

[subject]

BUSINESS AS USUAL?

What to watch out for doing business online

[date]

21 November 2011

Today, many business organisations of all sizes are developing an online presence and using the internet as a new and cost effective tool to reach customers, advertise and sell goods or services, manage their brand and interact with employees and the wider community via social media.

As businesses continue to develop and expand their online presence and their use of social media, it is important to understand the way that traditional illegal behaviours such as trade practices and trademark infringement are dealt with in the online environment. It is also important to be aware of the unique issues that social media and user generated content can create.

We can see that while it is relatively simple and inexpensive to implement online and social media strategies in organisations, complex issues can arise and poor management of these issues can ultimately undermine their effectiveness.

This update explores both current issues and recent case law related to online business activity as well as business use of social media.

These examples highlight the complexities associated with this new business environment and suggest that organisations ultimately need to be pro-active and adopt procedures and guidelines that facilitate and manage an effective on line presence and social media strategy.

User generated content and the meaning of 'publication'

Many businesses interact with customers and clients online and a growing portion of businesses use social media strategies to encourage users to 'like' their pages or to make comments about products or services. In fact, Nielsen reported that 14% of Australian businesses currently engage with consumers via a 'like' button on their website.¹ But, who is ultimately responsible for user generated comments or 'publications' on a website or Facebook page?

A recent case involving the ACCC and the company Allergy Pathway is noteworthy. The ACCC determined that testimonials written by clients and posted by Allergy Pathway and Allergy Pathway's responses to queries from the public on its website and Facebook page amounted to 'publication' by Allergy Pathway.

The testimonials in question infringed a number of sections, of the since reformed Trade Practices Act, regarding misleading and deceptive conduct and related offences. The ACCC ruling noted that while Allergy Pathway was not responsible for the initial publication of the testimonials 'it is appropriate to conclude that Allergy Pathway accepted responsibility for the publications when it knew of the publications and decided not to remove them'.²

¹ www.communityengine.com/wp-content/uploads/2011/01/Nielson-CE.pdf

² [ACCC v Allergy Pathway Pty Ltd \(formerly Advanced Allergy Elimination Pty Ltd\) \(No 2\)](#)

The logo for 'sainty law' is displayed in a stylized, lowercase, orange font. The word 'sainty' is positioned above 'law', with the 'l' in 'law' being significantly larger and overlapping the 's' in 'sainty'.

[office]

suite 1.03, 55 miller street, pyrmont
sydney NSW 2009 AUSTRALIA
Tel +61(0) 2 9660 9630
Fax +61(0) 2 9660 6806

[email]

katherine.sainty@saintylaw.com.au

[web]

www.saintylaw.com.au

[subject]

BUSINESS AS USUAL? What to watch out for doing business online



Online advertising and trade practices infringement

Google AdWords is a useful advertising tool for businesses wishing to take advantage of the popularity of the Google search engine. AdWords allows businesses to pay Google so that their advertising appears as the first result when particular 'keywords' are entered into the Google search engine. Unlike 'generic' links that appear on a page, paid advertisements appear as 'sponsored links'.

The ACCC brought a case against Google alleging that the search engine engaged in misleading and deceptive conduct by using sponsored links which failed to distinguish whether they were advertisements or genuine (generic) search results. On this point, the Court found that most users of Google understand that results listed under the 'sponsored links' heading were advertisements.

However, the ACCC also alleged that the use of business names in a sponsored link, where no actual association with that business existed, also amounted to misleading and deceptive conduct on the part of Google and Trading Post, who sponsored the link in this case.

Trading Post had used the business names 'Kloster Ford' and 'Charlestown Toyota' in their sponsored links. The Court found that Trading Post had infringed the law and engaged in misleading and deceptive conduct because they had no affiliation with either of the businesses, and no information regarding either business could be found by clicking on the link. But, Google was not liable for this misleading conduct because they were 'merely communicating' the representations without adopting or endorsing them.

While the ACCC are appealing the decision, businesses should exercise caution when using search terms to drive web traffic to their sites as they could be breaching consumer protection laws.

Online sales, user generated content and trademark infringement

As well as using the internet to advertise and market products many businesses and individuals are also selling products to customers through internet marketplaces like eBay. eBay Australia recorded 5.58 million unique views in January 2011.³

While the sale of products over the internet offers convenience for buyers and sellers a ruling by the EU Court of Justice shows that trademark infringement can occur through the promotion of goods via user generated content posted on internet marketplace sites.

L'Oreal SA took action against eBay International AG over the sale of counterfeit and other trademark infringing goods. The court ruled that eBay was responsible

'Businesses have been advised to ensure their Google AdWords show close ties to their activities in the wake of a high-profile judgement against Trading Post Australia'.

itnews.com.au
September 2011

³ <http://www.news.com.au/business/online-shoppers-not-killing-local-retail-industry/story-e6frfm1i-1226019685341>

[subject]

BUSINESS AS USUAL? What to watch out for doing business online



for trademark infringements because it had taken an active role by using keywords corresponding to L'Oreal trademarks to promote its users posting.

The court also noted that as a diligent economic operator eBay should have realised that the online offers for sale were unlawful and removed the data from the site or disabled it.

Brands, reputation and engagement with social media

While businesses are using social media to interact with consumers and the wider public, interest groups, competitors and consumers are also able to take advantage of wider audiences to raise issues that they see as relevant to the company or brand. When dealing with issues championed by interest groups, competitors or consumers, companies need to consider the most appropriate course of action to quickly and effectively resolve conflicts that may arise. Traditional reputation management measures may not always be appropriate and brand reputation can be further damaged if conflicts are not dealt with effectively.

Nestlé and Greenpeace: Greenpeace began a social media campaign to stop Nestlé from sourcing palm oil and other paper products from suppliers who destroyed the habitat of the orangutan in Indonesia. As part of the social media campaign Greenpeace made a video that likened eating a Kit-Kat to eating an orangutan. When Nestlé had the video removed from YouTube Greenpeace then loaded it on Vimeo. 1.5 million views of the video subsequently occurred across both video streaming sites.

Greenpeace urged its supporters to call, email and leave comments on Nestlé's Facebook page to protest against the removal of the video. A logo designed by Greenpeace featured the word 'Killer' in the Kit-Kat font. Supporters then used several forms of social media including videos, comments and changes to their Facebook profile images to support the Greenpeace action. They also physically protested at the Nestlé AGM.

Nestlé initially reacted by threatening to remove any comments by users on the Nestlé page who had the 'Killer' logo as their Facebook profile picture. This threat by Nestlé did not have the desired effect and a month after the AGM Nestlé announced a 'zero deforestation' policy in partnership with The Forest Trust and committed to excluding 'high risk plantations or farms linked to deforestation' from its supply chain.

Twitter – Cybersquatting, misappropriation of name and likeness and trademark issues

While Twitter use is not as popular as Facebook it is nevertheless another avenue that individual and business organisations interact with friends, fans and customers. In the United States ninety five percent of individuals who use Twitter do so via their mobile phone.⁴ But, what happens when individuals or organisations set up accounts representing themselves as others?

'Online shopping sites such as eBay may be liable for trademark infringements if they play an "active role" in promoting counterfeit goods, Europe's top court ruled today'.

The Guardian, UK, July 2011

'The campaign reached a crescendo within just four days of being launched, catching Nestle unprepared and scrambling for a response'.

Forbes.com, October 2011

4. <http://mashable.com/2011/06/01/twitter-pew-study/5>.
<http://www.smh.com.au/articles/2009/03/17/1237054799469.html>

[subject]

BUSINESS AS USUAL? What to watch out for doing business online



Tony La Russa and Twitter: In the United States, Tony La Russa, the Manager of the St Louis Cardinals discovered that a person had set up a Twitter account under his name and had published 'tweets' containing obscenities and inappropriate remarks. 'Bio parodies are fun for everyone' appeared as part of the account profile and the account had four followers.

On 4 June 2009 Tony La Russa sued Twitter for trademark infringement, trademark dilution, cybersquatting, misappropriation of name and likeness, invasion of privacy and intentional misrepresentation.

Twitter does have a policy in relation to impersonation profiles but parody accounts are acceptable as long as the profile somehow indicates that is it not supposed to be legitimate. One Australian example of a parody profile that comes to mind is the @fakeStephenConroy account that was set up by Telstra employee Lesley Nassar that satirised issues associated with Senator Conroy's portfolio.⁵

Twitter launched an account verification system on 11 June 2009 which was in part a response to La Russa's action. Verification was shown by the display of a blue button on individual feeds to prove authenticity, but, Twitter eventually closed this option to the public.

While there was some publicity about the Tony La Russa case it was voluntarily dismissed on 26 June 2009 and no money changed hands between the two parties.

Effective management of social media strategies

If business investment in online presence and social media strategies is increasing then business owners need to develop and implement clear, but flexible, guidelines and procedures that cover areas such problem and complaints handling, intellectual property or trademark infringement.

Staying on top of your responsibilities in the online space, including moderating user generated content and interaction with customers is imperative. Of equal importance is planned, deliberate and timely approach to resolving disputes or issues that may arise.

'Twitter users are allowed to create parody, commentary, or fan accounts (including role-playing). Twitter provides a platform for its users to share and receive a wide range of ideas and content, and we greatly value and respect our users' expression. Because of these principles, we do not actively monitor users' content and will not edit or remove user content, except in cases of violations of our Terms of Service.'

Each user is responsible for the content that they provide. Accounts with clear intent to deceive or confuse are prohibited as impersonation accounts and subject to suspension.

Twitter Parody, Commentary and Fan Accounts Policy

Sainty Law offers specialist communications and media legal advice that adds value to its clients' businesses.

Contact:
Katherine Sainty
Managing Director

©2011 Sainty Law

*This publication is for your information and interest only. It is not intended to be comprehensive, and it **does not constitute and must not be relied on as legal advice.** You must seek specific advice tailored to your circumstances.*

5. <http://www.smh.com.au/articles/2009/03/17/1237054799469.html>