

Blogging is rapidly changing the marketing landscape and marketers who fail to acknowledge it, understand it and embrace it will suffer the consequences – commercially and legally, says **Kim Tunbridge**.

The legal implications of blogging.

We all know that word of mouth is the most powerful form of marketing. Blogging is just that – only on a faster, international and more permanent scale. As a blog can be viewed in many jurisdictions throughout the world, conduct in relation to a blog could cause different legal headaches in Australia as well as in other countries. This article considers only some of the legal implications of blogging under Australian law.

Potential liability arising from blogging is not just limited to the actual blogger. Employers may be vicariously liable for the actions of employees who are acting 'in the course of their employment'. Similarly, actions by third parties who are acting as an authorised agent of the company (such as an advertising agency) will often result in the company itself being liable for the actions of the third party. Consequently, great care should be taken to ensure that employees and agents of the business are aware of the legal implications of blogging, and what activities the employee or agent is authorised to undertake in the name of or on behalf of the company.

The potential legal risks of blogging that marketers need to consider when incorporating blogging into their marketing strategies include the following.

PRIVACY

The Privacy Act generally requires certain businesses to collect, disclose, use, store and otherwise handle personal information in a specific way. Personal information is information that is capable of identifying an individual.

Legal risks include:

- personal information could be collected by the marketer from researching blogs without any privacy consent or for a purpose

other than that which the blogger originally posted the blog, and

- a marketer could identify or name an individual who has a relationship with the company (being a client, employee, supplier or colleague) in a corporate blog – the individual could feel that this is a breach of his or her privacy.

DEFAMATION

Defamation generally occurs where a statement is published, in writing or verbally, which refers to a person (or allows the person to be identified even if not named) and where such statement is capable of harming that person's reputation and standing.

Legal risks include:

- a marketer could make a defamatory statement about a company or individual (being a client, employee, supplier, competitor or other third party) in a corporate blog or in a third party's blog, and
- a competitor or employee could be making defamatory or disparaging statements in their blogs about a company or brand (this is a real issue as many bloggers air their issues – especially regarding their employers – in their blogs).

There is much debate by bloggers, especially in the US, about whether defamation laws should apply to blogs. In Australia, however, publications on the internet are capable of being defamatory and there is no specific exception for blogging.

CONFIDENTIAL INFORMATION AND TRADE SECRETS

A breach of confidential information generally occurs if a person who has a duty to maintain confidentiality directly or indirectly discloses confidential information in an unauthorised manner. Disclosure of confidential information

is a huge issue in relation to blogs. The type of confidential information that may be disclosed includes the inner workings of the company, strategies and policies of the company, trade secrets, the future plans of the company, the relationships of certain people within the company and information in relation to a company's clients.

Legal risks include:

- confidential information and trade secrets could be disclosed by an employee, supplier or client of the company in a corporate blog, in a comment on another blog or in that person's own personal blog, and
- confidential information of a competitor could also be disclosed in a blog by its employees, suppliers or clients.

COPYRIGHT

Copyright generally provides owners of original literary, dramatic, musical and or artistic works certain exclusive rights in relation to that work, such as the right to control its reproduction, communication to the public, performance or adaptation.

Legal risks include:

- a blogger using a company's logo will effectively be breaching copyright in the logo (this may also be grounds for a trademark infringement claim)
- a blogger reproducing a copyright protected work owned by the company will be infringing the company's copyright, and
- copyright could be infringed if the company uses photographs in its blogs without the copyright owner's permission.

PASSING OFF

Passing off generally occurs where a person wrongly represents that their goods or services are associated with others that already have an established reputation or goodwill in the marketplace.

Legal risks include:

- a blogger may be using the brand as his or her identifier or providing information about the brand, and arguably passing himself or herself off as being associated with the brand
- a competitor could be passing itself off in blogs as being the company or being related to the company or brand – this could be for the purpose of obtaining business or, alternatively, hurting the company's brand, and
- a competitor could be using similar advertising or sponsorship to that of the company on blogs in order to direct new enquiries to its website.

MISLEADING AND DECEPTIVE CONDUCT

The consumer protection provisions of the Trade Practices Act generally provide that a corporation must not, in trade or commerce, engage in conduct that is misleading and deceptive or that is likely to mislead and deceive. There are similar provisions in each of the state Fair Trading Acts that extend this requirement to partnerships and sole traders.

Legal risks include:

- a misleading or deceptive comment could be made by an employee or agent of the company in a corporate blog or in a comment on another blog (as people tend to write blogs quickly or in response to a comment on a blog, as well as employing the common practice of using shorthand, there is likely to be an increased risk that

statements made in blogs could be misleading or deceptive), and

- a misleading or deceptive statement could be made in advertising on a blog, such as in relation to comparing products of competitors in a misleading or deceptive way and promoting discounts that are outdated and are no longer available to consumers (the same rules that apply to advertising on other media will generally apply to blogs).

NEGLIGENT MISSTATEMENT

Negligent misstatement generally occurs where a person is careless or negligent in providing advice, information or opinions on business or professional matters, where it is reasonably foreseeable that a person will be relying on that advice and that other person actually does rely on this advice and suffers loss or damage.

Legal risks include:

- negligent advice could be provided (and relied upon) intentionally or unintentionally by an employee or agent of the company in a corporate blog or in a comment on another blog (there is likely to be a higher incidence of negligent misstatement in blogs as people tend to write blogs quickly or in response to a comment on a blog without having all the facts, having asked all the relevant questions and having considered all the options).

PLAYING IT SAFE

In order to minimise legal risks in relation to blogging marketers should ensure that they:

- monitor blogs and the 'blogosphere' on a regular basis
- have (and enforce) a blogging policy that clearly outlines what is acceptable conduct for employees in relation to blogs and has authority to publish any kind of public statement in relation to the company and its employees, clients and suppliers
- ensure employment contracts impose an obligation on employees prohibiting them from making disparaging remarks (in a medium) about the company, its employees or clients
- ensure staff are aware of the legal implications of blogging and the potential liability that can be imposed on the employer and/or the employee directly as a result of an employee's blogging activities
- ensure that all employees, suppliers, clients and prospective suppliers and clients sign confidentiality agreement, which makes clear that blogging (and any other unauthorised disclosure) of confidential information will breach the agreement and the obligation of confidentiality, and
- ensure that confidential information is only disclosed to those who need to know

Please note: this article is not a substitute for legal advice and is only provided as an overview of some of the legal issues relating to marketers and blogging. M

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