



*Emerging Enterprise
Center*



Law School for the Tech Entrepreneur

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September 27, 2011



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The New Frontier: Employment Law and Social Media

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What Do We Mean By Social Media?

- “Social Media” (sometimes described as “Web 2.0”) refers to Internet applications that facilitate interactive information sharing by incorporating user-generated content

- Examples:
 - Social Networks (e.g., Facebook, LinkedIn, and MySpace)
 - Blogging Sites
 - Microblogs (Twitter)
 - Virtual Worlds (Second Life)
 - Multi-media content sharing sites (YouTube, Flickr)

Advantages of Social Media

■ Marketing:

- Companies can use sites such as Facebook for free marketing to potential customers or clients
- Because of the information available on these sites, companies can target specific individuals or groups who might be interested in their products or services

■ Professional Networking:

- Sites such as LinkedIn are becoming the modern day Rolodexes
- Employees can form and maintain professional relationships that are valuable to the company

Advantages of Social Media (Cont.)

- Recruiting:
 - Social networking sites are widely used, especially by young job-seekers
 - Companies who recruit through social networking sites can gain an advantage in attracting new employees:
 - According to a 2009 survey, 55% of employers had used social networking sites for employee recruitment
 - Social networking sites allow employers to target a broad range of applicants from diverse backgrounds and all geographic areas

- **SO... WHAT ARE WE WORRIED ABOUT?**

My Photos - Profile Pictures

Photo 1 of 1 [Back to Album](#) · [My Photos](#)





Carl Candid



Good Times

I

3 hours ago · Comment · Like · Share



Carl Candid Yesterday I was "sick" - haha!
3 hours ago · Delete



Lyndsey Kruzer Looks real rough over there at Technology, Inc...
2 hours ago · Delete



Carl Candid Yeah, well my boss has been a huge jerk lately, so I'd earned a day off on the company's dime.
2 hours ago · Delete



Scott Merrill You need some 420 rest at work, my friend. Btw, can you hook me up again? That Vermont bud is killer. I can stop by your office to get it like we did last time. Maybe duck into the parking garage for a quick toke or two? Hahahaha...
about an hour ago · Delete



Carl Candid Yeah .. let's meet at 2. We should invite that hot new intern too.
about an hour ago · Delete



Scott Merrill Btw, your secretary is hot. Can you get me her phone number? Don't worry...I'll just text her.
21 minutes ago · Delete



Carl Candid 617-555-1234 don't tell her you got it from me.
14 minutes ago · Delete

Carl Candid Taking a break from surfing the net to work on the Alpha Project ... this is definitely going to be the next big thing in cloud computing 11 minutes ago [clear](#)

Wall Info Photos +

What's on your mind?

Attach: [Share](#)



Carl Candid Taking a break from surfing the net to work on the Alpha Project ... this is definitely going to be the next big thing in cloud computing

11 minutes ago [Comment](#) [Like](#)

[Options](#)
[Remove](#)

RECENT ACTIVITY

- Carl and Lyndsey Kruzer are now friends. [Comment](#) [Like](#)
- Carl and Jamie Matthews are now friends. [Comment](#) [Like](#)
- Carl likes Gay Marriage.
- Carl likes Legalize Pot.

Create an Ad

Lowell Bucket List x



Things to do in Lowell before you die. One huge coupon emailed daily.

Like

Gay Social Network x

Get your profile on fabulis, the new social network for gay guys and their friends.

Like

What Are We Worried About?

Current Employees

- Loss of employee productivity at work
 - 55% of employees admit visiting social networking sites during work hours
- Reputational damage for the company based on employee online activity
 - Employees using company name or trademark in conjunction with inappropriate behavior
 - Employees posting information or pictures concerning inappropriate on-site conduct
 - Employees defaming employer online
- Improper use of confidential information
 - Trade secrets
 - Disclosure of other internal company information

What Are We Worried About? (Cont.)

Former Employees

- Use of Social Networking Sites in Violation of Restrictive Covenants
 - Overt wrongdoing (e.g., downloading company sales list and contacting customers via LinkedIn upon termination of employment)
 - Passive wrongdoing (e.g., employees who are already linked to customers through social networking sites updating their information to reflect job change and posting positive information about products of new company)
 - Example: *TEKSystems v. Hammernik*: alleged breach by departing employees of restrictive covenants via LinkedIn activity

Going Overboard?

- Employers must be careful in monitoring employee use of social networking sites

- Example: Monitoring Off-Duty Conduct:
 - While an employer may have an interest in ensuring its employees exhibit good judgment and character, it may run into risks if it takes adverse employment action based on conduct viewed online
 - Private Profiles
 - Federal Stored Communications Act
 - Invasion of Privacy
 - “Lifestyle Discrimination” Statutes
 - Exist in some form in 33 states
 - Protect employees from adverse employment action based on off-duty, lawful conduct such as consumption of alcohol, tobacco products and/or other “lawful consumable substances”

Going Overboard? (Cont.)

Other Concerns

- Collisions with evolving privacy-related protections of on-line activity
 - Example: *Stengart v. Loving Care Agency (2010)*: New Jersey Supreme Court holds that employee who sent messages to her attorney from a personal e-mail account using company-issued laptop had a reasonable expectation of privacy in the e-mails
 - Evolving protections will be state-law driven

- Whistle-blower protections

- Union Organizing

Concerted Activity

- Intersection of oldest and newest areas of labor and employment law
- NLRA prohibits “interfering with, restraining, or coercing employees in the exercise of their . . . rights to engage in concerted protests or complaints about working conditions”
- NLRB (which enforces NLRA), just in 2011, has fielded 129 cases involving employers disciplining or threatening to discipline employees for statements made on social media
- What does this have to do with non-union employers?
 - NLRA clearly applies to non-unionized employers
 - Area of focus for Obama-controlled NLRB
 - Most of the 129 NLRB cases involve non-unionized employers

Concerted Activity (Cont.)

- Protected:
 - Five employees fired for complaining and corresponding with each other on Facebook (during off hours) about issues in the workplace

- Unprotected:
 - General complaint by single employee about cutbacks at a company, where there was no employee discussion involved

- Recent NLRB General Counsel guidance alleviates some of the concern raised earlier this year
 - Question is whether activity is “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself”

Wall

Info

Photos



What's on your mind?

Attach:



Share

Options



Deb Lynch Things have been really rough around here lately. What do you think we can do about it?????

5 minutes ago · Comment · Like · See Wall-to-Wall



Carl Candid I know!! I'm trying to get all the engineers together at the brewery tonight to organize a bunch of us going to the company and talking about how we're being treated around here. 5:30 - spread the word!

3 minutes ago · Delete

Write a comment...

Best Practices

- In the workplace...
 - Develop and distribute a blogging and social networking policy, focused on:
 - Posts should be honest and accurate
 - Conduct should be appropriate and respectful
 - Incorporate important concepts into existing confidentiality and IT acceptable use policies
 - Inform employees that their online activities using company technology are subject to monitoring, so as to protect against potential claims for invasion of privacy
 - Implement training on brand awareness and “do’s and don’ts” of social networking
 - Consider restricting access to social networking sites during work hours

Best Practices (Cont.)

- Protecting the company's reputation and other legitimate interest:
 - Make sure the employees know what information the company considers confidential, protected, or a trade secret and know that disclosure in any form is unacceptable
 - Consider asking employees who blog to do so anonymously or to include a disclaimer that their views do not reflect those of the company
 - If the company does suspect employee violation of restrictive covenant via social networking site, make sure to preserve the evidence (but also consider asking the employee to remove objectionable content)

- Don't Penalize or Prohibit Concerted Activity

Applicant Screening

- Recently TIME magazine reported that 70% of surveyed HR managers have rejected an applicant based on content on an online social networking profile
- Potential problems with pre-employment screening via Facebook and similar sites:
 - Use of inappropriate measures to gain access to applicant sites that are limited/private
 - Access to protected status information (age, disability, sexual orientation etc.), leading to claims of discriminatory hiring practices
 - Failure to comply with Fair Credit Reporting Act's requirements for background checks

Applicant Screening (Cont.)

- Best Practices:
 - If screening applicants' online activity, do so uniformly
 - Have a neutral party who is not part of the hiring process screen applicants for the sought-after information and report back to decision-makers, omitting any protected class information
 - Consider not using online social networking to screen employees until after an initial in-person meeting
 - As always, have a legitimate, non-discriminatory reason for hiring decisions
 - Comply with the Fair Credit Reporting Act (if using a third party to engage in background screening via social networking sites)



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Creating and Preserving Value in Licensing Transactions

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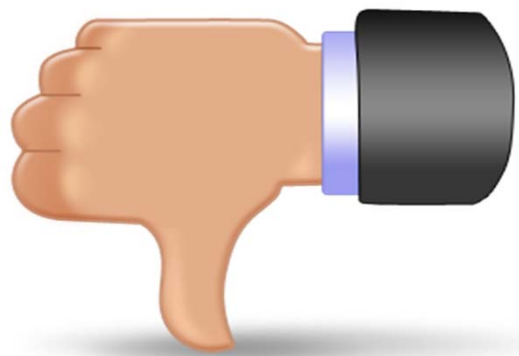
Pros & Cons of Licensing

- **Leverage Resources of Partner**
- **Commercialize More Quickly**
- **Non-Dilutive Funding**
- **Validation / Strategic Position**



Pros & Cons of Licensing (Cont.)

- **Lose Some Control of Destiny**
- **More Difficult to Partner with Others**
- **Need to Plan for Long Term / Exit**



Plan Ahead

- **Ensure you have the Right to License**
 - ✓ Assignments from Inventors
(Employees or Consultants)
 - ✓ Verify Chain of Title / Depending on IP did you file / protect
 - ✓ Do You Need Other Consents?



Plan Ahead (Cont.)

- **What's the Market / Potential for Your Technology?**
 - ✓ Which Players are Most Logical?
 - ✓ How Does the Market Work?
 - ✓ Where's Largest Opportunity?
 - ✓ Who's the Competition and Why are You Better?

Nuts & Bolts of a License

- **What Are You Licensing?**
 - ✓ Patents
 - ✓ Trademark / Copyright
 - ✓ Know-How / Trade Secret



Nuts & Bolts of a License (Cont.)

- **What is the Territory?**

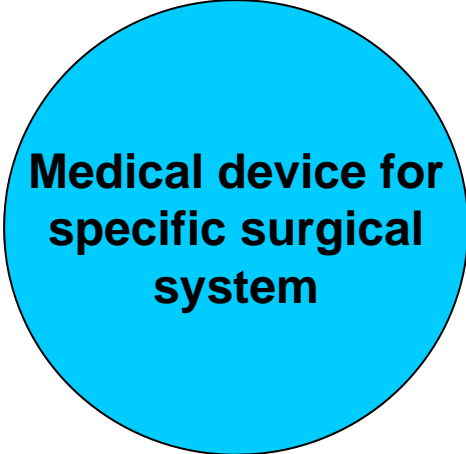


- **U.S./ex-U.S. (Canada, Japan, Europe)**


Nuts & Bolts of a License (Cont.)

- **Is there a Field or Use Limitation?**

Examples:



**Medical device for
specific surgical
system**



**Oncology
for a drug
or diagnostic**



**Specific
software for
financial
program**

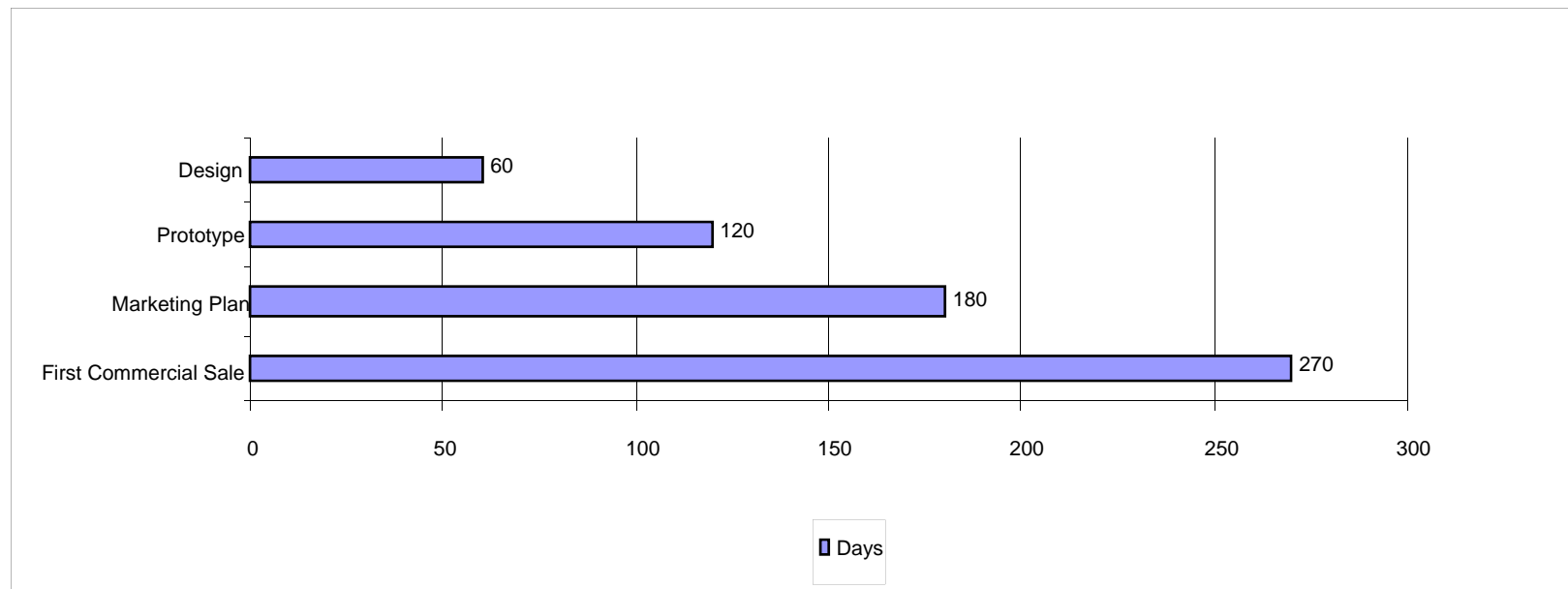
To Be or Not to Be Exclusive?

- Your Partner will want to be exclusive to invest in R&D or Infrastructure
- So You Will Need To Protect Yourself:
 - ✓ Define “Field of Use” Carefully
 - ✓ Preserve Ability to Grant Initial License in Most Lucrative Field
 - ✓ Add Diligence Covenant by Partner



What Will You Be Paid?

- **Upfront Payment**
- **Milestones Development/Regulatory/Commercialization)**



What Will You be Paid? (Cont.)

- **Royalties (% Net Sales, \$ per Units, Value)**
- **Other Payments:**
 - ✓ Research or Technology Transfer Payments (e.g. FTEs)
 - ✓ Option Exercise
 - ✓ Sublicense Revenues

Intellectual Property Rights: Thicket of Improvements

■ Who Owns What:

- ✓ Based on respective Core Domain in Specific Area of Technology
- ✓ Inventorship
- ✓ Joint Ownership
- ✓ Funding Party Owns Results



Why Assignment Matters

- **Agreement Continues Even if You're Acquired**
- **But May Need to Accept Your Partner Selling Assets to/Acquisition by Competitors**





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Avoiding the Pitfalls of Litigation

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Avoiding the Pitfalls of Litigation

- **Before: From dispute to suit**
 - An ounce of prevention
 - Proper postur(ing)

- **During: On the battlefield**
 - Your litigator is your gladiator
 - Can you stand the heat?

- **After: The happy ending**
 - It's just business
 - Cover your assets

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