

Contracting With Social Media

Nick Abrahams and Sara Payton discuss some of the risks facing businesses who engage in social media.

Social media work used to be about preparing policies in relation to social media use in the office and addressing human resources issues. Concerns of businesses were largely limited to the effect that use by employees had on productivity and the workplace relations issues relating to the manner of use. However social media has jumped the fence. It is no longer simply about people going to Facebook to engage directly with Facebook. Rather, social media is now becoming a key part of most media sites and businesses are increasingly turning to social media to broaden their exposure. This increased use also brings with it a variety of separate legal issues that businesses must address.

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How social media is incorporated into websites

With the growth in the number of businesses incorporating social media into their websites, most internet users will have had some exposure to these features. It is not uncommon for online journals and newspapers to include an option for readers to 'Share' or 'Tweet' the content on Facebook, Twitter, LinkedIn and other social media sites. Similarly, many businesses offer visitors to their website the option to follow the business through social media. However, there are many other features that may be incorporated into your website. These include:

- Facebook 'Like' button – users can indicate whether they like a business, website or product and publish that information on their 'wall'. This feature also provides a counter facility that displays the number of users who 'Like' the item.
- 'Share' feature – users can select to 'Share' specific content on their relevant social media site. A link to the website will be published on the user's wall together with information that the social media provider extracts from that site.
- Facebook and Twitter 'Feeds' – a website can display a summary of the recent activity of other followers, or 'friends' of that website or business in the form of a feed of content from the social media site.
- Facebook 'Recommendations' plugin – this feature enables a website to display information concerning the most popular content on that site.
- Single log in – users can log into a business' site via the user's social network account.

Issues to consider

How do you intend to use the social media feature?

The issues relevant to incorporating social media in your website will vary depending on what social media features you intend to include. For example, are you simply providing a link to the social media site? Will you incorporate the logo for that site? Are you incorporating an enhanced feature, such as a 'Share' or 'Tweet' button? Will you use an Application Programming Interface (or 'API')? Specific terms may apply to different features. Similarly, different terms will apply to different social media providers.

The social media providers each publish their terms of use on their sites. As these terms of use are prepared by the social media providers it is not surprising that they generally favour the social media provider. Businesses must carefully review these terms to ensure that their intended use of the social media is compliant with the terms. Often these terms will contain restrictions on the ability to compete with the social media site. The business will need to assess whether its proposed integration with the social media site could bring the business within these restrictions.

Are the terms acceptable – do they permit your intended use?

The terms of use restrict how the social media site can be used. Where a business is planning on incorporating social media into its website, the terms of use must be considered to determine any limitations on the use of the social media features and any restrictions on what content can be included on the social media site. For example, many social media providers restrict how their features can be used for advertising. Similarly, there are often limitations concerning syndication functions. Therefore, before incorporating social media into its site, a business must ensure that the feature is right for what it wants to do.

Will you need to pay?

Perhaps one of the main attractions for businesses to incorporate social media into their sites is that such use is generally free. However, various sites do provide for circumstances where payment may be required. For example, at the time of writing, the Twitter terms provided that a business will be required to compensate Twitter, where Twitter content is the primary basis of an advertising sale. Other social media sites also provide a warning that use of their sites may not be free in the future.

What is the risk if the terms change?

These terms are subject to change at the discretion of the social network provider. Such change can occur very quickly and there is no limitation on the extent of such changes. This represents a risk to businesses that include social media in their websites, as a change to the terms could cause the investment in the application to be lost. Therefore, businesses must be vigilant in monitoring changes and ensuring continued compliance with amended terms. Businesses must also evaluate how easily they can cease using the social media feature in the event that the terms change in a manner that is adverse to the business.

Can you negotiate a separate licence with the social media provider?

Where a social media provider's terms prevent the intended use of the relevant feature, a business may need to seek a separate agreement with the provider to allow the proposed use. Where a separate licence is negotiated, a business will not be limited to the general terms and can more specifically address the manner that it intends to use the social media features. Businesses may also consider this approach where the risk associated with a change to the terms is high. However, ultimately there is no obligation on the social media provider to enter into such an agreement.

Where to from here?

If a business is contemplating incorporating social media into its websites, ensure that you review the social media providers' terms and, where in doubt, seek legal advice on how those terms will apply to the business.

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