

HOW COMPANIES CAN MITIGATE THE RISKS RELATED TO THE USE OF SOCIAL NETWORKS BY EMPLOYEES

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Today, the use of social networks largely exceeds the personal sphere. The accessibility of websites such as Facebook, Twitter, MySpace or LinkedIn by employees has become a major source of concerns for companies. According to a study ordered by a major computer company in the United Kingdom, the cost of employees using social networks is valued to 1.5 billion Euros per year.

According to the same study, more than one employee out of two admits surfing on such websites during working hours for personal reasons.

On average, these employees spend 40 minutes per day on such websites. In France, a study in 2009¹ showed that on average employees spend 86 minutes on the Internet per day including 58 minutes for personal use. It amounts to 29 days per year which are lost for the employer for each employee.

Beyond concerns related to productivity, companies face daily threats related to inappropriate use, or even malicious, of social networks by employees, both during and after working hours. Thus, social networks greatly facilitate the dissemination of information on the Internet and therefore make companies more vulnerable to attacks on their activities, their image or reputation.

This can be illustrated by several examples:

- **Disclosure of false information:** In 2007, an employee of Apple had posted a false ad according to which the next version of Mac OS and I-Phone would both be delayed by several months. The consequences were immediate: the price of Apple stock had dropped from 107.89 to 104.63 \$ in just a few minutes!
- **Disclosure of sensitive information:** In 2008, a pilot of the British Army stationed in Afghanistan did not hesitate to disclose, on Facebook and Twitter, its missions against the Taliban classified "top secret". It caused the cancellation of said missions which had become dangerous. In some countries, like Israel, prevention campaigns have been conducted to raise soldiers' awareness on the non-disclosure of classified information to avoid jeopardizing the safety of operations, soldiers and citizens.
- **Disclosure of information on business strategy:** Sometimes, the damages generated by the use of social network do not come from an employee's malicious intent. Indeed, some people have a passion for social networks and love detailing, without any ulterior motive, every moment of their day

¹ OLFEQ Study, "Reality of web usage in companies", 2009

on social networks. However this may affect their employer. When a salesperson, sales reps, etc... discloses he met a specific individual, or had an important appointment at a particular location, he may be revealing information which will of strategic importance for his employer's competitors.

Therefore, the main question that arises for companies is to know how to act against these new threats that may have a significant impact on the company's reputation or its activities.

The main problem stems from the fact that all measures implemented shall be fully compliant with the respect of fundamental rights and particularly freedom of speech, communication and Internet access, which has been set up as fundamental freedom in France by the decision of the Constitutional Council dated June 10th, 2009.

French courts did not provide to this day useful guidelines on this subject. However, US courts have made a number of decisions which may be applied to this type of circumstances.

In the US, the First Amendment warrants freedom of speech. In various cases related to the application of the First Amendment in schools, U.S. courts created "four tests" which should be used to determine whether a restriction on the freedom of speech shall be considered as a breach of the First Amendment.

We chose to discuss here a test which could be transposed to the restriction of freedom of speech in companies in the context of restricting the use of social networks for employees.

In 1967, in the test called "Tinker Test", a court admitted a restriction on freedom of speech considering it was permitted in case of a "substantial disruption or interference in the activity of the school" or when freedom of speech "affects the rights of others." This test was applied in a recent case (J.S. v Blue Mountain School District dated February 4, 2010) in which the court considered that the online smear campaign against a headmaster was indeed a "substantial disruption" and justified the coercive measures taken against the student, despite the fact that all online comments had been made outside the premises of the school. We may conclude that there may be limits to the freedom of speech but they shall be limited to specific cases and the restriction shall be strictly proportional to the threat or the disruption.

As a result, in the United States, there seem to be no opposition to a total ban on the use of social networks in companies which is relatively common. In fact, in the US, 54% of companies with more than 100 employees prohibit the use of social networks for their employees.

In France, case law², doctrine and especially the CNIL³ are unanimous about the illegality, or even the unconstitutionality, of the prohibition of Internet use and consequently of social networks. Under French law, the use of social networks by employees creates a conflict between two rights: the employees' right to access Internet and social networks and the employer's right to control (to a certain extent) its employees'

² Industrial Court, Mars 18th, 2009: "the use by the employee of Internet for personal reason in the enterprise by using the computer hardware made available by the employer is permitted, from then that the time spent on internet does not encroach improperly on working time "

³ Commission Nationale Informatique et Libertés – French data protection authority.

activities. However if the employer's right is not disputed, a general prohibition to access Internet, including for personal reasons, would be socially undesirable and legally fragile and questionable.

Besides, the Social Chamber of the French Supreme Court decided that "barring abuse, the employee shall enjoy, inside and outside the company, his freedom of speech."⁴ Also, Article L. 1121-1 of the Labour Code states that "no one may restrict people's rights and individual and collective freedoms when such restrictions are not justified by the nature of the task to accomplish or proportionate to the aim pursued".

The analysis of American and French law on this matter can only lead to the observation that companies should implement internally a clear and detailed ICT (Information and Communication Technologies) policy, which could provide guidelines for the use of social networks in the company. Such policies are formidable educating and empowering tools for employees.

Not so long ago, companies tended to restrict access to websites like Facebook or Gmail. Nowadays, this type of prohibition tends to disappear, in particular further to the implementation of ICT policies.

The fact that social networks became such an important communication tool for businesses also had an impact. According to a report, written by the "Information System Audit and Control Association"⁵, social networks are viewed by companies as a real business opportunity (interaction and communication with their customers

and business partners). According to a recent study elaborated by "Burston-Marsteller"⁶ 65% of the first 100 major international companies have a Twitter account, 54% have "Facebook Fan" pages, 50% YouTube channels and 33% of corporate blogs.

However, a report by the Manpower Group reveals that only 20% of companies in the world have implemented a policy pertaining to the use of social media. One of the main reasons for this implementation: maintain the employees' productivity and 63% of them admit that it works. Other studies go even further saying that "surfing" at work would allow employees to be more productive. According to the results of a study carried out by an Australian doctor, Brent Cocker⁷, employees who use Internet at work for personal reason would be 9% more productive than the others. He relies on the fact that pauses help relax the mind and allow a better concentration during the day. According to him "few short and discrete pauses as a surf on the Internet allow the mind to rest, thus to promote the concentration during a workday, and ultimately increase productivity".

However, despite all precautions, a question remains as to the recourses an employer may have when he feels he suffered damage because of one or more of his employees' use of social networks.

This problem is illustrated by a case currently pending before the French Labour Law court. In 2009, three employees were dismissed after they criticized their company and their superiors on Facebook. Their remarks had been

⁴ Industrial Court, December 14th, 1999, Pierre v. Sanijura

⁵ ISACA : "Social Media: business Benefits and Security, Governance and Assurance Perspective", May 26th, 2010

⁶ Burston-Marsteller: " The Global Social Media Check-up"

⁷ Cocker B.: " Freedom to surf", Melbourne University, 2009

transmitted to management by another employee, who had made a copy of such messages. The employer relied on these messages as a basis for a dismissal on the ground of "incitement to rebellion and vilification of the company". Two of the three employees challenged their dismissal before Labour Law court. Judges of this court, which are elected representatives of employers and employees, have recently been unable to give a ruling as they have not been able to find an agreement on this question. A new hearing, said to be a tie-breaker will be held in a few months and then a professional judge will intervene to settle the case. The judge will then decide between freedom of speech of the

employees (Article L 2881-1 of the Labour Code), the apparent disorder that the employees may cause within the company and the power of sanction the employer holds in the event of serious harm to the interests of the company.

This decision is eagerly awaited. Indeed, firstly similar cases have since been presented to court (a case of social workers of an association of defence of women victim of domestic violence's from Perigueux to be debated in March 2011). Moreover, both employers and employees are eager to know the limits of their respective rights and duties.

Ichay & Mullenex Avocats is a French law firm focusing on all legal issues related to the new technologies in France and abroad. They are considered experts in intellectual property and Internet law, e-commerce, online gaming, data protection. Ichay & Mullenex Avocats also assists its clients on all issues related to financing, mergers & acquisitions, restructuring, etc. and advises them on their litigation and arbitration procedures.

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