

SOCIAL MEDIA: BENEFITS AND PITFALLS

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Social media is new and pervasive, and it is here to stay. It is transforming both how we do business and how we live our lives. It can be breathtakingly fun as technology rushes to meet our ever-increasing expectations for instantaneous communication. But there are also potential traps for the unwary that can lead to personal, financial, reputational, and legal headaches. Simply put, social media offers great experiences and opportunities, but it is not for the faint of heart.

A good example of the seemingly overnight phenomenon that social media has created is the enhancement of our perceptions about personal electronic tools. Twenty years ago, few people used cellular phones and laptop computers – indeed, many consumers considered them to be luxury items. That market changed within a decade. Barely ten years later, cellular phones and laptop computers were being used by a significantly larger number of consumers, and they had become standard items both at home and in the workplace. Today, they are considered almost obsolete, having been replaced in large part by smart phones and tablets. What the next generation of technology will offer us is anyone's guess.

But social media is much more than technology. It represents a mental shift as we transform the way we communicate on a whole host of levels. Not only is the speed of communication much faster than it was before. Communication is now much more personal and attitudinal. Anyone with an idea or an opinion can share it quickly and easily, thus converting the traditional marketplace of ideas into a bazaar of freewheeling discussions. Besides the internet, email and instant messaging, social media features web-based and mobile instruments that allow blogs, chat groups, commentaries attached to news sites, marketing networks, and wikis, among others. The point of social media is to make communication more interpersonal and relational as we post our news and give feedback to others. Here are just a few illustrative statistics:

- Social networking covers 22% of all time spent online in the United States;
- Some 234 million teenagers and adults use mobile devices in the United States;
- Twitter averages almost 40 million tweets every day;
- One out of four persons age 65 and older belongs to some social networking site;
- Facebook now tops Google for weekly traffic in the United States;
- Social media has become the top activity on the Internet;
- YouTube is the second largest search engine in the world.¹

Social media is not just for individuals. Social media reaches from Main Street to Wall Street, as evidenced by Facebook's recent Initial Public Offering in the USD \$75 billion - \$100 billion range.² In a rush to be transparent to the public, government officials and corporate CEOs

¹"Social media," Wikipedia http://en.wikipedia.org/wiki/Social_media, downloaded February 6, 2012.

² "Facebook Sets Historic IPO," Wall Street Journal <http://online.wsj.com/article/SB10001424052970204879004577110780078310366.html>, downloaded February 6, 2012.

all around the world tweet, ask us to click “like,” and invite us to join their online circles or connections. This is not the traditional one-directional marketing which has worked for millennia, whereby someone actively broadcasts a message and someone else passively receives it. Although social media is barely 10 years old, it has become a commonly-accepted global three-dimensional interchange, whereby many businesses and customers engage each other in conversation, give feedback, and build trust relationships, often with virtually no face-to-face contact. Long essays are out. Snappy one-liners are in. Social media teaches us to question quickly, communicate concisely, and respond rapidly. It can be fun and exciting. It can also be frantic and all-consuming, as we run faster not to be left behind.

On one hand, this can all be good. “Viral” used to be just a negative infectious term but, if used properly, it can be a positive interactive term too. However, in the rush to be transparent and friendly, there are some dangers that co-exist with the benefits of social media, including:

- Our cultural lexicon now includes scary terms like “phishing,” “data mining” and “identity theft.” Using social media at home or at work can lead to the unwitting introduction of spyware and malware into our computerized applications. Social media can be a computer hacker’s dream, whether for malicious mischief or the irrevocable loss of “Sensitive Personally Identifiable Information” (SPII).

- Along with the loss of privacy, both personal and corporate, is the risk of losing proprietary information and financial protocols. Workers who engage in blogs and chat rooms may divulge privileged materials which could subject themselves and their employers not only to business losses, but also to potential legal liability.

- Suppose a widget manufacturer implements an aggressive marketing campaign that invites the public to post feedback on its website. A competitor might object to unfavorable comments that are made comparing its goods to the widget manufacturer’s products. One person’s opinion can be another person’s defamatory statement, and the constitutional protections afforded to some free speech might not extend to all commercial settings.

- An employer could conduct a background check on its job applicants by reviewing their Facebook page and other social media postings. It is unclear whether the findings constitute a “consumer record” which requires prior written consent from the applicant before the Facebook search can be initiated. It is also unclear whether an employer can face a retaliatory termination lawsuit for firing a worker based on the content of a YouTube video which is made off-hours at home.

The answers to such issues are not necessarily clear-cut. This is due to the patchwork of state and federal regulatory schemes in the United States, United Kingdom and elsewhere around the world. What might be a prohibited matter in one jurisdiction might be considered less actionable in another jurisdiction, which raises delicate questions of forum-shopping and choice-of-law considerations. But the law is beginning to catch up to technology. For example, the U.S. Federal Trade Commission recently implemented its Red Flags Rule.³ California has its Security Breach Notification Act⁴ and Nevada has a comparable statute.⁵ The United Kingdom has the

³ Fair Credit Reporting Act of 1970, 15 U.S.C. § 1681m(e), as amended.

⁴ California Civil Code § 1798.80, *et seq.*

⁵ Nevada Revised Statute § 603A.010, *et seq.*

Data Protection Act of 1998 in connection with the European Data Protection Directive.⁶ Such praiseworthy efforts may be difficult to enforce, however, given the ever-evolving status of technology and creative imaginations.

Hence, social media is a constantly emerging area for both public concern and legal analysis, and comprehensive guidance is not necessarily guaranteed. Economic losses might be incalculable following a data breach, and reputational losses might be equally devastating following adverse publicity gone viral. Effective risk management can be tricky when trying to anticipate what might seem to be unimaginable scenarios. The insurance industry continues to evaluate what products are best suited for specific types of suspected claims.

In the meantime, to be forewarned is to be forearmed, and here are some general tips to be preventative in a proactive way:

- Implement security precautions, from firewalls to guidelines for employee access to non-work related social media sites, especially while using employer-regulated business equipment. Monitor consistently for compliance with these protocols.
- Think responsibly before you post anything on social media. Consider its possible ethical, financial, legal and reputational implications.
- Remember, there are no truly private thoughts on social media. Once it is “out there,” it is “out there.”
- Act immediately if a problem arises. The seriousness of its nature might not be obvious immediately. Ignoring a problem, or delaying a solution, could only make matters worse.

CAVEAT: THE FOREGOING DOES NOT CONSTITUTE LEGAL ADVICE. PLEASE CONSULT AN ATTORNEY FOR INDIVIDUAL ADVICE REGARDING INDIVIDUAL SITUATIONS.

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⁶ “Data Protection Act 1998,” Wikipedia http://en.wikipedia.org/wiki/Data_Protection_Act_1998, downloaded February 6, 2012.