Karen L. Stevenson, Senior Counsel, in the complex litigation group at the law firm of Buchalter Nemer<http://www.buchalter.com> recently sent me an interesting contribution following up on the articles about social network sites published in this column. Today’s column is entirely her work with minor edits and an addendum from Mich.

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Sites such as Facebook, Twitter and YouTube<http://www.youtube.com> are valuable marketing tools<http://www.brandweek.com/bw/content_display/news-and-features/direct/e3id9de17c1ffdb9551475a54dbf134f956> Almost every major consumer product now invites customers to follow its product on Facebook or Twitter.<http://www.informationweek.com/news/software/web_services/showArticle.jhtml?articleID=22630075> But this usage is a double-edged sword. When consumer complaints go viral, companies may find it hard to regain control of the message about their products.

A recent example illustrates the problem: In May 2010, spurred by a Facebook group<http://www.facebook.com/pages/RECALL-PAMPERS-DRY-MAX-DIAPERS/124714717540863> of more than 10,000 members, a proposed national class action lawsuit was filed against Procter & Gamble (P&G) alleging that diapers made with the DryMax™ technology caused severe diaper rash, blisters and/or infections<http://www.reuters.com/article/idUSTRE64C4WO20100513?type=domesticNews>. In the past, government regulators might have received product complaints from consumers in ones or twos via snail mail or e-mail. Now, social networking sites amplify consumers’ views on a given product by concentrating hundreds or even thousands of opinions in one place. Companies must be prepared to respond effectively when complaints go viral.

Another major challenge associated with social networking involves individual privacy. What’s public? What’s private? And what’s discoverable in the social networking era? A recent decision, Crispin v. Christian Audigier, Inc., 2010 U.S. Dist. LEXIS 52832 (C.D. Cal. May 26, 2010)<http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202472886599&How_Private_Is_Facebook_Under_the_SCA> explores new dimensions in this area. In Crispin, a case involving breach of contract and copyright infringement claims, Audigier served subpoenas to obtain Facebook and MySpace communications between Crispin and various third parties. Crispin moved to quash the subpoenas on the grounds, among others, that the 1986 Stored Communications Act (SCA)<http://www.law.cornell.edu/uscode/18/2701.html> prohibited Facebook and MySpace, as Internet Service Providers (ISPs), from disclosing the requested
communications. A magistrate judge found that Facebook and MySpace were not subject to the SCA and ordered them to produce the required communications.

The district court reversed the magistrate’s decision. After analyzing the specific functionalities of Facebook and MySpace, the district court held that the Facebook wall postings and MySpace messaging services were subject to the SCA and therefore private. The court noted that no prior court had addressed whether social networking sites fall within the SCA’s privacy provisions. Crispin is the first, but likely not the last, court case to grapple with the issue.

The near-universal access to social-networking media requires that companies and their legal counsel be proactive in evaluating current policies and developing strategies that allow their company to take advantage of the benefits of social media, and effectively navigate the unique challenges that come with it.

[MK adds some practical advice:

- Convene a working group including legal counsel, marketing, personnel/human resources, information security and information technology representatives to create or review policy, procedures and emergency response relating to social networking issues.
- Define clear rules for employees detailing exactly what reference they may and may not make to employer-related information; stipulate whether they may mention that they are employed by the organization, whether they may use logos and trademarks owned by their employer, and whether they are responsible for monitoring the content of postings by non-employees on their social-networking sites that may affect their employer.
- Sketch out several plausible scenarios of increasing severity and work through the detailed responses that are appropriate in each case to minimize harm to the organization. Include considerations of personal communications, persuasion, legal pressures, and even law enforcement involvement depending on the details of the scenario. Challenge the team to think of alternatives to each scenario and work out different ways of responding.
- Provide awareness-raising and training for employees about appropriate, professional uses of social networking sites; include scenarios for role-playing and discussions.]

For more about employment policies and social networking, see


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