

Much has been written about the impact of social media (and related Intellectual Property matters) on businesses. In the rush to find new ways to reach customers, there are few hotter topics. However, relatively little has been written about the impact of such matters on insolvency practitioners and their strategies for dealing with distressed or insolvent businesses.

Social media has many advantages for businesses. It is an excellent and inexpensive way to: raise a company's profile; build and maintain relationships with customers; promote a brand or new products; target advertising more effectively; develop business opportunities; manage the news agenda.

Social media enables a business to connect with a wider audience and with more immediacy than traditional forms of marketing. Given the proliferation of different types of social media (Twitter, Facebook, LinkedIn, Yammer, YouTube, Yelp to name but a few of the more well-known) it is no surprise that businesses are increasingly seeking to harness its power.

Some of the statistics associated with social media can be mind boggling, particularly to those among us who are technologically challenged:

- One billion Facebook users as at September 2012, generating 2.7 billion "likes" and "dislikes" and uploading 250 million photos per day. If Facebook were a country it would be the third most populated in the world, ahead of the US.
- 465 million Twitter accounts generating 400 million tweets per day.
- Four billion YouTube video views every day — YouTube is now the World's biggest broadcaster.
- More iPhones sold every day (402,000) than people born every day (300,000).
- 0.9 billion smart phone users now expected to increase to 3.1 billion users in the next five years.

However, in a fast growing market with seemingly unlimited opportunities, it is unsurprising that the use of social media has some potentially serious downsides and pitfalls.

Some of the advantages of social media are also at the root of some of the problems being encountered, including: the blurring of the distinction between business and personal space, enabling businesses to "soft sell" to consumers who may fail to respond to traditional advertising; and the speed with which information can be disseminated to large numbers of people ("going viral" is no longer something to be medically avoided).

There are increasing reports of businesses taking action against employees for bringing a business into disrepute or damaging its reputation through the use of social media, often outside of their work time. Many of these have been well publicised, including dismissals of a pub manager for making inappropriate comments on Facebook about customers, airline cabin crew for describing passengers as "chavs" and criticising the airline's approach to safety, and also BBC employees for "misuse" of their social media accounts.

Many of these cases involve difficult questions about whether the comments made can be considered harmful to an employer's business, or whether they enable the business to be easily identified. The area is a developing one, but it is clear that anyone who thinks a Tweet or Facebook update is the equivalent of a harmless conversation between friends is very much mistaken. The "post first, think later" mind-set fails to take into account the fact that social media leaves a traceable, and to an extent, permanent record, and this has implications, both for employees and for businesses.

As more businesses seek to take advantage of social media, and its use continues to blur the lines between the social and business spheres, insolvency practitioners are finding that dealing with the challenges caused by social media is as standard an occurrence as filing reports and updating creditors.

It is not all bad news of course. There is scope for insolvency practitioners to use social media to their advantage as part of the overall strategy for dealing with an insolvency appointment, particularly where a business is being traded with a view to effecting increased realisations or achieving a going concern disposal. Astute insolvency practitioners can utilise the power of social media to counter the negative publicity surrounding an insolvency, to reassure key customers and suppliers that the business is continuing to trade and honouring its commitments or to target interested parties in social media special interest groups when running a sale process, with a view to increasing the potential sale price.

Many insolvency practitioners, particularly those with access to large PR departments are already using it to their advantage in these and many other innovative ways.

However, insolvency practitioners should also be aware of the potentially negative side of social media, including: Immediacy. The proliferation of habitual Tweeters and compulsive status updaters means that information intended for specific groups of people (such as employees) and which, until recently, would have remained "in-house", receives a far wider circulation and with an immediacy which can take the poorly prepared by surprise. Posts about potential redundancies or wider strategies, even if posted without malice, can have a detrimental effect on achieving the aims of the liquidator or administrator. The recent case of HMV employees tweeting about redundancies "live from HR" is a case in point. It does not take much for a business in such a situation to lose the confidence of key customers or suppliers, who will already be nervous about what the insolvency means for them. Such a loss of confidence can easily devalue the business or lead interested parties to reduce, or withdraw from making, an offer for the business.

Ownership of social media content: Uncertainty over who actually owns information or customer contacts used on employees' social media site profiles can potentially deprive the IP of an often valuable asset or, at best, reduce its potential value.

Negative "attacks": Attempts by competitors to use social media to take advantage of the business's insolvency to get rid of a competitor or poach customers, or by interested parties to drive down the value of the business, with a view to picking it up more cheaply are likely to be an increasingly common occurrence. This may include the creation of false Facebook pages or the use of Google Ad words so that a competitor's site comes up as a sponsored link when an internet user types in a business's name as a search item.

Potential risks from inappropriate postings: Employees, perhaps expecting redundancy and therefore no longer as selective about what they do or do not post in relation to the business, may be more likely to post comments, which may be deemed to be defamatory or malicious. Employers can be held vicariously liable for the actions of their employees in relation to such postings and court or tribunal awards may result. As recent high-profile cases have shown, retweeting the Tweets of others can result in just as much culpability as an original posting.

Some of the issues around social media can be addressed, and the risks minimised, by having in place a process to deal with them prior to appointment, rather than addressing them on an ad-hoc basis as and when they arise.

Lender Security: When carrying out IBRs for lenders consider whether Intellectual Property Rights (encompassing social media content) are covered by the lender's security and charges are properly registered at both Companies House and the Intellectual Property Office.

Engage with the ISP: On appointment, engage immediately with the Company's ISP (Internet Service Provider). The Company's website is its shop window and can be key to preserving value in the business. Ensure that the website hosting fees are paid to remove the risk of losing access to the website and related facilities.

Maintain Domain Names: Domain names are renewable every two years. Check when renewal is due on appointment to avoid the problems of dealing with any lapse in key domain names.

Considered Communication: Bear in mind that whatever is said, even in a context where a degree of confidentiality is requested, can quickly find its way to a wider audience.

Be careful not to say anything that you would not want a wider audience to become aware of. Whilst you can request that smartphones and blackberries are switched off during a meeting, there is little that can be done to stop someone posting on a social media site immediately after the meeting ends, so be prepared to deal with any misleading postings or the fall out that may come from accurate reporting of anything that you would have preferred to stay in-house. Avoiding communicating sensitive information to employees electronically can make spur of the moment re-postings on social media sites by disgruntled staff less likely.

Engage with employees: Remind employees of the importance of confidentiality and discretion and that ill-thought out Tweets and postings could have a detrimental effect on the insolvency strategy, including the ability to preserve employees' jobs. Get buy-in from employees at an early stage.

Review employees' contracts of employment and employee handbooks/policies: Identify any provisions regulating the scope, purpose and permitted use of social media by employees. Consider whether these apply regardless of whether the business's own IT resources or the employee's own equipment are used, and whether they entitle the employer to monitor email content and track social media and internet use for business purposes. Remind employees of any implications (suspension, dismissal etc) of breach of those provisions. This approach will obviously carry more weight where there is a genuine prospect of jobs being preserved, but even if redundancies are likely, a reminder that dismissal for gross misconduct and breach of contract means no redundancy payments, may prevent problems arising in this way.

Establish ownership of social media content: For key employees, review contracts to establish who has a claim to ownership of material or contacts of a business nature which are used on employees' social media sites. Check whether the contracts contain effective confidentiality and proprietary ownership provisions and restrictive covenants. If not, consider whether compromise agreements with key employees would cover this issue.

Use social media pro-actively: Consider whether the nature of the business lends itself to using social media to engage with creditors and other stakeholders.

Consider Cyber Liability Insurance: Existing insurance policies may exclude liability for losses arising from online activity. If so, seek extra coverage. Many insurance companies now offer policies which specifically cover risks associated with social media.

Use social media to counter negativity: Monitor likely social media sites (using word search facilities to identify negative comments). Whilst defamatory or maliciously false comments can be tackled by requesting the ISP to remove content, or even seeking an injunction, pursuing such cases involving social media is fraught with additional difficulties on top of costs and delays. Insolvency practitioners may not have the means or inclination for litigation, and the law does not provide a remedy for postings that are not defamatory or maliciously untrue, but which nevertheless can cause harm to achieving the insolvency practitioner's aims. Pro-actively placing positive stories, engaging with those seeking to promote negative agendas on social media sites, may be a more effective option than seeking an injunction or a Norwich Pharmacal Order (which can compel a third party to disclose the identity of individuals behind certain postings).

Exercise perspective: The old adage that today's newspaper is tomorrow's chip wrapping remains true. Just because a posting is made using social media, with the possibility of reaching a wide audience, does not mean that the potential audience will all be reached. Don't overreact.

Have a PR strategy: Some high profile appointments are likely to carry an increased risk of pressure groups forming quickly and wielding considerable influence. In such cases, have a strategy to engage with such groups, explain what you are trying to achieve, and get them on board.

This is a developing area. New challenges require new solutions. Those that are able and willing, not only to embrace the benefits of social media, but also to meet the challenges that it presents, will be the real winners.

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