

ON-DEMAND SEMINAR: SOCIAL MEDIA & INTELLECTUAL PROPERTY LAW

04 December 2017

About this seminar

The rise of digital marketing and social media has provided a tremendous opportunity for businesses to engage consumers. However, this fast-paced and ever-changing social landscape is littered with legal landmines and challenges.

On Oct. 26 Gowling WLG's Toronto office hosted a seminar on how to manage and leverage social media without putting your business at risk. Our lawyers will provide cutting-edge information on a number of timely topics in this five part on-demand seminar.

CPD Credits

This program consists of five videos that count for up to 3 hour of substantive credit under the mandatory CPD requirements of the Law Society of Upper Canada. The videos also count for up to 3 hour of credit under the requirements of the Barreau du Québec, and up to 3 hour of CPD under the requirements of the Law Society of British Columbia.

Part one

Transcript

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Eric: I'm going to be speaking about IP, trademarks and copyrights. And the whole idea of this presentation is [that] I want to give you information and the tools to try and handle some of this on your own. IP is a nuanced area of law. Sometimes the circumstances are not as straightforward as they appear but I want to give you that information, those tools, and also to shine the light on social media, generally. I'm going first because I want to give you a lot of information about social media. Whatever your familiarity with social media is, you are going to get some new information. It's not a secret. [Social media] is absolutely critical to any business nowadays. If you want to be successful and get positive traction in the marketplace, you need to have a positive social media presence. Note the power of social media. I love this little story about Tessa. She was turning 16 years old. She lived in Hamburg, Germany. She was really excited about turning 16. She wanted to have a party at her house and so she went on Facebook, on her Facebook account, and she put in an invitation to a party. The problem is when she posted her invitation to the party she forgot to mark it private. It said anyone can view an RSVP. What happened? All these lonely guys showed up to Tessa's birthday party. It's awkward. Tessa was literally under bed on her 16 birthday, She was afraid and she was frightened, understandably so. All these guys showed up. There were fights. The cops were called. Blood was shed. Why? Why? Because Tessa forgot to uncheck this box that says, "Losers don't come to my party." Okay? This is the power of social media. By not clicking a single box you have chaos.

Online ad spending is to pass TV spots. This is an article back in 2015. That's when we started to see this shift. You've got cord-cutters. You've got "cord-nevers". I think 24% of Americans don't even have cable anymore. You began to see this shift where advertisers were now spending their money, with a far more sharpened focus online and identifying, I think probably more accurately, their target market. You know how it is. You go to

newyorkpost.com, where I go a lot, and the next day I'm shopping for shirts, I go back to newyorkpost.com and there's an ad for Brook Street Shirts, right? That don't wrinkle. They don't fit me well. My arms are too long.

Netflix was nominated for 13 Emmy's in their first season. That was new. Amazon has won an Oscar. That's new. That didn't happen 5 years ago. This is the dramatic change that we are seeing now. Traditional forms of media now have this competition. Anybody here have young kids? Do you use a babysitter? Do you need cable for your babysitter? No. He goes, "Um, Eric, while you were gone I subscribed to Netflix using your credit card." I go, "Thank you." Totally different. These are cord-nevers. You've got cord-cutters but you also have cord-nevers.

Here are your main social media sites. You've got Twitter, and LinkedIn, and Facebook, and YouTube, and Instagram and Pinterest. I'll go through some of the key legal policies as they apply to some of this stuff. Bottom line is you see something that's problematic, as far as your company goes, as far as your brand goes, how do you get it taken down? But first some information. Most active users. So they're not just people who subscribe, people who are actively involved. Facebook has over two billion active users. Two billion! YouTube has 1.5 billion. WhatsApp has 1.3 billion. As you go down, Instagram is at 700 million. Twitter is at 328 million. Twitter's got about 600 million accounts or so, but right before their IPO they have to actually indicate how many active users do we have. So they have 368 million users. Pinterest is here at 200 million and LinkedIn at 106 million. I don't know what Telegram is but it's got 100 million users and that's pretty exciting. Do you know what it is? See? I don't know. They already have a 100 million users.

Snapshot. Use of the internet. So, global population, by my last count last night, was 7.4 billion. The number of internet users is 3.7 billion. Active social media users, about 2.8 billion. The number of mobile subscriptions, 8 billion. That's more than the world population. And active social mobile users, 2.5. I love that. I know we've got some advertising specialists here. Dan will be talking about it. How great is it nowadays, for brand owners, that you can take the advertisements with you. Onto the bus. When you go for a walk. I know I bike into work and I almost get killed every day, which is a whole different story, but I'm listening. I'm listening to sports shows and I'm getting ads dropping in. I'm taking everybody's business with me.

Annual growth in Asia Pacific. Businesses now are looking to China. I had a client of mine tell me a story that his friend runs a store in Vancouver. He just sells luxury watches. In walks this Chinese couple, looking pretty ordinary and pedestrian, and they go, "How much is this watch?" "\$650 thousand." I didn't know they had watches for 650 but that's

like [the price of] my house. What time is it? Time to pay the mortgage. She said, "What does this watch cost?" He said, "\$2.1 million." She said, "I'll take two of the \$650 thousand watches and one watch valued at \$2.1 million." There is obviously wealth here. We tend to be a little North American centric and think, well, all the action is here. All the social media action is here. That's not the case. They have a high number of internet users in Asia Pacific region. A high number of active social media users, over 300 million. 140 million mobile subscriptions and 375 active social media users. Lots of our clients are looking to Asia. Looking to places like China and a lot of them are experiencing dramatic and tremendous economic growth.

Internet users. This gives you an idea, right? We always think well, I don't know, it's us. Like, we're always on the internet. Maybe we are, as far as, if you look at the average, as far as our population goes, but East Asia rules the day. Fifty-seven % of internet users are in East Asia. In South Asia, 33% of them are there. In Africa, about 30%, and that's of their population. But here are the number of internet users in these different countries.

Top Facebook. So, these are the accounts on Facebook that have the most followers. Now, the first three are cheaters. They're Facebook. Clearly they're padding their stats. Beyond that, Cristiano Ronaldo plays for Madrid, and then his team's Facebook page after that. Shakira, whose hips don't lie. fc Barcelona, rival of Real Madrid. Vin Diesel. How is that possible? Do you sometimes look at a list and go, "Somebody's lying." How is that possible? Clearly, someone here is having fun. Eminem. Lionel Messi, whom I've seen play live, he's just fantastic. YouTube, Rihanna, Justin Bieber, Will Smith at the bottom. What you're seeing here is if you want to be, in part, successful on social media, in part it's about infotainment. Right? You don't go to social media to read twenty page dissertation on the neighbour principle, Donoghue and Stevenson, and stuff. You're going to learn to but also to be entertained.

Your top Twitter users, no surprise again. In line with infotainment. Katy Perry, Justin Bieber, Barack Obama, Taylor Swift, Rihanna, Ellen DeGeneres, who was one of your first kind of Twitter users. Lady Gaga, as you do down, Britney Spears, Kim Kardashian and Selena Gomez. CNN just broke on to this list. They were on it last year. I don't know. I think it might have something to do with the President. Facebook, more than 2 billion active users. Average users, 130 friends, none of which include me. People spend over. It's not funny. People spend over 700 billion minutes per month on Facebook. I tell this every time. It's true. Someone once asked me, "Is that per person?" I was like, "I became a lawyer because I'm not good at math except when it's time to bill." -- but I'm pretty sure if you do the math, days times months times ... no that's not going to be per person. That's going to be global. Average users, 80 community pages, groups and events. So

from the standpoint of a brand owner it can be a great place to go to leverage your brand. It could be a very effective venue from a brand messaging standpoint. Starbucks has done a really good job. A lot of brand owners do a really good job leveraging social media, to get their message out directly to the consumer, no middle man. What I love is this 150 million active users accessing Facebook on their mobile device. Again, because you're taking the advertising with you. About half of all Facebook users log on in any given day. So we know there are 2 billion of them and that is just growing. Total number of Facebook pages, you see there is a lot of them, 54 million. Languages available on Facebook, over 70. Seventy-five % of users are outside of the US. Number of fake Facebook profiles, 81 million. That's where I come in, in part. Sometimes they've misappropriated trademarks or they've misappropriated personalities and pretend to be CEO. Set up a site, ... stuff, drive the price down of a stock, chaos. We come in. Fix it. And Facebook revenue. In the second quarter of 2017, it was 9.32 billion. Don't know how much of that came from the Russians but I suspect it's not that much. About a quarter of users check their accounts more than five times a day. That makes you a loser, in case you're curious. No, I'm just kidding. If you do that I totally support you. 18% are 18 to 34 year olds and they check Facebook when they get out of bed. I guess it's better [that they get] out of bed than checking it in bed but, again, this might suggest that people are always on it. Average time spent on Facebook per visit, 18 minutes. This is significant. I've got a radio show. No one listens to it. It's in a number of markets across Canada. It's on TSN. The average listener listens for 4 to 5 minutes, or 6 minutes, on a radio show. Mine is between 3 and 4 seconds. That's generally it. Now what you have are people landing on something for almost 20 minutes. That's huge. That is significant. And they're looking at the content and the ads are right there. Sometimes embedded in the posts. If you do it properly as a brand owner, your post could look like sort of these organic postings. 350 million photos uploaded a day. How many of those are deleted, do you think, within 5 minutes? Regret. Right? Oh, I shouldn't have posted that photo. That's not good for business. That's not good for anybody. Twitter is, and Facebook is, social media is a loaded gun. You have got to be careful. I just find this growth, Facebook, to be staggering. In 2009 [there were] 200 million users. In October 2017, there were 2.1 billion users. Active users.

Twitter, 328 million are active. 500 million tweets per day. 40% of those on Twitter don't tweet so they go to Twitter, I think, for breaking news before it breaks. This is where I think we generally go now, if there's sort of breaking news, and you want to be updated almost in real time. Twitter is great for that. If you had different hobbies you'd follow different people but people don't feel as compelled now to tweet out. Twitter's growth hasn't matched that of Facebook. There have been issues, an open question with respect to the interface, as far as Twitter goes. But it's still a really effective tool in certain

circumstances to speak directly to a consumer. We know that Kim Kardashian will make twenty or thirty grand by just posting a single tweet about a perfume, as the brand owner appreciates the value of having no middle man, connecting directly with the consumer.

Driving force. That's a pretty delicious demographic for advertisers. 25- to 54- year olds. Older than you think. Twitter, 28% of retweets include "please retweet". That's a form of begging in case you're curious. I remember I had someone told me once, they said, "You know, Eric, when someone follows you on Twitter, you should thank them." That's kind of desperate. No? It's like, "Hey. I want to be your friend." "Thank you. I don't have any." So, I don't thank people. Anybody here thank people that follow them on Twitter? No. And Mark, do you think that's kind of weird?

Mark: Yup.

Eric: Yeah, no. I agree with Mark. I think Mark is totally right. It's totally, totally weird.

Twenty million fake accounts. There are a lot of them. So, again, that's where the legal side of this? That question kind of kicks in. How do we get these accounts down? It can be a little bit of a horror show with Twitter because it's so new and I will go through that. Sixty% of users access it on their mobile device. Again, taking it with you.

LinkedIn has 300 million users. Number of new members every second, two. It has 100 million users in the US. It's in 200 countries. The average time spent on LinkedIn is 17 minutes. Again, now we are seeing this inflated number, relative to the old numbers, as far as traditional media goes. This is the only social networking site that 50- to 64-year olds use more than 18- to 29-year olds. This is interesting. The most used adjective on LinkedIn is "responsible". The economy not great [so the common word] is responsible. Do you know what the word was when the economy was really, really good? What was the most often, someone always gets, what's the term, the word that was used the most often on LinkedIn to describe someone looking for a job when the economy was really, really strong? Anybody have any guesses? Throw any word out, even like tall, anything.

Audience: Innovative.

Eric: Innovative. That's really good. That's really close.

Audience: Creative.

Eric: Who said that? Yes. That is exactly it. It was creative. I think that's outside the box. I'm going to help move this company in a whole new direction. Now, it's like, would you please give me a job? I'm really responsible. I'll do what you tell me to do. That's how

things have changed.

Turkey, Colombia, Indonesia, [are the] fastest growing markets and, again, nearly half of the users visit it from their mobile communication device. I personally find it weird. I mean, in law, at Gowling, LinkedIn isn't really, I think, a necessary tool. It is in other industries. I do find it weird when someone down the hall wants to connect with me as a LinkedIn friend because you could just come and say hi.

So, brand owners, you're looking at many of them are really active on social media, obviously, and these numbers are changing as I speak.

Online spending. These numbers are in trillions of dollars. So this is retail sales from 2014 to 2018. These are the projected sales at \$2.5 trillion globally, online. I bought my four-year-old son a Superman outfit for Halloween, online. I bought my Batman outfit to match his outfit, online. I buy a lot of this stuff, online, and I'm getting more comfortable buying things that may not fit that I have to return, online -- which is everything because I've got a really weird body.

Seventy-seven % of millennials and 56% of gen-Xers prefer buying online. So this is how it is changing. Parents spend 61% more online than non-parents. Usually buying pacifiers. Right? Please stop crying. Nearly half of parents stated that they can't live without online shopping and men reported spending 28% more online than women during the past year. Men and women both report spending five hours per week shopping online so I guess the takeaway is that men are irresponsible online. They spend more money in the same amount of time. Well, I needed that NFL jersey. Yes, it did cost \$5 thousand but it was game-worn and has blood on it. With online spending and social media, about a quarter of shoppers are influenced by social media reviews. Thirty % are likely to make a purchase from social media network like Facebook and Twitter. About a quarter are likely to make a purchase from Facebook. Fifty-one % of millennials likely to make a purchase over social media.

There are obvious, obvious tremendous advantages to being online, and specifically, in the social media space if it's managed properly. It can result in dramatic economic growth. But with dramatic economic growth come dramatic legal issues. From an intellectual property standpoint, what are the issues that arise on social media and how can they be addressed? These are your key ones: Impersonation, trademark infringement, user name squatting, copyright infringement, and this is a new one, hacking. You have a Facebook account? I have 250 thousand followers. My account is kicking it. It's amazing. Everyone's coming to it. Getting lots of likes and thumbs ups and the whole thing and then you get an email at three o'clock in the morning from someone in the Philippines saying, "I have taken

over your account. Give me a \$100 thousand or you're not going to get it back." So what do you there? It's actually not straightforward. I found a way but it's not that straightforward because Facebook, for some reason, of all their policies, they don't seem to be enthusiastic about giving you back your hacked account, which is really interesting. But there is a way. Stay tuned.

I'm going to focus on Facebook and Twitter. Those are the main ones. Facebook and Twitter have different enforcement policies dealing with all the issues that I just mentioned. Impersonation, infringement, squatting, copyright infringement. Not hacking so much. Well, they do but it's a terrible policy and is not remotely helpful. Let's look at Twitter, for example. They have an impersonation policy. Impersonation is what it sounds like, pretending to be another person, or another company with the intent to deceive. That may result in suspension of a username. So, the username is, let's say, Starbucks, their username is @Starbucks. That's what I'm saying when I refer to a username. @Starbucks is a username. That could result in suspension of the username and the suspension of the account. But here's the thing: Twitter users are allowed to create accounts based on parody, critical commentary, legitimate critical commentary and fan accounts -- using third party brands. When I said third party brands I don't only mean Nike and General Motors, I mean Britney Spears. Because while Britney Spears is a name, from a trademark standpoint it also functions as a trademark in association with entertainment services. It's a different way to look at it but that's in fact what it is. I'll come back to that nugget. It's really, really important. Someone who is accused of impersonation can defend the impersonation complaint by taking the position that well, look, my account in the bio says I'm not Nike, or this is a fake Britney Spears account, or it's a fan account for Britney Spears. The bio could indicate that it's a parody and the argument made is that tweets don't mislead or confuse end users as to affiliation or endorsement. But let me say this, this is all in Twitter's policy, as far as what impersonation is not. It's important but here's the bottom line. What's the overall commercial impression created by that site? If it's that the site owner, the account holder is affiliated with or otherwise endorsed by the brand owner, it could be a collection of different information that tweets themselves, the username, the avatar, right, the photo. Photos are really, really powerful. In trademark law there's this fundamental rule. This fundamental principle is that if someone is using a third party logo, that [fact] by itself suggests that they're affiliated with, or endorsed by, the brand owner. So, if you're driving your car and you drive, I don't know, say a Jeep. Let's say Mark drives a Jeep, right, and you want to get your Jeep fixed and you see there's a mechanic, who has got Jeep written out in paint and he wrote it out by hand, you know it's unauthorized. Then you see someone else who's got the [official] Jeep logo, you're like, "That's authorized. I'm going

to go there." That's the initial commercial impression that's created and it is not dispelled. Once you get there then that would be infringement. You look at what's the overall commercial impression created by the site. If the account says it's @fakevisacard and the bio says this is a fake Visa card account, who would have a fake Visa card account, Michael? I don't know. But then you look at the tweets and the postings related to interest rates for Visa cards and some, I hate to use the term like some fake news, you can make an argument that despite the fact the account expressly indicates it's a parody account, the overall impression created by that account is such that this is going to confuse end users and this site can come down.

Here's a really nice example. Nick Kypreos, who works for SportNet, the account at the top, @nickkypreos, it's not Nick Kyp-preeos, like someone once said to me because that's what it looks like, that's the fake account. Nick Kypreos registered the username realkyper and created that account. To register a username, all you need is a username, an email and a password. Then you type in the username that you want and if it's available, it's yours. There's no vetting process. If you have a unique email address it can take all of 15 seconds to secure any username you want that is available. This was kind of a big deal, because during the trade deadline a few years ago, the fake account at the top announced a trade that the Canadians had made. Now, it was picked up by the AP and ran across the country. As a Habs fan I knew it wasn't true because the trade made sense and it was reasonable. Again, that's not funny. But that's the power of it. You would say, "Hey, Nick, you should file an impersonation complaint." and my answer to that is, "No, you should not." With social media, from a legal standpoint, it is really important to always pick the right policy, the right course of action. Because if you pick the wrong one, you go down the wrong road, you are going to screw yourself. So, in this case you pick a trademark violation. Why? Because if you file an impersonation complaint as the remedy, if you are successful, the account comes down but the username is then transferred to you. So, realkyper won't be replaced by nickkypreos because he filed an impersonation complaint. Michael's like, "That doesn't make sense." That's just the way it is. A trademark complaint allows for the transfer of the username, apart from the account coming down. So, this is what you pick. Now, you're looking at Kypreos like, well he's not a trademark. Then go back to what I said about Britney Spears is his position, his position at Rogers, should be that while Nick Kypreos is his name and a trademark lot that doesn't function as a trademark, it could certainly be elevated to trademark use if used as such. Best example, Calvin Klein. That's someone's name. Put it on the back of jeans. What is it? It's a trademark. In this instance here, because it's a service it feels more esoteric and elusive, but that's all it is. You say Nick Kypreos functions as a trademark in association with entertainment services in the field of sports. The value of those services are an open

question but that's what you can rely on. That's why you make sure that you file the complaint pursuant to the trademark policy.

Username squatting. I said how easy it is to pick up a username. Let's say I want Nike Shoes, @nikeshoes, I type in my email address, a password, type in the username, if it's available, it's mine. People will secure usernames on Twitter, or on Facebook, which is after the forward slash, it's called the post domain path. On Facebook there used to be just a series of numbers, nonsensical numbers and letters, reflecting sort of a directory filing system. But Facebook years ago decided, let's just make this, let's let people identify their account by way of a username in the post domain path. People will squat on those. The issue is, on Twitter, unlike a domain name, a dot.com, I can find out most of the time who owns a dot.com or a dot.ca or a net, org, info, biz, but I can't find out who owns a Twitter username because there's no ownership information associated with it. The person's who's really squatting may leave clues as to how to contact them, but if you're a brand owner and you didn't pick up your username and someone else has it -- and this happens all the time -- it's really tough to contact them. You can contact someone on Twitter by replying to them, or sending them a message, but a lot of the time you don't hear back. Try and be proactive as far as the username's go.

If you do file a username complaint, or a trademark complaint, and you get the username, here's kind of the little wrinkle. That username will be, if it's inactive for 6 months, Twitter has the right to delete it and it goes back in the public domain. So you can fight over your username. You can secure your username. You don't use it, you could lose it. Let's say you're Nick Kypreos. You've used realkyper now for 10 years. You don't want to replace that with nickkypreos. But unlike a domain name, I can hyperlink [Gowling.ca](#) to [Gowling.com](#). You can't use two usernames and associate them with one account. So, if you secure your username, what you need to be doing it every 3 or 4 months go in and post a tweet, "Hey, if you're looking for me I'm really located here." That then would successfully deflect any attempt by Twitter to delete the username you have fought so hard for.

Copyright infringement. I talk about picking about the right policy. Let's say I'm on Facebook and I see an account on Facebook and it's infringing. They have my username. They have my logo as the avatar and they have some posts there. If I file a copyright complaint and it's only in connection with a single posting, the avatar on the Facebook page, the account image. What happens is Facebook will go in, or Twitter will go in, if they agree with you, and they will pluck the image off the account. The rest of the account stays up. I mentioned to you before the power of an image in trademark law --how it would suggest, prima facie, that the brand owner endorses your activities or [that] you're

somehow affiliated with them. Once you remove the image, the site stays up, your case is now a lot weaker. Make sure you pick the right policy. As far as filing these complaints, Twitter and Facebook, they have different online forms. For squatting, and infringement and copyright, and you enter the information. I will say this, two things, on trademarks. Facebook and Twitter will ask for your trademark registration numbers. You may not have trademark registration numbers. You may have only what I've referred to as common law trademark rights. What are those? Well, they're enforceable rights that arise by virtue of use of the mark in the marketplace. Absent a trademark registration, if you use your mark in the marketplace, you can protect that because that's kind of the foundation of the trademark's regime in Canada and the US. It's called a use space regime. You use the mark, whether you have registration or not, you can protect it. That's why, for the most part in Canada and the US, you can only get a trademark registration if you started to sell a product or a service with the mark on it. So, the part where they ask for your trademark registrations, you just leave it blank. And you know most online forms say, "Anything else?" That's when you put in your demand letter. Say, "By virtue of extensive continuous use since 2005 we are the owner of common law trademark rights in blank." Twitter and Facebook will respond favourably to that. As far as copyright goes, people say, "Do I need a copyright registration?" No. In fact I have filed countless trademark claims and copyright claims this year, half the time I have registrations, half the time I don't. Copyright, I never have a registration. But you don't need it. Why? Copyright vests the second, the minute that you create a work. You own the copyright in it. You do not have to provide a copyright registration number. It's easy to get a copyright registration number. It takes about 2 or 3 days. It's about 500 bucks. But the only time you want to get a copyright registration is you are involved in litigation through the courts because the copyright registration, on its face, is prime facie evidence that you own the copyright in that work. But as far as social media goes, you don't need to have trademark registrations or copyright registrations. I hope that that is clear.

Any questions on any of that. No. Okay, I'll come back to it. Hacking.

So we've had a few cases. Brand owner wakes up, someone has misappropriated their site, they control it, they want \$100 grand US, so \$42 million Canadian, to give that site back. You look at Facebook's policy, hacking policy, and what does it provide? They'll tell you to create a new account. That's the solution. So you do that. You lose all of your followers. All of your goodwill. You're back to zero followers. That is not an ideal resolution. So, the solution that I was able to kind of put together was, you get an affidavit in the name of the Facebook Admin for your Facebook page. So, every Facebook page has an Admin. Their name is there. Their email is there and the Admin manages the site.

So they're actually inside your account. You draft an affidavit in their name explaining what happened. You attached government identification, photo of a drivers licence, passport and you file that affidavit, all by email by the way, by email to Facebook. If you need the email, shoot me an email and I will give it to you, because it's long, nonsensical, it's got numbers. That's what Facebook does. They just want to confuse you all the time, okay? And it works if you don't have a lot of experience in the area. You send it in. That actually works. That will work. That is the way to get a hacked account back but you have to move quickly. Why? Because what the hacker is going to do to try and encourage you to pay them, \$42 million Canadian, is they're going to start posting stuff on your account. I've always hated my own products. They're shoddy. They're made by kids. Right? People are like, "Oh my gosh. I'm not going to buy this stuff anymore." So, you want to move quickly and you can. That's the wonderful thing about email. I issue most of my demand letters by email, all of them go by email, and if it's necessary then it also goes by courier. If I want to have evidence that this person has received it but use instantaneous communication. That is the best way. I know some lawyers, the old days, will send demand letters by pigeon, on a big piece of mango skin and write it out, Dear Sir, no. That's not how it works anymore. It's quick, it's fast, it's cheap, but that gets results. Particularly when you're dealing with multi-jurisdictional issues and that's the big issue. Multi-jurisdictional, you have someone who's in Macedonia who's ripping off your brand, you've got to be aggressive. You've to be pointed and you have to have a sharpened focus if you are going to be successful. Okay.

Just some tips. Be proactive. If you've got a new brand coming out secure the usernames for it. Secure the domain names as well, dot.ca, dot.com, dot.org, info, biz. Those are your main top level domains. Those are the ones that you want secure. Be proactive but you can't conceive of every possible, you know, username or domain name, registered by an evildoer. Right? You can't. So you just do the best that you can. Review sites on Facebook and Twitter for unauthorized use of your trademark or copyright. Any misappropriation of intellectual property that you see on Facebook and Twitter, and LinkedIn as well, assess it and determine is there a harm to my company? Are end users being misdirected to these sites under the mistaken impression that this is us? Not to show the, meaning, that's them. Every case is different. You don't want to act on every case because there's going to be a lot of them. If you're a significant brand owner, or even not, we've got a client here, a cosmetics company that's been around for seven years with explosive, staggering growth, but they are being misappropriated on trademark registers, domain names, Facebook, Instagram, it is never-ending. It might surprise you that some people are targeting you. Then if you feel as though one issue, or two or more, require enforcement then you go after them but make sure, again, you pick the right

policy. You pick the right course of action. It is absolutely critical.

Part two

Transcript

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Daniel: There's really no such thing as "risk free" in this space. Right? So, it's cool if it's not your playground. Not everybody has to be here but at the end of the day, if you're not there and people are talking about your brand, then there's risk in that as well. Right? If you're not a part of that conversation then you risk having what they say stand as the record. You just gotta kind of accept the fact, and this is where marketing and legal always have a little bit of tension, right? I know we've got marketing folks and legal folks in the room which is -- you've got to accept the fact that playing in this space -- inherently has some risk to it. This is the kind of formula that I put together just to say, "How do we get there? How do we know there's always an element of risk?" You have an extremely powerful communication tool. Right? We saw the video of Erik Qualman which shows you all the great stats on social media. This is the way we communicate now. Everybody's got a smartphone or a computer or access to some way to talk to that world. You've got an extremely wide and diverse audience that we're talking to. Right? Again, we're not talking

to a room full of 100 people, thank you all for coming, we're talking to billions of people once we put our messages out there. Nothing is private. Right? You saw the example with Tessa. She thought something might have been private. It wasn't private. You see a bunch of people pull things down on social media all the time. Many of the examples I'm about to show you have been pulled down, except they live on [in social media] forever. They live in this presentation. They live in other people's presentations because these things are so easily shared and you can never erase this stuff. Right? At the end of the day, no matter how careful you are, no matter how private you think you're being, there's just an element of risk. We can accept that and then we move on and we say, "Okay, so how do we mitigate that risk? How do we deal with that in the social sphere from a marketing perspective?"

The last kind of wordy slide before we move into more picture slides is, I have this conversation all the time, with clients. You gotta remember, there's no social media act in Canada, right? There's not one piece of legislation of where we say, "Hey, isn't this great? If you're going to do social media you gotta do it in this way." We're stuck, obviously, trying to fit in the confines of all of the laws that came before us. [We have]the Criminal Code for contests and promotions, andthe Competition Act for false and misleading advertising. None of these deal with social media. So, we're taking old laws and trying to fit it into new medium which is always a fun challenge, right? But in addition to that, what we're looking at as well and Eric mentioned this, pick the right policy. Pick the right policy. When you're marketing on a social site you are entering into an agreement with that social site every time you do that, right? You create a page. You run a promotion. Well, they've got terms of use. They've got promotion guidelines. They've got advertising guidelines. They've got licencing rules. So, it falls to us to figure out if we're going to play in their space, in their sandbox, we have to play by their rules. The reason we have to play by their rules is because if we don't do what they say we have to do, the terms of use, as you can imagine are extremely broad, in terms of their discretionary rights. I'll just pull down your promotion. I'll just shut down your site. I'll take whatever action I deem to be appropriate in my sole discretion to deal with this issue. If your fan base, your millions of fans or hundreds of thousands of fans all of sudden don't see that promotion there, don't see you playing in that space anymore, that leads to more social conversation, andleads to more risk. Understanding what those rules are before we do any of this is an extremely important piece that didn't really exist in more traditional advertising when we were dealing with television and radio and more traditional media. Eric alluded to this, but it's just worth repeating in terms of a caution is, this stuff is revised very frequently and often with very little notice. Right? What you did on Facebook, or Twitter, or Pinterest, or Instagram, or whatever social site you were working with last month or six months ago, this is the

classic thing in advertising, right? We just pick up those contest rules and we'll just change some dates and rerun it. And you go, "Well, yeah.", but if you look at the Twitter terms, you can't actually do what you had done six months ago. Facebook is notorious for this. Right? It used to be very difficult to run contests on Facebook. You used to need to have to get approval rights. Then it went through a whole period where you had to use an app to run it. Couldn't use Facebook technology. Now they've thrown their hands in the air and said, "Uck, we really don't care. Just use Facebook.", and so you have to keep on top of all of these terms of service as they change from promotion to promotion.

Let's learn from the misfortunes of others. Here is an example of your funny, or somebody's funny, somebody who's got fired funny, it's not necessarily other people's funny. Right? Here's IHOP, and again it's always fun talking about these examples because everybody rolls their eyes and goes, "Oh my God. Well, we would never do that.", and I guarantee you had they been sitting in this room for the first talk I gave on this a number of years ago they'd go, "Well, we would never do that.", and yet it happened. Here you go. Flat stack of pancakes. Flap a great personality. IHOP responds, "Earlier today we tweeted something dumb and immature and [it] does not reflect what IHOP stands for. We're sorry." Okay, so what you don't see, of course, in between here and here, is the social reaction and backlash of all the consumers saying, "What the hell is wrong with you? That's not funny." Right? There's no lawsuit happening here. Right? It's just brand. It's a bad brand decision, and obviously they own it at the end of the day, fine. I think the apology is good. Right? They get to "we're sorry". They own it. My wife, after a number of years, finally said to me, "Stop saying you're sorry for how I feel. That's not an apology. I'm sorry you feel that way is not an apology." Getting the apology right in social media, it worked for a number of years, so there you go, I got away with it but, getting the apology right in social media is extremely important. Right?

Here's another example. So, that was an example of your funny is not someone else's funny. Here's an example of you gotta pick your words really, really carefully. So, the Government of Massachusetts decides they are going to tweet out an article and some information about sexual assault awareness month. Okay? Information all good. They're putting out good content. Look how they frame it. "Sexual assault is always avoidable". No, right? Don't say stuff like that. Be very careful about how you frame your messages. You think you're being helpful take ten seconds and figure out that your framing it in the correct way.

Here's another one, which I love, which is thinking that people want to engage with you. Right? We all have this tendency to say, as I said, it's a conversation, so let's go out and talk to our fans. Surely our fans love us and they want to talk to us. Maybe that's true.

Maybe in the height of the economic crisis in the US, if you're JP Morgan Chase, this is not the greatest of ideas. They have a question and answer session. Come talk to one of our big JP Morgan people about your issues and all that other good stuff. So, before it even starts, "Is it true that JPM stands for "just pay more?" "What's your favourite type of whale?" "Can I have my house back please?" So, before it even starts they come up with "Tomorrow's Q&A is cancelled." Bad idea. Back to the drawing board. So, again, this is not illegal. This is just a bad idea. So, we talk about social [media], and Eric talked about this, it's fast, it's really, really fast, so I'm going to show you some examples of real time marketing at its best, but these are the conversations that are happening now. Right? Somebody comes up with this idea. Do they bounce if off legal, who knows? But somebody's got to think about this and go, "Who are we? What's are environment? What's our audience? What does the world look like right now? Is this a good idea?" You can just do this stuff without thought. Right? Which you can see in a lot of these examples is exactly what happened.

Here's another one which is a horrific example of thinking that it's always appropriate to be seen to be engaging -- always appropriate to be responding to something. "Boston, our hearts are with you. Here's a bowl of breakfast energy we could all use to start the day." So, on the morning of the Boston bombing at the marathon [that breakfast food was promoted in the message of consolation]. So bad idea, obviously, right? Capitalizing on a tragedy, never a good idea. Had they just said, "Boston, our hearts are with you" [during this] tragic event. Boom. Probably no issue. Again, what you don't see is all the tweets in between that, and in fact, what you don't see in this case is the multiple times that they tried to apologize but tried to do it in the more traditional lawyer [way], but don't ever admit anything, don't say you're sorry, they didn't get the apologies right at least a couple of times until they finally got the apology right. You can see that how [you] manage these things is extremely important on a back end. Again, because the social backlash is enormous.

Bots. We love bots, right? It's so much easier to let a computer take over the program and monitor our social sites for us. Who wouldn't want to do that? I don't want to pay some guy to sit in a basement and look at my Facebook page 24/7 and make sure nothing goes wrong. We've got a bot for that. The problem is bots don't think like humans. Right? " Congrats to [@americanair](#) and [@usairways](#) on creating the largest, shittiest airline in the world. Congrats to [@americanair](#) and [@usairways](#) on creating the largest, shittiest airline in the world. Congrats to [@americanair](#) and [@usairways](#) on creating the largest, shittiest airline in the world." "Thanks for your support. We look forward to a bright future." That's a problem. Right? Again, not a legal issue but doesn't make you look really good, and of

course people pick up. It's funny that they think responding to every tweet coming their way like this. Because it was a bot. Right? A bot was just automatically responding to anything that caught that hashtag.

Here's a bad example. Joining the conversation, right? Everybody thinks, again, that's it like important for me to pick up on this and be a part of that because we're a brand. Digiorno, ""whyistayed You had pizza". If you knew why #whyistayed was trending it was because Ray Rice, the former NFL football player, who domestically abused his fiancée at the time, she wrote an article about why she stayed with him. So #whyistayed was trending. So, of course, the apology is, "A million apologies. Didn't read what the hashtag was about before posting." Not only does it make you look bad but, I mean seriously, Google solves like 90% of these issues. You don't gotta call me. Google why that hashtag is trending and then don't post this. Pretty simple. Right?

Okay. That's the learning from the misfortunes of others, as we say. Let's look at a few of the key legal issues in this space. Right? The first is the "is stealing still stealing" [question], right? We live in age now, and I think everyone in this room will appreciate, treating the commercial use of content versus the personal use of content, very different buckets. Right? When I want to take content and use it for my commercial purposes I'm subject to a whole bunch of different rules than Dan posting a video on YouTube that includes a huge bunch of third party rights. Unless I do something crazy, the odds of Madonna coming after me for using her song in my YouTube video, probably pretty small. I'm a major brand and I put Madonna in there? That's going to be a problem. So that's kind of this issue which is the way this works now is there are aggregator tools. Right? Aggregator tools just go out and comb the web and they find content, whether it's by hashtag, whether it's by brand company mentions, and they grab all that content and they say, "Look at all this fantastic stuff that's trending, or that's using are name, or whatever's happening." and they pull it all back. Then the marketing folks say, "We have to use this content." And that's not a knock on the marketing folks. I get that. Right? You want to use the content because it's really positive content. This is where the legal folks have to come in and say, "Hold on a second. From a rights perspective, let's actually take a look at what's going on here." Let's use YouTube as the example of this because they've got very clear defined policies about how this all works. You start from that premise we talked about right at the beginning which is, the same rules that applied from a legal perspective before, still apply now. Right? Nothing's new here. You look at those terms of service and you say, "First and foremost we're a company. This is commercial use. Can I use this service and the content on the service for commercial use?" Right? Some sites actually say no. YouTube says yes, provided you don't do certain things, and some sites say go

for it. You gotta figure out, first of all, what bucket you even fit in from that perspective. Then you gotta look for what's called the flow through licence. Right? When I post something on YouTube I have to grant a licence to YouTube for them to post that content to the world. Just the way it works. Every site will have at least that first step of licence. You post here. You give us a licence to basically rebroadcast that to the world. But what we're looking for here is that one step further. This is what YouTube is which is, when Dan posts to YouTube he not only grants a licence to YouTube, he grants to a licence to every other user of YouTube. That's the piece we're looking for because we're saying "We're another user of YouTube and we want to use this content. So we found the flow through licence. We're good on commercial purposes." Now you gotta look at whether or not there's specific usage rules. YouTube has a policy which says, "You can take the content, and you can use the content off the YouTube service, provided you do it in a specific way." In their case that's using the embedded player. Right? You need to basically take YouTube's imbedded player, put it on your site and play the video through that, so that the nexus is clear. Right? People understand that video comes through YouTube. You can't just rip the video off YouTube, stick it in a commercial ad and go, "What? We followed the policies." because you haven't. Right? Specific usage rules. Facebook, other sites, have scraping rules. So you gotta figure out that. Is it even allowed to scrape content from that site and turnaround and use that content for your commercial purposes? Let's say we get through all of that, which is the can we do it piece, right? Commercial purposes, flow through licence, we're doing it in the right way. You get to the "should we do it?" piece. Which is the implied endorsement piece. I'm going to show you some of those examples in a little bit but let's say that video has third party music rights. Let's say that video has celebrities in it, or non-celebrities, but third party identifiable individuals. It's unlikely, so maybe if my kids in the video, no problem. I can consent on their behalf and there you go. But let's say I create a video of me at a baseball game, and the shot is one of the Jay's players, and in the background is some music, and that's the video I post on YouTube and a brand picks it up and goes, "That's amazing. We're going to use that." And you go, "But you have no rights because I certainly didn't have any rights to put that celebrity, baseball player in the video, the music in the background." all that other stuff. So, can you do it and should you do it? Then you look at that and go, "That's just YouTube." We just talked about an aggregator that pulls stuff from all over the web. You can see how complex this issue is, which is, you can't just take stuff from everywhere and repurpose it for commercial purposes.

Capitalizing on things is always something that marketers want and have to do. Again, I get it. Right? That celebrity is holding your coffee cup. Absolutely you're going to want to go out and say, "This dude loves our coffee." So, let's look at the spectrum of that, right?

Because we start from a basic privacy principle which is you have no right to use the identifiable image of somebody else for your commercial purposes. Right? Celebrity or not. Obviously celebrities are in a completely different camp because, right or wrong, their images are worth, or they think they're worth, a lot of money. Eric mentioned earlier Kim Kardashian gets thousands and thousands of dollars for tweeting, we're going to talk about that in a little bit, but these celebrities do command, or at least some of them do command, immense amounts of money for the commercial use of their image. They're not going to be cool with you just going, "Oh. I get it. There. I took a picture of me holding a Starbucks coffee. You can stick that in an ad when I've got nothing to do with Starbucks and you haven't paid me for that." So the spectrum is this, which is, you start at one end of the spectrum with Pharrell Williams. Here he is at the Grammy's. Arby's says, "Hey Pharrell can we have our hat back?" He is a good guy. He engages with them and he made some comment back about, "Are you trying to start a beef?" You know, Arby's. All is good. Right? You look at that and you say, "Arby's took a shot. They have no right to use his name. They have no right to be seen to be associating with him. They're doing something funny. It's probably along the lines of some type of parody. But they took a shot and nothing happened. Other than some good social communication." On the other end, over here, of the spectrum, you've got Katie Heigl. Katie Heigl is photographed leaving Duane Reade, a drugstore in the United States, and not only did they retweet that photo, they added some context to it. "Love a quick Duane Reade run? Even @KatieHeigl can't resist shopping at #NYC's favourite drugstore." Pharrell Williams, good guy, party on this side. She sues them for six million dollars. That is kind of the spectrum in which you're playing in. Right? You look at that and you say, "We don't have a week to decide whether or not we're going to do this. Whether or not we're going to engage here. Whether or not we're going to post this." Right? This stuff's happening within minutes, or an hour at the most. So, this is the real time marketing piece of this. Right? How do we decide whether or not this is something, as the lawyers in the conversation, that we're either okay with or that we say, "You know what? Practically speaking the risk is probably low enough." How do you do that? Again, you go to Google. And you say, "Let's see who we're talking about here." Right? Are talking about Pharrell? Are we talking about somebody who's known to engage with brands with whom they're not affiliated, have fun on social media? Are we talking about somebody like Katie Heigl or Michael Jordan, who is known to protect their image, no matter what? If it's that person let's step back from that. Let's not do that. If it's the other person you say, "Well, maybe there's some merit to that. Maybe we can do this." Then you look at it and you say, "Does that person whom we're talking about have a commercial relationship with one of our competitors?" for example. Right? If we're a car company and we want to do this because this guy was seen driving our car but at the end

of the day he's got a relationship with another car company, then even though he may be Pharrell type good guy doesn't want to sue everybody, he may be contractually obligated to protect that. Or there may be issues because of his relationships. This is a tricky one. There's no black and white answer in that extremely contextual, and because it's happening extremely fast, you gotta make these decisions in real time. Right?

Let's take a look about how others have done that same thing but without maybe accepting some of that same risk. The background context of both images on this slide is that Luis Suarez bit an Italian soccer player during the World Cup. Okay? The sound bite heard around the world. Everybody got it. Immediately, Snickers comes out and says, "More satisfying than Italian #LuisSuarez." And you go, "That is brilliant." Right? Now, the conservative lawyer would go, "Well, you know Luis Suarez is his name. [You have] no right to use his name for commercial purposes. You are accepting an element of risk." And you say, "Yes. I agree with you." Practically speaking #LuisSuarez is trending around the world at that time so the odds of him doing anything about that would be extremely low. But maybe we're Cinnamon Toast Crunch. And maybe we decided we don't need to put any context around this. Let's just show one Cinnamon Toast Crunch biting another Cinnamon Toast Crunch and everybody will understand what that means. Right? To me, when I said at the beginning, there's no such thing as "risk free" but the one example, I think this is it. Right? This is, you look at this and go, "Nobody would care about this five years later, or understand what it means, or tie it to Luis Suarez, or anything." Because if I hadn't told you the story about Luis Suarez you would just think that was one Cinnamon Toast Crunch biting another Cinnamon Toast Crunch. End of story. Brilliant ways to help mitigate the risk of capitalizing on something without necessarily having to accept using celebrity images.

Oreo is another example of this. Right? Think about the Super Bowl where the lights went out. And Oreo basically says, in that moment, "You can still dunk in the dark." Now, they're not an official sponsor of the Super Bowl; the Super Bowl protects their rights extremely tightly. Yet, they post that out. Everybody gets it. You're watching the Super Bowl, the lights went out, oh you can dunk in the dark. That's brilliant. Right? At the end of the day great way to capitalize on something without excepting immense amounts of risk for doing so.

These stats appeared in the video that Eric showed at the beginning of this, right? It's concerning from an advertiser's perspective but it really serves to highlight what we're talking about here. Seventy-eight % of consumers trust peer recommendations. Only 14% of people trust advertisements. So, you look at that and you say, "Okay." So that really then is the impetus for the next couple of legal issues that we're going to talk about:

Influencers. If 78% of people trust peer recommendations, and only 14% of people trust advertisements, why has this become a thing? This has become a thing because we know that people trust these people. People trust celebrities, for right or wrong. People trust their friends. People trust people who they think have used products and written reviews but they don't necessarily trust true advertisements. Of course that company's going to say nice things about their product. They're that company and those are their products. Oh, if this guy, Dan, likes those products that means something to me. Right? This is where influencers have become an extremely explosive topic. We are going to pay someone, give them free product, they are our employees -- it doesn't matter. There's some level of what we call material connection between me, as a brand, and these people, who have an extremely influential following.

So, Kim Kardashian, influencer. Right? She's paid to do all that stuff. This is where you look at what Kim was doing, and it's brilliant, right? They've created this entire area of, I hate to use the word employment, but at the end of the day this is really a job, right? There are full time influencers now. So, when she was posting with that lipstick, everybody would have thought, "Oh, Kim uses that lipstick. I love Kim. I want to be like Kim. I will use that lipstick." Now the FTC, the Federal Trade Commission in America, and the Competition Bureau slower but surely, have come along and said, "Hold on a second. You need to disclose that material connection." So when Kim uses that lipstick and she tells you, "I was paid ten grand to post this." you think about that differently. It's not a true peer recommendation or celebrity recommendation. It's influenced by the fact that she was paid that money. Or she was given that product for free. You look at that and go, "That is the real key to influencer marketing. This is a real tension between marketing and legal. Marketing says, "No. No. But if we tell people that there's a connection, people aren't going to put [money into it;] let's wait on it." And legal is going, "But that's exactly the point. We cannot trick people into consuming what is effectively advertising." Right? The law is catching up with this, obviously, and saying, "You need to tell people that this is advertising content and that this person has a material connection with you." Right? Of course they're saying nice stuff. They're your employee. Of course they're saying nice stuff. You gave them ten grand to say nice stuff. So, that's the disclosure piece of influencers. The other big piece with influencers that you gotta consider is the contracts that go along with them. This is now, as I said, this is now a business so when brands engage with these folks, what are you doing? You are effectively turning over, at least the significant element of your brand and your reputation, to this other person. So, you're going to want to contractually make sure that they understand what their obligations are. Right? You need to make it very clear that you have a relationship with us. You need to make it very clear that what you're doing is advertising. By the way, don't do all these

things to the extent you make claims about our company, we need to review those. Because we can't be out the letting you say this car has the most fuel efficient rating in the history of all cars when we know that's not true. Right? So you deal with that by contract and then you go, "But is a contract enough?" You've got really sophisticated influencers. Right? PewDiePie is an example of, that guy makes over a hundred million dollars doing this so query whether we all made the right career choice. But at the end of the day, sophisticated. He's going to have lawyers and legal teams and all that other good stuff. Your smaller influencer. Right? They may not have that level of sophistication so the other key piece, from just a contract perspective, is training. You need to train these people. You need to basically say, "You're going to be a brand ambassador for us? We're putting part of our brand, or all of our brand, in your hands? You need to take this seriously and understand that this is how this works." Right? So training, contracts, proper disclosure, that's the influencers in a nutshell. It's a very interesting fast paced and expanding area but definitely something to be paying attention to.

A version of that, but slightly different, and Eric alluded to this a little bit earlier which is, I'm reading a newspaper article, or what I think is a newspaper article and at the end of it I get down there and go, "Oh. I get it. That's an ad. Because the top ten places I can take my wife on our honeymoon is actually sponsored by that travel company." And I don't find that out, maybe until very late down at the bottom, goes, "Oh by the way, what you just read was an ad." Right? You would have seen this as consumers reading, as you say, on the web, the New York Times, or wherever you are, and at the bottom you would see things like, "From around the web", "Other stuff you may like" and that's where they put all this advertising content. At the end of the day that's what this is. Right? This is not a new thing. It's no different than advertorials, product placement, all of the older versions of this that we used to deal with, this is just the new version of that. Right? And you say, "Well, what are we talking about here?" Is this something that somebody has gone and written something and we say, "Wow. That's amazing. Thanks for writing that. We had nothing to do with it whatsoever. We really like it and we want to bump it up. We want to make it more prominent." So maybe that's a hashtag sponsor. Right? That's something were we say, "We're putting some weight behind that." Contrast that to the other example which is, "We're going to engage you to basically write this article for us. We want you to say these five things. I don't care how you say them but work them in there. And then we're going to want to review it and you gotta do this subject to our edits. And then, by the way, don't tell anybody." You look at that and you go, "Well, hold on a second. That's not right." and so what is that? That's an advertisement. Right? That is what that is. And, again, legal and marketing always having this discussion. Right? We don't want people to know it's an advertisement, I get that, but that's why you start now seeing ads. Paid advertisements.

Sponsored advertising. The word advertising, the acronym "ad", is extremely important in that context. It needs to live before the people are encouraged, or required, to engage with the content. Right? So you can't have a link that somebody clicks on and then they get into, and then the video starts playing, and then halfway through the video you basically come up to the conclusion that this is an ad. That has to be [there] at the beginning. People have to know that what they're engaging with is advertising. Then, not only that, that link, that idea of the fact that this is advertising, has to follow that content because content is shareable everywhere. It's not enough to say, "Hey. This is an ad. Here's the video." By the way that videos now shared ten thousand times, in the context of the fact that it is an ad, is now lost. Designing these types of campaigns is extremely important because there are material connections. This is advertising, or its sponsor content, and that's what we need to make very clear.

Just quickly on another type of this type of trickery, if we will. I once had a client say to me, we went through all these kinds of issues and she said to me, "Congratulations. You've officially exhausted my bag of marketing trickery." It's very concerning to me that you have a bag of marketing trickery but, at the end of the day, that's what these issues are about. Right? We cannot trick people into consuming advertising content. Here's another example. Right? Astroturfing. Fake reviews. This is a good one to pause on and say, "So what at the end of the day? What's the real risk in all of this?" A company got fined 1.25 million dollars for doing exactly this. Right? Which is you cannot go out and say to your employees, for example, "Hey. Please go write a review or a rating of that product. Don't tell people you're an employee of ours. Just let's boost our star ratings from three to five." That's an extreme problem. Right? Let's think about a more nuanced example of that. What if I said to you, "We're going to run a contest or promotion and we're going to get you, as part of your entry, to write a review of the product"? Okay, so we all understand contest law and we're going to say, "Well, there's a no purchase necessary." Forget that stuff. But we're going to end up with is a whole bunch of reviews that come in by virtue of being given a chance to win something in a contest. Now, that is material. Right? Because those reviews are tainted. They're tainted to the degree that at the end of the day, if people knew, "Well, yeah, of course they said all that nice stuff because they were trying to win the ten thousand dollar prize", or the car, or the heads, or whatever it is. You would want to know that as a consumer. You put that lens on it and you say, "That is what the last three things we just talked about is all about." We're looking through the eyes of the consumer. Right? The Competition Bureau. The FTC. That's what they're doing and they're saying, "Are consumers being tricked into consuming this content or into misunderstanding this content." Because go right back to that stat, 78% of people trust peer reviews, 14% trust advertisements. That's why this is has all

happened. And that's why it's extremely important.

I think we're on time. Close to time. Okay.

This is the last slide I have and we don't need to spend a lot of time on it. Again, going back to the conversation about social terms and Eric said pick the right policies. This is but one example, but contests and promotions are obviously an extremely important marketing tool in social media. Contests are subject to the various different terms and policies of Facebook, and Twitter, and LinkedIn, and YouTube and Instagram. A few years ago it was the case where we would run a Facebook promotion. It doesn't really happen anymore. What happens is we run a Facebook/Instagram/Twitter promotion, or some combination thereof, likely throw in a scavenger hunt and a bunch of other crazy stuff. This is no longer enter to win your chance. These are complicated programs. What you've got to do, obviously as we said, is go to those terms of service, figure out exactly what they do and do not allow you to do and then structure your promotion in that way. Facebook, again, is a good example of that. As I kind of walked you through earlier of about how it went from extremely strict to even more strict to less strict. There are still things you cannot do. Right? You cannot "like-gate" your promotion. You cannot say to somebody, "You have to like us in order to participate." You cannot use personal timelines. So when you have a promotion which just says, "Hey. Go on a social site and post some stuff and use the hashtag and when we find that we'll do a random draw and pick the winner." You can't do that with Facebook. That has to be run on your corporate fan page. So Facebook gets carved out of the entry mechanism and says, "Oh, by the way, if you're doing this on Facebook, go to our page, find our contest post, leave a reply to that and that's how you enter on Facebook." Because you can't use personal timelines. Sharing on Facebook is still one of those issues that's a little bit nuanced but, you know, it's interesting because social grown in social media is what it's all about. Organic. Right? Sharing. Facebook still limits the way in which you can, for example, share this with your friends to earn bonus entries. So there's a workaround to that which is effectively you do not get a bonus entry for the mere act of sharing with a friend. You get a bonus entry if you share with a friend and that friend subsequently enters the promotion. There's no direct incentive for sharing. There's an indirect incentive should they actually end up entering the promotion. Right? So, again, those are just a couple of examples on the Facebook side. You've got Twitter, YouTube interests, all the other sites, they've all got these types of policies and so these types of marketing programs need to consider them all. That is what I had to say today. Thank you very much for listening.

Part three

Transcript

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Elisa: The perils of social media in the workplace. I'm going to start by discussing with you social media and recruiting. Just by a show of hands: Do we have any people in the room who are involved in the recruiting process at any point? Okay. Not many. So, how many of you have actually conducted a social media search of a candidate? So, if you're not involved in recruiting, [let's ask you,] if you were, how many of you would actually conduct a social media search of someone whom you were looking to hire? Let's be honest, everybody. Come on. Okay. Workopolis did a study, this is a 2015 study, they haven't updated it, but they did a study of employers and how many employers actually do Google, or conduct a social media search, of their potential candidates. Over half did say that they do a candidate's social media site. They basically said, "Well, we're looking because we want to see how create they are. We want to see if they would be a good fit with the team," but we all know what they're really looking for. They want to see if they're lying about something. They want to see things that might not be caught by a normal background search. So they're looking for dirt, essentially, on the potential candidate. In terms of the social media results, does that actually impact your decision as to whether to hire or not? In this study, they found that more than half of the people surveyed did say

that it impacted their decision not to hire the candidate. Most often they said the reason was because they saw posts where the people were drinking. Maybe there were drugs in the post or on a YouTube video and where they were showing inappropriate dress. However, the flip side to that is that the social media searches actually influenced employers to hire someone because they saw things on the social media search which they liked. They saw someone being charitable. They saw someone being kind. That's the positive side to it. It actually impacted them in a good way. The question is, to do it or not. Should you Google a candidate? Should you go looking on their Facebook page, their Twitter account, their Instagram? What are the pros and cons?

There are pros to this. You can learn positive information about the person. As I said, you can see that they've been involved in charities, so you might like that. That might be a good fit for your organization. You're also going to learn things that you might not learn from a background search which are positive and which will influence you to hire them. But, there are cons to this as well. Accuracy. How do you know if the information is accurate? You can't know for sure. Employers have a duty to collect data that is accurate. So sometimes you might be relying on something that is not even true and it could be misleading. We all know that the cyber world is inherently unreliable. Human rights. There are human rights implications. You can collect information from these social media sites that are related to grounds that are protected by human rights. The grounds would include sexual orientation, family status, ethnicity, religion. You have to be careful, because there's increased vulnerability to human rights claims, because you might be exposed to that information while you're conducting your searches. And another con is privacy. When you're collecting personal information about a candidate, which you will be collecting through these social media searches, you can only collect, use and disclose information that a reasonable person would consider appropriate in the circumstances. Just think all of the information that you might collect from a social media search. A lot of that information is not going to be relevant. In some Provinces, and Federally regulated employers, there are higher duties because there is legislation that applies in those Provinces that would require you to obtain consent of the candidate before doing the search. You can only review relevant data because there is a high potential when you're doing these social media searches that you could potentially breach some privacy laws. The problem is once you're doing a search, the information is there. It pops up and you've got it. Once you've seen it you have it in your possession.

Social media and recruiting and human rights. As I mentioned, when you're doing a social media search, the potential for you to actually gather information related to a protected ground is significant. The problem is once you have that information you're deemed to

have taken it into account in your decision making process. The Human Rights Commission basically says, "Look, once the genie's out of the bottle you can't put it back in." It's then up to you, as the employer to prove, "We didn't consider that information." That's going to be difficult to prove because you already have it. That will expose to you a potential human rights violation. Just imagine you have a number of candidates. You do these social media searches. One of the candidates that you conducted the search on may be, perhaps, disclosed their sexual orientation. They end up being the candidate that is not the preferred candidate and they don't get hired. They find out that you had this information, they could easily commence a human rights complaint and say, "The reason why you didn't hire me is because you saw on my social media post my sexual orientation. That's discrimination." and then you have to prove that that didn't factor into your decision making process at all.

The problem with social media is that it's just not reliable. Anyone could put information out into the cyber world so how do you know whether it's true? It could be inaccurate. It could be very outdated. It could be unsubstantiated and it could be very misleading. Also how do you know whether the person who owns the social media account actually posted it? Their account could be hacked. It could be a joke. You have no idea unless you ask the person which rarely ever happens.

Just imagine Jenny Smith is one of your candidates. You do a social media search on Jenny and you find this post. "Keeping hydrated on my sick day #yolo." So, if you saw this do you think you would automatically disqualify her as a candidate? Most likely. But how do you know this isn't just a joke? This could be just a joke. It may not be real. However, part two to that is, if this is a joke, do you want someone who posts things like that on their Facebook page to actually be in your employ, anyway? Because that shows poor judgment because it's not very funny. This is the problem. You don't know whether this is true or not and this Jenny might be a great candidate and you may have disqualified her from the position because of this one simple post.

This is just a recap. In terms of privacy, the Privacy Commissioners in Alberta, Quebec and Canada, they discourage social media checks as part of your background check. And I already reviewed that. If you're in Alberta or Quebec, or you're governed by federal law, you have those specific requirements based on the legislation. The law is unclear in the balance of the other provinces because we don't have privacy legislation that deals directly with your employees.

Privacy and passwords. This became an issue because there were employers that were actually asking candidates for their passwords so that they could search their social media

accounts. Most of these sites, where you require a password, the user agreement will preclude you from giving out your password. The Ontario Human Rights Commission has also come out with their statement on this saying that they think it's actually contrary to the human rights legislation to ask for a password. The problem is that despite the Human Rights Commission's standpoint on this, and these user agreements, there's no real clear law that would prohibit you from doing it. All I can say is that I wouldn't recommend it. I don't think it's a good practice. Let's look at some best practices. My advice is to hold off on searching your candidates until you have your short list. So you're not searching every single candidate. You've got your short list of candidates then conduct your search. Then the key is whoever is actually making the hiring decision should not be the person conducting the search. You should have one person who conducts the search, sifts out all the irrelevant information, puts that aside and gives only the relevant information to the person that's actually making the hiring decision. Because then you're going to protect yourself against those arguments if someone says, "Well you saw on my social media this." Well, that person can say, "Well, no I didn't because I didn't search your social media. I didn't even have that information." You're removing yourself and you don't have the irrelevant information. In terms of privacy law, you should consider if the privacy laws are applicable to you, but also what would be good is to tell the candidates in your job postings, in the application forms, that you will conduct online searches as part of your background checks. The better option would be if you have an electronic form to get them to click to consent to an online search and the best would be to, obviously, to obtain a written consent. If you do background checks regularly you may have a background check company that does them for you. They will normally ask them to sign a written consent form to consent to the background check and included in that you'll have criminal background checks, you'll have reference checks, you could include social media online checks.

We've been talking about candidates. How about employees? Is it appropriate to conduct social media searches on your employees? Do you care what your employees are posting on social media? Some employers may care because what they're posting, whether they're on or off duty, could potentially impact the employer. Their reputation. If they're posting things where they're clearly identified that are negative, it could impact the reputation of the company. It could damage workplace relationships if there's bullying that's going on in social media between the employees in the company. What if they're disclosing your confidential information online? You could be liable for their actions. If you've got a manager who's harassing an employee, online, you could be vicariously liable for that manager's actions. They could be posting defamatory comments or trash talking your competitors. These are things that you might want to know about. Here's an example

why you might want to know. Social media, mixed with an employee who has poor judgment, could be detrimental to your reputation. Do you want to go to Taco Bell after seeing this? No. I'm sure this impacted Taco Bell's clientele after this was posted. This is an example of poor judgment by an employee and you would want to know that. It looks like his girlfriend works at KFC. She's licking potatoes. I'm pretty sure KFC was not happy about that and I know they weren't because they fired her after she posted this online. You have to ask yourself, "What were they thinking when they did this?" Funny but now they don't have a job.

Social media conduct, whether it's during work hours or off duty, is going to be important to you as an employer. Employees have a duty of good faith and loyalty while they're in your employ. That applies while they're on duty and while they're off duty. They have a duty to promote the interests of the company. They shouldn't be doing anything that would be negative to your interests. That duty is 24/7, on or off. And it's a broad duty and it includes a positive obligation not to disclose your confidential information, [and] to give proper time and attention at work. We call it "social networking" where they're surfing the net all day long instead of doing their job. They should be complying with workplace policies, assuming you have a social media policy, and your supervisors and management are responsible for actively enforcing those policies in the work place.

What if you do the social media search on your employees and you find that they actually are posting information that is detrimental to your business? Or harms your relationships in the workplace. Can you fire them? Can you terminate them for cause? Some employers have done so. Some successfully. Some not successfully. Most of the cases where they're dealing with social media misconduct, which is off duty, are normally about employees who are complaining about their employer. The posts allow you to identify who the employer is, whether it's directly or indirectly. It harms the reputation of the employer and/or the co-workers, so there's some harm in the posts. They're posts about hate mongering, discrimination, harassment and bullying of co-workers. [In] most of the cases, this is the common theme through them, in terms of the conduct. I'm going to review a number of cases where employers did terminate because of a social media post that they found inappropriate and what you'll see is [that] these are most of the key factors that were identified in those cases. It was important that the employer was identifiable. There was public access. It wasn't a post that was entirely private. Other people could view it, even if the public access was inadvertent and they didn't actually realize it. The post has to adversely impact the employer. There's got to be some proof that it did adversely impact the interest of the employer or that it somehow impacted the relationships in the workplace. In many of the cases the employees weren't cooperative when they were

asked about the post or they lied about it. They didn't acknowledge it or they apologized but it wasn't very genuine. In these cases the employer had a social media policy. So the employees had some guidance on what they were allowed to post and what they weren't allowed to post. Let's look at a few of these cases.

In Loughheed Imports, two employees made negative comments about the employer using vile and profane language. I just want to read you a few actually. Bear in mind these are the actual posts so some of the language is not appropriate.

"Wondering if my two supervisors at work go to the bathroom together and who holds whose -- I hate saying this but I'm going to have to -- "penis while pissing." That was the post.

"Was asked for my opinions at a morning safety meeting. I replied, No comment. Seems my boss who owned the business 25 years and is fixed operations director of two dealerships as well couldn't comprehend my reply. So it's confirmed. He's a complete jackass, not just a half-tard."

This is stuff that this person's posted on social media. In the posts the Facebook friends included current workers and former co-workers. In this case once the employer saw the post they terminated the employee and the termination was upheld. The employees in this case denied posting the comments and they alleged that someone else had posted them and their account had been hacked. That was found not to be true and the adjudicator held that the comments were disrespectful, derogatory and damaging to the employer's reputation and the employees could not have a serious expectation of privacy in their posts. In that case I think the key elements are there and that's why the termination was upheld.

In the Groves and Cargojet Holdings case the grievor, the employee, posted comments on Facebook indicating that she wanted to "kick the lead hand in the twig and berries wearing steel-toed boots and spit in his face." In this case the comments were only visible to her Facebook friends but someone passed them onto management so they became aware. They terminated this person's employment. The employer considered the post as a violation of their workplace violence and prevention policy because if you look at that you can interpret that as a threat of violence. But in this case the termination was overturned by the adjudicator. They said that the violence policy in place was limited to the workplace. This was a comment in social media which was considered to be not the workplace. It wasn't highly serious compared to a direct threat. Imagine if this threat occurred in the workplace and she was standing there in front of the manager saying, "I want to kick you in that area" and made the motion with her boot. That would be much

more serious and the comments were just a single occurrence. Facebook posts were only visible to her authorized Facebook friends so it was private. They found that there was no real damage to the employer's reputation.

Here's another case. This is the Canadian Union of Postal Workers. This is an employee, with 31 years of service, [who] posted a negative comment on her Facebook page about her supervisor. She said, "Die bitch die. Go back to hell. They miss you." Employer terminated the employee's employment and in this case the termination was upheld. This is significant because we have an employee with 31 years of service. Oftentimes when you're terminating for cause there are a lot of mitigating factors that a court will look at. One of them is the length of service and if that person has an unblemished record. The fact that this 31 year employee was terminated and it was upheld is significant. The points that were significant for the adjudicator were the posts were visible to anyone who viewed the Facebook profile. She didn't have it set to a private setting for friends only. This was open to the whole world. Even if she had restricted access to friends, many of the Facebook friends, [were] current and former Canada Post employees, so they could have brought the post directly to the workplace. They're basically saying though, even though it was open to the public, if she had restricted it to friends they probably would have made the same decision anyway. Another key factor is the supervisor that read this was quite distraught about the comments and went on a temporary stress leave. That was significant because the posts did impact the workplace and the work relationships. The posts were held to be offensive, abusive, intimidating and mocking to the point of bullying. In this case the employee showed little or no remorse for having made those posts.

Here's another one where this is a perfect example of how you think that individuals understand social media and how it works. This is a perfect example of how this person did not understand it. She had a blog that she posted. She thought her blog was private. I'm not sure how she thought that but it wasn't. It was accessible to everyone. She was a personal care worker at a residence for the aged and she decided she was going to disclose patient information, without the consent of the patients, and she made inappropriate comments in her blog about the patients. The employer obviously found out and her employment was terminated. In this case, as I said, the employee claimed that her blog was private. So she was trying to say, "Well, no one was able to read it except for my blog subscribers" but that was wrong. It was accessible to everyone. In that case the discharge was upheld.

Here's another one where lack of judgment is very evident in this case. In this case the employee was assigned to clean up a suicide scene that occurred at the hospital. Before he cleaned it up he decided to it would be a good idea to take pictures of it and then post

it on Facebook. He deleted the photos one day later. The hospital terminated the employment of the employee. In this case the arbitrator determined that posting the photos on Facebook, together with the comments that the individual made about the patient's suicide, was publicizing confidential patient information and therefore they did uphold the termination in that particular case.

Honestly, this one, I love doing this presentation because I find all these cases and I just shake my head. I don't understand. In this case the employee's decided they were going to post a video on the internet that showed an employee having his genitals stapled to 4 x 4 wooden plank at the work site during lunch. The employees in the video were wearing the employer's uniform so anyone that looked at the video could connect it to the employer. The employer terminated the employees employment. The Ontario Labour Relations Board upheld the termination and these were the things that they noted, the conduct was offensive and shocking. The employer was easily identified in the video. There was potential for significant prejudice to the employer's reputation and the employer, because of what they do, had a significant interest in preventing, and if not an obligation to prevent, it's employees from engaging in stunts, pranks and horseplay in the workplace because of the safety sensitive nature of the positions that they held. We always say it's really difficult to terminate for cause but this is a good example of where you actually can terminate for cause. So if this ever happens.

Audience: This last amazing example, really what does the video have to do with it? Whether there was video or not it's ...

Elisa: Oh, absolutely. I would say that I think the difference between the video and someone just happening upon this scene is that the video was accessible by customers, potentially. So the customers would look at that and go, "Hmmm. Not too sure. Maybe I'll take my business elsewhere." So there's an added element here of potential damage to the employer. If it was just happening and the manager saw this it would really be a health and safety issue and, I mean, inappropriate conduct obviously. I'm not quite sure how they happened to do that and not have to call 911 after doing that. I'm not sure how they got away with that.

One more, I think this might be my final example. This is an example of where you can post something online which is completely unrelated to the work place and it could still potentially be a cause for termination. Matt Bowman was a Toronto firefighter who posted sexist, misogynistic, racist and generally offensive tweets on Twitter. Just generally, nothing related to the workplace. The tweets were made while he was off duty. He identified himself as a Toronto firefighter on Twitter and his Twitter profile showed him in

his firefighter uniform. Here's the example. I'll just let you read it. Can everybody read it?

Audience: Is this the guy who stapled his genitals?

Elisa: No. They might be related. This is the firefighter and this is one of the tweets.
Okay?

In this case, Mr. Bowman, issued an immediate apology when it was brought to his attention that the employer had discovered these posts. He denied that he made any other additional offensive tweets but the problem is the employer uncovered similar offensive tweets and they decided they were going to terminate his employment. The employer's position was that he violated a number of their policies including their social media policy and damaged his reputation, specifically because they had recently made efforts to implement diversity initiatives. The arbitrator agreed and the termination was upheld.

Okay, sorry, I lied. I have one more. In this particular case this individual decided he was going to tweet that he wanted delivery of marijuana and the police actually saw it and they decided that they would respond. Not too bright.

Okay, sorry. I lied again. I have another one. I've got so many cases. Do I have time for, okay, you know what? I'm going to skip through. We've done quite a few cases. What I'd like to do is get to the policies.

At the end of the day, what is of critical importance is that you have a social media policy. In a lot of the cases where they didn't have a social media policy the court basically held, well, how does the employee know what they're supposed to do? You would think that well, they're an adult, they should know better. But it's very important that you have a policy so you can help them to exercise good judgment. You shouldn't assume that they know what their obligations are and you want to draw those bright lines so that they know what's acceptable and what's not and [so they know] not to cross over that line. That, once you have that policy, they've read it, they've been trained on it, then that rebuts the presumption that they said, "Well, I didn't understand. I didn't know." The ignorance defense would no longer be applicable. So what should your social media policies include? Do you want to ask your question about policies now or do you want to wait?

Audience: You can go ahead.

Elisa: Okay. All right. So, first and foremost, you want to explain what social media would include. I wouldn't include an extensive list of all the different social media platforms, because you don't want to limit it, but at least explain to them what it would include. Remind them of the perils of social media. That once it's out there it's out there forever,

and that it could be misconstrued so they have to be very careful about what they're posting. This is important. Explain to them that their social media activity applies even while they're off duty. Their off duty social networking activity is applicable in this policy. Because a lot of them may automatically assume what I do on my own time, and what I post on my own time, should be of no concern to my employer. But if that person is going to post things that could damage the employer's reputation, then it does become your business. Remind employees that they cannot publish any comments that would negatively affect the employer. They have a duty, as I mentioned earlier, of good faith to act in your best interests. Remind them of their confidentiality obligations. A lot of this you might say, "Well, how could they not know?" Well, that person that worked at the hospital and decided to disclose that patient information obviously didn't understand her confidentiality obligations. And they have to understand that if they breach that obligation their employment could be terminated. Also, they need to be aware of other laws that they could violate. Defamation laws. Copyright laws. Security laws. You would want to link this policy to your other policies. Your harassment policy. Your violence policy. Because you can harass another coworker through social media activity. Clarify the use of your logo and when they can use it. Maybe you don't want them to use it for their Twitter account unless that's part of their job. Clarify what happens to the Twitter account, the LinkedIn account when their employment is terminated. Make sure they update their employment status. Oftentimes employees will leave their LinkedIn account status the same even after their employment is terminated. But oftentimes the employer doesn't want them to be associated with their company anymore. So it's important that you have this in the policy so they understand. I actually had one where the person was refusing to remove it. You would think it's ridiculous but it happens. Insist that passwords to corporate accounts be shared. It's another big one. I've had cases where the person was the only holder of the password. They terminate that person and then they're refusing to hand it over. So basically you can't update your accounts. You're locked. So if you have that in the policy and insist that they share those [passwords], then you will prevent that type of situation from occurring. Clarify the rules about speaking on behalf of the employer. Most of the time, unless the employee's part of their job is to be your communications person and speak to the public, the employee should not be speaking on your behalf and you should advise them if they're going to post something that relates to the workplace that they have a disclaimer that it doesn't represent the views of the employer. Be clear on whether use of social media is prohibited or allowed in the workplace. If you're going to allow it then you should be clear about the parameters, in terms of the use. Explain any specific rules regarding use of social media in work related capacities. You know, do you want them friending your customers on Facebook? Providing recommendations on LinkedIn? If you

have any specific rules or guidelines on that you should include them in the policy. Because the issue is while they're an employee it's all fine and dandy, but then once the employment is terminated, do you want that ex-employee to be friends on Facebook with a customer when they've gone to work for a competitor? Advise employees that their use of social media while at work will be monitored. This is a big one because they have to understand that they don't have an expectation of privacy. So you will monitor their usage. Provide them with internal channels to vent and tell them what those channels are, because if they can't feel like they can let their steam off in the workplace, and they have a safe place to go, they're going to do it online. Caution employees that not every violation of the policy may be detected. You can't be possibly looking at their email or their social media accounts 24/7. So they shouldn't assume that any questionable behaviour has been condoned. If you haven't found it they can't assume that you've seen it and you've condoned it. Require employees to report inappropriate social media activity to a designated representative in your company. You should make it clear that if you self-report a breach of the policy in a timely manner, you'll be treated more leniently, provided the breach is inadvertent and not malicious. Obviously you want to advise employees of the consequences of violating the policy. They have to appreciate that if it's severe enough that they could be terminated. It's of key importance to train your employees. You can have a policy. You can post it on your intranet, or you can tuck it away in your HR office, but if the employees are not made aware of it, and then they're not trained on it, then you can't rely on it in a situation where they've breached it. If they don't know what the rules are how could they know they've broken them?

And that's it.

Part four

Transcript

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Melissa: We obviously really couldn't speak about social media in Canada without talking about Quebec and the unique legal issues that are very specific to this market. Just to give you an idea of how prevalent and how popular social media is in Quebec, over 90% of Quebecers between 18 and 34 use social media actively. That number only goes down slightly to 85% for 35 to 44 year olds and 76% for 45 to 54 year olds. With stats like that the question really isn't whether we should be engaging with Quebec customers on social media. It's really how well we do that. When we consider how well we do that, well, when you think about Quebec, that necessarily means in a way that is compliant with Quebec law and in a way that is respectful of the Quebec culture. But before we jump on the social media band wagon, there are a few uniquely Quebec issues that you will want to consider. Especially knowing that social media is not a risk free zone.

The first is engaging with the young on social media. If you do that, it can be problematic. Quebec's infamous French line, "Which laws?" and we're going to talk about how to translate your interactions on social media to comply with the law. [We'll look at] some rules on using testimonials as well.

If you advertise products so they're intended for kids or in a manner that may be appealing to kids, then you may be offside of the Quebec Consumer Protection Act. If you didn't already know, Quebec is one of only three jurisdictions in the world that prohibits commercial advertising to children, the other two being Norway and Sweden. While we may hold the title for the only jurisdiction in North America to have these types of laws, I do want to mention that the federal government intends to introduce rules that will restrict unhealthy food and beverage advertising to kids, and to teens as well. It looks like those new rules will be far more restrictive than the Quebec rules actually. The ban has been in effect for nearly 40 years and if you think that advertisement is lost on the young then just consider by the age of 4, children are able to recognize hundreds of logos. There were studies that were done, in Quebec, and the studies on the ban indicated that Quebec had lower childhood obesity rates. There was actually a decrease in the consumption of fast

foods in Quebec. So, while that may not be good news for those of you in the room who work in the fast food industry, it is great news for Quebec children. And it's specifically those rising obesity rates in Canada that the federal government is trying to address by introducing restrictions on unhealthy food and beverage advertising.

The ban. The rule is that you cannot advertise to children under 13 years of age in Quebec. In assessing whether or not your ad is considered prohibited advertising to kids, the regulators will look at three factors. One, the nature and intended purpose of the good. Are you advertising financial service products or are you advertising toys, for example. [That] makes a big difference. The manner presenting the ad. Does the ad use music, imagery or characters that are appealing to kids? The time and place it is shown, of course. So, are we talking about late night TV versus after- school programming or Saturday morning cartoons, and the general impression? I do also want to highlight that it's not just manufacturers and retailers who can be held liable for advertising to kids. The ad agencies, and anyone who distributes, publishes or broadcasts an advertisement that is prohibited in Quebec, can also be held liable.

The regulators have actually published a guide that can assist companies in complying with this rule and this is an excerpt from the guide. What you'll essentially see is that if the ad medium does not allow for reaching kids, and your product is not really intended for adults or children, then you're fine. But if the ad medium does allow for reaching children, then you need to take steps to ensure that your ad is not designed in a way that might be appealing to kids, even if the product is not necessarily intended for children. If you have any doubt I would definitely suggest taking a look at this guide. It is very helpful.

Over the last few years a number of companies have been charged, and pleaded guilty, to advertising to kids. 2009 was a particularly eventful year. In 09, Lucky Charms pled guilty for inviting children to play games on their heavily branded website. This is what the website used to look like. If you go to luckycharms.ca's French site it doesn't look like that anymore. Although it's a bit of a dated case it is significant because it was the first time that the ban was applied to the online space. The ads were actually on the Lucky Charms cereal boxes but what was the issue here was that the advertisement was actually on the website. What this suggests to us is that the ban will also apply to the social media world, and not just websites but social media sites as well.

I always mention the Saputo Igor Muffin case for two reasons. One, because it was blatant advertising to kids. Two, because it had legal implications that extended far beyond just Saputo. Again, in 2009, Saputo launched this advertising campaign. You can see it here. It has CDs, posters, a sample of the Igor Muffin, and they distributed this to

over 230 daycare centres in Quebec, directly to the children. The kids would sing the Igor song. Dance the Igor dance. They got pictures to learn how to do that. They would eat the Igor Muffin and then likely go home and nag their parents for more. Saputo pleaded guilty. They didn't contest the charge. They pleaded guilty and paid a fine. But what's notable about this case is that the ad agency that had designed this campaign was also charged and also pleaded guilty to advertising to kids. Again, it's not just the manufacturer or the retailer who can be held liable, the ad agencies are also at risk.

More recently, Maple Leaf pleaded guilty to five counts of advertising to kids and paid a \$10,000 fine for having broadcast a Top Dog's commercial during a French language children's network program. Since Teletoon has its head office in Ontario, this case is significant because it marked the first time that really indicated that even broadcasters based outside of Quebec, but who advertise in Quebec, can be held liable under the Consumer Protection Act.

Over the last few years we've also seen the regulators go after things like logos on amusement park rides and signs at fairs. In 2015 Coca-Cola was charged and pleaded guilty and paid a \$28,000 fine for their Fanta- branded waterground at Six Flags in Montreal. You can see that the waterground has since been modified, and they've essentially removed all of the Fanta branding and colouring, but this is also a very significant issue and the fines were close to \$30,000.

We've also seen a tightening of the rules with respect to TV ads. Think TV, previously Telecaster, has over the last few years received training by the Quebec Consumer Protection Office and has been taking the position that ads that are heavily branded, or that show a child interacting or consuming a product, merit a "K" or "KK" rating. What that means as an advertiser is that you'll only be able to air your spot if 15, or 5% or less, of viewers are under 13. That's going to greatly restrict your media to generally the after 9:00 pm time slot, or after 11:00pm slot. If you don't want to get one of those unfavourable ratings, then you definitely want to modify the ad. Revise it so that you're not showing a child interacting with a product which is very common in ads that we see in the States, particularly, and make sure that the ad is not heavily branded. I'm just going to also mention that they tend to take that position more with respect to French television advertisements, but since the prohibition is in the Quebec Consumer Protection Act, it applies to both English and French media. Just to keep that in mind.

All these cases were initiated by the Quebec Awake Coalition. That's a consumer advocacy group in Quebec that regularly files complaints with the regulators for things that it deems to be prohibited advertising to kids. They recently filed complaints with respect to

colouring books, activity booklets that are distributed at restaurants, which if you've gone to restaurants that are kid friendly you know are generally very branded. They've also recently filed complaints with respect to cereal box gifts and toys. Now, what's interesting though is that there is an exception to the ban when it comes to "on pack" advertising. Technically, any advertising that is on a product packaging or labelling, is exempt from the ban. So it will be interesting to know how the regulators will address this complaint because not all complaints ultimately lead to penal prosecution or fines. Stay tuned for what that might look like.

Advertising in Quebec obviously also has its own unique linguistic challenges. We have the Charter of the French language which mandates that French is the official language of business and commerce in Quebec. The Office québécois de la langue française, the OQLF, just mandated with ensuring compliance a term that requires companies to comply with the Charter. The Charter has hundreds of provisions but for the purposes of this presentation there are three basic advertising rules that you want to consider.

The first, and it's not really relevant for social media but I thought I'd mention it anyway, product packaging and labelling. Product packaging and labelling, every inscription on the product, on its packaging, labelling or documents supplied with it, needs to be in French. It can be in a language other than French, as well, provided that the French version is equally prominent. Equally prominent in terms of placement. In terms of font size and content. You'll see here that the Laughing Cow is translated in French, same size font, same placement, everything that is in English on that primary packaging, is translated to French in the same size font.

Second rule concerns catalogues, brochures and commercial publications. So think the IKEA flyer, for example, those are also subject to the equal prominence rule. They either have to be exclusively in French or equally bilingual. You can also have a French version, and an English version, provided you've got an equal number of versions.

The third rule concerns commercial advertising. That is billboard signs, posters, any sort of point of sale materials. The rule for these types of materials are different. The French needs to be markedly predominant and what that expression really means is actually the object of its own regulation. But, generally, if you've got English and French on the same poster, for example, then we call it the two-thirds rule. It needs to be two-thirds French, one-third English. So French needs to be given much more predominance.

I'd also like to mention -- it's not a social media issue -- but there were new signage rules that came into effect last November which require companies to add French to their signs in Quebec, their outdoor signage. If that is something that is on your mind feel free to

come see me later and we can talk about that.

Since the Charter was enacted back in the 70's, prior to the internet becoming mainstream, you're going to be hard-pressed to find any words like website, email, social media, internet, anything like that. And that's probably why I get so many calls from clients saying, "Where does it say in the Charter that my website needs to be in French. I've read it over. I don't see that anywhere." That is because the regulators have taken these archaic rules and they've kind of interpreted them, and adapted them, to the realities of today. They take the position that websites and emails are electronic versions of the second rule. The rule on commercial publications. The IKEA catalogue rule. Websites and electronic messages are assimilated to catalogues, brochures and similar publications. They're just in electronic form. Those need to abide by the equal prominence rule. Which means that if you're subject to the Charter and you have a website, you need to have an equivalent French website. Equivalent, again, in terms of content, font size, overall material presentation. If you send emails, emails are also considered an electronic form of a commercial publication. Your emails need to be either completely in French or equally bilingual. There is, however, an exception that applies specifically to emails. The Charter provides that you can send an English only, or a non-French email, to a physical person who has expressly requested to receive those types of documents in English only. In this kind of post-CASL era, when you're asking for consent, you can ask for the language preference. Just be sure to retain and record that consent in case you're ever challenged.

We spoke about commercial publications including websites where there are exceptions that apply to specific types of commercial publications. So logically, those exceptions should apply to websites, or social media sites, that fall within this exception. A commercial publication, think website, concerning a cultural product or educational product, like a book or a film, can be exclusively in that other language provided that that content of that product is in that language. So, a website, or social media page, about a movie for example, an English language movie, could technically be exclusively in English. The same goes for a news medium. The Montreal Gazette, for example, publishes in English only. Their website, and social media pages, should logically benefit from this exception.

When it comes to social media we've always taken the position that a company's social media page, or pages, are essentially an extension of the company's website, and so they are also subject to the Charter and that commercial publications rule. In 2015 the OQLF officially took that position during the whole Delilah incident. In February 2015, Delilah, featured here, received a letter from the regulators. Essentially stating that all of her posts on her company's Facebook page were only in English and ordering her to translate those

to French or risk being fined. After taking to social media, as many business owners do in Quebec when they receive letters like this, the OQLF withdrew their threat of complaints on the promise that going forward, her corporate posts would be bilingual. The OQLF also agreed that greater guidance and clarity was needed with respect to how the Charter applied to the social media space. So fast forward a year later they finally filled that regulatory interpretation void by publishing a guide entitled "Social Media and the Charter of the French Language". Although the guide does not have force of law, it's really only for informational purposes, it does give us a deeper understanding of how the regulators apply the Charter to the online space. Essentially, if your company's based in Quebec, or has an establishment in Quebec, they social media site is used by the company in its official capacity. So, it's not a fan page, for example, and the social media content concerns the Quebec market, then you're subject to the Charter and it needs to be in French. Again, when we talk about content that will be subject to the Charter, any time you're posting something of a promotional or advertising nature that concerns Quebec without needing to be exclusively intended for the Quebec market, that [content] needs to be translated. The guide also confirms our opinion that the Charter doesn't go so far as to require you to translate customer posts to French. Right? Just the ones that are coming from the company, emanating from the company, need to be translated to French. It also doesn't require you to respond in French to someone's question that may be in English. But, obviously a customer asks a question on social media in French, you would want to respond in French.

Okay, I don't have much time so we'll go quickly through the rest. And if you want to weigh the risks of compliance versus non-compliance, there are regulatory fines. There's also negative PR, right. So, bear in mind that French language issues are a very sensitive topic in Quebec, so negative PR can result, even if the regulators decide not to act. To give you an example there was the major retailer, and when we talk about French we don't just talk about making sure the French copy is there, we're also talking about the quality of the French copy. Do make sure that the quality of the French that you're using is appropriate. Here's an example of a major retailer who advertised this dumbbell storage rack on its website, and you won't be able to make that out, but they essentially, I'm assuming used something similar to Google translate, and described the dumbbell storage rack, they translated dumbbell to moron, or idiot, and described the product as an official way to store and hold your morons. So, it's pretty unfortunate, but you do want to take care to ensure that the quality of your French copy is appropriate, because you don't want to be a company that's making headlines for being insensitive or disrespectful to the French/Quebec market. Morons, yeah.

Testimonials. Dan spoke about this so I'll go over this fairly quickly. But if you want to collaborate with influencers, I mean it's a great way to engage customers and create buzz and excitement about your brand, but you want to do it in a way that is compliant. There are both Federal and Quebec specific rules with respect to this. Under the Federal Competition Act testimonials need to be the actual honest and true opinion of the person giving them; that goes without saying. The Competition Bureau, as Dan mentioned, will go after things like fake reviews. I was actually at a seminar two days ago that was given by Ad Standards where they revealed that 80% of Canadian consumers are less likely to purchase a product if there are fake reviews on your site. That really indicates that lack of transparency cannot only cause penal issues for you and fines at the Federal level, but can also be detrimental to your bottom line.

Similar rules in the Canadian Code of Advertising Standards needs to reflect the genuine reasonably current opinion of the individual. Consumers are notoriously fickle so do ensure that you are using up to date data. They need to be based on the person's actual experience with the products. So make sure that the person who is tweeting, or blogging, or vlogging about your product has actually used it, and that they've used it fairly recently.

You've also got the general "thou shall not lie" false and misleading provisions that you'll find in the Federal Competition Act. You'll find it in Provincial statutes as well. They Competition Bureau interprets that as meaning you cannot conceal the commercial intent behind a post, for example, you need to be clear as to the relationship between the person making that representation and the supplier of the product. But, in addition to the false and misleading rules that you'll see in the Quebec Consumer Protection Act as well, there is one rule that is specific to testimonials. It provides that you can't falsely hold out that any person has recommended, approved, certified, sponsored or endorsed your product. While the Quebec regulators don't have any sort of policies that interpret that provision, we find that they generally tend to rely on whatever the Federal government uses, and so the Competition Bureau recommends that for online disclosures that you comply with ASC's guidelines on testimonials. And what those guidelines state, for example, is that a representation will be false and misleading if you do not disclose the commercial intent, the commercial relationship, or the relationship between the person making representation and the brand owner, for example. The nature of that material connection needs to also be clearly disclosed. If you're paying for the post, say so. If you provide the product for free, say that as well. [That information] needs to be in close proximity to that post. To the extent that you've collaborated with a blogger, that disclosure needs to be at the very beginning. It cannot be disclosed once you're five or 10 minutes into the video.

If you want examples on how to disclose the material connection the FTC also has a guideline on that. The Competition Bureau also suggests that you check out the International Consumer Protection and Enforcement Networks Guidance document. There are two guidance documents. There's one for marketing professionals and another one for digital influencers. What all of those guidelines, the ASC's guidelines on testimonials, the International Consumer Protection and Enforcement Networks guidelines and the FTC's guidelines, what they all underscore is the importance of the transparency and ensuring that you adequately disclosed when consumers are being fed advertising content. If you don't disclose that material relationship in a manner that is compliant, well, that can be very costly in Quebec because of that specific rule on endorsements. We've seen in the last few years that regulators go after companies with fines that are far above the minimum fine of \$2,000. This is specifically with respect to the telecom and automotive industries, where the regulators have gone after companies by issuing a large number of fines, totaling in the hundreds of thousands of dollars. What that means is that if you're going to engage in conduct that is contrary to the Consumer Protection Act, well, it might be more cost prohibitive now than it may have been a year or two ago, especially for larger companies who, according to the regulators should know better.

Part five

Transcript

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Wendy: Defamation. Defamation on the internet. My slides are super embarrassing for a social media presentation because they are so boring. They are literally only words. You can read them later. I actually went through and changed some of the colours to make it really interesting but I'm not sure that quite achieved the objective. Feel free to just ignore those slides, or read them, or do what you want. There is defamation on the internet. The law still exists, even though the internet is the Wild West, the traditional laws do apply. And like many of the things that people said this morning we're kind of stuck in a traditional common law defamation world, in trying to apply those concepts to the internet, which is not always an easy thing to do but it's something that's sort of developing through the case law as we go along. What is a defamatory statement? It's basically really, really broad. It's anything that would lower the reputation of an individual or a company. Many of you, or some of you, may have experienced your companies being targeted, or harassed, online by someone with some type of campaign. It's something that we deal with and advise clients on quite frequently within the firm. It's an unfortunate circumstance and the question always becomes, "Can we sue for defamation? Do we have some sort of recourse here?" The answer is maybe but it's not actually easy. Although defamation is a really broad concept, and is basically anything that would lower reputation, there is a number of really powerful defenses that are intended to protect freedom of expressions. It's not an easy action to bring and then we'll get into if you have the practical reasons why online it's not necessarily easy at all.

What lowers reputation? Any kind of allegation that a company, in that context, is involved in corruption or treats their employees poorly. One of the things that came up the other day was someone putting posts on Twitter that alleged sexual harassment within the work place. Which is serious, right? I mean that's a serious allegation to put up on Twitter, especially with what's been in the news with Weinstein, and all of that. The threshold that a plaintiff has to meet to just assert a defamation action, or what you have to prove as a plaintiff in a defamation action, is actually pretty low. You have to prove that a statement was published, which is usually not difficult to do, in an online environment. Things can disappear so it becomes a bit of an evidentiary issue but it's not like slander, which is spoken defamation, there's something in writing that you have. You have to prove identification, so that the posting or the material is actually about the company or the individual, and that it's capable of being defamatory, which is something that we already covered. It's kind of a broad unlimited concept of lowering reputation. But, a lot of the

action is in the defenses and, of course, truth is an absolute defense. So, if something is true about you or your company you're going to have a hard time maintaining that as being actionable.

Defense that's probably the most powerful on the internet, or in the internet context and that we get a lot of questions about, is fair comment. This is the basis on which people can post all of their negative reviews. That a negative review is essentially a comment. It's an opinion that someone has of a business, and how it's running its operations, and there's pretty broad leeway, there's very broad leeway to make comments. There is a limit though. We've talked a lot today about fake comments. Fake reviews. There is fake positive reviews, which was what came up this morning in most context, but there's also fake negative reviews. You can have an employee who will go online and just slag the company with tons of fake reviews that are negative because they're angry about something that happened in the context of their employment. Is that actual? Probably, because malice, which is like an actual ill intent or motive to injure, or an ulterior purpose, is something that will defeat a fair comment defense. Although there's broad leeway to make comments, if it's a genuine review of a business and no matter how ugly and negative that review is, it's probably not actual unless there's some sort of ulterior motive. Which there may be.

Qualified privilege. Traditional qualified privilege is what you think about when, for example, people are protected because they make reports to the Children's Aid Society about a suspected abuse. That's your traditional qualified privilege. You have a duty to say something and someone has an interest in hearing about it. That usually doesn't apply in an internet context because you're always dealing with publications to the world at large. You're not dealing with I made a report to the police. I made a report to the CAS. I confined the publication to the people who really need to that information. You're pushing out information to the world. But there is a defense that covers statements of fact, and not only statements of comment, which is the public interest responsible communication defense. It allows people to make statements of fact that may be wrong if it was something that they were doing in the public interest, and if they were responsible in making those statements. Or made efforts to act responsibly. A lot of times that defense sort of came up in the context of traditional journalism where people were researching facts and they were making attempts to verify those facts. A lot of times that just doesn't happen on the internet. Although it's a pretty broad defense, it's something that may not apply in an internet context, because most of the time people aren't making a lot of effort to verify what they're putting out there, as we know.

A fairly new thing in Ontario that some people may, or may not, have heard about is an

anti-slap defense. A slap suit is a strategic litigation against public participation. What does that mean? We've all heard of instances where the big company is accused of being unenvironmental and then someone criticizes them. You've got Greenpeace. Greenpeace criticizes them for being unenvironmental and so a big company has all this money and they sue Greenpeace to make them not talk about the unenvironmental practices of the company. That's sort of your traditional slap suit. Ontario now has legislation that says that if a company -- it's usually a company -- brings a defamation lawsuit, then the defendant can bring a motion, an anti-slap motion, to have that defamation lawsuit dismissed right at the outset. All that defendant has to do is prove that the publication was in the public interest and then the onus shifts to the plaintiff to show that the action that they're bringing has substantial merit and that there are no applicable defenses, and that the public interest, the harm to them, would outweigh the public interest in the publication. That's an anti-slap suit. It's kind of crazy how it works because once the plaintiff brings their action the defendant can immediately file a motion and then the whole action stops. That motion is supposed to be held within 60 days, which is like lightning speed in the courts, and is not something that is actually happening in practice. Then there's really no risk to the person you're suing for bringing that type of motion because if they lose their motion they pay no costs. If they win their motion you have to pay them full indemnity costs, which means all of their legal costs for bringing that motion. If you're a company, and you're considering bringing a defamation action for a harassment campaign online, this is now a factor that you have to think about. Will you be able to defend against an anti-slap motion if that's brought in the context of that action?

As I was saying at the start all these concepts, (except for the anti-slap motion which is new), they were all part of the common law and now they're just trying to transpose them into an internet context. What does that mean? There is in the internet, I think it's accepted, that there's more back-and-forth debate that a bit more will be tolerated, in practice. But on the other hand, as we spoke about, some of the defenses that have traditionally been available are going to be pretty hard to prove in an internet context. For example, the responsible communication defense, in a lot of instances when people throw things up on the internet and sort of start a campaign of harassment against a company, it's not very responsible. They haven't made any effort to verify the type of information they're putting up there. When it comes to damages, as a company it's normally the case that not as much is available in terms of damages as for an individual because an individual is considered to have more rights to reputation than a company, but on the other hand, there've been some very large damage awards in the internet context because you think of how widespread an allegation can become [when it's] on the internet. [Consider] what an impact it can have because all of a sudden this is global and not just local, right?

It's much different than your traditional sort of newspaper context.

An interesting thing to think about, when I've been speaking for most of this I've been speaking as though a company, or your company, might be harassed on the internet and then be considering a defamation lawsuit, but you also have to think of the flip angle. Which is, what are your obligations when you have an internet presence to ensure that you're not sued for defamation? Elisa had spoken a little bit about this in the employment context. Do you know what your employees are posting when they're on the internet? One of the risks is that they're going to be posting things that are defamatory. Another thing that often comes up is the whole issue of posting a website and having a forum on that website that people can post to. That is fraught with risk when it comes to defamation because the law in Canada is really uncertain as to what liability you'll have as a web host, and as the hoster of that forum, or that ability to comment. From a practical perspective companies have been doing, or businesses and newspapers, have been doing sort of two different things. One is that if you decide to have this kind of forum that allows people to contribute or post, you don't look at those posts at all. You don't vet them in advance. You let people post and you don't monitor and you don't take any action to do that. But the moment that someone gives you notice that there's something objectionable, you have a look at it, and in most cases if it seems at all objectionable, you take it down. That's called a "notice and take down" approach. The intent there is to try and benefit from the defense of innocent dissemination, which is an old sort of concept in the law that applied to, for example, like book publishers. They weren't expected to know what type of content they were publishing all the time, but if they actually received notice that something was defamatory, then they would stop publication, so that's the intent there. The other approach that can be taken is that you actually only allow comments to go up if you've monitored and vetted them and are satisfied that they don't have any objectionable content.

So those are the approaches. The issue of republication, as well that's kind of a tricky one on the internet. A lot of times when you have an internet presence you'll link to a whole bunch of other material and a question that came up was, "What if you actually provide a link and when someone follows that link it leads to defamatory content?" Have you published, have you republished, that defamatory content by providing a link to material? Which could be really dangerous because a lot of times you just want to provide resources to the public, right? So you just want to provide a bunch of links, and then obviously you have no control over the content, and even the fact that that content may change over time when people go to those links. There was a Supreme Court of Canada case on that. The Supreme Court held that just the mere publication of hyperlink would not

be republication of the defamatory material, for which you'd be liable, but they left it open as to what would be construed as sort of an endorsement of the material in the link, or an acceptance of the material in the link. So, if you go beyond just a link, and in some way endorse that content, then you're leaving yourself open to risk. As I say, you have no control over something that you've linked to because it can be changed and altered over time, right?

What if you are the subject of an internet campaign against the company? What are your options? What do you do? I mean, you have to think about how serious the material is. I mean, in the case I was just speaking about, an allegation against a specific employee or against management that they've engaged in serious sexual harassment, that's a pretty serious allegation. And you've got an employee involved and what's your obligation to that employee who has been targeted, not just the company, to try and protect and defend their rights as well, right? Are these statements of fact or are they statements of comment? Going back to this whole [question of] how much liberty we give to make comments or to state opinions. Is it an isolated incident? How widespread is it? How much damage is this really doing? That's really important to think about because you don't want to give someone, essentially, a platform, right? A lot of times if you take action against someone who has this kind of campaign against the company it just kind of inspires them and they keep going. You really have to think is this really widespread? Is this really reaching a broad audience? Is it worth taking action? There's a question this morning about what if there's defamatory content on Twitter? Can we write to Twitter? Will they take it down? The answer is almost certainly no. They will require a court order. Most social media sites -- when it comes to defamatory content as opposed to intellectual property rights, which are treated much differently especially if it's a US-based website -- have very, very liberal defamation laws. They value freedom of expression very highly and for that reason will normally require a court order in order to take down content that you say is defamatory. The whole issue of what should we do? Should we maybe send a letter? Should we send a cease and desist type letter? There's two things to consider in the context of defamation. One is that in some jurisdictions, including Ontario, there are notice requirements for bringing an action. You may have to serve, or you may -- out of an abundance of caution, if you actually are intending to bring an action -- you may want to serve a notice of intended action. It's called a Notice of Liable. Because it's uncertain in the law right now whether those notice provisions, which were structured in the context of traditional media, a broadcast or a newspaper, actually apply in an internet context. I think they don't, but the law isn't entirely clear on that. From a cautionary perspective, if you actually intend to sue, that would be advisable. On the other hand a lot of companies will say, "Just draft something. Write a cease and desist. Write to the person who's doing

this. Threaten them. Get them to stop" kind of thing. And, again, that's one of the those things you really have to weigh. If you're not actually intending to follow up with a lawsuit you really have to think about that. Because oftentimes the first thing they're going to do is post that letter on the internet and then they've got something to fight about. Then they're enlisting the aid of all of the people who are against the big bad corporations that are silencing freedom of expression. Look, they're threatening to sue. You have to understand that that's probably going to be publicized and may garner more attention than the whole issue deserves, right?

The other thing that I often get people calling about is, "This is terrible. You have to get them to take it down. It has to come down immediately. Let's get an injunction." Almost impossible to do. The reason being [is] that for reasons of protection and freedom of expression, courts will almost never grant injunctions for alleged defamation. That's an interlocutory injunction. If you actually go through a lawsuit, and you're successful, you will get a permanent injunction, which means they have to take down the offending material and not publish offending material of that type again. But to get an interlocutory injunction before your lawsuit is actually heard is extremely difficult. If all else fails, and you really think it's worth it and you decide to bring a lawsuit, defamation is a complicated area. There will be lots of things to think about in terms of the jurisdiction in which you're suing, who you name as parties, and what kind of allegations you actually include within the lawsuit.

That's defamation. I didn't do any slides on privacy. I don't know if you want me to spend a few minutes talking about any issues.

Unknown: Maybe some highlights.

Wendy: Sure. The only thing I was thinking about [is] what I could talk about in privacy in an online environment. One of the things I get asked about a lot is the use of photographs, not from a copyright perspective, but from a privacy perspective. What is your restriction in terms of, for example, taking photographs at events and posting them online to say, "We've had this great event." Things like that. The law's not entirely clear. I mean, I think consent is always the best way to go, if you're able to get consent. If you know you're going to be taking a lot of photographs at an event and they might be quite identifiable, so they might show people up close and things like that, it's always best, on the registration form, to get people to give consent to their images being published. That's obviously always the best type of thing to do. Each of, almost, well not each province, but many provinces have statutes that are privacy acts. They deal with the issue of images as well. And definitely, if you are using an image of an identifiable person, which is that they are

the subject of the photograph, it's going to be a problem to use that in any commercial context. I think that's fairly basic, both from a statutory perspective in those provinces that have statutes, and also from a common law perspective, I think misappropriation of personality was already mentioned. That's an issue. Another thing is children. A lot of people, I think rightly so, are very concerned about images of children, their children, being on the internet. I would say, in basically every context where you're going to have children in a photograph that are identifiable, you're going to want parental consent for that because it's a sensitive issue right now. If what you're posting has people in the picture in a purely incidental way and they really aren't identifiable, then I think that's a slightly different situation. What else was I thinking about? Oh. I don't know if it came up this morning, but with social media, in terms of advertising, one of the things that's coming up a lot now is ad tracking. The issue of using ad tracking companies. This is where you all will have experienced it if you don't actually use it. You're on one website and searching for things, and you navigate to another website, and then you get advertisements from the website that you were on, that's ad tracking, or behavioural advertising. Our privacy commissioners all have pretty strict guidelines on that now. You need to be transparent so that in your privacy policy you warn banners, or things like that, about the fact that you're using that ad tracking and you also need to give an opt-out ability. What I recommend is if you're ad tracking and your privacy policy, you're really specifically disclosing who you use because you will have companies that you're using for that purpose, and someone will know who it is. Some IT person or marketing person will know who you're using. Then you can provide the link to that provider and all of those providers, basically all of them, provide some ability to opt out. You can provide the link to their opt-out page and that way you've satisfied the requirements to give an opt-out ability. It should never be directed to children, ad tracking, and it should never be directed to sensitive material such as health.

So, I think that's it. I'm the last one standing between us and lunch.

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Related Intellectual Property, Canada's Anti-Spam Legislation (CASL), Advertising & Product Regulatory

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