



Media & Defamation Alert

March 2010

Be Alert, Not Alarmed: Legal Pitfalls for Companies Using Social Media

Facebook and Twitter accounts can build your company's profile. They can also disparage it.

In this alert, we discuss the risks of online social networking profiles for your company's reputation and legal liability.

More than a third of Australians use Facebook and Twitter. Few Australian companies, however, are joining online social networks, in light of a range of risks that may lead to legal liability.

Risking defamation

Your company may be liable for publishing defamatory material posted on your corporate social networking profile, whether the defamatory material is posted by one of your company's employees, or by any other online user.

Defamatory material may include messages, videos, photographs, cartoons, or even links to defamatory material. At common law and under the *Defamation Act 2005* (NSW), your company's Facebook or Twitter profile may render your company liable to:

- make an offer of amends;
- offer a retraction or reply;
- an injunction; or
- pay damages.

(In estimating liability for damages, it is important to keep in mind that every viewing of a web page with defamatory material is considered to be another publication of the material).

Your company could be sued by an individual, or by:

- a company with less than 10 employees; or
- a not-for-profit organisation (such as the Make-A-Wish Foundation, who were in the press last year when they were defamed on the ABC television programme, *The Chaser*).

While various defences are available, such as fair comment and honest opinion, any developments in this new area of the law are likely to attract significant media interest. Adverse publicity is likely to follow.

Internet publication

Even though your online social networking page can be viewed around the world, it will be subject to Australian law if your profile is published in Australia. However, the complaint may not always be dealt with by the State or Territory it was published in, given the importance of other factors such as the place in which a person's reputation is most valued. If a Queensland celebrity is defamed in a blog published by a Melbourne newspaper, for example, the defamed individual may have a case for having the publication dealt with under Queensland law.

However, there is one important defence for innocent internet content hosts. The *Broadcasting Services Act 1992* (Cth), Schedule 5, Clause 91 exempts internet content hosts from State and Territory laws where:

- the internet content host was not aware of the nature of the Internet content; or
- the law has the effect of requiring an Internet content host to monitor, enquire about, and keep records of, Internet content hosted by the host.

Defamation is not the only area of legal risk confronting companies with a presence in online social networks.

Risking privacy rights

If a Facebook or Twitter user who does not want their identity made public is identified



by another user on your corporate profile, whether in a photograph or in a message, your company may be liable for a breach of privacy.

Privacy is protected under the *Privacy Act 1988* (Cth) and the 10 *National Privacy Principles* requiring companies to keep an individual's personal information private, which extends to the use of information obtained online.

This may lead to action being taken by the Australian Communications and Media Authority.

Risking intellectual property rights

With online social networking platforms allowing users to post a range of material

from graphics to videos and unlimited messages, your corporate profile may be liable for hosting material such as a trademark or copyrighted material owned by another company or an individual.

Your company may be held liable for damages for breach of intellectual property rights.

Limiting potential liability

Despite these risks, online social networking sites boost profile and marketing, with individuals able to add your business as a friend and explore your new product and service announcements.

However, you should always ensure that your corporate profile is being monitored regularly for compliance with defamation,

privacy, intellectual property, employment and other laws. In the event that material is posted on your corporate profile which may lead to legal liability, you should remove the material as soon as possible and seek legal advice.

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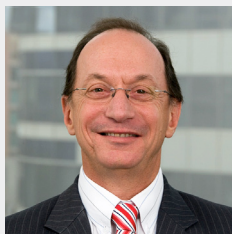
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