

Social media and your company's IP - the new frontier? Absolutely

In the age of information and convenience, you are much more likely to visit a world-wide-web (www) address than a business premises for the majority of your needs as a consumer. In addition customers are much more likely to compare products, look for good deals and read reviews of products and services online before actually engaging in any activities with businesses. This is mainly due to the fact that consumers have realised that engaging in commercial activities on the internet is safe, quick and means you do not have to pay parking or bump into colleagues on Saturday mornings in the local Woolies. This article considers the impact of the social media revolution. It urges rights owners to adopt a policy to monitor and protect against misusers effectively and explains why the solution is often multifaceted.

In addition companies have realised that their engagement with customers via the internet is as important (if not more important) than customer service in-store. Due to the freedom of information and views on the internet, one disgruntled customer can post numerous negative comments about your company and products on the net within minutes.

Research has shown that Facebook¹ (the social media network) has 500 million active users, 50% of those users log on to the site every day². Facebook surpassed Google³ hit rate (the number of people who visit the site) in 2010 and 70% of all Facebook users are situated outside of the United States. On the local front recent events like the South African Idols™ show and the recent State Of the Nation address by President Zuma saw thousands of South Africans participating and posting comments on twitter⁴ throughout the event, which influenced the both public perception and the final outcome of these events.

Companies have become more aware of this phenomenon⁵. In 2010 GAP (the American clothing giant) changed their GAP logo and used the internet to roll out their new campaign and logo (using, *inter alia*, their Facebook fan page to do so). Within hours GAP's official Facebook page was inundated with negative comments and sentiments pertaining to the new logo. GAP, due to this reaction from the online community, immediately reversed the rebranding (which must have been a very costly affair) and changed back to the traditional GAP logo.

¹ www.facebook.com

² www.facebook.com

³ www.google.com

⁴ www.twitter.com

⁵ Companies are now judged on their level of engagement with the consumer using social media (see *The world's most valuable brands. Who's most engaged, study by engagementdb.com, July 2009*) where Starbucks came out on top.

The fact that these forums (such as Facebook and twitter) are relatively cheap to use (you can register for free) and are so readily available to the general public also presents a multitude of opportunities for companies. The Burger King restaurant chain made use of Facebook in an immensely successful campaign called the “Sacrifice Ten Friends” campaign. Participants were requested to sacrifice 10 of their Facebook friends for a free Whopper™ (a Burger King burger). The application was adopted and within days 20, 000 users sacrificed 200, 000 friends for free Whopper™ Burgers! Locally companies like Standard Bank has used twitter to inform their customers of fraudulent activities and engage with customers who have questions and queries.

Direct engagement and access by the general public to companies’ information, logo’s and images have unfortunately also created opportunities for abuse. There are instances where trade marks have been hijacked and used by unauthorised parties to the detriment of the owner of the trade mark, thereby damaging the brand. Despite the fact that most of the social media sites have both privacy and copyright notices on the sites, it remains the responsibility of the brand holder to monitor and police the public domain (which now include social media sites) in order to protect their trade marks, copyright and online reputation.

Using intellectual property on social media sites may be in contravention of the Trade Marks Act 194 of 1993 (“the Trade Marks Act”) or the Copyright Act 98 of 1978 (“the Copyright Act”) or amount to unlawful competition and may therefore be capable being protected by our courts. The courts have the authority to stop the online abuse and order the infringer to pay damages and costs to the owner of the intellectual property. Under the Digital Millenium Copyright Act (DMCA)⁶ and the Copyright Directive⁷ rights holders may be able to take down offending sites and rights owners may use the dispute resolution procedures set up by online media sites to stop abuse. Our experience has been that this is often the most effective way of dealing with misuse of intellectual property on those sites.

Bearing in mind that there are thousands of sites and millions of users (twitter had 18.1 million users in the US alone in 2009, South African followers amount to 55 000 in March 2010⁸) monitoring these sites can be a daunting task. Due to these developments, Bowman Gilfillan has launched a social media watch service monitoring any unauthorised use of its client’s trade marks and copyright in the social media sphere. We believe that we are the

⁶ A United States copyright law that implements two 1996 treaties of the World Intellectual Property Organisation

⁷ Passed by the European Union on 22 May 2001

⁸ Fuseware research

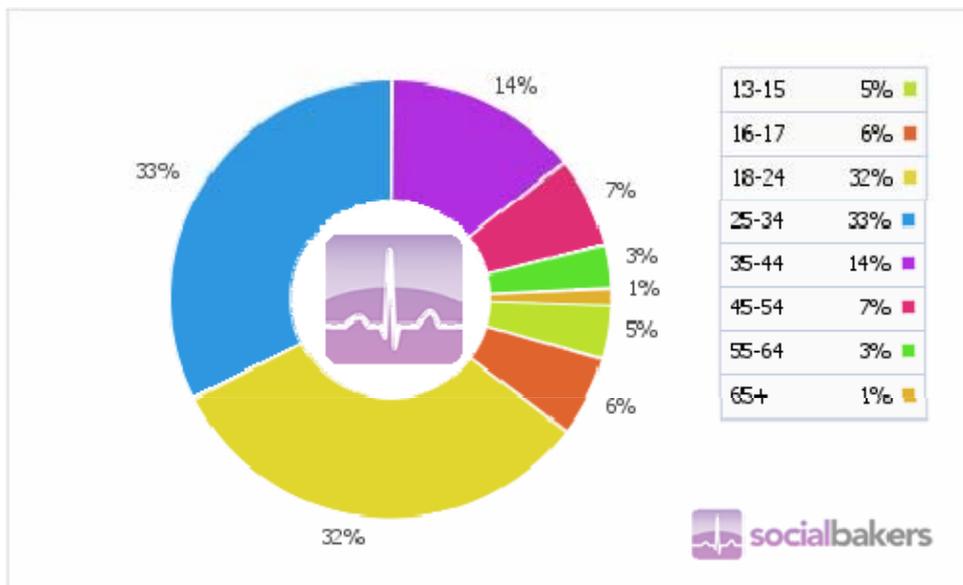
first South Africa law firm to do so.

Once an unauthorised use is detected, clients have various options available to them (in addition to the relief under the legislation and procedures mentioned above) could include engaging directly with the “infringer” as The Coca-Cola Company decided to do. The current Coca-Cola™ Facebook page (that has 22, 411, 124 followers) was originally created by a fan of the company (strictly speaking an infringer of the intellectual property of the The Coca-Cola Company). The company decided to engage with the fan and, in collaboration with the fan, kept the page updated and maintained. The page is now the official Coca-Cola™ Facebook page and is used to update the public and engage with customers on a daily basis. This is a good example of how brand owners can use social media as a tool to strengthen the brand and influence public perception; it is not always about enforcing one’s rights (which can backfire) but about adapting to, and understanding, the online environment. As a result IP attorneys also have to become more sophisticated and clients need to be wary of choosing the right team to assist them.

With 200 million Facebook users regularly logging onto the site using their mobile phones, coupled with the rapid increase in broadband penetration within Africa, it is impossible for companies to ignore the impact of these sights. Monitoring and policing of these sights are necessary steps every brand holder should take when protecting its image and intellectual property. Our advice? Log on, monitor and educate your employees and consumers on what is your intellectual property and how to use it appropriately.



Demographic of Facebook use – South Africa



Darren Olivier & Renée Luus

- Darren Olivier is a director in our IP department and heads up the Brand Enforcement section. He is on the official panel of experts to World Trademark Law Report and sits on the editorial board of Oxford University's Journal of Intellectual Property Law and Patents. He is a dual qualified solicitor/attorney (UK and South Africa), and a qualified Trademark Practitioner (South Africa). He is co-founder of AFRO-IP, a social networking site and blog aimed at developing and promoting IP interests in Africa.
- Renée Luus is a media lawyer and a consultant in our Brand Enforcement Section. She specialises in the copyright protection and enforcement of rights flowing from copyright and domain names, licensing disputes and passing off matters. Renée is a dual qualified solicitor / attorney (UK and South Africa) a student member of the South African Institute of Intellectual property.