

The risks of leveraging social media and user-generated content

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This practice note examines the legal risks associated with leveraging social media and user-generated content and provides practical guidance as to how parties engaged in such activities can mitigate those risks.

Social media

Social media is an increasingly popular means of communicating online. Based on user participation and interaction, social media takes a variety of forms, including:

- online social and business networking (eg Facebook, LinkedIn, MySpace)
- online blogs (eg Twitter, Blogger.com)
- online forums (eg Mumsnet)
- online shops and auctions (eg eBay, Amazon)
- online digital media sharing (eg YouTube, Vimeo, Flickr)
- online reference texts (eg Wikipedia)
- online games and applications (eg World of Warcraft)

User-generated content

Increasingly businesses are encouraging consumers to contribute material to branded social media platforms and incorporating these contributions into consumer-focused advertising and marketing campaigns. Social media content submitted by consumers is termed 'user-generated content' or 'UGC'.

This practice note refers to those who create or submit UGC or interact with social media as 'consumers'. Businesses leveraging (using) that UGC or hosting a social media platform are referred to as 'brands'.

Legal risks

Social media platforms and leveraging UGC for commercial purposes present a number of significant legal risks for brands. Enabling consumers to upload information about themselves (or others) or to share content, such as photographs, videos and music, in these informal contexts--with ease and often instant global accessibility--may lead to third-party rights being infringed.

Firstly, this practice note will highlight some of the key legal concerns brands in this sphere face. Secondly, the note will to examine the practical ways in which those risks should be managed.

Copyright infringement

Copyright will protect the vast majority of UGC and material shared using social media, including pictures, video, sound and text.

[References: CDPA 1988, s 1\(1\)](#)

Any uploading or sharing of a copyright work by a consumer, and the subsequent use (eg on its website or other social media platform) by a brand is likely to involve one of the acts reserved to the copyright owner by the Copyright, Designs and Patents Act 1988 (CDPA 1988). Such restricted acts include copying a copyright work or communicating it to the public. If the consumer's/brand's use of the work in social media is not authorised by the copyright owner, the use will constitute copyright infringement by both the consumer and the brand.

[References: CDPA 1988, ss 16-26](#)

Remedies available to rights holders that take action in respect of copyright infringement include:

- interim and final injunctions
- seizure of infringing copies and other articles, eg media incorporating UGC such as, for example, any promotional material
- orders for delivery up or destruction of infringing articles, and
- damages or an account of profits

Accordingly, a claim for copyright infringement can force a brand using social media to remove infringing material. Combined with liability for damages and costs, copyright infringement can be an expensive mistake resulting in significant brand damage, eg through adverse publicity or a negative public reaction.

Trade mark infringement and passing off

If UGC uses:

- a sign that is identical to a registered trade mark in relation to goods or services that are identical to those for which the trade mark is registered
- a sign that is identical to a registered trade mark in relation to goods or services that are similar to those for which the trade mark is registered, where there is a likelihood of confusion as to the origin of the UGC goods or services
- a sign that is similar to a registered trade mark in relation to goods or services that are identical to those for which the trade mark is registered, where there is a likelihood of confusion as to the origin of the UGC goods or services, or
- a sign that is identical or similar to a registered trade mark with a reputation, and that use without due cause takes unfair advantage of or is detrimental to the distinctive character or repute of the registered trade mark

[References: TMA 1994, s 10](#)

then the consumer and brand making use of that UGC can be liable for trade mark infringement. A typical example would be if a consumer made reference to a well-known rival company on a brand's Facebook page in an unjustifiably disparaging way.

[References: Reckitt & Colman Products Ltd v Borden Inc \[1990\] 1 All ER 873](#)

Where UGC incorporates a recognised/well-known (but unregistered) trade mark or badge of origin, and a brand uses that UGC in a way that misrepresents the commercial relationship between that famous mark and the brand, the brand could also be liable for passing off.

Remedies available for the trade mark holder (in respect of trade mark infringement) and the owner of the famous unregistered mark (in respect of passing off) include:

- interim and final injunctions
- seizure of infringing articles
- orders for delivery up or destruction of infringing articles, eg media incorporating UGC (eg as above, any mattering materials), and
- damages or an account of profits

As with copyright infringement, a claim for trade mark infringement or passing off can require the brand to cease using the UGC (eg withdraw any advertisements using a competitor mark) leading to wasted media space, considerable brand damage, loss of management time and expense.

Privacy

If UGC contains 'personal data,' ie data relating to a living individual by which they may be identified, consumers and brands leveraging it will need to comply with UK data protection legislation, privacy laws and advertising codes.

Information Commissioner's Office: Determining what information is 'data' for the purposes of the DPA

For example, if UGC contains personal data, it will often be necessary for the brand seeking to use the UGC to obtain consent to that use from the person to whom the UGC relates. Failure to do so could constitute a criminal offence and lead to a claim for damages and/or the imposition of a fine of up to £500,000.

Individuals have a 'right to respect for private and family life' under the Human Rights Act 1998 (HRA 1998). That Act also provides that individuals are entitled to the 'peaceful enjoyment' of their possessions, including their image and goodwill. Therefore, if UGC contains an image of or information of a private nature relating to an individual, the brand seeking to use that UGC will need to obtain consent from the person to whom the UGC relates. Failure to obtain such consent could lead to a claim for damages and an injunction to prohibit the breach of rights (eg removal of UGC containing private information or personal data).

Rule 6.1 of the UK Code of Non-broadcasting Advertising, Sales Promotion and Direct Marketing (CAP Code) 'urges' marketers to obtain written permission before referring to or portraying any member of the public in an advertisement (unless in a crowd or general public scene). Even stricter rules apply in the case of members of the British Royal Family. A brand will therefore need to seek the consent of a person appearing or referred to in UGC prior to utilising that UGC for advertising purposes. Failure to do so could lead to adverse publicity, including disqualification from industry awards, a requirement that all future advertisements be pre-vetted prior to release and even an Office of Fair Trading referral.

[References: DPA 1998, s 1](#)

[References: DPA 1998, Sch 1, Pt I \(1st Principle\)](#)
[DPA 1998, s 55A](#)

[References: HRA 1998, Sch 1, Pt I \(art 8\)](#)
[HRA 1998, Sch 1, Pt II \(art 1, the First Protocol\)](#)

[References: UK Code of Non-broadcasting Advertising, Sales Promotion and Direct Marketing, rules 6.1, 6.2](#)

Defamation

UGC will be defamatory if it contains an untrue imputation that 'would tend to lower the claimant in the estimation of right-thinking members of society generally or cause him to be shunned or avoided or tend to expose him to hatred, contempt or ridicule'.

Both the consumer creating the UGC and the brand using it will potentially be liable if it is defamatory. This is a real risk as defamatory statements are not always readily identifiable; whether or not a statement is defamatory often depends on the context in which it is made.

However, where a consumer uploads or shares defamatory UGC, the UGC host or leveraging brand may defend itself against third-party claims on the following two bases:

- the brand using the UGC was:
 - not the 'author', 'editor' or 'publisher' of the material (ie it had no effective control over the content of the published material and played an entirely passive and neutral role in its publication)
 - took reasonable care in the material's publication, and
 - did not know (and had no reason to believe) that what it did caused or contributed to the publication of defamatory material;

and/or

- the brand using the UGC:
 - was not aware of the unlawful information in question, and/or
 - when it became aware of the unlawful activity or information in question, acted expeditiously to remove or disable access to that unlawful information

In order to have 'knowledge' (or a 'reason to believe') that UGC is defamatory, it will now be necessary for a complainant to explain to the brand why the UGC is defamatory in nature. It is not enough for the complainant to simply state that the UGC is defamatory since, for example, a defence may be available.

From the brand's perspective, the key issue is whether it has been notified (or is aware) of the defamatory material. Once a brand is affixed with this knowledge, the courts will consider it a common law publisher (because the brand will be taken to have associated itself with or made itself responsible for the continued availability of the UGC). Such knowledge also means that the brand will risk losing its ability to rely on the statutory defences.

Malicious falsehood

If UGC contains:

- a false statement
- that has been made maliciously, and
- causes financial loss to the party to which the UGC relates (or is calculated to cause such loss)

the consumer that created it and the brand using/hosting it may be liable for the tort of malicious falsehood.

Such a claim is, however, only likely to be brought where claims for trade mark infringement and defamation cannot be made out.

References: [Sim v Stretch \[1936\] 2 All ER 1237](#)

References: [Defamation Act 1996, s 1\(1\)](#)

References: [Electronic Commerce \(EC Directive\) Regulations 2002, SI 2002/2013, reg 19](#)

References: [Tamiz v Google \[2012\] EWHC 449 \(QB\)](#)

References: [Tamiz v Google \[2013\] All ER \(D\) 163 \(Feb\)](#)
[Defamation Act 1996, s 1\(1\)](#)
[Electronic Commerce \(EC Directive\) Regulations 2002, SI 2002/2013, reg 19](#)

References: [Kaye v Robertson \(1990\) IP & T Digest 17](#)

Consumer imitation

It is critical that brand owners do not post comments and/or blogs while pretending to be consumers.

A business will be guilty of a criminal offence under the Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277 if, in its interaction with social media, it creates a false impression that it is:

- acting for purposes not relating to its trade, business or craft, or
- a consumer

The CAP Code also states that marketing communications must be 'obviously identifiable' and must not falsely claim or imply that the marketer is acting as a consumer.

References: SI 2008/1277, reg 12

References: UK Code of Non-broadcasting Advertising, Sales Promotion and Direct Marketing, rules 2.1-2.4

Other

UGC may pose a number of other risks to consumers and brands, including:

- offences under the Contempt of Court Act 1981 if, for example, the UGC 'tends to interfere with the course of justice'
- offences under the Obscene Publications Act 1959 (OPA 1959) if the UGC contains material that tends to 'deprave and corrupt'
- offences under the Criminal Justice and Immigration Act 2008 (CJIA 2008) if the UGC contains extreme pornographic images
- offences under the Sexual Offences (Amendment) Act 1992 (SO(A)A 1992) if the UGC identifies the victim or perpetrator of a sexual offence who is entitled to anonymity under that Act, and
- offences under the Public Order Act 1986, as amended by the Racial and Religious Hatred Act 2006, if the UGC incites religious or racial hatred or hatred on the grounds of sexual orientation

References: OPA 1959, s 2(1)

References: CJIA 2008, s 63

References: SO(A)A 1992, s 1(1)

Managing risk

A number of steps can be taken by brands considering using UGC for advertising or marketing purposes so as to limit the risks identified above. These include:

- moderating UGC
- implementing a notice and take-down policy, and
- agreeing robust terms and conditions with consumers

Moderation

It is important for a brand to identify to consumers whether and, if so, how the UGC platform will be moderated and what content will be accepted.

The brand will have a choice of moderating content before it appears on the platform (pre-moderation) or afterwards (post-moderation):

- pre-moderation affords a brand using UGC some protection, provided that the moderator accurately identifies and excludes any potentially problematic material from publication on the platform. However, if the brand fails to spot such risks prior to publication, the brand's ability to rely on the 'no knowledge' or 'hosting' defences under the DeA 1996 and Electronic Commerce (EC Directive) Regulations 2002 (see 'Defamation' above) is reduced, since it has knowledge of the offending material. Pre-moderating is also labour intensive and often has the effect of causing a delay in the publication of content (pending approval). This may have a negative effect on the consumer's experience of the platform
- reactive post-moderation will give a brand stronger arguments that it is entitled to take advantage of the statutory defences noted above. There is, however, a risk that unlawful UGC may damage a brand before it is identified and removed following a complaint. Such damage can affect both the platform hosting the UGC and the brand running the campaign; the brand may itself also host the platform

Brands may seek to limit some of the administrative burden and legal risks associated with moderation (both pre- and post-) by outsourcing the task to a third-party supplier. Good practice is for a brand to ensure that the supplier is subject to a robust contract, which makes the supplier liable for failure to identify (and exclude) any problematic content.

Hosts of UGC platforms should also be aware that they will commit a criminal offence if they allow a person 'barred' under the Safeguarding Vulnerable Groups Act 2006 (SVGA 2006) as amended by Protection of Freedoms Act 2012 (PFA 2012) or anyone against whom the appropriate checks have not been performed (eg Criminal Records Bureau) to moderate websites 'likely to be used wholly or mainly by children'.

References: SVGA 2006, ss 7, 9, 34ZA (as amended by PFA 2012)

Notice and take-down policy

Brands should implement a clear notice and take-down policy to ensure that potentially unlawful UGC can be reported by platform users and rights holders can request the withdrawal of specific content with ease. This may take the form of a 'report' or 'flag' facility, as seen on social networking sites such as Facebook.

Brands should immediately remove (or disable access to) any UGC material about which complaint is made, following which they should determine whether there is legal basis for permanently removing that content or whether it can be reinstated.

It is particularly important to remove content quickly if a brand intends to rely on one of the statutory defences discussed above. Prompt action is particularly advisable following recent case law, which suggests that, in some circumstances, removal within several weeks is not expeditious enough. Brands should therefore aim to remove defamatory UGC within hours or a few days. Where a brand does act sufficiently quickly, it may be the case that the claimant will not be able to show that during the period between notification of the defamatory UGC and the time of its removal, the likely damage to their reputation is more than trivial (eg only an insignificant number of people accessed the UGC during the period it was available). If there is no substantial tort, the court may not allow a case to continue.

References: Tamiz v Google [2013] All ER (D) 163 (Feb)

Terms and conditions

Brands leveraging UGC may further limit the risks posed by using such content by using prominent consumer terms and conditions, ideally written in plain English. To ensure the terms and conditions are enforceable, consumers should be required to expressly agree to them by way of a tick box or an equivalent mechanism before being permitted to submit or access content.

The terms and conditions should address the following matters:

- how UGC will be moderated, including the brand's right to edit and/or remove content at its discretion
- how and why the brand will process consumers' personal data (typically include a link to an applicable privacy policy)
- a warranty from the consumer that submitted content will not infringe copyright, trade marks or privacy rights or contain material that is offensive, obscene, pornographic, false or defamatory
- a warranty from the consumer that they have obtained the consent of any third party who appears in or is referred to in that content (eg the written permission to submit a picture of a friend in a photograph taken by the consumer)
- an indemnity from the consumer to the brand in respect of claims brought by third parties where the consumer is in breach of the above warranties, and
- an assignment of all rights (in particular intellectual property rights) in the UGC from the consumer to the brand, including the explicit permission for the brand to use the material as it sees fit, although additional formalities may be required in order to assign the copyright to the brand

[References: CDPA 1988, s 90](#)

However, the practical protection afforded to brands by terms and conditions is limited. In particular:

- the terms and conditions may not be enforceable or binding if, for example, a consumer is a minor or not based in the United Kingdom
- certain warranties and indemnities may not be enforceable under consumer protection legislation if they create a significant imbalance between the parties' rights
- References: Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083
- consumers are unlikely to have sufficient funds to properly compensate a brand for losses suffered in connection with a breach of the terms and conditions
- taking legal action against a consumer is not attractive as it may result in adverse publicity and discourage others from engaging in the social media activity, which is the purpose of using UGC

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