



## TECHGEAR



The Social Network Access Keyboard (\$30) is a USB keyboard with 19 dedicated hotkeys designed specifically for navigating social media platforms.

## WEBLINKS



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### TheOnion.com

The funniest site that I have found on the Internet. Interestingly, its stories are occasionally picked up and repeated by “real” news outlets.

### Snopes.com

The urban legends reference site. It is amazing the things people believe that are just not true. The site’s founders, Barbara and David Mikkelson, have spent years researching this fascinating and exhaustive collection of apocryphal tidbits.

### Yahoo! Babel Fish

<http://babelfish.yahoo.com>

Language translation for about a dozen languages. The results are helpful, if sometimes hilarious.

### The Way Back Machine

<http://www.archive.org/web/web.php>

Websites archived back to 1996. Sometimes you need to see what a certain website looked like in the past (e.g., if you are looking for a former employee of a company). It even shows our firm’s original website, which is pretty scary, but entertaining.

### Poodwaddle.com

I am not sure how they calculate it, but their world clock information has fascinating statistics. It shows, on a continuing basis, the number of deaths, illnesses, births, crimes, national debt, global warming, pollutants being released, and a lot more.

# Social Media and E-Discovery

BY GWYNNE MONAHAN

By now, most of the information you have acquired about social media networks has been focused on marketing, networking, and client development. Rarely is there a legal conference without some kind of social media network meet-up. However, many lawyers still view social media networks as time wasters. Some lawyers think a tweet is no substitute for a handshake. Others are reluctant to engage in social media because ethical rules do not seem to offer clear guidance on using networks for marketing or client development.

While those are valid points, they also present a very narrow view of social media networks. After all, it is hard to see posting photographs of a recent vacation or “checking in” at the local Walgreens as anything more than trivial information.

But what if that “check in” showed that your client was not at the scene of a crime? Or perhaps relevant conversations took place through Twitter’s or Facebook’s messaging systems, but are not necessarily publicly available.

It is this realm of e-discovery, where lawyers’ understanding of how social media networks operate, that is increasingly important.

In order to understand the relationship between social media networks and e-discovery, it is necessary to use them. This does not mean spending hours each day posting information to Facebook or Twitter. Rather, it means going through the process of creating an account and getting a feel for how social media networks function. For example, how does

posting to Facebook differ from posting to Twitter or LinkedIn? How does posting a video or link differ from posting a photograph? And when might being able to post to Facebook, Twitter, and LinkedIn at the same time be relevant?

Getting a feel for how social media networks function is one aspect of using social networks. Another, perhaps more important, aspect is how the privacy settings have an impact on who can see what types of information. As both *Crispin v. Audigier* and *Romano v. Steelcase Inc.* demonstrate, the courts look to the privacy policies — and user privacy settings — of social media networks to help determine what information is public and what is private and whether that information is admissible.

The relationship between social media and e-discovery is both old and new. It is evolving as the law gains an understanding of how social media networks operate.

The relationship is old in that, like other mediums, the information is discoverable. It is new in that information contained on social media networks can be both public and private. In other words, social media networks are a hybrid of an open network and a “walled garden.” Some information is readily accessible by the public, including lawyers, judges, and potential jurors, while other information is accessible only to parties who have been given permission. Knowing the difference and how social media networks separate their public information from more private information is increasingly important.



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In *Crispin*, for example, the court held that the Stored Communications Act (SCA) protected messages on Facebook and MySpace that were not publicly available. The court made the distinction between Facebook wall posts and Facebook messages. It looked to the privacy settings of Facebook to help make the distinction because a user's privacy settings dictate what is publicly viewable and what is viewable only to those invited. While information posted to a Facebook wall may be public, information sent through Facebook's private messaging system is not necessarily public.

In *Romano*, the court held that private messages were admissible because contradictory information was posted in the public areas of Facebook and MySpace. Public posting of contradictory information, in the eyes of the court, meant there was a reasonable expectation of relevant information being included in private messages, too. Such a conclusion is reached with an understanding of how social media networks operate and how public information is distinguished from private information.

While it may seem obvious how social media networks distinguish between public and private information, it may not be as obvious with other networks, like Twitter.

Twitter, too, has a private messaging system, Direct Message. Unlike Facebook's private messaging system, it is limited to 140 characters. Twitter also allows its users to make profiles private. In the parlance of Twitter, private accounts are "protected" and only followers approved by the account creator can see tweets, send tweets, and send direct messages. For many users, Twitter is not as intuitive as Facebook or LinkedIn. As a result, it may be overlooked or ignored altogether.

Not every court, nor every lawyer, has an understanding of how social media networks operate, and how "public" information is distinguished from "private" information. Gaining such an understanding, then, can put you at an

advantage over opposing counsel, and allow you to educate judge and jury.

It is clear that social media networks will continue to proliferate, which presents a challenge for both lawyers and e-discovery professionals. However, using some of the popular social media networks can make it easier to quickly assess how another social media network treats

public and private information.

If you have been on the fence about engaging in social media networks, take a minute to think about it in terms of e-discovery. Understanding how social media networks operate and how they distinguish public information from private will help you continue to be a zealous advocate for your clients. ★



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