

Digital watch?

Time's up on misleading behaviour online

So you know that lots of people are online, tweeting, blogging and vlogging hoping to go viral. You've been told that your business should launch a social media campaign in order to capture the attention of Generation Z and hipsters who are anti-social socially but uber-social social media-ly. And as you scratch your head when you hear words and phrases including “totes amazeballs”, “cray” and “awesomesauce”, and you're not quite sure of the correct pronunciation of “meme” you hesitate whether advertising online and having online profiles is for you.

Whilst the language of social media may appear new and overwhelming to some, it can be easy to forget that there are some traditional legal principles that also apply as in other areas of business activity and advertising generally. Competitors are also watching each other, especially how particular businesses manage their online profiles and what social media campaigns work and don't work: cyber-stalking on a business level. The point is that some familiar principles, problems and challenges will still exist when you take your business into the online world of social media.

Seafolly puts the squeeze on competitor's bikinis

In *Seafolly v Madden* is an example of the problems and legal issues that may be encountered online. In 2010 Leah Madden of the Australian swimwear label White Sands, put up posts on her personal Facebook page comparing her designs to designs of the swimwear label Seafolly. The inference was that Seafolly had either allegedly copied or imitated the White Sands designs.

After writing to Ms Madden demanding that she delete the posts, Seafolly then initiated proceedings, alleging false statements were made regarding the perceived similarities and alleging breaches of copyright (Ms Madden has used Seafolly images alongside her own in order to make her point regarding the similarities).

The Court found in favour of Seafolly, finding that Seafolly had not copied the White Sands designs and that Seafolly's designs had gone to market prior to the contact between the two parties. The Court also found that the conduct was in trade or commerce irrespective that Ms Madden's account was a personal account.

“Be careful what you say online including in personal social media profiles. Your competitors may be watching and may not hesitate to protect their brand and enforce their rights.”

ACCC-uracy of product representations

Likewise, the ACCC is keeping watch over online activity, taking enforcement action against businesses that have allegedly breached established legal principles.

With an increase in popularity of online shopping, there has also been an increased reliance by consumers on testimonials and reviews of goods and services. As such, the ACCC has been considering the accuracy of product claims, consumer testimonials and reviews of goods and services and whether businesses have been faking them. The concern is that in many instances consumers are unable to check and validate claims, and that they place heavy reliance on such claims.

One example is the matter of Citymove Pty Ltd, which allegedly published false customer testimonials on their “Moving Review” website. It admitted to paying contractors to copy testimonials from another unrelated website, alter them and publish them on Moving Review. Citymove Pty Ltd paid infringement notice issued by the ACCC.

“ Don't post fake reviews or claims about your business. Regulators may receive complaints from consumers or competitors about your business and searches may reveal if the review has been used elsewhere. ”

The ACCC also initiated proceedings against Allergy Pathway and obtained undertakings from them not to engage in certain conduct, specifically in relation to representations regarding the characteristics of Allergy Pathway's products.

In subsequent proceedings the Court found that Allergy Pathway and its director, in breach of those undertakings, made prohibited representations about Allergy Pathway's purported allergy treatment on its website and on Twitter, Facebook and YouTube. The representations included testimonials written and posted by clients on Allergy Pathway's Facebook "wall" and testimonials written by clients and posted by Allergy Pathway on its website and Facebook and Twitter pages.

Whilst Allergy Pathway was not responsible for the initial publication of testimonials (the original publisher was the third party who posted the testimonials on Allergy Pathway's Twitter and Facebook pages), Allergy Pathway accepted responsibility for them when it knew of them and decided not to remove them.

“ Make sure claims regarding your products are accurate and don't mislead consumers. If you have online profiles and pages, make sure they are monitored and inappropriate posts are removed. ”

No group for you

The ACCC has also identified online group buying websites as an area of current focus, with a considerable increase in complaints over the last 12 months. Particular concern is placed on the purported conditions and limitations of use, expiry dates and transparency of terms.

“ If you are going to enter into a relationship with an online group buying website make sure the conditions that consumers are subject to are clear and prominent. ”

Ctrl Alt Compete

One final area of focus for the ACCC in 2013 relating to online activity is conduct by business which impedes competition, especially where established businesses attempt to undermine and prevent new businesses emerging online. Given that more and more consumer and business transactions are being conducted online, the ACCC is effectively seeking to facilitate a thriving and vibrant online economy. Long established laws which prevent businesses from misusing market power or engaging in anti-competitive conduct will also apply in online situations and to online businesses.

“ Don't misuse your market power or engage in anti-competitive conduct. If you believe that your business is on the receiving end of such conduct then seek legal advice. ”

Summary

The above examples reveal that even in online settings, some common issues and challenges apply. You can expect that your competitors will be watching your online behaviour, and it is relatively easy for someone to keep evidence of what you say and do online. Likewise the ACCC is keeping watch over inappropriate online activity and it will not hesitate to use the considerable and broad powers given to it - as it has in more traditional environments. Be mindful of your online behaviour - it can be an expensive lesson if you don't get it right *#aintnobodygottimeforthat*

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