

Social & Mobile & Clouds

Oh My!



BY **Joseph I. Rosenbaum,**

In the classic motion picture, *The Wizard of Oz*, Dorothy asks the Tin Man if they might encounter any wild animals in Oz. His response elicits the famous phrase, “Lions and tigers and bears, oh my!” Fortunately, they don’t encounter any tigers or bears, and the only lion they meet is their companion on this enchanting journey, the Cowardly Lion. Small business owners may find the emergence and convergence of technology to be as anxiety-provoking, and perhaps just as mysterious, as Dorothy must have felt in Oz. Facing an unknown, dynamically changing environment that is as mystical as the Wizard behind the curtain – social and mobile and clouds, oh my!

Social media, wireless and mobile technology, and cloud computing can provide opportunities and capabilities unheard of just a few years ago. It is no triviality for a small business owner to learn how to capitalize on these opportunities and capabilities, without being overwhelmed with the challenges (and without incurring massive expenses in the process). Part of the challenge is the rapidly changing and unpredictable legal framework surrounding these technologies. Virtually every facet of business is governed by these rules and regulations. From intellectual property to employment; from sales and marketing to customer service and operations – one would be hard pressed these days to find an area of any business that is unaffected by the convergence of social media, wireless technology and cloud computing.

Now, you know I can’t give you legal advice. You

would have to be a client. Furthermore, every situation is different. Every industry, every business, with its unique culture, location, and commercial environment, is different. No one can give meaningful advice – legal or otherwise – completely out of context. But if this article can identify some issues, highlight some considerations and provide some insights you might not have thought about, it can perhaps inform and guide the business executive reader as to what she or he should be thinking about as we explore this brave new world.

SALES AND MARKETING

Every business, from a sole proprietorship to a multinational, global behemoth, sells something – goods or services or both. Every business needs to advertise and market what it sells. Most have promotions and some even have loyalty and rewards programs. Online marketing, and digital, mobile advertising have created unprecedented and cost effective ways to reach customers. The ability to accurately track buyer responsiveness has eliminated the need for the guesswork that comes with traditional print, radio, and television advertising. Companies have sprung up that mine data, gather lists and segment demographic information. While credit bureaus are hardly obsolete, the amount of information that is readily available from reliable sources, about who your customers are- or who they could be, is mind boggling. If you haven’t sought advice from a marketing professional, an advertising agency, or a branding specialist, to really take advantage of the information that is available, you are doing your business a disservice. This is a mistake

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your competitors may not make. That said, online and mobile advertising and marketing comes with a new set of regulations and requirements. There are laws and regulations that regulate email (CAN-SPAM), and laws that regulate telemarketing and SMS (TCPA).

There are FTC pronouncements regularly on regulating online behavioral advertising and geo-location targeting. In addition, there are Federal and State regulations that apply to the protection of data, privacy, and identity theft. The use of lead-generating and referral selling techniques is also regulated by laws. Want to run a sweepstakes contest? Once you mention that the promotion is void where prohibited by law, that a purchase is not required, and that making a purchase won't increase your odds of winning, how many characters will you have left on your SMS text message to tell people about the actual promotion?

Frightened? Don't be. Consider what it must have felt like to a scribe, when Gutenberg invented the movable type printing press. Yet look at all the marvels and advances that resulted from bringing books and printed content to the consuming public. The technology of today is empowering. Learn about it. Take the time, (or have someone in your business make the time) to understand how it can help you, what the cost is, and how you can use it to your advantage. Of course, while complying with the laws and regulations that apply.

INTELLECTUAL PROPERTY

Does your business create audio-visual, musical, or graphic content? Think not? Think again. Do you have packaging? Do you have a name, or a trade name people know? Do you have brands – products and services uniquely identified by your distinctive logo or marks? Do you create advertising? Some of these things can be protected by traditional intellectual property laws – trademarks, service marks, copyright, and even patents. Then again, the world has changed. A search of all pages named “Starbucks,” will likely yield thousands of pages of items associated with their name, logo, and products. You may also find some not-so-nice pages, where offensive, ranting and hateful language is used in connection with their name, their logo, and their products.

If you think all of these logos, names, brands and distinctive marks are licensed or used with permission – you're kidding right? You will find them in many unexpected places. Unfortunately, traditional ‘cease and desist’ letters from lawyers, threatening trademark prosecution under Section 43(a) of the Lanham Act isn't likely to generate much fear and trepidation in the social

media world.

Similarly, in the world of copyright, content can be duplicated, transmitted, modified, displayed and translated in the blink of an eye, without even altering or taking the original. It is still illegal, but good luck trying to find, much less prosecute, anyone. That doesn't mean organized, illegal, intentional activity shouldn't be pursued by civil and, if necessary, criminal prosecution. It does mean that technology has not just changed the rules of the game – technology has changed the entire game. Consider the effects of application programs like Photoshop, that can adapt and morph creative images; translation programs, that can create derivative works in an instant; combinations of music and graphics, animation and live action – the opportunities for plagiarism are endless. Just look at YouTube and try to catalog the creativity of the human mind. Add to that, promotions that take advantage of user-generated content – the next generation of consumer testimonials. Don't just tell us why you like our products and let us use your

words in advertising (by the way, that is also regulated by the FTC), now we want you to create a video showing how you use our product and telling us why you love us. Whose content is that? Is it yours? Is it theirs? Well, like any good lawyer, I'll tell you the answer: it depends!

EMPLOYMENT

You have people who work for you, and with you. You and they may have a Twitter account, a Facebook account, and a LinkedIn account. Sound familiar? You may have actually decided to enter the 21st Century and you have asked your son or daughter to help you put up a Facebook page for your business. Maybe you have some fans and some “Likes”? You created a Twitter account you can use for business and you put your logo and brand name on LinkedIn for all the world – literally all the world – to see. What are you going to put on those pages, those feeds, those accounts? Will you let your employees talk about work and their jobs and your products and services? Do you have an official company ‘Tweeter’ or ‘poster’? While it's tempting to think about all these platforms as opportunities to advertise and market (or even sometimes to recruit employees when you are hiring), often the employees are not informed of the rules of the virtual road. Can they talk about their boss on Facebook? Can they describe what they are working on, back at the office?

Don't forget, in the United States, and at least in some other countries in the world, there are rights of free speech. When is an individual acting within the scope

In Chinese, the word for 'crisis' is made up of two characters - one represents danger and the other opportunity. Which will you choose?

of their employment and when are they free to say what they wish, without reprisal or recourse? Knowing what we know now about social media platforms and the sheer scale and volume of interactive communication, life was simpler a mere 20 years ago. Again, being frightened or putting one's head in the sand like an ostrich, isn't the right answer. Nor should you presume that the word 'policy' or 'guidelines,' mean something onerous and horrid to punish employees if they say nasty things about their bosses or your business. Every cloud has a silver lining – every potential challenge is also a chance to make every employee a brand ambassador, or a spokesperson, generating good will. In Chinese, the word for 'crisis' is made up of two characters – one represents danger and the other opportunity. Which will you choose?

E-COMMERCE

One of the major benefits of technology, is the ability to create an activation event – a sale – instantly, in response to your advertising and marketing efforts. Fresh Direct delivers groceries – but you order online! Amazon.com allows you to stream or download music and motion pictures, online. Bookstores, department stores, retail merchants, and distributors, all use online and mobile technology. "Apps" enable everything, from ease of searching for inventory to purchasing, even

customer service and returns. As long as human beings wear clothing and buy consumable goods, and eat real food, there will always need to be a mechanism or vehicle to deliver the physical, tangible item – but virtually every other aspect of the transaction can be automated, with corresponding cost-savings, if done right.



I'd like to emphasize the words "can be," in the sentence above. Just because something can be automated, doesn't always mean it should be. Some companies have carefully analyzed when consumers don't

mind automated systems and when they prefer to interact with a real, live human being. Notice those little pop-ups on those websites that say "Want to Chat with a Live Representative?" or "Need Help? We Are Here"? No one knows your business better than you do. No one is closer to your customers, your suppliers, your business partners, and those you need to help you do business. Whether an advertising agency, a widget manufacturer, or a lawyer, automation is not a one size- fits -all solution. Indeed, some business processes in regulated industries may have specific rules regarding how, when, and to what extent, automation can take the

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place of human beings. Health care, financial services, sales of gasoline, food sales, and air travel, are just a few examples of industries that have regulations above and beyond the typical laws regarding automation.

Using e-Commerce driven websites to help sales and revenue is not new these days. If you are a small, entrepreneurial business that develops mobile apps for the advertising industry, no one has to tell you about the benefits of technology – or the challenges. But what if you are a shoe repair shop, or a dry cleaner? Assumptions can be dangerous. Incorrect assumptions can make business needlessly difficult. A competitor may not make the same assumptions as you do, and he may learn to use technology as a sustainable, competitive advantage.

PRIVACY & DATA PROTECTION

Last, but certainly not least, on our key issue list, is the area of privacy and data protection. Probably no area of law has been the subject of more legal and regulatory activity over the last decade. Let's first also dispel a myth – privacy is not the same as data protection. While the distinctions between the U.S. notion of privacy, and the European system of data protection may be a good subject for a scholarly paper, in fact, the legal concepts are quite different. Many nations, including the U.S., prefer to characterize (e.g., legislate and regulate) them using similar words, even though they are different.

Privacy generally refers to the right to be left alone. This includes being free from intrusions and inspections of one's non-public characteristics and activities. A person's DNA makeup is private – one generally cannot obtain that information without permission. What articles in a printed newspaper I might be reading in the privacy of my home is another example. Indeed, I can prevent others from peering into my windows and observing whether I'm eating breakfast or sewing a button on my shirt fairly easily. Data protection refers to the treatment of information that may or may not be mine, whether it is public or private. My credit card numbers, or the countries I've visited with my current passport are hardly private. In many instances, the unique identification assigned to me by the government, or banks, or insurance

companies, is not something private to me. On the contrary, they usually belong to someone else and are assigned to me. Similarly, my public behavior – which generally includes using someone else's Internet browser to surf the websites of others – is not private. Buying a container of milk at the local supermarket, swiping my loyalty card and paying with a credit card at checkout are hardly private acts. Yet, I, and each of the entities with whom I have a relationship in these and other transactions and interactions, have an interest in the information concerning those activities. Preventing this data from use beyond its intended purpose is data protection, not privacy. While the distinction may be somewhat subtle, and often esoteric, the legal implications are not.

Businesses gather information – with technology, now more than ever. Information about the financial condition of a business can be relevant for competitors, consumers, and employees. Information about consumers and employees can be relevant for businesses as well. Depending upon what type of business you are in, and what type of information you collect, it is likely the law and regulation will have a say. Banks and other financial institutions are heavily regulated with strict fiduciary and client confidentiality obligations. The FTC now has authority to regulate the protection of personally identifiable consumer information among real estate agents, travel agents, airlines, and mortgage brokers. If your business accepts credit or debit cards, you undoubtedly have heard of protective self-regulatory requirements referred to as PCI compliance (technically, Payment Card Industry Data Security Standards).

Unless you have been living under a rock, you know that data breaches and identity theft have been all over the news. The targets have not just been financial institutions or hospitals where sensitive and private information is stored. Breaches at retail department stores, government databases, and even supermarkets have been recorded. Almost every State in the country has now enacted and implemented identity theft and data breach legislation, in addition to any Federal legal and regulatory requirements that apply.

Behavioral advertising, and location-based targeting using mobile devices, have similarly been in the cross-hairs of legislators and regulators. If you browse the web to find air transportation from New York to San Francisco, check out restaurants in Redwood City, and the availability of good seats at the next ball game; not only do each of these websites know you have visited, it's also a pretty good bet the browser knows you are planning a trip to California and even when you prefer to go! Buy movie tickets on your mobile phone, and when you arrive at the theater the next day, a coupon appears in an SMS text message offering you discounts on popcorn!

That type of information has value to a business owner.



