use of social media is blurring boundaries between work and home and between public and private in ways that are still not well understood by the law. Any balance between employee and employer interests that was developed through organised labour movements and a focus on individual rights in the 20th century has become manifestly inadequate for reconciling competing interests in the digital age. The law becomes highly uncertain at points at which its liberal underpinnings begin to conflict. This is visible, for example, where the traditional sanctity of the private sphere conflicts with the assumptions of freedom of contract,[15] leaving employees vulnerable to terms of employment that are apparently invasive. It can also be seen where the emphasis on autonomy leads to conflicting results as employees are made responsible for taking care of their own interests but are not practically able to do so without giving up the ability to express themselves or connect with others online. Resolving these issues at law likely requires a much different approach to that which is conventionally applied to employment contexts. This paper calls for a new conceptual framework to better evaluate employer risk and employee interests in online social contexts. Any such framework must be able to balance employer risk against employee autonomy.[16] Ultimately, however, it must also support the development of consensual understandings of appropriate conduct and equitable reciprocal obligations between employees and employers.

**References**

1. Donald Kluemper ‘Social Network Screening: Pitfalls, Possibilities and Parallels in Employment Selection’ 2013 (12) Advanced Series in Management 2.

2. AFP ‘US Politicians Propose Password Privacy Bill,’ The Australian, 7 February 2013. http://www.theaustralian.com.au/technology/us-lawmakers-propose-password-privacy-bill/story-e6frgakx- 1226572363437 accessed 22 February 2013.

3. Louise Floyd, Max Spry, ‘Four Burgeoning IR issues for 2013 and beyond: Adverse action, social media & workplace policy; trade union regulation (after the HSU affair); and the QANTAS aftermath’ (2013) 37 Australian Bar Review 153, 164.

4. Ross Slovensky, Willliam Ross, ‘Should human resource managers use social media to screen job applicants? Managerial and legal issues in the USA’ (2012) 14 (1) Info 55, 57.

5. Richard L Pate, ‘Invisible Discrimination: Employers, social media sites and passwords in the U.S.’ (2013) 12(3) International Journal of Discrimination and the Law 133, 136.

6. Rose v Telstra [1998] AIRC1592.

7. Seafolly Pty Ltd v Madden [2012] FCA 1346.

8. Little v Credit Corp Group Ltd [2013] FWC 9642.

9. Banerji v Bowles [2013] FCCA 1052

10. Dover-Ray v Real Insurance [2010] FWA 8544, [50]-[51]; Fitzgerald v Smith T/A Escape Hair Design [2010] FWA 7358,[50]-[52].

11. Malcolm Pearson v Linfox Australia Pty Ltd [2014] FWC 446. Graeme Turner, 'Litigating employee restraints of trade and confidential information’ (2009) 47 (4) Law Society Journal, 59.

12. Graeme Turner, 'Litigating employee restraints of trade and confidential information’ (2009) 47 (4) Law Society Journal, 59.

13. Eagle v Morgan, 2012 U.S. Dist. LEXIS 143614 (E.D. Pa. Oct. 4, 2012); PhoneDog v Kravitz, 2012 U. S. Dist. LEXIS 10561 (N.D. Cal. Jan. 30, 2012).

14. See Breen v Williams (1996) 186 CLR 71; Phipps v Boardman (1967) AC,127,128; Fairstar v Adkins [2013] EWCA Civ 886; Whitmar Publications Limited v Gamage & Anors [2013] EWHC 1881 (Ch).

15. Nicolas Suzor, ‘The Role of the Rule of Law in Virtual Communities’ (2011) 25 Berkeley Technology Law

16. See John B Thompson, ‘Shifting Boundaries of Public and Private Life’ (2011) 28 (4) Theory, Culture & Society, 49, 60; Beate Rossler, The Value of Privacy (R.D.V, Glasgow, Cambridge: Polity, 2005); Helen Nissenbaum, ‘A Contextual

Approach to Privacy Online' (2011) 140 (4) Daedalus, the Journal of the American Academy of Arts & Sciences, 32, 40