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Enterprises and the social network





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There is currently much discussion about the legal aspects of social networks. The media are targeting their criticism on how Facebook & Co are handling user data and the violation of privacy rights. Meanwhile, it has come into fashion to use social networks for marketing measures, a practice which, however, does not come just with opportunities but also with numerous legal risks.

Like the internet in general and contrary to a common opinion, social networks **do not operate in an unlegislated area**. They are governed by the **principle that the law is neutral to technology**. When enterprises present themselves in social networks they need to observe the same rules which also apply outside the internet. Thus, social media marketing needs to comply with the exact same rules on brands, competition and copyrights that govern other marketing measures. Specifically, protected trademarks and contents may be used only with the owner's consent. On top of this, entrepreneurs have to follow specific rules when carrying out marketing activities in social networks.

In particular, entrepreneurs need to comply with the duties of providing website credits, information and identification set out in the E-Commerce Act (ECG). Under Sections 6 and 7 ECG, an entrepreneur operating online must make sure that all advertising and other marketing measures are clearly marked as such and that the natural or legal person who commissioned the commercial communication is named. The advertising character of a message must not be disguised. The use of fake profiles (profiles registered under another name in the social network in order to give positive reports on an enterprise as a seemingly neutral

third party) is prohibited. A violation of the ECG may lead to administrative fines and justify claims under the Unfair Competition Act (UWG).

Direct messages in social networks are qualified as "electronic mail" within the meaning of Section 107 of the Telecommunications Act (TKG). Accordingly, personal messages on Facebook require the recipients' prior consent when a mail is sent for the purposes of direct advertising or to more than 50 recipients (**spam ban** and **opt-in principle**). Even a Facebook friendship does not per se signal consent to receiving electronic advertising. "Direct advertising", however, does not include messages posted by an enterprise on its own Wall, which are passively read by its "friends".

A violation of the spam ban may lead to administrative fines (up to EUR 37,000 per infringement) and an action for injunction by recipients and competitors. A violation of Section 107 TKG, indeed, constitutes a breach of the law and is unfair within the meaning of Section 1 UWG. Moreover, posting any direct advertising in a social network may be an aggressive business practice according to No 26 of the Annex to the UWG.

Where an enterprise allows its "friends" to comment Wall postings or where it uses an option provided by the social network to incorporate own internet



applications in the social network in the course of which it accesses users' personal data, it may be subject to reporting, information, correction and deletion duties under the Data Protection Act (DSG). An infringement may lead to administrative fines (up to EUR 10,000 per infringement) and an action for injunction. Furthermore, the responsible authority may seize the data carriers and programs.

Considering such consequences, an enterprise should perform an in-depth legal review when it plans to use social networks for advertising purposes. In doing this, it should check whether the terms of use stipulated by the operators of the social networks actually allow any commercial use.

Facebook & Co are even more frequently used **at work**. As the employer may interdict the use of the business internet access and e-mail address for private purposes, the employer may also prohibit the use of social networks even if the private use of internet and e-mail is permitted, in general. Nevertheless, even when the employer has not communicated any explicit prohibition this does not imply that unlimited use is allowed. In this respect, the ban on excessive use applies all the more than on instances such as sending private e-mails or if the user on one occasion books, say, a holiday trip on the internet: All that is acceptable is a moderate use limited in time provided that it does not affect the employee's work, does not put a harmful burden on the employer's resources, does not create any security risk and does not foster any illegal activities. In any case, it is not allowed to keep Facebook running "in the background" on a permanent basis. If the employee resists any explicit prohibition on the use of Facebook or if s/he neglects his/her work duties because of its excessive use, the employer is allowed (after warning the employee) to dismiss such employee.

Even where the use of social networks is (to a limited extent) permitted, some rules need to be observed, in particular the employee's duty of good faith towards his/her employer. If an employee discloses company secrets or insults the employer, workmates or customers on Facebook or if s/he posts a victory in a game of tennis while having reported in sick, this can justify his/her dismissal.

Therefore, an enterprise is well advised to introduce social media guidelines for its employees, naturally with due regard to the consultation and information rights of the works council.

Privacy rights frequently get short shrift in social networks, especially when it comes to the posting of photos. Users tend to overlook that photos must not be uploaded if this violates any justified interests of the person pictured or his/her family (Section 78 Copyright Law). Where privacy rights are violated in such manner, e.g. by posting an embarrassing photo that shows an individual in a clear state of drunkenness, such individual is entitled to raise claims against the person posting it. It should also be considered that in some social networks the removal of photos is either impossible or feasible only with a delay. Therefore, users of social networks should obtain the person's consent before posting a photo of her/him, regardless of whether s/he is a user or not.



For further information on the subject please contact:

Mag. Oliver Walther

Lawyer and Partner

walther@preslmayr.at

New partner

In November 2011, **Lisa-Maria Fidesser** joined our team as a partner. She had started as a trainee lawyer at our offices in June 2007. The focus of her work is on litigation, contracts, data protection law and banking law.

As usual we celebrated her joining us as a partner together with her family, friends and our staff members by giving a welcome bash.

