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## Social Media: new ground brings new risks

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One in two New Zealanders is on Facebook. Almost 800,000 are active on LinkedIn. Social media is all-pervasive.

Social media is part of the legal furniture too. Many New Zealand law firms have Facebook pages, LinkedIn profiles or Twitter accounts. New Zealand courts have allowed legal proceedings to be served on defendants via Facebook in situations where the defendant has a Facebook site. What people say on social media sites has also proved to be a rich source of evidence in court: a criminal court in New Zealand recently considered evidence from Facebook to be relevant to proving a defendant’s state of mind in a murder case; and the Guardian newspaper reports that two-thirds of US lawyers said that Facebook was their “primary source” of evidence in divorce proceedings. The American Bar Association has even issued a guidance note on “Judge’s use of electronic social networking media”.

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### Social media in NZ businesses

One in five New Zealand businesses use some form of social media for business purposes. Business owners from Generation Y – as befits their tech-savvy reputation - use social media sites as a marketing tool more than others. A recent survey suggests twice as many Generation Y business owners use social media sites to promote their businesses than do Generation X business owners (42% to 21%). That is almost four times as many as business owners over 60. The survey suggests that younger business owners prefer marketing – such as social media sites - that lets them interact with their clients in an informal, conversational way.

Business users must, however, use social media with care. The features that make social media sites particularly attractive to younger business owners - real-time interaction with (prospective) customers and the ability to post information while on the move - are the same ones that might allow careless comments to be made online and spread quickly leading to legal liability.

A recent case illustrates the point. Late last year, an Australian court considered that a post made by a Facebook user on her personal Facebook site could be (actionable) misleading or deceptive conduct. Leah Madden, the principal of swimwear label White Sands, came to believe that, following a buying appointment in May 2010, Seafolly, a large international swimwear brand, had copied a number of her swimwear designs. She posted an album of photographs (“The most sincere form of flattery?”) on her Facebook page. The album showed her range and that of Seafolly. Ms Madden suggested in comments that Seafolly had copied her designs. Unfortunately (for Ms Madden), had she made enquiries she would have learnt that the designs she complained of had either been on the market or were already in final design stages at the time of Seafolly’s visit. The Australian Federal Court found that Ms Madden’s comments were “in trade” (as, though they were made on her personal page, they were made by the principal of a company seeking to influence the attitude of customers and potential customers of a competitor), and were “misleading and deceptive”. The Court ordered Ms Madden to pay damages to Seafolly.

Companies have even been found liable for postings other people, unrelated to the company, have made on social media sites. Allergy Pathway operates clinics for the diagnosis and treatment of allergies. It allowed customers to post content on its Facebook page. The testimonials on the site made some exaggerated claims, including that, for example, the company could cure or eliminate virtually all allergies or allergic reactions. Although the company could have removed the content, it did not. In 2011, the Australian Federal Court considered that, as the company wanted to benefit from the comments, it accepted responsibility for them, and was liable for any “false, misleading or deceptive” content.

Although these cases were brought in Australia, under Australian law, in New Zealand these cases might both be captured by (the similar provisions of) the Fair Trading Act 1986, which prohibit misleading or deceptive conduct or the making of false or misleading representations in trade. Indeed, the New Zealand Advertising Standards Authority (“ASA”) issued guidance in October 2012, consistent with the lessons from Allergy Pathway: user-generated content (such as customers’ postings on a company’s Facebook page) might fall within the jurisdiction of the ASA where, for example, a company adopted the content, incorporated it within its own advertising, or left it on its site. (New Zealand businesses might also need to be mindful of the Defamation Act, Therapeutic Goods Advertising Code etc.)

The message seems to be, as a Canadian court recently reflected, in a case in which a blogger alleged that he had been defamed on a political message-board during a “robust and free-wheeling exchange of political views”, it is (probably) wrong to treat comments made on the internet differently from those made on traditional media outlets: businesses should take care with what they post, or allow to be posted, online.

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### Who owns the information

The dangers for companies using social media sites do not end with careless posting. If a company has a LinkedIn page or a Twitter feed it is not always clear who owns the relevant information: are identities and contact lists the property of the individual or the company? In a recent US case, a website company sued a former employee who had resigned and changed his Twitter name. PhoneDog said the employee had cost the company thousands of dollars in lost business by taking his (17,000) Twitter followers with him. In another US case late last year, EdComm Inc, a provider of financial services and training, successfully defended a claim

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that it was not entitled to access a former employee's LinkedIn account and mine the information and incoming traffic when she left. The court considered, on a preliminary basis, that the LinkedIn account of the former employee, Ms Eagle, did not belong to her, even though it was Ms Eagles's name that appeared on the account, suggesting that a company can legally claim an individual's LinkedIn account if that account was created solely for transacting and developing company business.

There are also a range of issues for businesses with employees to be aware of: what social media activity outside the workplace can employers legitimately control?; what controls can you/should you have on social media activity within the workplace?; can you monitor employee social media activity?; should you have a social media policy, and what should be in it?; and can you use social media in recruitment? Those issues merit an article of their own.

So, what should businesses do to avoid the dangers? The obvious lesson is to take care about what is posted – or re-tweeted - online and carefully monitor what is on your site. If damage is done, be proactive and respond quickly. Businesses should also consider adopting a written social media policy or putting a disclaimer on their site, and conducting online audits for information about the business. Businesses should also ensure that control over the account and ownership of its online information is clear and consider if its insurance will protect it in a situation in which an employee gives away company secrets online or takes information away.

Social media sites offer companies great opportunities for contact and comment, but businesses should not be lulled into a false sense of security about the seemingly anonymous, casual and conversational nature of new media. Businesses that have a presence on social media sites, promote themselves using social media, or allow employees to use social media, should take steps to minimise their risk.

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