

THE ADVISOR

CURRENT BUSINESS AND PERSONAL SERVICES LAW ISSUES

SPRING 2012

LEGAL PITFALLS OF SOCIAL MEDIA FOR BUSINESS



LAURA MACFARLANE

Social media sites such as Facebook, Twitter and LinkedIn are powerful business tools for marketing products and services and building brand recognition. However, the undeniable advantages of using such tools cannot be discussed without addressing the legal risks. To minimize the risk of becoming a plaintiff or defendant in costly litigation, companies must be aware of the legal pitfalls, and actively take steps to address the risk.

Who owns your social media accounts?

Social media accounts and content are created, established, developed and updated by individuals. The individual that creates the content therefore may have rights in the account. Issues often arise when the individual that developed a valuable social media presence for your company is no longer employed by your organization. What if the individual refuses to divulge the login credentials? Who “owns” the Twitter followers? Who owns a blog that was created and maintained by the former employee? Who owns your employees’ LinkedIn accounts?

Few business owners understand that ownership of a business’s social media platforms is often not a straightforward matter. A business and its former employee are currently embroiled in litigation in California over who owns a Twitter account that was created and published in the business’s name but maintained entirely by the former employee. In another case, a business that invested a great deal of time and money in developing its former employee’s LinkedIn account is suing the fired employee for “misappropriation” of the account and its associated list of connections. There are many instances of former employees or business partners being sued for misappropriation and damages where they have refused to divulge login credentials for the “business’s”

social media accounts – however, the plaintiff businesses have had only moderate success in regaining control over the accounts or being awarded damages.

The expense of litigating such ownership issues also likely pales in comparison to the business losses that can result from a loss of control over, or a misappropriation of, your business’s marketing-related lists, including Twitter followers and Facebook friends. In the past, businesses have successfully asserted control over such assets by arguing that these valuable business assets were “trade secrets” or confidential information. However, the public nature of the customer and marketing information that is created and maintained through social media platforms has made it increasingly difficult for companies to successfully argue that such lists are protectable as trade secrets or confidential information, which poses a significant challenge for businesses that wish to restrain their use or publication.

Liability for User-Generated Content

“User-generated content” (UGC) is the content created by consumers posting material on the company’s social media forums. This popular marketing technique uses a company’s consumers to promote the companies’ products and services, and enhances brand loyalty by engaging users of the companies’ products and services.

Numerous legal issues surround UGC, not the least of which is the company’s potential liability to third parties for copyright or trade-mark infringement or defamation. What if a consumer posts a third party’s music video or a cinematic movie clip to the company’s Facebook page? Or if a consumer posts defamatory material using another company’s trade-marks? Although the law in this area remains unclear, the “host” business may be liable to injured third parties for publishing the impugned material.

Reducing the risks

The stakes are high as social media tools increasingly become integrated into every part of many businesses. As the courts continue to grapple with who owns, controls, and can modify social media tools, businesses can reduce their risk of such legal conflicts by having a well-drafted, comprehensive computer, Internet and social media use policy that clarifies ownership, use, and liability issues for these valuable business assets. If you wish to determine whether your business is at risk, or discuss how to secure protection for your social media profiles, our Intellectual Property and Technology Group has expertise in this area and would be happy to assist. ▲

DISCLAIMER

The Advisor is a commentary on current legal issues in the business area and should not be interpreted as providing legal advice. Consult your legal advisor before acting on any of the information contained in it. Questions, comments, suggestions and address updates are most appreciated and should be directed to:

Peter Collins in Calgary 403-260-8516 or Rick Pabst in Edmonton 780-423-7664

REPRINTS

Our policy is that readers may reprint an article or articles on the condition that credit is given to the author and the firm. Please advise us, by telephone or e-mail, of your intention to do so.

CALGARY

400, 604 - 1 STREET
 CALGARY AB T2P 1M7
 PH 403 260 8500
 FX 403 264 7084

EDMONTON

2000, 10235 - 101 STREET
 EDMONTON AB T5J 3G1
 PH 780 423 3003
 FX 780 428 9329

YELLOWKNIFE

201, 5120 - 49 STREET
 YELLOWKNIFE NT X1A 1P8
 PH 867 920 4542
 FX 867 873 4790