

## SOCIAL MEDIA AND THE LAW (AND SCARY LEGAL JARGON DEMYSTIFIED)

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The world is changing and the online world in particular grows and changes shape by the day. From social media sites like Facebook, Instagram, Twitter, Pinterest and Tumblr, to blogs and other online media, do the old-world legal issues still apply in the new-world landscape?

It's an increasingly important question because as things change they also seem to get more and more complex. We try to answer it for you below, and so that we can discuss this in more depth we'll also give you some background and refreshers on what some of those key legal issues are that have historically faced advertisers and their agencies, along with some of the new ones. Some you may be really familiar with, some may be new to you, while others you may have heard of but never had the courage to ask more questions about - so hopefully this publication is of value to you!

### Defamation

We're all broadly familiar with defamation but what exactly is it, when is it a factor and when is it not? Simply, it is a *personal* cause of action that is available to an individual but not to corporations, so technically you can't "defame" a large business or a company. It is available to be pleaded where an identifiable individual is defamed/ridiculed in a *dishonest and disparaging* fashion and the defamatory imputations are *published to at least one other person*. For example an Australian man recently successfully sued Google for defamation, as when you searched Google for his name derogatory images came up including photos of him alongside drug baron Tony Mokbel. Damages can be awarded from a defamation action and they can be quite high, and given the potential scope of publication and re-publication in the new age (especially on social media) the damages can potentially run very high indeed. The key for brands is to ensure that any comments made (or that are allowed to be or remain posted by third parties on websites, for instance) do not unfairly disparage any individual or cause them to come into ridicule or be shunned or avoided. Importantly, even "re-tweeting" on Twitter or "sharing" by Facebook any comments made by others may constitute publication for defamation purposes, and considering the potential for further re-tweeting from the first re-tweet, potential exposure grows exponentially.

### Copyright

Copyright concerns on the internet generally are a major issue – a majorly misunderstood issue – and social media is no exception. Simply, with the ease with which materials can be shared and re-shared, it is very easy to forget that active copyrights exist in almost all materials shared on the internet. Photos, music, stories, blog posts, artworks – these and other forms of works *are owned* and just because they are accessible does not mean they are "public domain" materials that can be used and shared without permission, at least not without legal consequences. For a more detailed discussion of the misconceptions around what is "public domain" and "common use" and what is not, we recommend you read our publication on this topic from April 2014 at <http://anisimoff.com.au/publication/lm414/>.

Social media platform terms of use (for instance Facebook's *Terms of Service*) also outline certain rules around the posting of works and uses of the works of others. In most cases the terms of the various platforms allow users to interact with the works in certain ways (called a "licence"), and these licence terms are agreed when using the platform. This means that users have some rights to use photos and other materials, but those rights may differ for commercial and personal uses. It is imperative to ensure that all third party works used (including if tweeted, pinned on Pinterest, shared on Facebook, or posted on Instagram) are

used with an appropriate licence, and this applies across all media. For example, internet “memes” are commonly formed by modifying a template image by superimposing text to make different jokes on a theme. The original template image will almost always be protected by copyright, and although the owner might think it’s all fun and games when the meme is shared between friends for laughs, if the same image is used for commercial purposes by a company (especially one that is perceived to have deep pockets), the copyright owner might decide an infringement action is worthwhile.

## **Trademarks**

Using certain phrases and logos may infringe upon the trademarks of third parties. Trademarks can be registered or they can be unregistered (these are frequently called “common law trademarks”). The main risk with trademark infringement on social media is in using taglines or straplines as branding devices and not realising that they are already in use and/or are registered as trademarks by third parties. All new branding devices should be cleared by a legal advisor (for instance, Anisimoff Legal) *before use* to ensure free and clear availability or at least to structure a suitable strategy around use.

## **Passing off and misleading and deceptive conduct**

The common law tort of passing off can be used to enforce rights where, through marketing claims or other such actions, an entity implies some commercial connection with a third party where there is no such connection. For example, pop-star Rihanna recently successfully sued fashion retailer Topshop in the UK for selling T-shirts with her face on them without consent. There is also statutory protection enshrined in the *Australian Consumer Law* (ACL) to prevent such conduct, being primarily the misleading and deceptive conduct provisions. Passing off actions and misleading conduct actions are similar actions in many ways, however misleading and deceptive conduct can also be an issue with other types of claims in marketing/advertising, like product claims (see below). It is imperative to note that it is no defence if social media posts (i.e. a tweet or a user comment on a blog) giving rise to passing off or misleading and deceptive conduct concerns were made by third parties if they appear on your profiles. It is law in Australia that you are responsible for the posts appearing on any profiles that you control. This makes monitoring very important (see below).

## **Product claims**

Like for general advertising and marketing, false product claims (such as place of origin claims) are similarly problematic when they are made on social media, and again the same considerations will apply to claims made by brands and by users and third parties on online brand profiles that the brands allow to be published (or to remain published) as apply to traditional advertising. Social media does introduce unique challenges, however, such as difficulty in communicating qualifications and disclaimers on Twitter which limits the amount of text in each post.

## **False representations and testimonials**

In addition to the misleading conduct provisions of the ACL, the other big area of interest in the ACL when it comes to social media is the false representation provisions. These provisions prohibit the use of inaccurate representations such as false claims of affiliation or endorsement (i.e. endorsement purportedly from a celebrity or certification authority such as the Heart Foundation), and also prohibit the use of false testimonials. We have seen recently that this is an area of particular interest of the Australian Competition and Consumer Commission, in part due to the relative newness of the expanded legislation in this area. There have also been various recent cases where the owners of websites were held liable in Court for false claims and false endorsements made by third parties appearing on their websites, but predominantly the cases showed that the site owners knew of the claims but did not remove them. Again, monitoring is a key consideration, and we go into more depth on that below.

## **Social media platform terms of use**

While they themselves do not technically amount to “law”, the terms of use of the various media platforms *are* actually contracts between the user and the social media platform that are enforceable as such. These contracts do carry with them the same obligations as other commercial contracts, and in many cases they include important provisions relating to liabilities and licences, privacy and other considerations. Many of the terms of use (YouTube’s for instance) have terms that apply for commercial usage that do not apply to personal usage, so this must be considered carefully along with all of the terms generally on any platform that a brand may agree to use. Another flow on from these terms of use is that brands not only need to consider the rights of third parties, but also be mindful of the rights the brands are giving others in respect of their own material that is posted for third parties to access. Once the material is online, third party users will enjoy rights over the material that brand’s may not have contemplated or be totally comfortable with.

## **Offers and promotions**

Generally speaking the various social media platforms have their own rules and regulations regarding the types of offers and promotions (such as competitions) that can be run on their platforms. Facebook in particular has very detailed rules regarding offers and these should be checked regularly as they are subject to change. In addition, consideration also must be had to whether terms and conditions of offers can be adequately communicated as on Twitter for instance, 140 characters is extremely limiting. This can undermine the legality of competitions and cannot be ignored.

## **When mere “gaffes” become actual legal issues**

There is a big difference between a PR gaffe occurring on social media (which are very common) and a legal concern, however sometimes the two overlap. It is very important that a proposed social media campaign is given proper and full consideration and all reasonable outcomes are considered as the potential for campaigns to go very wrong and lead to other issues (such as those discussed above) are not to be ignored. Monitoring is important in this regard, but of course even monitoring cannot guarantee prevention of poor PR outcomes. For example, brands have no control over how hashtags are used on Twitter, Instagram or Tumblr, so campaigns can be hijacked with negative comments that can trend and lead to undesirable headlines.

## **Monitoring**

As outlined above there is a raft of legal issues that apply and must be considered with social media marketing, and these are ongoing. Given the exposure that may be caused by third parties (such as for misleading claims being made by others on a brand’s pages) it is imperative that frequent monitoring of a brand’s social media profiles is undertaken in an ongoing sense, and brands should have clear guidelines around record keeping and take-downs. Importantly, it would be prudent to retain records of any claims made that are taken down as many times deleting them will result in them being lost forever, and it may be necessary (including for legal reasons) to know exactly what has been said and when, and by whom.

## **So what now?**

Hopefully the above has given you more grounding in some of the key issues to look out for with your next social media campaign, although it feels like we’ve only barely scratched the surface. Like always, it is a great idea to involve your legal advisors earlier rather than later when it comes to these matters, as prevention is always better than cure when it comes to legal trouble, and since social media and online publication can spread very quickly, things can get out of hand very fast.

## Contact us

If you would like further information on the legal issues surrounding social media and the online space, or you would like to get some specific advice on the issues as they relate to you or your clients, please contact one of our experts below.

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