Legal perils to avoid when using social networks

Sharon Givoni *SHARON GIVONI CONSULTING*

Introduction

Considering that social media networks captured an estimated 2.34 billion users worldwide in 2016,[1] legal practitioners working in the role of an in-house counsel can no longer ignore the effects that trickle down from this global phenomenon. Social media can be a double-edged sword for businesses. On one hand it represents promotion and growth, but on the other hand it is rife with potential difficulties as a result of the inherent challenges employees face when using social media in a professional capacity. While many in-house counsels are broadly aware of the legal issues that can arise from social media use, the lack of precise boundaries in this growing area of intellectual property law means that pragmatic strategies need to be implemented to avoid the associated legal perils.

This article is aimed at providing updates on recent events, and tips for in-house counsels working in businesses that are or want to get involved in social networking. This article explores:

- Who legally owns the business's networking account?
- Recommendations for drafting social media policies for businesses.
- Resolving legal issues arising from social networking while preserving the reputation of the business.

Who legally owns the business's social networking account?

Takeaway tips

- The person who creates a social media page is the owner despite having created it during their course of employment.
- Company policies and employment contracts should expressly state that ownership of any social media page created in the course of employment would rest with the business.

Property in social networking accounts

Traditionally, ownership in property is associated with a bundle of rights.[2] However, like all things virtual, this bundle can be somewhat ambiguous with respect to the ownership of a social networking account. Some social networks have attempted to overcome this. For instance, the ownership of a Google business account is determined at its creation.[3] This policy makes it easier for businesses to maintain control of the account, particularly in circumstances where the employee that has created the account has left the company.

However, not all social networks have this clear policy in place. As a result, this can cause the ownership of the account to come into dispute when the person whom the company engaged to create and manage the social network account is no longer employed. The following case study exemplifies this very problem.

Case study: Eagle v Morgan

The United States case of *Eagle v Morgan*[4] demonstrates that the ownership of a social networking account can rest with an employee where there are no social media policies in place.

In this case, Dr Eagle set up a LinkedIn page with her company's email address and used it to network for the business during her course of employment. According to the LinkedIn user agreement, the account belonged solely to Dr Eagle.[5] As a result, the United States District Court for the Eastern District of Pennsylvania held that the LinkedIn page created by Dr Eagle belonged to her despite the fact that she created it during her employment and that other employees contributed to the page.

Following Dr Eagle's departure from the company, she brought a claim against her former employer for the unauthorised use of her name, intrusion of seclusion by appropriation of identity, and the tort of misappropriation by publicity as a result of being effectively locked out of the LinkedIn account.[6] While Dr Eagle failed to recover any damages from her former employer, it demonstrates the risk of liability businesses are exposed to when there are no social media policies or agreements that regulate the ownership of a social networking account in place.

Case study: Phonedog Media v Kravitz

Similarly, in *Phonedog Media v Kravitz*,[7] Mr Kravitz retained ownership of a Twitter account that he created during his course of employment.

Having successfully garnered a sizable following of some 17,000 followers with the handle "@Phonedog_noah", Mr Kravitz departed from the company, taking with him the social network account and all its followers. Mr Kravitz subsequently changed the handle of the account from "@Phonedog_noah" to "@noahkravitz" and has now amassed approximately 19,200 followers.[8] While the case was eventually settled, Mr Kravitz retained ownership of the account. Interestingly, Mr Kravitz has used this account during his employment with a competitor of his former employer.[9]

What do these cases mean for you?

While these decisions from the United States may not necessarily reflect the approach that would be taken under Australian law, it provides valuable guidance in the absence of precise boundaries in this emerging area of law. These cases highlight that the ownership of a social network account should be clearly expressed in a business's social network policy. They also demonstrate that it would be prudent to also address an employee's creation and use of social networks in their employment contracts.

Recommendations for drafting social media policies for businesses

> The onus … lies upon "model" employers to run adequate training and educational programs to make employees aware of what constitutes appropriate social media use.
>
> — Mike Davis, *Privacy Law Bulletin*[10]

In the digital age, it is undeniable that social media can be beneficial in promoting a business. However, with this greater exposure and potentially increased profits, comes the risk of the unintended and irreversible consequences of intellectual property infringement and the reputational damage that closely follows.

The ease at which companies can find themselves on the wrong side of the law is demonstrated by the controversy of fashion label Lorna Jane's unauthorised use of an Instagram image of a customer on top of a mountain in Queensland wearing the company's clothing.[11] Lorna Jane originally reposted a photo of a customer wearing the company's clothing on their Instagram account.[12] However, the customer subsequently complained and considered legal action when she saw her image reproduced on a range of Lorna Jane T-shirts.[13] While this matter appears to have settled out of court, it demonstrates the need for companies to protect themselves from liability that arises from the use of social media.

Takeaway tips

- Businesses should have a comprehensive social networking policy to guide online conduct of employees.
- Regular workshops and training on appropriate conduct with regards to social networking can prevent legal issues and negative publicity that may damage a business's reputation arising.

Given the pervasiveness of social networking, businesses should be wary about the potential liability that can arise from the content employees post online. Therefore, it would be prudent for businesses to clarify the exact procedures and protocol they expect their employees to follow.

The benefit of creating a clear and unambiguous social network policy is three-fold:

1. It becomes a platform on which disciplinary action can legally stand upon following non-compliance by an employee.
2. Having a suitable social network policy protects a company's public image — it becomes something they can rely on if an employee does something wrong in order to show the public that it was not something that the company condoned.
3. It makes it clear to employees what boundaries they are obliged to follow.

The importance of a well-defined social networking policy is demonstrated in the following case of *Pearson v Linfox Australia Pty Ltd*.[14]

Case study: Pearson v Linfox Australia Pty Ltd

This case demonstrates that an employer can regulate an employee's social media use outside of work hours.

In this case, the court had to consider whether Linfox Australia had unfairly dismissed Mr Pearson when he refused to sign the company's social network policy, among other things. To this, Mr Pearson held firmly to his belief that

> … Linfox do(es) not pay me or control my life outside of my working hours, they cannot tell me what to do or say outside of work, that is basic human rights on freedom of speech.[15]

However, Commissioner Gregory of Fair Work Australia disagreed, stating: "[T]he establishment of a social media policy is clearly a legitimate exercise in acting to protect the reputation and security of a business."[16] He further stated that:

> Gone is the time (if it ever existed) where an employee might claim posts on social media are intended to be for private consumption only[17] … [I]t is difficult to see how a social media policy designed to protect an employer's reputation and the security of the business could operate in an "at work" context only.[18]

The message for lawyers is that it is not only important to develop a sound workplace policy but also to ensure that it is reviewed and that employees are trained on how it applies.

What should a company's social network policy cover?

While it is beyond the scope of this article to discuss detailed elements of a company's social media policy, a policy should at the very least define what behaviour and conduct is acceptable and unacceptable and the consequences for breaching the policy. For example, the policy can include provisions which warn employees about copyright infringement, specify that any opinions expressed by an employee are their own and not the employer's and encourage employees to have respect for the other people they communicate with online. Further, it should state what disciplinary action is involved for varying degrees of breaches.

However, more specialised industries such as health and fitness, finance, and alcohol businesses may need additional rules as such companies are often subject to further regulations.

While there is no one-size-fits-all approach to developing a social media policy, Telstra's social media policy is a sound example of how to balance the risks and benefits of social media use. It uses a structure modelled on encouraging their employees to "use social media"; but when doing so, asks that their employees remember to:[19]

- consider who they are representing;
- take responsibility to ensure that what they post is accurate and does not breach any confidentiality requirements; and
- show respect for individuals and communities.

Do not fall into the web of bad publicity

> Look, it happened. It cannot be unhappened. We move on.
> — Danny Katz, *The Sydney Morning Herald*[20]

It is not only the legal consequences that businesses need to worry about, but also the negative publicity involved. This reputational damage of a company that can be caused is highlighted in the case of *Seafolly Pty Ltd v Madden.*[21]

Case study: Seafolly Pty Ltd v Madden

This case features two competitors in the swimwear industry. In the original proceedings, Seafolly initiated proceedings against Leah Madden, the owner of White Sands, for misleading and deceptive conduct, injurious falsehood, and copyright infringement.

Madden had mistakenly thought that a model was wearing her bikini when it was actually a Seafolly design.[22] Remembering that a buyer from Seafolly had viewed her range, she uploaded a post on Facebook with the photos of Seafolly's designs (taken from their websites and catalogues and used without permission) juxtaposed against those of White Sands's with the title "The most sincere form of flattery?". She made further comments in this album of photos including "Ripping off is always going to happen, but sending in a dummy 'buyer' to get photos is super sneaky!" and "Seriously, almost an entire line-line ripoff of my Shipwrecked collection". In addition, she sent emails to various media outlets containing similar allegations. This led to a large public response, mostly shaming the actions of Seafolly.

Seafolly then initiated their legal proceedings based on Madden's post on Facebook on her own private account, on the account for White Sands, and the emails that Madden sent to various media outlets, arguing that Madden had insinuated that Seafolly had copied a bikini she designed.

Madden cross-claimed for misleading and deceptive conduct, and defamation in relation to Seafolly's press releases that were made to address her online allegations.[23]

The judge stated that Madden was "reckless in giving public expression" based on "no adequate foundation",[24] and ordered both Madden and Seafolly to pay damages.

The lessons to draw from this case include:

- There is no recourse from online accusations so employees should undertake appropriate due diligence before publishing any comments online to ensure the accuracy of the allegations they contain.
- Employees should be aware that comments made on any public platform, even on personal Facebook accounts, can be classified as being said "in trade or commerce" and may come under the Australian Consumer Law if they are "about the supply of goods or services".
- Whether someone has been misled is not determined by reference to who read the statement, but rather what the hypothetical "ordinary" reasonable readers would have understood as the meaning.
- If your employees lead to conclusions without making reasonable enquiries and make a false claim, and in making a statement which the person is convinced is true but which is ultimately found to be false, this can be misleading.
- Your employees may think "It's ok, all I am doing is expressing my opinion", but this is not a defence to an allegation of misleading or deceptive conduct. Moreover, it cannot be relied upon where the opinion was not "honestly held". If an employee is reckless or indifferent when it comes to saying the truth, this can be very damaging.

Conclusion

As businesses increasingly immerse themselves in the stream of social networking, they need to be updated and cautioned about the risks involved, and how they can prevent and mitigate problems arising. However, there is no need for businesses to shy away from jumping on board the social networking bandwagon and reaping its benefits if appropriate, well-thought-out strategies are implemented in advance.

Sharon Givoni
Principal Solicitor
Sharon Givoni Consulting
sharon@iplegal.com.au
www.sharongivoni.com.au

Footnotes

1. Statistics and Facts About Social Media Usage, available at www.statista.com/topics/1164/social-networks/.
2. *Yanner v Eaton* (1999) 201 CLR 351 at 365–66.
3. Google's Terms and Policies, available at www.google.com/+/policy/pagesterm.html.
4. *Eagle v Morgan* 11–4394 (EDPa, 2012).
5. LinkedIn User Agreement, available at www.linkedin.com/legal/user-agreement.
6. *Eagle v Morgan* 11–4303 (EDPa, 2013).
7. *Phonedog Media v Kravitz* 11–03474 (ND Cal, 2011).
8. Available at https://twitter.com/noahkravitz?lang=en (as at 21 April 2017).
9. J McNealy "Who owns your friends?: Phonedog v. Kravitz and business claims of trade secret in social media information" (2012) 39 *Rutgers University Computer & Technology Law Journal* 30–55 https://ssrn.com/abstract=2135601.
10. M Davis "Social media policies: balancing individual expression, privacy and employment obligations" (2015) 12(6) *Privacy Law Bulletin* 163.
11. M Ward "Brisbane teen considers legal action after Lorna Jane 'stole' her Instagram photo" *The Sydney Morning Herald* 8 October 2015 www.smh.com.au/lifestyle/fashion/brisbane-teen-considers-legal-action-after-lorna-jane-stole-her-instagram-photo-20151008-gk429m.html; S Garber "Lorna Jane IP suit highlights IP pitfalls" *Lawyers Weekly* 27 October 2015 www.lawyersweekly.com.au/opinion/17390-lorna-jane-ip-suit-highlights-ip-pitfalls.
12. Above n 11.
13. Above n 11.
14. *Pearson v Linfox Australia Pty Ltd* [2014] FWC 446.
15. Above n 14, at [15].
16. Above n 14, at [46].
17. Above n 14, at [46].
18. Above n 14, at [47].
19. Telstra's Social Media Policy, available at http://exchange.telstra.com.au/3rs/ (current as at 9 September 2014).
20. D Katz "The battle I face with my left-handed partner" *The Sydney Morning Herald* 19 November 2016 www.smh.com.au/good-weekend/modern-guru/solving-the-kettle-issue-with-my-lefthanded-woman-20161116-gsqq4s.html.
21. *Seafolly Pty Ltd v Madden (Seafolly)* (2012) 98 IPR 389; [2012] FCA 1346; BC201209325 and *Madden v Seafolly Pty Ltd (Madden)* (2014) 313 ALR 1; [2014] FCAFC 30; BC201402065.
22. *Seafolly*, above n 21; *Madden*, above n 21, at [4].
23. *Madden*, above n 21, at [72].
24. *Seafolly*, above n 21, at [72].