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Commercial risks and rewards of the social media phenomenon

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Over the past year there has been much talk of the phenomenon of 'social media'. In broad terms, this means the adoption of social networking tools and digital communications technologies to upload and transmit content to a wide audience. These capabilities are by no means new: people have been able to post content, interact and engage in all kinds of marginal activity online for over 10 years. However, it is the mass-market adoption of these technologies that is driving change. The adoption of these techniques by brands, broadcast media and major multinational enterprises as a means of interacting with customers – whether customer service, advertising and marketing or promotional – has become a truly global phenomenon. As mobile devices become as powerful as laptops were only a few years ago, this trend of social engagement through technology will grow and grow.

Why should companies care about social media? First, the speed of development in social media far outstrips corporate risk management capability. Now that everybody is a potential publisher across multiple media channels, all companies face risks in a broad range of legal practice areas, including advertising and marketing, intellectual property, employment, finance and securities and privacy. Second, these new behaviours affect businesses in unexpected ways, from difficulties with reputation management to declining stock prices and loss of revenue to (hopefully for most brands) positive buzz, word of mouth and viral recognition of branded products and services. Third, the laws in this area are dynamically evolving, with constantly changing legislation, case law and policy. To make matters worse, differing jurisdictions approach these issues differently, creating a patchwork quilt for global companies to navigate.. Third, the laws in this area are still being developed, with constantly changing legislation, case law and policy. To make matters more interesting, the classic legal solution to a legal problem in social media may not always yield the result that the client would like.⁽¹⁾

Misdemeanours on social networking website Facebook are now a common headline (the teenager sacked for her "my job is boring" comment; the football fan duped into cheating on his girlfriend by fans of a rival team). Legal documents have even been served using Facebook. While all this happens, companies wrestle with adapting their employment policies to deal with social media. In some instances corporations have adopted policies and technical controls, seeking to prevent their employees from using social networks during office hours.

Employee conduct on social media can have knock-on implications for corporate reputation and, in extreme instances, can result in falling stock prices. When a United Airlines passenger posted a video on YouTube in which he sang his complaint about the airline, the story was picked up by the major US news networks and United's stock fell. A cottage pseudo-legal industry is developing around protecting corporate reputation on social media platforms. In simple terms, this can mean more than sending notices demanding that a social network shut down a '[Company name] sucks' page and can include search engine optimization work, 'spoofing' (the practice of countering negative commentary on social media with positive commentary) and advising on techniques to raise a company's profile generally.

On the other hand, companies are seeking to engage with customers directly using social media, sometimes with less-than-successful results. Advertising law and regulation have often been amended, and new guidelines promulgated, to keep pace with the new forms of commercial promotion enabled by social media technologies. The challenge for in-house lawyers advising on these kinds of activity is to determine policies regarding how marketing teams should interact with the online community at large. In some cases this can go wrong – the classic example being where a person employed to act as the moderator of a social media site or service starts to abuse site users himself or herself.

The protection of intellectual property on digital media platforms has always been a hot

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topic and social media only creates additional problems and complexities. The highest-profile social media case, *Viacom v Google*, which concerns the legitimacy of Viacom content posted on YouTube by users, is ongoing in the United States. If the case goes to trial, it has the potential to help resolve broad legal questions concerning the extent to which operators of social media destinations (eg, MySpace, Bebo, Veoh) are exempt from liability for IP rights infringement as repositories for content uploaded or posted by users. Content owners continue to fail to realize revenues from online and mobile exploitation of content between users. Instant messaging services which allow the sharing of large files and large file upload services (eg, RapidShare) allow social media users to transmit content within a community and without paying a rights holder. In recent years there have been numerous cases attempting to bring file sharers to account, with very limited success.

A new trend has emerged in virtual worlds (ie, digital environments which replicate or mimic the real world) of brands engaging with consumers. Although many companies have a corporate presence in Second Life and Habbo, for example, this interaction is now becoming a commercial opportunity. For example, in Sony Playstation's virtual environment Home, a user can create a digital avatar who can buy and wear virtual clothes from a virtual Diesel store. Although this might sound odd, for the social media generation this kind of online personalization is important in establishing an online identity within social media environments. Consequently, there is commercial value in offering virtual products. It also raises numerous legal issues: what if a third party were to establish an outlet selling counterfeit virtual Diesel goods? In what currency should transactions be undertaken? Under what terms can users create and sell virtual products?

There is also the question of privacy. Social media enterprises collect, store, use, share and dispose of a huge amount of personal data. This data can be used to analyze any number of human interactions, from the way that friends connect on Facebook to the demographic and purchasing habits of users. Unlike specific banner ads or even context-sensitive advertising, social networks, virtual worlds and online environments can often track a user's behaviour across a range of activities and websites or interactions – in much the same way that a browser can retain information regarding use patterns and visitations online. Accordingly, this type of information has huge potential commercial value. Over time, users of social media sites have become more alive to the value of their personal data. In turn, lawyers are increasingly asked to advise social media companies on their compliance with privacy and data protection laws. This does not always produce uniform results – for example, if an employee of a company recorded a confidential meeting with a customer, could the company seek removal of the confidential video from a social media destination on the grounds of privacy? The user agreements of various social media sites mean that the result may differ according to where the user posts the content.

It is clear that many companies are looking for guidance and comfort as technology changes and affords even greater levels of instant communication and interaction. Even lawyers can take advantage of social media to further their own business and provide guidance to clients.

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Endnotes

(1) As social media commentator Loren Feldman said: "You think Twitter users care about lawyers?"

An earlier version of this update appeared in *Legal Week*.

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