

6 Tips for Minimizing Legal Risk in Social Media

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Foreword by Julian Ranger, founder of SocialSafe



As we move into a world where branded social media channels are no longer seen as experimental marketing channels, but essential communications tools, it's important for businesses to be mindful of the risks they face in this area.

While the reputational dangers of getting social media wrong have been well documented, the legal and regulatory risks are less obvious. This is partly because the law is often slow to catch up with digital trends, and also because there have been few, if any, high profile test cases involving business use of social media.

But make no mistake, social media plays an increasing role in legal proceedings, and businesses ignore the legal risks of social media at their peril. In this paper we offer some advice for minimising that risk, much of which boils down to simple common sense, such as keeping a secure, easily accessible archive of everything your business publishes on social channels. That's the part SocialSafe can help with, and we'll be happy to explain how if you'd like to get in touch.

Introduction

Over the past decade businesses have enthusiastically adopted social media as a communications tool, especially for marketing. In the rush to take advantage of these new platforms many businesses have overlooked the legal and regulatory risks.

In most western countries businesses are subject to laws which govern the way they manage their marketing communications, whether they're selling to consumers or other businesses. In addition to laws which apply to all businesses, there are many regulatory requirements which apply to specific industries (such as financial

services or healthcare).

But when it comes to social media and legal/regulatory compliance, businesses tend to take one of two paths:

- A. We don't know how the rules apply to social media, so we won't use those channels at all (the approach favored by businesses in strictly regulated industries)
- B. We aren't aware of any rules about social media, so we presume it's OK to do whatever we want on these channels

Ignoring social media entirely means that a business needlessly misses out on the numerous advantages it can provide when a simple awareness of the appropriate rules could remove that barrier. By contrast, just assuming there are no rules that apply to social media can expose the business to legal or regulatory risk which could be easily avoided by understanding the rules and operating within best practice guidelines.

Problems commonly arise from the fact that too few businesses give their staff adequate training in how to use social media correctly in a business context. Compliance specialist Debbie Harris says *"This produces two issues; the organisation does not take advantage of having their employees involved in their marketing and it can present an issue when employees do not understand what is appropriate to be posting on social media sites such as Facebook."*

The bad news is that whatever business you're in, there are almost certainly laws and regulations which are applicable to the way you use social media. The good news is that, with a little common sense, it's easy to make sure your business is compliant and avoid risk.

Social Media is not a Special Case

The first thing to understand is that the rules which apply to business communications via any other channel (e.g. any type of advertising, direct mail marketing, email messages, telephone calls) also apply to social media. Social media is just another



Credit: Jason A. Howie

communications channel, and is in no way exempt from existing laws.

The more informal nature of channels like Twitter and Facebook can encourage some people to play a little fast and loose when they post updates on their company's brand profiles, forgetting that there are legal implications when speaking on behalf of a business. One of the most common examples is when people post defamatory comments about competitors.

Internet law specialist James Mitchell says *"A lot of people imagine that they are free from legal obligations when they are posting comments in social media. This is, of course, not at all true. Serious issues, and potentially very high damages, may result from statements made in social media if those statements are untrue, misleading and likely to be harmful for the target of those comments. So, individuals as well as companies need to exercise control over the use of social media."*

There is very rarely a good business reason to publicly comment about a competitor, and posting damaging comments about them on social media channels is a good way to attract the attention of their lawyers. The risk is clear, a potentially expensive court case, or at the very least being forced to make a public apology which would be damaging for your company's reputation.

Copyright Still Matters

Another common mistake is forgetting that trademarks and copyrighted content can only be republished with the consent of their owners. In social media people frequently share images and content without asking for permission from whoever created or owns that material, under the assumption that it doesn't really matter anymore.

The law has not changed, however, and just because it often goes unenforced in social media, that doesn't necessarily mean there is no legal risk. Copyright holders are still well within their rights to pursue anybody who uses their material without permission, and will often seek compensation from companies which have done so.

Transparency is Essential

Many businesses are blissfully unaware that it is illegal to post positive reviews of their own products and services online without disclosing that the person posting the review has a commercial relationship with the company. This practice is known as 'astroturfing' - from the idea of it being a fake grass-roots campaign.

The EU Directive on Unfair Commercial Practices (2005) effectively bans European companies from astroturfing, as do the



Credit: Rae Allen

Consumer Protection from Unfair Trading Regulations (2008) in the UK. In the US, the Federal Trade Commission's "Guide to Endorsements and Testimonials" lays down similar restrictions.

Consumer reviews can play a major part in customer's buying decisions, so it's no surprise that some businesses are tempted to post fake product reviews on sites like Amazon, blogs (by secretly paying writers for positive reviews), or even their own websites. But the law is clear - this is simply not allowed, and there are [recent examples](#) of US authorities clamping down on this.

Data Retention

There are numerous national and international laws and regulations which require businesses to store archives (for varying degrees of time) of various different types of data, such as financial records, email and telephone calls, and even web traffic. The sheer number and scope of these requirements can be mind boggling.

For example, in the UK alone we have the Corporate Governance Code and the Data Protection Act. The EU's Markets in Financial Instruments Directive ([MiFID](#)), applies to certain types of financial services

companies operating in the EU, while the Sarbanes Oxley Act applies to publicly listed US companies, or any international companies which operate in the US.

Depending on the country your business is headquartered in, the countries it operates in and the sectors it serves, there could be any number of different legal and regulatory requirements it is subject to. While most of these will demand varying degrees of data retention, as yet it's difficult to say exactly how any of it applies to social media.

James Mitchell says "*This is an area where the law has been slow to catch up with changing technology. The vast majority of cases are settled before a judgement is made, so we have very little legal precedent to work from.*"

In America, at least, a growing number of civil and criminal court cases are using evidence gathered from social media channels as part of the '[eDiscovery](#)' process which gathers potentially relevant information from electronic sources. And while reliable statistics on the use of social media evidence in UK courts are hard to find, [media reports would certainly indicate](#) that this is a rising trend.

Under the circumstances, it makes good sense for businesses to keep archives of all the content they publish on social media channels, as well as all the communications that take place with other users.

Relying on Facebook, Twitter, LinkedIn et al to provide indefinite access to previously published material is risky - you cannot guarantee those services will always be able to provide the data you need. An independent application like SocialSafe can

help you create a more secure backup of all this data in an open format so that it can be easily accessed whenever required.

This can also apply to public sector bodies. For example, the Freedom of Information Act in the US, and similar laws in other countries, could require that bodies be able to disclose information about their activity in social media. Keeping accurate and easy to retrieve archives of social media activity is the only way to meet that obligation.

Personnel Considerations

Many businesses still do not include any provision for social media in their employee contracts, or even provide staff with general guidelines for how they should behave when publishing digital content on behalf of the company. Whether employees are able to post directly to the company's branded social media channels, or are discussing the company in their own channels, they need to be given clear guidelines for this.

If an employee posts something legally questionable on behalf of the company, whether or not their contract includes a social media conduct clause could impact how the matter is dealt with in court.

Compliance consultant, Debbie Harris, says "*Rules are different in different countries. In the U.S. employees are being reinstated in many cases where social media policies were too vague. In Canada, the opposite is often true and employers are winning the battle. The important thing is open communication within an organisation. Have a social media strategy, get your employees involved, have a clear social media policy that is communicated and understood, and have an open door policy for concerns.*"

6 Tips for Minimizing Risk in Social Media

While there are still many grey areas surrounding social media and the law, companies can minimize the risk they are exposed to by following some simple guidelines.

- 1) Have **clear policies** in place for how your employees are allowed to use social media. The guidelines published by [IBM](#) are frequently held up as a great example, as are those from [Intel](#), so by all means use these as a starting point, but make sure you **adapt them to your own organisation's unique requirements**.
- 2) Ensure that **employees** are not only **educated on the guidelines**, and the risks of ignoring them, but also that the guidelines are **enshrined in employment contracts** so that staff members are fully aware that they must be obeyed.
- 3) Avoid discussing competitors or publishing negative comments about

other businesses or individuals on your social channels, unless you're absolutely certain that the comments you publish could not be classified as defamatory or otherwise unlawful.

- 4) Be wary of posting **images or content for which you do not hold copyright** or have permission to use. Sometimes fair-use applies, but make sure you understand what constitutes fair use before publishing (also known as '[fair dealing](#)' in the UK and Commonwealth countries).
- 5) Be **transparent and honest with everything you publish** in your social channels. Avoid the temptation to post fake reviews or endorsements.
- 6) **Keep secure archives of everything that is published on your organisation's social media channels** – both the content that you post and comments posted by third parties. **SocialSafe can help** you do this easily, automatically, and in an open format that can be easily scrutinized by legal professionals should the need arise.

This paper was produced by SocialSafe Limited, publishers of the SocialSafe application which enables businesses to create automated backups of the content they publish across all of their social media channels.

For more information please visit www.socialsafe.net/business

We are grateful for the expert advice provided by:

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