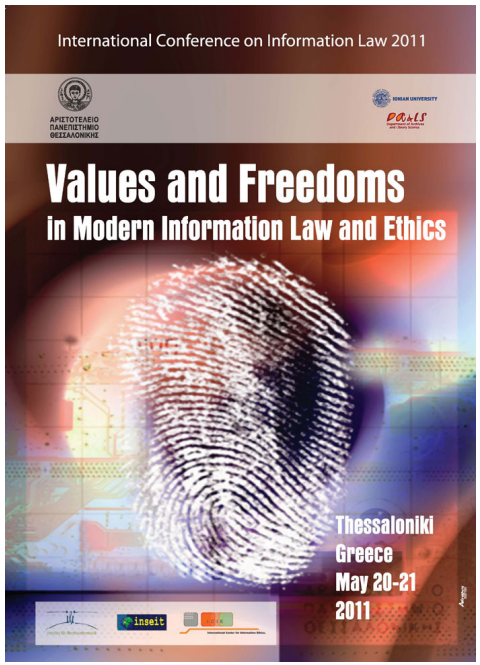

Social Networking and the Employment Relationship

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Stathis Mihos – brief CV

Today:
Legal Manager Hellenic Fuels S.A.
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Previous positions:
Legal Manager
AGET Heracles (Lafarge Cement subsidiary) in Greece

Senior Associate
KLC Law Firm (Athens)

Trainee at Public Power Corp.

Also:
Board Member of Association of Corporate Counsel (Europe) and Country rep for Greece

Author «Monitoring of Internet Communications in the Workplace»

Regular contributor to the legal magazine 'Synigoros' ('Counsel') (column «In house»)

Aims & Contents of this presentation

- We aim to examine the legal aspects of the use of social networking in relation to the employment relationship
- Contents:
  - Definitions
  - The spread of Social Networks
  - The main conflict
  - Why employers love and at the same time are fearful of Social Networks
  - Examples of problems in using Social Networks in employment or quasi employment relationships
  - Issues in the use of Social Networks before, during and after employment
  - The ‘between friends’ argument
  - The employment contract’s obligations and consequences of their violations
  - Areas that require attention
  - And finally, to sum up

Definitions:

- **Social Networking:** web-based services that allow individuals to

  (1) construct a public or semi-public profile within a bounded system,

  (2) articulate a list of other users with whom they share a connection,

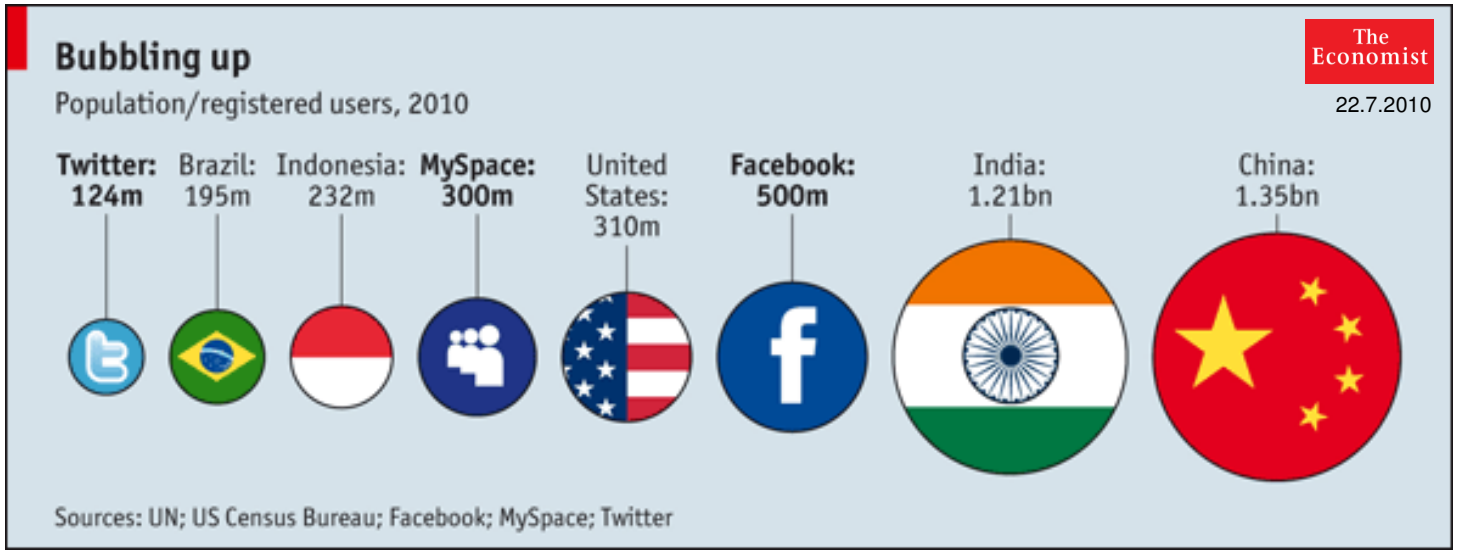
  (3) view and traverse their list of connections and those made by others within the system,* and

  (4) exchange data with other system users in the form of comments, files, messages etc.

- **Employment Relationship:** Any dependent employment relationship, valid or not, for a definite or indefinite period of time, full or part-time, in any place (including home or teleworkers), irrespective of duties or tasks or position assigned.

*D.M.Boyd-N.B.Ellison

A networked world



facebook myspace twitter

LinkedIn XING badoo QQ空间 QZONE.QQ.COM

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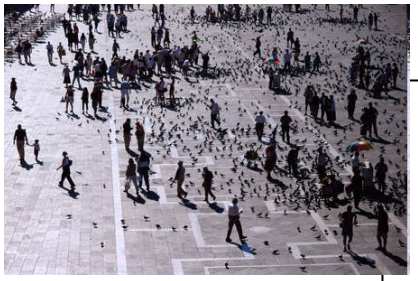
The main conflict: Public vs Private



‘If postings in cyberspace are equivalent to the behaviour in the public square, then are postings in Social Networks equivalent to behaviour in a private party?’

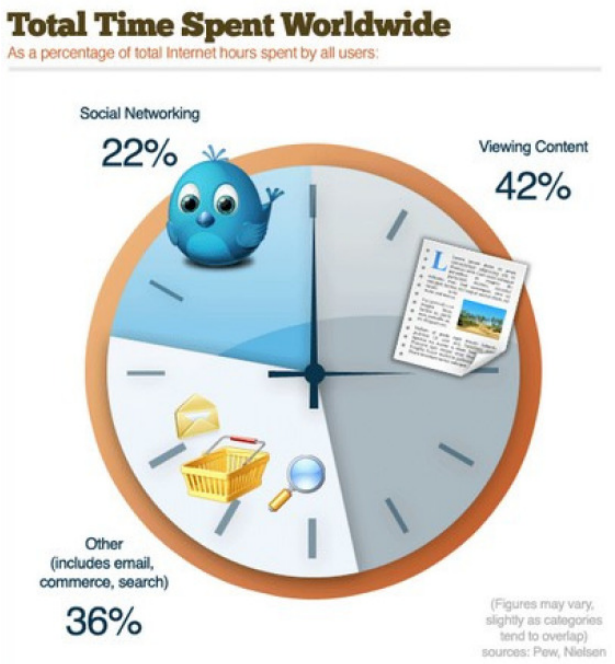
Why employers love Social Networks

For businesses, social networking is a way to:

- Create brand awareness
- Manage online reputation
- Recruit
- Learn about technologies and competitors
- Intercept potential prospects

Why employers are fearful of Social Networks (1)

- Liability (libel, defamation, harassment or sexual harassment, discrimination etc.)
- Security issues (2008 Facebook Koobface worm)
- Leaking of trade secrets
- Time waster
- Copyright or trademark infringement
- Unauthorized use of client names or other info



Why employers are fearful of Social Networks (2)

Corporate Espionage:

- Hackers bypass security and access sensitive data using social engineering
- Have access to lists of employees, qualifications, functions and connections
- Loss of corporate IP, hacking networks, blackmailing employees
- MUST HAVE: Awareness training, Security policy for SN, limited provision of information

It happened in…

- In 2007 a customer brought to the attention of a retail outlet that an employee had posted on Bebo unflattering comments about a manager. The employer initiated disciplinary proceedings against the employee. A disciplinary meeting was held and the employee was dismissed for gross misconduct.
- The claimant initiated unfair dismissal proceedings. The Employment Appeal Tribunal held that the dismissal was disproportionate to the offence and directed that the retail outlet pay the claimant €4,000 in compensation.

It happened in…

- Three employees of a French consulting company, posted comments in late 2008 from their personal home computers on Facebook about company managers, including its Human Resources Director.The conversation appeared on one of the three employee's Facebook page, with comments by two other employees. The employer discharged all three employees for rebellion against the company's hierarchy, and denigration of the company's image.
- The employee on whose Facebook page the comments appeared chose mediation while the other two filed a complaint before the labor court.
- The employees argued that the Facebook page was private and the comments were humorous. The employer argued that the list of Facebook "friends of friends" included the employee who owned the Facebook page and other company employees and the Facebook page was capable of being read by people outside the company during the time period in which it had been posted.
- The Court accepted the employer's arguments and upheld the discharge of the two employees (*Barbera v. Société Alten SIR*; *Southiphong v. Alten Société SIR* (*Prud'hommes de Boulogne-Billancourt*, Nos. RG-F-/326/343), November 19, 2010

It happened in…

- In 2008 a higher education professor posted on Facebook derogatory comments as well as documents relating to the work and career of a colleague. Both professors were candidates for the same academic position.
- The Court of First Instance of Thessaloniki (16790/2009) found that the postings constituted an unlawful infringement on the claimant's personality and issued an injunction requiring the offender to refrain from using the claimant's personal data or using the Internet for the publication of the aforementioned documents.

It happened in…

- In 2009 an airline employee was fired from her job because she was spending too much time visiting social networks such as Facebook at work, neglecting her duties and business clients calling. The employer had previously sent an email to all employees forbidding visits to social network sites.
- The Court of First Instance of Athens (34/2011), in a widely published decision, found that the dismissal was not abusive, as the claimant's behaviour constituted a breach of her employment contract's obligations.

It happened in…

- In 2010 two employees posted on Facebook offensive comments about their supervisors and their employer. A supervisor who was an employee's Facebook 'friend' saw the comments and after being removed from the 'friends' list monitored the comments with the help of a former employee 'friend'. One of the employees alleged that his Facebook account could have been hacked as he had left it logged on at work. The employer terminated the employment of the two employees. The Union filed an unfair labour practice complaint alleging that there was no cause for termination and the employer was motivated by anti-union animus.
- On 22.10.2010 the British Columbia Labour Relations Board decision in *Lougheed Imports Ltd (West Coast Mazda) v United Food and Commercial Workers International Union, Local 1518* dismissed the Union's application.
- The decision established that employees have no reasonable expectation of privacy in comments made on social networking sites, and that when those comments are damaging to the employer's business or offensive, insulting and disrespectful to supervisors, the employer may have just cause for termination; however, employers should be cautious when deciding to monitor these sites.

It happened in…

In March 2010 the Israeli military called off a raid on a West Bank town after a soldier posted on his Facebook profile that his combat unit was going to "clean up" the area. The soldier was reported by his friends, court-martialed and sentenced to 10 days in prison, according to media reports.

It happened in…

- In 2010 Sarah Baskerville, a government department employee, had made several posts on Twitter mentioning the fact that she had been hungover while at work, as well as making personal comments about people she had worked with. Two national newspapers reprinted these comments in articles about the views and behavior of public officials.
- She complained to the Press Complaints Commission, that it was a breach of privacy to reproduce the comments without permission
- According to the commission, Baskerville made two main points: that it was reasonable to expect the message would only be seen by the 700 followers on her account; and that her account was clearly labeled as a personal view that did not reflect her employer's (but not at the time the newspapers used the material)
- The commission has now ruled to reject the complaint: anyone could have stumbled across the information and the retweet feature of Twitter meant there was a strong possibility it would be seen by people other than Baskerville's followers.
- One notable point about the case is that the two newspapers stressed that Baskerville had openly used her own name rather than posting anonymously.
- Was reprinting the Twitter posts a breach of copyright? fair use clause - 140 characters

It happened in…

- In 2009, business owner Paige Darden of Beartooth Mapping Inc. stumbled upon an employee's MySpace profile saying this person was planning a two-hour lunch because her boss was out of the office.
- In 2010 an employee for Nolcha LLC exposed "crucial details" on Twitter about a potential business deal with a prospective client, but the client never saw the post and the deal went through.
- In 2009, an account manager for Zorch Sourcing LLC posted on her Facebook profile that she had quit her job. One of the Chicago firm's largest clients, previously befriended by the employee, learned about her resignation this way and lodged a complaint.
- Julie Robinson, owner of Undercover Productions Inc., a staffing agency in Las Vegas, says some of the independent contractors she hires seem to forget that she follows them on Twitter. "One girl said she was out having a great time drinking and she called in sick the next morning,"

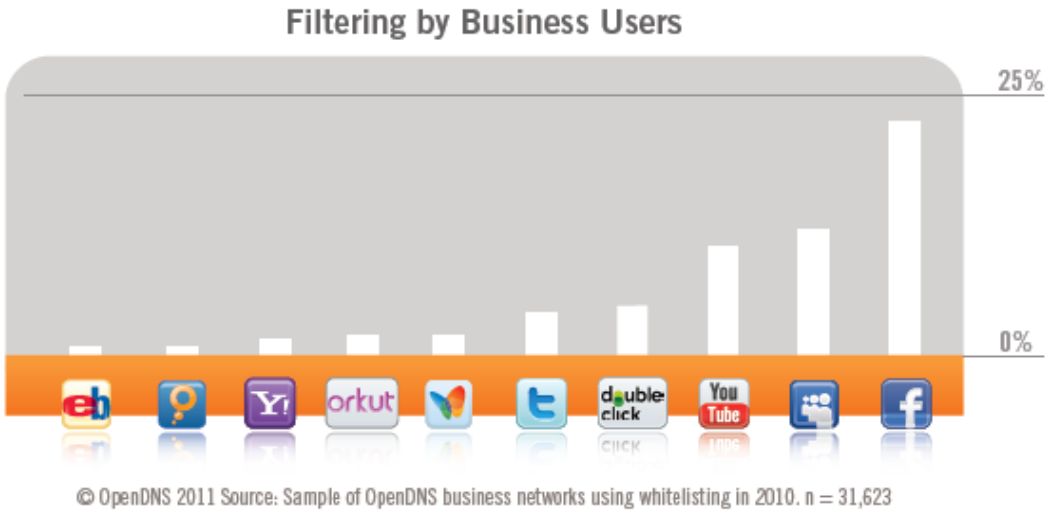
Who are you, really?

- In making hiring decisions, employers can lawfully* use information that the applicant voluntarily disclosed and is publicly available. This may relate to illegal activities, poor work ethic, poor writing or communications skills, feelings about previous employers and racist or other discriminatory tendencies or even poor judgment in maintenance of his or her public online persona.

- However employers run the risk of being held criminally and/or administratively liable if found to have violated, in a hiring decision, anti-discrimination in the workplace laws (L.3304/2005) related to use of criteria such as race, age, disability, religion, sexual orientation etc.

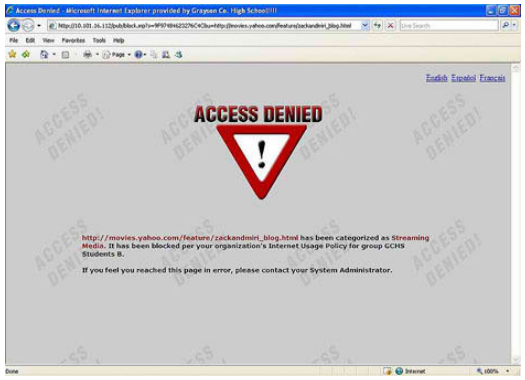
*NO	*YES (BUT)	*MAYBE
		
Finland's Data Protection Ombudsman Reijo Aarnio ruled that employers cannot use Internet search engines (i.e. Google) to obtain background information on job candidates	*UK's Employment Practices Code published by the UK Information Commissioner's Office says that during a recruitment process, employers have to: "Explain the nature of and sources from which information might be obtained"*	*A bill, to be passed by the German Parliament, would prohibit employers from using social networking sites such as Facebook (but not "professional" online networks such as LinkedIn or Xing) when conducting background checks and screening current and potential employees*

To poke or not to poke at work?



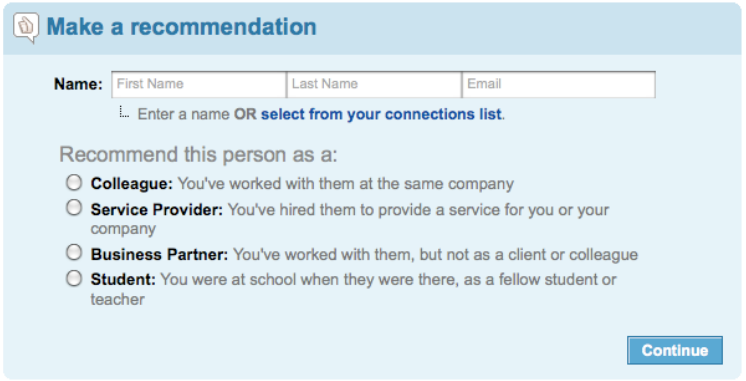
1. Facebook.com — 23%
2. MySpace.com — 13%
3. YouTube.com — 11.9%
4. Ad.Doubleclick.net — 5.7%
5. Twitter.com — 4.2%
6. Hotmail.com — 2.1%
7. Orkut.com — 2.1%
8. Ad.Yieldmanager.com — 1.8%
9. Meebo.com — 1.6%

TUC (British Trades Union Congress) General Secretary Brendan Barber said in 2007: '*Simply cracking down on use of new web tools like Facebook is not a sensible solution to [the] problem … Better to invest a little time in working out sensible conduct guidelines...*'



Gone, but not forgotten…

- Supervisors and co-workers are increasingly asked to "recommend" former employees on LinkedIn after separation from employment.
- Technically, a positive recommendation on a person's LinkedIn page is not the same as an employment reference (Art. 678 Civil Code), unless given by an authorized company representative and has been requested by the employee.
- However in practice it amounts to the same, so employers should consider adding to their policies a prohibition on managers from "recommending" or commenting on the job performance of former employees via social media without prior specific authorization.



Between friends & The household exemption

According to Opinion 5/2009 of the Working Party of Article 29 of Directive 95/46/EC:

- When users operate within a purely personal sphere, contacting people as part of the management of their personal, family or household affairs, the regulations governing data controllers do not apply.
- The 'household exemption' does not apply and the user might be considered to have taken on some of the responsibilities of a data controller, if user:
  - acts on behalf of a company or association
  - uses the social network mainly as a platform to advance commercial, political or charitable goals
  - acquires a high number of third party contacts, some of whom he may not actually know
  - takes an informed decision to extend access beyond self-selected 'friends'
  - provides access to profile to all members within the social network or the data is indexable by search engines

The application of the household exemption is also constrained by the need to guarantee the rights of third parties, particularly with regard to sensitive data. In addition, it must be noted that even if the household exemption applies, a user might be liable according to general provisions of national civil or criminal laws in question (e.g. defamation, liability in tort for violation of personality, penal liability).

Suggestion: if the household exemption does not apply, then we are *not* in a closed environment of friends.

When a ‘friend’ is not a friend

- Can one have access to information posted on social sites by *deceptively* ‘friending’ a person? (i.e. the employer befriending an employee) ->
  - Fraud? (386 Penal Code requires damage to property),
  - Unauthorized access to data? (370C par.2 PC or 22 par. 4 L.2472/1997)
  - Unauthorized change of name? (415 PC, a misdemeanor)
- What if the *real* name is used?
  - Ethical issue but not necessarily illegal (exception for Lawyers: possibly violation of art. 38 of the Code of Ethics).

Dunbar’s Law (Robin Dunbar, British anthropologist): limits to 150 the number of individuals with whom any one person can maintain stable relationships. Facebook says the limit is 5,000. BT’s innovation head JP Rangaswami thinks social software might help raise the Dunbar number.

How about an employer's policy for social networks?

- Only 17% of employers have a risk mitigation policy and program (Deloitte 2009)
- The employer may use a policy to:
  - Prohibit the use of *company email address* to register with a social network
  - Prohibit using company *logos or trademarks* in postings, pages etc.
  - Request employees to *disclose* (identity/affiliation) and *disclaim* (not my employer views)
  - Give *guidelines* on friend requests by colleagues or managers
  - etc.

Violating the employment contract's obligations

The issues presented in slides 8-9 may constitute violations of the employment contract's obligations for the employee that may be sanctioned and even lead to termination of the employment relationship.

Criminal acts related to the employment relationship

- Such issues (slides 8-9) could also lead to penal sanctions.
- i.e. an employee that disseminates false or true (but confidential) information about the company could face criminal liability:
  - Defamation 362 PC, Aggravated Defamation 363 PC, Defamation of a Corporation (SA) 364 PC, Fraud 386 PC, fraudulent damage 389 PC, Secrecy of Letters 370 PC, Secrecy of data of particular types (i.e confidential professional or belonging to private enterprises data) 370B PC, Breach of professional confidentiality 371 PC
- A criminal act of an employee that is related to the employment relationship, may lead to unpaid termination of the employment relationship

Obligation of loyalty (288, 361, 652 CC)

‘An employee should not harm the lawful interests of the employer’

Specific obligations:

- to respect employer’s personality
- to maintain confidentiality
- not to compete with employer business
- to get along with colleagues
- not to disparage employer products

HOWEVER

An employee may act against the employer’s rights in order to protect her own lawful interests or expose unlawful conduct (applicable also when employee’s duties include postings in social networks about employers products).

Areas that require attention

- How does one know what is ‘real’ on the internet? How can one know the true author? (‘cyber identity theft’)
- Trade union rights? Is Facebook talk among employees equivalent to water cooler talk? Is this protected?

And finally, to sum up… ☺