

Social Media: Risks and Best Practices

BEST PRACTICES FOR THE LEGAL DEPARTMENT OF TOMORROW

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Overview

1. Overview of Social Media Risks
2. Legal Responses to Social Media Issues
3. Role of Legal Team and Public Relations
4. Social Media and the Employment Relationship

Social Media Risks

- Social media is pervasive
- Host of risks and considerations: legal, reputational, HR
- Social media can:
 - Trigger a crisis
 - Amplify a crisis



Social Media Risks: Misleading Influencer Advertising

- Influencers increasingly important to social media marketing strategies
- Failure to disclose partnerships/relationships with influencers creates misleading advertising risk



Social Media Risks: Appropriation of Name or Likeness

- Obtain consent to use a person's name or likeness
- Case Study: Katherine Heigl sued a drugstore for posting a photo of her to social media with the text:

“Love a quick #DuaneReade run? Even @KatieHeigl can't resist shopping #NYC's favourite drugstore”



Social Media Risks: Astroturfing

- Encouraging employees or hiring third parties to post positive reviews is “astroturfing”
- Practice may constitute misleading advertising under the *Competition Act* and consumer protection laws



Social Media Risks: Disclosing Customer Personal Information

- Social media allows direct engagement with customers and the public, new channel for customer support
- Public interactions may result in disclosure of personal information
- Establish privacy policies and customer service practices that address this risk



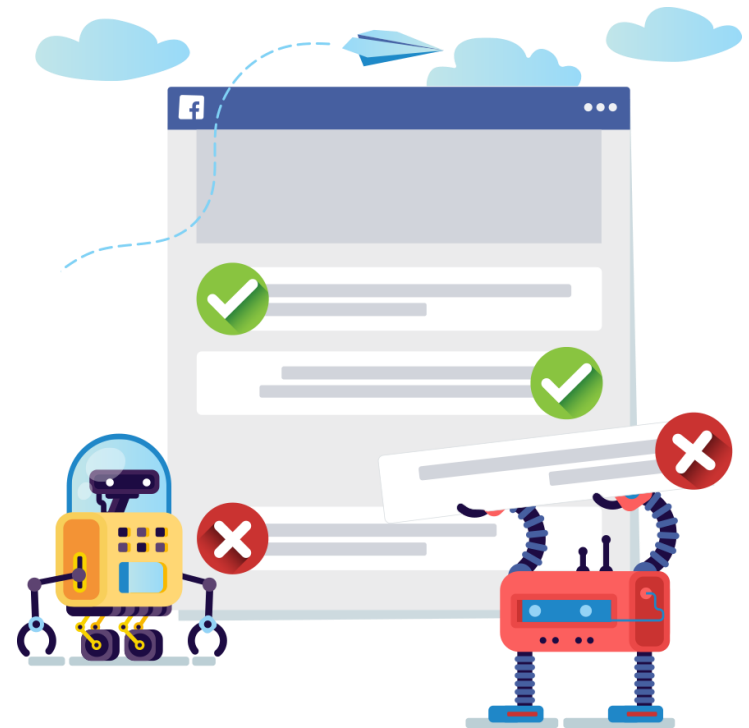
Social Media Risks: Trade-mark Infringement

- Risk of misuse of trade-marks by others amplified on social media
- Enforcement challenging, particularly where identities unknown
- Most platforms have appropriate use policies and mechanisms for protecting brands



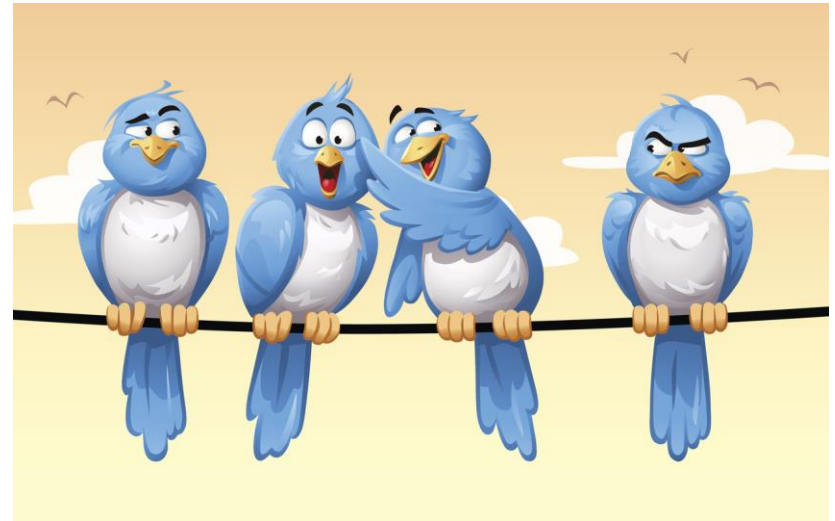
Social Media Risks: Operating Forums / Publishing Comments

- Engaging with customers on social media allows posting of defamatory, abusive, private, confidential or copyrighted content
- Risk of liability for republishing content
- Develop policies and customer service practices that address moderation of social media



Social Media Risks: Content Takedowns

- Risk of defamatory, abusive, private, confidential or copyrighted content relating to your organization or employees posted elsewhere
- Attempting to take down content posted elsewhere creates own set of risks



Case Study: *Acumen Law Corporation v Nguyen*

- B.C. lawyer sued a former client for posting a negative online review.
- Reviewer did not respond to the civil claim
- Judge ordered \$1 in damages to “demonstrate disapproval of the plaintiff’s actions”
- Judge: *“In my view, this action should never have been brought”*

*“Anywhere else would be
more helpful. worstest
lawyer. would not
recommend.” - Google
Plus review*

Legal Responses to Social Media—Considering Legal Action

- Taking legal action in response to social media activities involves many considerations
- Do you need to go to court?
- Can you identify the defendant?
- How will legal action affect perception of your organization?



Legal Responses to Social Media (cont'd)

- Demand letters frequently posted to social media
- Potential backlash for “silencing critics”
 - Consider language and tone
 - Consider importance of detailing the specifics
- Consider effect of any anti-SLAPP legislation on merits of claim
- Courts not receptive to overly sensitive companies
- Addressing social media risks may require a multi-pronged approach

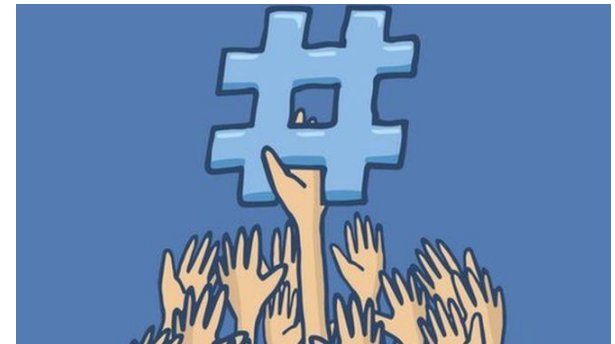
Social Media Risks: Public Allegations of Wrongdoing

- Using social media to make public allegations about misconduct (against company culture, senior executives, etc.)
- Heightened risk of regulatory proceedings or class actions
- Reputational risk
- Example - #MeToo related allegations



#MeToo Case Study: Weinstein Company

- October 5, 2017: NYT – Harvey Weinstein had "paid off sexual harassment accusers for decades"
- Immediate social media reaction
- Hours later: Weinstein issued an apology
- Following days: news stories, online articles, social media wars
- October 8: Announcement that Weinstein was fired from Company
- October 10: Harvey Weinstein denies allegations
- October 15: Alyssa Milano uses #MeToo hashtag and urges other victims to share stories
- Ripple effect on Twitter, Facebook, etc...



Coordinating Role of Legal and Public Relations

- Retaining External Counsel
- Engaging PR consultant - proactive or reactive
- Define roles
- Importance of coordination between Legal and PR – complementary roles



Role of Public Relations

- Develop clear PR and communications strategy
- Assess reputational risk
- Assist with communications with complainant and stakeholders
- Issue Press Release
- Advise on response strategy and messaging



Role of Legal Counsel

- Advise on legal risks, regulatory matters, disclosure issues, contractual obligations, etc.
- Coordination and strategic advice
- Ensure privilege is maintained
- Review of policies and procedures
- Conducting investigation
- Involved in developing communications and response strategy
- Remediation



Social Media and the Employment Relationship

- Social media intersects with employment/workplace laws and issues in a number of ways, including:
 - Corporate social media use (branding, ownership, etc.);
 - Personal social media use (discipline, freedom of speech, etc.);
 - Social media and background checks;
 - Social media and company equipment;
 - Social media and employee privacy;
 - Social media and confidential/proprietary information;
- Employers should develop detailed, thoughtful social media policies

Social Media Policies— Considerations

- Define social media:
 - Social networking sites (Facebook vs. LinkedIn);
 - Video and photo sharing websites (Flickr, Instagram, Snapchat, etc.);
 - Weblogs (personal blogs, corporate blogs);
 - Forums/discussion boards (Reddit, Google Groups, etc.);
 - Messaging sites (WhatsApp, WeChat, etc.)
 - Podcasts
 - Reviews



Social Media Policies—Considerations

- Distinguish between corporate use and personal use;
 - Corporate use: dedicated individuals; dedicated accounts?
 - Personal use: where to draw the line?
- Ensure coordination with other policies;
 - Code of Business Conduct
 - Confidential Information / Data Privacy policies and agreements
 - Integrity/Compliance policies
 - IT / Computer Use policies
 - External communications / Media policy
 - Cellphone / Handheld Device policies
 - Workplace Harassment, Violence, Discrimination Policies

Social Media Policies—Content

- Define scope and applicability;
- Consider permitted non-business use, if any
 - Enforcement;
 - Consistency;
 - Limitations;
- Consider legal issues
 - Protection of free speech;
 - Right to associate;
 - Workplace harassment



Social Media Policies—Content

- Define expectation of privacy and monitoring
- Define prohibited conduct
 - Unauthorized use of Company intellectual property (trademarks, logos, etc.);
 - Unauthorized disclosure of confidential, proprietary or business information;
 - Violation of intellectual property laws (e.g. downloading music illegally);
 - Use of company assets for outside business purposes
 - Posting, transferring, viewing or linking to sensitive material (profane, defamatory, harassing)
 - Communications regarding politics, religion and morality?

Social Media Policies—Content

- Business Use
 - Internal business use vs. External business use;
 - Content;
 - Ownership;
 - Approvals;
 - Use and storage;
 - Passwords;
 - Training



Social Media Policies—Content

- Personal Use
 - Consider ability (and desire) to regulate off-duty conduct
 - What is nexus to the workplace?
 - Profiles
 - Company related social media messages
 - General guidelines



Social Media Policies—Education

- Share policies with new hires immediately as part of onboarding process
 - Incorporate compliance with the social media policy into the employment contract
 - Consider sign-offs for existing employees
- Educate employees using training sessions, media, postings, etc.
 - Re-educate—policies will only remain effective if they are top-of-mind for employees
- Use real-life case studies
 - If you are aware of a relevant social media crisis, use that event as a case study for employee training purposes