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# Social media presence

Legal pitfalls and best practices



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## Today's goal...

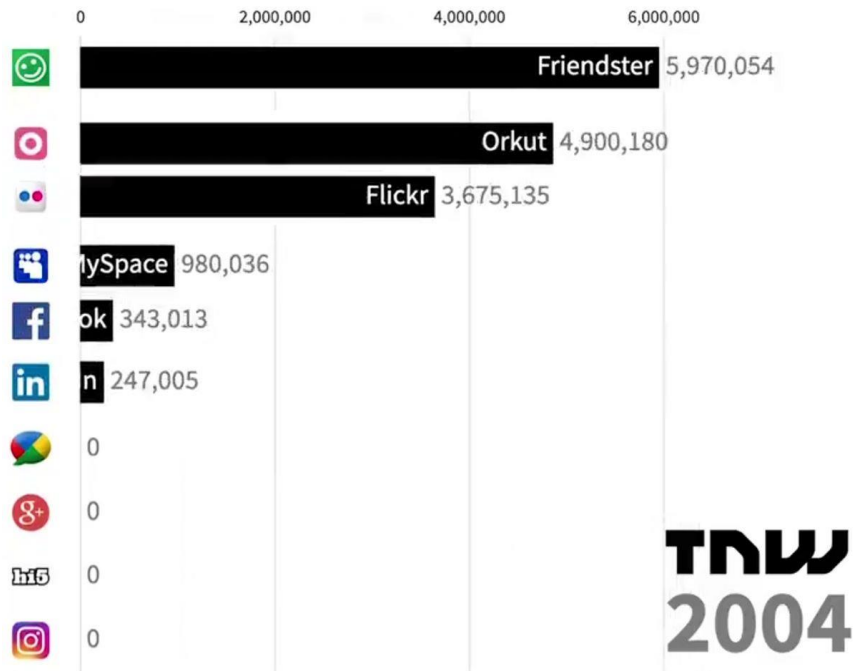
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- I. Give you a general overview of the legal issues raised by social media;
- II. Discuss the legal risks in the use of social media and the existing protection tools;
- III. Provide a few examples of how such risks can be addressed

I. Brief overview of legal issues raised by social media

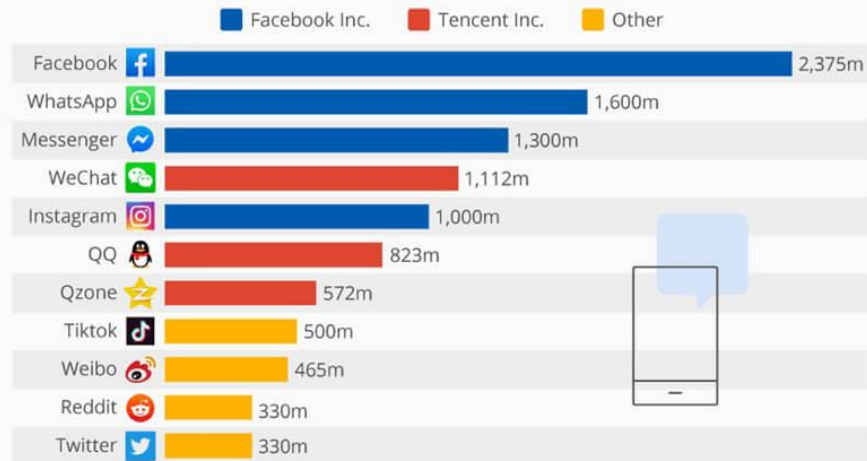
Three key issues:

- Nature of social media
- (legal) Definition of social media
- International character of social media



## Facebook Inc. Dominates the Social Media Landscape

Monthly active users of selected social networks and messaging services worldwide\*



\* July 2019 or latest available

Source: Company data via DataReportal Q3 Global Digital Statshot

## Diversity of platforms

Evolution of technologies, of functionalities, of audience

Diversity of the legal questions raised by social media means no uniform legal environment

## Viral effect of social media

Reaction vs anticipation

Limited impact of legal tools

Risk of “Streisand Effect”

## What is social media from a legal standpoint?

Is it a media?

Is it something else?

## Is social media subject to a special regime?

Many countries have specific provisions for social media platforms (e.g.: French law on Fake news, US section 230 Communication decency act, etc.)

What about Switzerland?

- Social media is used all across the world but to which territory is it connected?
- Terms and conditions and conflict of law rules to determine applicable law
- Where is the competent jurisdiction?
  - 1) Place of defendant?
  - 2) Elected jurisdiction?
  - 3) Consumer's domicile?
  - 4) Place of harmful act?
- Where are the social media companies actually located?
  - 1) US;
  - 2) Europe (Ireland, Paris, London);
  - 3) Asia;
  - 4) Switzerland?



## II. Legal risks in the use of social media

Different types of legal risks:

- A. Risks for the users
- B. Risks for the platforms

### No “Social Media Law” in Switzerland....

- ... and no need for such law according to two reports by the Federal Council (October 2013 and May 2017)
- Current update of certain Swiss regulations will have an impact on social media (revision of data protection act, proposal of regulation to protect the youth, etc.)
- Confirmation that the law applies to social media platforms

## A. Legal risks relating to the users

## Defamatory content

- Harm to the personality: the harm will be deemed unlawful when it is not justified by the victim's consent, or preponderant public or private interest;
- Harm to reputation (*atteinte à l'honneur*):
  - Defamation (art. 173 Swiss Criminal Code);
  - Libel (art. 174 Swiss Criminal Code);
  - Insult (art. 177 Swiss Criminal Code).

Recent case: liking defamatory content can lead to condemnation (**6B\_1114/2018**)

## Intellectual Property

- Copyright:
  1. Unauthorized use of protected work;
  2. Violation of right to be mentioned as author;
- Trademarks:
  1. Unauthorized use of a registered trademark;
  2. Violation of trademark's owner's right (use of a confusingly similar sign, etc.)
- Other IP rights?

Designs, domain names, databases, etc.

## Prohibited content

- Prohibited advertising:
  - Alcohol, tobacco, medicine;
  - Gambling and lotteries.
- Prohibition of pornography:
  - If made accessible to underage users;
  - Or if hardcore pornography.
- Prohibition of representation of violence
  - Images of cruel treatments towards humans or animals...
  - ... unless justified by artistic considerations.

- Prohibition of unfair competition:
  - ❑ General prohibition of unfair commercial behavior (art. 2 Unfair Competition Act)
  - ❑ Specific prohibitions:
    - Prohibition to communicate false or fallacious or uselessly hurtful information on a competitor;
    - Prohibition to provide false or fallacious information on its own company, products, services, etc.;
    - Prohibition to have false or fallacious or uselessly hurtful or denigrating comparative advertising.



## Use of social media in the context of employment raises several issues:

- Issue of liability in case of unlawful content:
  - Employee vs consultant
- Issue of employees' surveillance
  - Restricted surveillance means under Swiss labor law;
  - Art. 328 Swiss Code of obligations and art. 26 Ordinance 3 On Federal Labor Act;
  - Surveillance must be proportionate and limited to security or organizational measures;

## Use of social media to collect information on a future employee

- Under Swiss law, company is only entitled to collect info on the candidate's ability to perform the work attached to the offered position;
- Additional research is as such prohibited;
- No obligation of a candidate to provide access to his/her social media account or passwords;
- Several state laws passed in the US as framework of social media use in the recruitment process.

## What about private use of social media by an employee outside of work hours?

- Right to use social media outside of work hours, but ...
- ...Employee still bound by his/her duty of loyalty (art. 321a par. 1 SCO): « *The employee must carry out the work assigned to him with due care and loyally safeguard the employer's legitimate interests. [...] »:*
- ... Employee still bound by his/her obligation of confidentiality (art. 321 a par. 4 SCO): « *For the duration of the employment relationship the employee must not exploit or reveal confidential information obtained while in the employer's service, such as manufacturing or trade secrets; [...] ».*

## Numerous cases of sanctions / termination due to publications on social media

→ 8C\_336/2019 of 9 July 2020: immediate termination of police officer deemed abusive

→ Case of federal

employee posting

nude pictures from

workplace

Assaillis par les demandes des médias, les Services du Parlement ont fini par publier un communiqué, à 17h44, limpide. Il précise: «Une collaboratrice des Services du Parlement a fait d'elle-même, à sa place de travail, une photographie de nu, qui a été publiée dans plusieurs médias. Afin de sauvegarder la réputation du Parlement et de ses services, l'employée concernée a été suspendue de ses fonctions avec effet immédiat. Cette mesure reste en vigueur jusqu'à ce que les faits soient tirés au clair et que les conséquences du point de vue du droit personnel soient arrêtées.»

## **B. Risks for the platforms**

## User generated content - what liability?

- No special status for service providers or Internet platforms under Swiss law;
- Possible liability for the acts of a third party if service provider (i) has been informed of the unlawful character of the content and (ii) has not taken any action;
- Similar regime at European level (Delfi case)
- Ex-cursus: what will happen with section 230 of Communication decency act?

## Users' data and protection of Privacy

- Collection and processing of personal data by GAFA was the main driver of change within EU that lead to adoption of GDPR
- EUR 50 million fine issued by French authority against Google
- Twitter fined for unlawful cookie banner
- Several pending investigations against Facebook
- Risk is not limited to the platforms – operators of webpages with embedded social media buttons deemed joint controllers (see Fashion ID case)

## Users' data and protection of Privacy

The technical tests revealed a number of serious privacy infringements. Some of the key findings are summarized below:

- Altogether, the ten apps were observed **transmitting user data to at least 135 different third parties** involved in advertising and/or behavioural profiling.
- The **Android Advertising ID**, which allows companies to track consumers across different services, was **transferred to at least 70 different third parties** involved in advertising and/or profiling. This identifier was often transmitted in combination with other personal data such as GPS location and IP address. This extensive collection, combination and use of persistent identifiers enables tracking across apps and devices, and the creation of **comprehensive profiles on individual consumers**.
- All of the apps shared user data with multiple third parties, and all except one shared data beyond the device's Advertising ID. This information included the IP address and GPS location of the user, personal attributes including gender and age, and various user activities. Such information can be used to track and target these users with ads, to profile them, and consumers like them, and to infer many

## OUT OF CONTROL

How consumers are exploited by the online advertising industry

14.01.2020





## Revised Copyright Act – new obligations for host providers

- “Stay-down” obligation for host providers creating a particular risk of copyright infringement
- Obligation to set up measures “reasonably required from a technical and economic viewpoint”
- No blocking obligations for internet service provider

# III. Common tools and best practices

### A) Adoption of a social media policy

- Anticipate and limit risks relating to the use of social media by the company and by the company's employees;
- Set the Company's social media and communication strategy

### B) Creation of a social media taskforce

### C) Training of social media professionals

- Although no “social Media law”, the law applies to social media
- Company managing these platforms are still likely to see new regulations arise / news decisions (GDPR, GAFA tax, Copyright Directive, etc.)
- Among individuals, the main challenge will remain the international context



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