



## TOP 10 LEGAL ISSUES IN SOCIAL MEDIA

There are approximately 400 million Facebook users; nearly 20 million people use Twitter; and according to Technorati.com, there are some 70 million blogs, a number that may be doubling every six months. It is no wonder, then, that social networking and social media are the “next big thing” for businesses large and small. Social networking tools are used by advertisers and marketers, by human resources departments, and of course by job-seekers and employees. For many companies, the question now is not *whether* to use social media in its business, but *how*. And as with any new aspect of doing business, there are several potential pitfalls that a company must be aware of to avoid running into legal difficulties. The following are some of the legal issues that a company may face as it integrates social media into its business practices:

### *1) Disclosure of Confidential Information*

Often unknowingly, confidential information, such as trade secrets, may be disclosed by an employee or other party with knowledge on popular social media websites such as Twitter, Facebook, or LinkedIn. Confidential information may also be disclosed via blogs, chat rooms, and anonymous blog comments. Widespread disclosure of trade secrets, in particular, can result in the loss of intellectual property rights in the confidential materials. In addition, some websites purport to claim ownership of user-posted information, such as comments to a story. The best protection is to update policies and procedures so that employees are aware of their ongoing obligations not to disclose confidential or proprietary information.

### *2) Unauthorized Use of Trademarks*

Unauthorized use of third party trademarks on a social media site may lead to legal liability for trademark infringement, dilution or unfair competition. While, in certain circumstances, it may be a permissible “fair use” to refer to a company and its product or service in a product review, blog, or status posting, it is not permissible to use the trademarks of others to create a false impression of endorsement, affiliation or sponsorship. Also, websites such as Facebook now have sophisticated infringement reporting policies whereby a trademark owner can prevent another party from adopting its mark as a username or the like.

### *3) Unauthorized Use of Copyright-Protected Works*

Copyright-protected works, such as text, videos, music, photographs, and source code, are often copied from another location and used on a social media website without the authorization of the content owner. Use of copyright-protected works without authorization creates the potential for infringement liability. Also, site owners may be protected under a “safe harbor” provision in copyright law, whereby if they take down infringing content after receiving notice, they are protected from liability. This safe harbor does not automatically apply to trademarks, but similar procedures should be implemented by site owners for the unauthorized use of marks.

The best practice is to seek permission before using material that appears to be a copyright-protected work. In some cases, the content owner may charge a license fee, but that fee will certainly be less costly than an infringement lawsuit. Some content, though, is available for public use without express permission, such as open source code. However, even that material often requires attribution to the original author, so pay close attention to the terms and conditions of use.

#### *4) Defamation Issues*

Some of the features that make social media attractive, such as real-time interaction and the ability to post on the fly, are the same ones that could result in unintended legal liability. Statements published to a limited group of “connections” or “friends” that arguably defame a third party may result in legal action against the poster. Given the infancy of social media, it is unclear whether courts will view this type of posting as sufficient for libel purposes, but best practices are to avoid statements that could be construed as defamatory. Also, posts made anonymously may be traceable via IP address or similar technique. So anonymity alone will not necessarily prevent liability.

#### *5) Electronic Discovery*

While the rules and practices of litigation generally lag behind the actual technology employed, courts have begun to grapple with issues of discoverable information in electronic form beyond the usual emails and scanned documents. Today, “tweets” on Twitter, status postings in Facebook, and discussion forum postings on LinkedIn are all discoverable information to the same extent as emails and text messages. While these messages are often shorter than traditional emails, they create problems precisely because they are shorter and thus require more explanation. Companies with electronic document retention policies must ensure that these communications are also explicitly included as corporate property.

#### *6) Dynamic Information*

Another aspect of some forms of social media, such as Wikipedia, is that content can be edited by almost anyone. Recently, Wikipedia has tested a “flagged revision” program for entries about living people—in these cases, changes must be approved before they are

posted. It remains uncertain whether this policy will be applied to corporate entries. Also, companies must be aware that employees or other interested parties may change entries to remove unfavorable information, or, even more worrisome, to add untrue unfavorable information. In addition, it may be possible for third parties to identify when a company employee makes a change to a Wikipedia entry about the company – for example, to remove or alter references to an unfavorable lawsuit outcome – which could lead to more bad publicity than the original entry might have garnered.

### *7) Human Resources Issues*

It is becoming increasingly common for company HR departments to review the Facebook, LinkedIn, and other social media pages of both job candidates and current employees. While this practice can be useful to help make hiring decisions, companies must ensure that their hiring and retention practices do not unlawfully discriminate based on information available through such candidates' and employees' social media pages.

In addition, professional social media sites such as LinkedIn offer the opportunity for people to write recommendations for others in their networks. While this can be beneficial to the subject of the recommendation, there are two considerations for supervisors to keep in mind when writing recommendations for their employees: (1) a good recommendation can later make it difficult for a company to defend against a claim of wrongful termination; and (2) a negative recommendation may result in discrimination, defamation, or workplace retaliation claims.

### *8) Securities*

Businesses with an Internet presence must be vigilant to ensure that securities laws and regulations are not violated. While this clearly applies to company-managed websites and blogs, it also means that employees and executives need to be careful about what they say in other forums, including on Twitter or third-party message boards. The CEO of Whole Foods was taken to task for a series of message board postings he had made under a pseudonym, talking down his company's competitor, Wild Oats. When Whole Foods later acquired Wild Oats, the SEC investigated to determine whether his postings had been an illegal attempt to affect Wild Oats's stock price. While the SEC ultimately took no action against him or Whole Foods, the incident demonstrates how careful companies and their executives and employees must be.

### *9) Privacy/Publicity*

Just as third-party materials posted to a social media site may infringe copyright or trademarks, or disclose confidential information, posting photographs and video without proper releases may violate the privacy or publicity rights of individuals.

In addition, companies in certain industries, particularly health care, must ensure that their employees do not violate specific privacy regulations (e.g., HIPAA) in their activities on social media sites. Even a seemingly innocuous Twitter comment about a

patient's condition could be a violation. In another area, a woman has sued two debt collection agencies for violations of the Fair Debt Collection Act after they posted information to her Myspace page about her debts.

### *10) Endorsements*

The FTC has recently issued new rules requiring bloggers and other users of social media to disclose any paid endorsements. This means that bloggers who receive compensation for discussing a product or service must disclose that their comments are paid; but it could also apply, for example, to someone who receives free nights from a hotel and then Twitters about how great the hotel is. Similarly, employees who truly love their company's offerings and tweet about them or discuss them on message boards are supposed to disclose that they are employed by the company. While the FTC is unlikely to pursue individual bloggers or tweeters with small followings, those with wider exposure may come under scrutiny, and the FTC has said that its primary purpose is to keep companies in line.

To sum up, social networking provides a new set of tools companies can use to enhance their business, but as always, there are risks. However, with some forethought and attention, a company can minimize or avoid legal trouble and make those tools more effective.

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