

COOKE, YOUNG & KEIDAN

Social Media and Litigation

Philip Young

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Reputation management/Comms

 **Donald J. Trump**  [@realDonaldTrump](#) 

It's freezing and snowing in New York--we need global warming!

RETWEETS 4,223 LIKES 2,391 

11:24 AM - 7 Nov 2012

 1.7K  4.2K  2.4K

 **Elon Musk**  [@elonmusk](#) 

Am considering taking Tesla private at \$420. Funding secured.

9:48 AM - 7 Aug 2018

15,299 Retweets 85,378 Likes 

 6.1K  15K  85K

 **Elon Musk**  [@elonmusk](#) · 7 Aug 2018 

Shareholders could either to sell at 420 or hold shares & go private

 1.3K  2.1K  19K

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 **Donald J. Trump**  [@realDonaldTrump](#) 

Meryl Streep, one of the most over-rated actresses in Hollywood, doesn't know me but attacked last night at the Golden Globes. She is a.....

RETWEETS 37,861 LIKES 124,285 

3:27 AM - 9 Jan 2017

 **Barack Obama** [@BarackObama](#) 16m

"I've cut taxes for those who need it: middle-class families, small businesses."—President Obama

[Expand](#)

 **Lindsay Lohan** [@lindsaylohan](#) 9m

[@BarackObama](#) we also need to cut them for those that are listed on Forbes as "millionaires" if they are not, you must consider that as well

[Hide conversation](#) [Reply](#) [Retweet](#) [Favorite](#)

22 RETWEETS 14 FAVORITES 

10:41 PM - 6 Sep 12 · [Details](#)

 **Donald J. Trump**  [@realDonaldTrump](#) 

Obama is, without question, the WORST EVER president. I predict he will now do something really bad and totally stupid to show manhood!

RETWEETS 2,020 LIKES 2,049 

6:07 PM - 5 Jun 2014

  

Marvin Morgan

2 OF 25

In January 2011, Aldershot Town's Marvin Morgan faced disciplinary action after responding to fans who had booed him, by [tweeting](#):

“Like to thank the fans who booed me off the pitch. Where's that going to get you! I hope you all die.”

Service (1)

- Service by alternative means:
 - CPR 6.15(1) allows Court to Order service of Claim Form by alternative means. Can be: method and/or place of service. CPR 6.35(b)(a) extends this to the Court granting permission for service out. CPR 6.27 (docs other than Claim Forms) is parasitical on CPR 6.15
- Required:
 - Good reason. Not discretionary (see Kaki v. National Private Air Transport Co [2015] EWCA Civ 731)
 - Court looks at all relevant circumstances to determine good reason (Société Générale v. Goldas Kuyumculuk [2017] EWHC 667 (Comm))
 - Application supported by evidence
 - Cannot be contrary to law of country where docs are to be served

Service (2)

- By Facebook:
 - CMOC Sales & Marketing Ltd v. Persons Unknown & Ors [2018] EWHC 2230 (Comm) (service of Claim Form etc.)
- By Whatsapp:
 - CMOC, as above
 - Gray v. Hurley [2019] EWHC 1636 (QB) (service of Claim Form on D in New Zealand)
- Via website:
 - Pirtek (UK) v. Jackson [2017] EWHC 2834 (QB)
- By Twitter:
 - Unreported Lewison J case of 2009: service of injunction permitted by Twitter on anonymous D

Service (3)

- By text message:
 - NPV v QEL and another [2018] EWHC 703 (QB): service of injunction by text message
- By LinkedIn or Instagram?
 - (Permitted in the US: Harleysville Insurance Co. of New Jersey v. Mega Security Corp)
- Practical tips:
 - Explain (in evidence) form and operation of social media to the J
 - Ensure Order doesn't just cover CF but all other docs in the proceedings
 - Include deemed service provision. Also, permission to serve out?
 - In cases of anonymous Ds, think about self-identification orders
 - Do it by the book! Also, if possible, seek multiple forms of alternative service
 - Consider combining it with other cost saving innovations, i.e. service by data room (CMOC)

Evidence (1)

- SM is often very useful evidence
- Merits
 - Conversations often very important in many types of cases, i.e. fraud, conspiracy, etc.
 - Interesting example: *Forse & Ors v. Secarma & Ors* [2019] EWCA Civ 215 (interim springboard injunction in team move case. Whatsapp messages attached to judgment – “Order of the Phoenix”).
 - (Banking litigation – bank IMs, vs burner phones and Whatsapp)
 - Other relevance, i.e.: location evidence, finding people (including Ds), connecting people, etc.
- Character/credibility
 - Casual conversations can reveal a person’s true views (and sometimes character)

Evidence (2)

- Asset investigation/tracing
 - Is it the same dog?
- Challenging asset disclosure given by Ds under DOs ancillary to freezer



Disclosure (1)

- Often overlooked: social media = disclosable documents!
- Implications:
 - Include SM in initial advice to clients about preservation of docs and about not creating new docs
 - Beware destruction of SM, i.e. (a) *Monroe v. Hopkins* [2017] EWHC 433 (QB) (para 84); and (b) a foreign example: *Gatto v. United Airlines Inc* USDA, District of NJ (client “cleaned up” Facebook. Led to spoliation motion, adverse inferences at trial)
 - May need to conduct disclosure review of clients’ SM and give disclosure
 - May need/want to conduct disclosure review of oppo’s SM. IT/forensics assistance?

“Ah deleting chat is to reduce the chance of something leaking and Mark getting shit to no end from LJ and possibly legal consequences due to the non poaching clauses and all that”

(from the Whatsapp exchanges scheduled to *Forse & Ors v. Secarma*)

PR/Comms (1) (Also: just what is covfefe?)

- In media-engaged litigation, think about engaging specialist reputation management/comms expertise
- But then manage them!
- Caution:
 - contact with other side or the Judge
 - take control of SM accounts of rogue employees / others (Monir v. Wood [2018] EWHC 3525 (QB))
 - risk of defamation (Monroe v. Hopkins [2017] EWHC 433 (QB))
- Finally, it's not just parties and litigants ... it's Judges too who can risk reputational damage. This tweet (and two others) by Judge Kiichi Okaguchi earned him a reprimand from the Japanese Supreme Court:

“I will upload more and more photos of my naked body, my body with only white briefs, and so forth.”

Q&A?

“How can we be free when we are prisoners to social media, in a world without privacy? How can we be free when our every movement is tracked and every conversation is recorded and can easily be held against us? How exactly are we free if we are tethered to our cell phones?”

Tom Green

“I myself get nervous when I write something on social media. I make sure I don’t write anything wrong.”

Disha Patani

“The problem with material on social media is that its authenticity might be questionable.”

Abraham Lincoln

COOKE, YOUNG & KEIDAN

Cooke, Young & Keidan LLP

21 Lombard Street

London

EC3V 9AH

Tel: +44 (0)20 7148 7800

Fax: +44 (0)20 7283 1499

Email: info@cyklaw.com