



# Social Media Marketing - The Legal Basics



How do you leverage social media while staying within the bounds of the law? Lawyer Brigit Rubinstein shares business protection basics.



**Brigit Rubinstein**

**James:** James Schramko here. Welcome back to SuperFastBusiness.com. This is episode 886. Today, we're talking about legal matters, a very interesting topic, and a necessary topic. If you have any size business online, you're going to encounter a legal situation at some point. And sometimes, if you're unlucky, it'll surprise you, and there'll be huge implications.

If you're wise and you're listening to podcasts like this, you'll learn some of the things to avoid before you get there. And I've really, heavily believed in having good legal advice. So today, we're speaking to an actual real life lawyer, Brigit Rubinstein, welcome to the call.

**Brigit:** Thanks, James. I am real, and I am alive.

**James:** For me, it's always really cool to be chatting with a lawyer and then afterwards, I won't get a big bill.

**Brigit:** Unusual, it will never happen again.

**James:** [We've had several legal experts on this podcast.](#) And it's because it's part of your team. You need a team. In my team for the business, we talk about the obvious stuff, we have our assistants doing administration, we have podcast editors, we have people helping us edit our websites, we have people even writing things for us.

Then the less obvious stuff, we need good accountants and we need good lawyers. We need to be trading under the right entity. We need to make sure we're not exposing ourselves to any enormous risks that could wipe us out. And you don't have to look far to see examples of train wrecks, like things going absolutely off the rails.

## **Why legals are important in social media**

I was reading one this morning about a store that has had a huge backlash, and customers have abandoned them and basically rubbed them through the mud because of one comment they put on social media. So today's topic is social media marketing, the legal basics. We're going to be talking about things like do's and don'ts, what should we be aware of that we may not be aware of? Because we probably know lots of regular legal stuff, but this is a new territory.

I mean, if you go back two decades ago, this wasn't a thing, right? And social media, I would have to say, as a user and a marketer, so I'm kind of like on both sides of the coin here, it seems to have escalated in the last year or so. It seems more divisive. It seems there's a lot more aggression. There are more keyboard warriors.

We have topics fueling and obviously, we have a pandemic. There's the issue of vaccinations - even just saying that, I'll probably get labeled somewhere on a social media platform just for saying that word. I'm not expressing any opinion on that. I want to state that clearly. But I'm saying that is a topic that probably more than any lately has fueled enormous tension online.

And a lot of business owners have to take a position on it, which is an interesting one. And then we've got other things, we've had an election in the United States. And if you have a market outside Australia, like I do, that's always a big drain, the social media just gets absolutely decimated, in the lead up to and during a campaign like that.

We've had disasters, we've had all sorts of things going on. So it's often political stuff. There's the pandemic stuff. People in general, I think, are a bit more fragile, a bit more worn out, a bit more on edge. They've had changes in their life and their business. They can't go and see family, they don't get the pressure release as normal. People with a differing opinion will challenge them on things.

### **Are you aware of these things?**

So I think it's probably easy to get in trouble, is where I'm getting at. What sort of things do you think we should be aware of from a social media legal perspective?

**Brigit:** Yep. So I suppose the first thing that I would say is, within all of that context that you've just set out, is also the fact that people are using social media much more, we're all online more. And I think in July, I read a statistic that 57 percent of the world's population is using social media. So it's got incredible reach. And yet, I think this is what distinguishes it from traditional advertising, it has this strange, intimate feel to it. So that's where I think a lot of the complexity comes in.



There needs to be more transparency on social media, so that consumers aren't manipulated by their sense of intimacy and authenticity, especially when you consider the reach. So really, in terms of social media marketing, the principles are pretty much the same as with traditional advertising. And primarily, those are the principles that are in the Australian Consumer Law.

And to really just simplify those, it's basically, don't mislead and deceive consumers, and don't make false statements or representations about your products and services. And those are the two core principles that guide everything else from there. And I guess the important part is understanding how to apply those principles in social media, because it's not always very clear.

**James:** Yeah, I mean, if you're doing any kind of advertising, the platforms themselves, they're pretty hardcore, you know, they slap you down, they'll turn off your accounts, they'll ban you, they'll shadow ban you. If you're off the narrative they want to push, then they won't show your stuff to anyone. So you could be triggering their algorithms and preventing yourself from getting exposure just by the angles that you take.

Now, I work with some people in markets where it's hard to get reach. Some of the platforms don't like some of the topics. One classic example is a market where my customer has a product that helps people stop drinking alcohol. So if they want to go alcohol-free, but he keeps getting banned, because they think he's dealing with alcohol-type topics, it's like a gelignite topic.

In terms of the not-misleading-people, I mean, it seems like a core human thing that we shouldn't do that. Right? And it seems like, eventually, people come unstuck, they'll have some kind of action taken against them, whether it's from a governing body, whether someone dobs them in, that's an Australian term, by the way, for our overseas audience, if someone reports you that's dobbing them in. It's kind of an un-Australian thing. It's viewed dimly, but it does happen. Definitely people around you or consumers feel upset about something you're doing, they'll turn you over to the authorities and make a report.

The other one that I think is fascinating is when advertisers pop up in your feed, offering something, the comments that happen underneath them are often vitriolic. They are outrageous comments of pure hatred. And there is one interesting distinction between platforms like LinkedIn where you have to be a real person to comment versus some of these other social platforms where, I mean, Facebook tries to be a real person, but Twitter, especially, and Instagram, to some extent, and YouTube, comments are just outrageous.

I'd love to know also, we should probably cover the basics about defamation and libel, because I have seen people actually get fined and have to pay court costs for saying something nasty about someone else, and there was no defense. So can you talk about the basic, I mean, I learned this stuff in commercial law practice 20 or 30 years ago when I was studying accounting, but I realized a lot of business owners actually don't know that you're not allowed to just slag someone off in public.



## When are you guilty of being misleading?

**Brigit:** Yeah, so I definitely want to talk about the third party comments. But just to go back to something you said earlier, you were saying that, you know, obviously, it's almost like a basic understanding that you shouldn't be misleading consumers. I guess I just wanted to say that most of the instances that I've encountered where consumers have been misled, it hasn't necessarily been a deliberate attempt to lie to customers.

It's often a misunderstanding of the law, and a lack of understanding of how you actually apply those principles. So one of the reasons why I think that our services are so important and why these kinds of educational pieces are important is really you just want to be given the basic tools to know how or how not to mislead consumers. And believe it or not, it's not always completely obvious.



To give you a brief example, you can say something that's true, but that's still misleading. And a lot of people don't understand that. And so for example, if you were to leave out an important part of a sentence, and it was a half-truth, that could be misleading, but you may not have intended to mislead consumers.

In relation to third party comments, really, really topical at the moment, and people are talking about it a lot, there's two areas where I think it's a concern. The one is, are you liable for defamatory comments by third parties on your social media pages? There was a very recent high court case. I don't know if people have been following it. It was against a few large media corporations, where they had published news stories about Viola, an individual and alleged criminal actions.

And as a result, people were leaving really, really defamatory comments about Viola on the newspaper comments page. And Viola took the media publications to court for defamation. So the question that was put before the court was, can a newspaper who has not written these comments, has nothing to do with those views, doesn't endorse the views, can they be responsible for defamation from third party people making highly insulting comments about this young guy?

And the court found that the newspapers could be seen as publishers, they haven't yet found that the newspapers are guilty of defamation, and I'll explain to you it's an important distinction. But what they said was that, if you are the owner of a social media page, and you're commercially benefiting from the engagement that takes place through enabling comments, you can't then raise your hands in the air when that commentary becomes defamatory, and say, Well, it's got nothing to do with me, especially in circumstances where there are a number of options.

You could disable comments. You could disable comments and vet them before you publish them, you could moderate frequently. But it was groundbreaking in the sense that it was the first time a website or social media page owner was found liable for posts that they didn't know about. And so we're waiting for the second half of that judgment, which will say whether there's also a defense to the claim of defamation of innocent publication.

So they haven't been found liable for defamation, but they have been found to be publishers. So that's really, really been a big wake up call, I think, to social media owners, and we can discuss some steps that they can take to mitigate those risks. The second element is whether a page owner is responsible for misleading and deceptive comments on their website.



And this has been clearly answered, when a page owner, let's say that you make a product that's supposed to deal with allergies, and a couple of consumers comment on the page that, This also completely cured our asthma, and you have no therapeutic basis to make that claim, if you don't delete and remove those posts, then you as the page owner will be liable for misleading and deceptive comments to consumers. And there could be hefty, hefty fines for that.

## How these laws translate in the US

**James:** How do they translate to the US law? We hear a lot about this, the US governing body is really harsh on medical claims and financial claims, and they do take people down. I'm not sure, is it called the FTC? But we hear about it a lot. I imagine this is probably universal across most Western places, you're going to have similar sort of levels of law.

**Brigit:** Yeah. So we're very much in line with international standards. And to just give you a sense of how seriously it can be taken, ASIC recently led criminal and civil charges against a travel insurer and underwriter because they were making, I suppose, potentially misleading claims about their travel insurance products, and they were incentivizing people to buy their travel insurance products based on out-of-context statements from government websites.

And ASIC, first of all, sued them in civil court and got 1.5 million damages. They were ordered to remediate customers, so pay back the customers who had been misled into purchasing travel products. And then ASIC led seven criminal charges against them for making false and misleading claims. And that could be a penalty of up to \$17 million or more.

So our regulators are definitely not messing around. They take things seriously. And I think another thing to bear in mind is that it's not just the big corporations that are in the firing line. Especially on social media, there are a lot of small businesses that have a significant reach. And the regulators will look at that.



They won't only look at the size of the business. You know, if you have a massive business with a small reach, that's one thing. If you have a 10-person business and they've got hundreds of thousands of fans or followers on social media, there could very well be the target of legal action if they get it wrong.

### Allegations and fake testimonials

**James:** I've seen some legal action against one, there was a celebrity chef who had legal action from ASIC, I think, for promoting a product that had some - do I have to use the word allegations? I don't know what the context here, but it was saying it did certain things. And some people say, you can't really prove that.

And so, it seems like if you pop up, you get a bit of a following, or you get a bit of fame. There's also food bloggers who fake injuries or illnesses. There are Go Fund Mes that are set up with no real basis to the purpose of the Go-Fund-Me. So like, it is a minefield. And absolutely in the online space, I've seen lots of sites where there are fake testimonials. That used to be a real thing in the internet marketing space 10 years ago.

I saw people presenting from stage. And even though their products changed over the years, the testimonials were exactly the same. And when I questioned this person about it, he said, I just made them up. Those people, like how serious could it fall back to the actual director? And God help them if they're a sole trader, right? There are different levels of protection that someone might have if they operate.

Would you say there's a minimum level that you'd want to be if you're, say, a five- to 10-person online-based business? What sort of structures would you want to see in place, and how could you, at least, get some firewall against a catastrophe happening that was not malicious, but just accidental?

**Brigit:** Yeah. So testimonials, obviously, there's been quite a bit of history of court action taken against parties for fake testimonials. I'll divert very quickly, just to tell you about a case where the Meriton Hotel tried to manipulate customer reviews, by essentially providing, whenever a customer stayed there and was likely to have an unhappy experience, they would doctor the email address, and then send off to TripAdvisor only valid email addresses of happy customers. And then unreachable email addresses for customers that were likely to be unhappy.

And so the regulator found out, the ACCC took them to court, they were found liable, a couple of million dollars damages, and I think did significant harm to their reputation. So it still happens. People still do these kinds of things.

## **Ways people game the system**

**James:** Humans manipulate, they game the system. I saw a story last night that was sad. I made a video about - it was a rant video, me talking about how it's really hard on your team members if you want to install software, screen-tracking tools, right? I don't like it. I think they're going to hate working for you. So I made a video about that.

Someone said their team member was showing, like, a 95 percent efficiency. And when they probed further as to how they were able to do that, it turns out when this person was going off to the bathroom, they were getting their husband to move the mouse around on the screen. And I'm like, that is a classic testimony to how people want to game the system.

It definitely happens with reviews. I can see how they're cherry picking the good ones and discarding the bad ones. I mean, one way that I've seen people sort of cover off a little bit with the nice words that people say on the site, they're kind of like a resume, right? They're usually only going to pick the good ones to put on their site.

Usually, they'll say, These results are not typical. You may go even better, or you may get nothing at all.

**Brigit:** The disclaimer.

**James:** I actually have a full one-page disclaimer that really, you know, it's up to the person to be able to - I don't know if they're going to get a result or not. I can give them every possible chance. But there's still occasions where it won't happen, and they should know that going into it. And we do little things like having a tick box with terms and conditions before someone can order.

**At what point should you see a lawyer?**

We have fully done by a proper lawyer, disclaimers, terms, conditions, privacy policies, and all of those things. These are things people skimp on in my market, because they start as small operators. They might start their business in a bedroom. Make \$10,000, \$20,000, scale it to \$100,000. Then next thing you know, they're doing a few million dollars, and they've never even visited a lawyer once or spoken to them about getting protection. So that's why I'm curious. What's the go-to minimum?

**Brigit:** So what I would say for businesses that are just starting up on social media, and they're bootstrapping, they don't necessarily have the funds for a lawyer, is that the ACCC website is an absolute wealth of information on all of these things, on testimonials, on reviews. But in terms of what the expectations are from the ACCC, who regulates them, the Australian Consumer Law, as to how often do you have to moderate your website, you're liable for the comments, what is expected of you, before they find you liable for having written that comment or published that comment.

And so the ACCC says there's two key things to look at. First, how big is the company? If the company is big, they expect you to be monitoring after every single post what is being commented. They expect you to monitor the social media pages seven days a week, 24 hours a day. You should have the resources to do that.

And with a company that size, they ultimately expect that a defamatory comment or a misleading comment should be dealt with almost right away after being posted. If not before, you know, you may decide that you actually need a moderation policy before you publish comments. Depending on the outcome of the defamation case, many media organizations may go that route.

The second thing that the ACCC will look at is, okay, let's say you're a really small company, but you've got a really, really wide reach, which, you know, as we know, there are a lot of companies like that, the ACCC will expect you to put in place resources that allow you to monitor really frequently, so that you can pick up almost on a twice daily basis if there's any problematic comments.

And in terms of testimonials, reviews, things like that, you should really have a comprehensive social media policy. Also, not just for yourselves, and your employees, and your company, but also for people that are visiting your site, they should be made aware what's acceptable, what's not acceptable on the website.

## **On incentivizing reviews**

And it's interesting also, I think a lot of, again, you know, we talk about people gaming the system, etc. But really, I encounter a lot more sort of ignorance than malice in this part as well. I'm a member of many, many business groups online, and I'll often see, for example, people ask a question, How do I deal with a bad review? And many people will come back and say, We'll go leave positive reviews for you now. So that's illegal, basically.

**James:** On that note, a lot of people pay for reviews.

**Brigit:** Yeah, that's a no-no.

**James:** I mean there's plenty of companies, they'll say, Listen, you send us a video talking about our product in a positive way, we'll send you \$100, or whatever. And they don't disclose that on their site. And I think if a consumer relied upon that page to purchase and found out that that was paid for, they might be upset.

**Brigit:** Absolutely. I mean, people rely more and more on reviews and testimonials. But on that point, interestingly enough, you can actually incentivize people to provide reviews. You just have to basically, first of all, offer everybody the same incentive. So don't just incentivize people you think have loved your services, you've got to make it an incentive for either a good or bad review.

So for example, you could say, Have a free Margarita at our bar for an honest review of your experience at our hotel tonight. And then best practice would be to also disclose that incentive under the review by saying, our guests received a free Margarita for their honest review of their experiences, and then you're covered, and you may still get those positive reviews.

**James:** What if they delete the one-star reviews?

**Brigit:** Again, that is classic, misleading and deceptive. It's breaching the Australian Consumer Law.

**James:** I'm just anticipating someone listening to this.

**Brigit:** Well, absolutely. People do it all the time.

**James:** Like, I don't incentivize testimonials. What we do is we have a net promoter score go out to people, and I also have a follow-up email. If you purchased a product from me, then a week later or two weeks later, you'll get an email from me saying, How was the training? You might reply back, It's rocked my world. I had no idea this was out here. I'm following the framework, and I got this amazing result.

And then I might reply back and say, Would you like to share your story on a podcast, or, Can I use that quote on my website? And you might reply back, Yes. And that would probably go on the website. It seems like that would be okay.

**Brigit:** That would be absolutely okay. And I mean, what you're really doing is you're investing in your customer satisfaction in a genuine and real way. And then you are telling people about their experiences.



## Do you let people know something is sponsored?

**James:** I do a lot of podcasts with case studies, and we call it a case study. I know my website's probably well and truly covering the aspect. I'd say almost all of my audience knows which products I like. We have a [products page](#), we recommend the products. And we have a disclaimer stating that I could make an income from it. So we're trying to cover all the basics.

And it seems like a lot of the social platforms these days will give you the option to let you know if it's a sponsored post or an endorsement, the influencers seem to have that option on Instagram.

**Brigit:** Yeah. So there's been a lot of coverage recently of how do you disclose sponsored content. So, I mean, I'm sure you're aware that there is a code of conduct to the advertising, the AANA, which is Australia's advertising authority. And their sort of golden rule is you must disclose when content is sponsored. There are no legal penalties if you don't comply with it, it's purely voluntary.

But if you breach the code, what they do is they will name and shame. And so, I'm sure you've read, there's been lots of articles around recently.

**James:** It's cash for comments, you know, radio announcers getting freebies.

**Brigit:** Exactly. Things like that.

**James:** Look, it is a big thing in our market, because we do a lot of what we call native advertising. And my business model really does work around me finding and aligning perfect partners for my audience, and helping people find them. But they also know that's my model, and we talk about it. And I actually go to the effort now.

I say, like, if you're not a partner of mine, but just imagine you were, I might say, Look, Brigit and I work together to bring you this information. And if you get in touch with Brigit, then that's great for both of us, you know? So there'll be that sort of discussion around that. But probably 85 percent of the content on my podcast is not partners. I'm not getting paid for this episode, and you're not paying for this episode. So it's like, we're just having a conversation.

I do notice a lot of news agencies have switched off comments. Maybe it just got too hard. I just want to clarify something. I think what you're saying is, if I had a Facebook page, and someone makes these comments, would they come after me or Facebook, or both of us?

**Brigit:** You.

**James:** Facebook, they've really got this game sewn up, haven't they?

**Brigit:** They really do.

**James:** They've got whistleblowers out there alleging that they know how addictive it is. And they know that it's bad for people, but they still do it anyway. They just push it to the side. They'll ban you or stop you from advertising things they don't like. They'll put a warning sticker on comments that don't fit the narrative, or they'll shadow ban you. But if someone does something wrong, then it'll be on you. That's genius.

**Brigit:** Absolutely.

## When guests aren't what they seem

**James:** On our own website, we require people to be approved for us to publish a comment. And one of the reasons that came up is I had a guest a long time, years ago, on my show. And he was very endearing and enigmatic, and people were drawn to it. And then what we started getting are these comments on the post were people who, you know, were alleging that this person didn't service them well, I'm saying this kindly.

There were lots of cap locks involved and words that we'd have to censor. And I was very uncomfortable about that.

**Brigit:** How did you deal with it, James?

**James:** Well, firstly, I actually contacted my guest, and I said, Hey, listen, we're getting these comments. I'm wondering if you could perhaps get in touch with this customer and see if you can resolve their concerns. His response was, Delete my post, cancel my program and never contact me again. So I'm like, Wow! That's like, if I've ever seen an admission.

These things kept coming. And then we'd get in touch with the people and say, Listen, sorry, but we don't have contact with this person anymore. You can try their support things or whatever. And then we would delete the comments. But recently, we just deleted the whole post. It was a shame because it brought lots of traffic to my site, and I was able to siphon that traffic into other things.

But at the end of the day, it's about values. And if this guy's not serving the market, then I'm not going to be catching traffic for him. I'm going to leave him to deal with his own demons. And it's only my opinion, but I suspect he probably does provide a sh\*tty service, and I don't want to be a part of it. I don't want to be associated with it. I don't want to endorse it. And I don't want to deal with his train wrecks that he's creating elsewhere.

Someone's going to email me saying, Who is it? I won't disclose that, so don't bother. But there's only two episodes I've ever deleted from the 886 episodes so far, and one of them was this one. And the other one was someone who, I got contacted by a lawyer saying, We demand you cease and desist this post, it contains inaccuracies, and it's fraudulent in nature or whatever.

But what I found out is that our guest had lied about founding a business, and had said that he grew it into this fortune business. And then I emailed him and said, Hey, listen, we got this legal thing from your company, is what they're saying true? And he goes, Yes, unfortunately, I've behaved badly. And it is actually true.

So I had to delete that. And as a result of that, we research guests more thoroughly. I mean, you come to me recommended by our mutual contact [Ilana Wechsler](#), who is a partner of mine, and who I am helping grow the business. And the trust level for me is much higher for a first-person referral like that.

And then I still have the choice whether I publish this episode or not, after we record it. So if you're listening to this, then it passed the test. But we definitely scrutinize guests more, because I recognize that it does fall back on me.

**Brigit:** It sounds like you'd really had firsthand experience of the dilemma that content producers face. I mean, it's an awful dilemma.

**James:** It's hard. There's so many bandits out there bullsh\*tting, you know, rented Ferraris and Uber, they hire places, a mansion for a weekend to take pictures, and then they use that for the next three years. When I look under the hood of some businesses, I'm still shocked. It shouldn't be so easy to shock me now. But I've seen things that, you might see a baller who's making 10 million bucks a year, and you tip them upside down, you wouldn't even shake 20 cents out of their pockets. It's unbelievable.

It even happened when I was at Mercedes-Benz. A lot of our high-flying clients would come in, I remember this guy called Kovelan Bangaru, and he bought a Maybach. And then, a while later, he was on TV. There was some allegations of some kind of fraud, and he disappeared from the country and everything was repossessed. And like, you know, it happened a lot.

So yeah, basically, you've got to do your research and your due diligence. But I value my audience so much that, you know, the only reason I've been around in this industry so long is I protect my own reputation. And I don't want to get in trouble.

### **Sifting through some of the legalese**

Now, we've used lots of words that people probably don't understand why we're talking about. I'd love it if we could do a little bit of legal bingo. If you could just tell me what these words mean, in layman's terms.

**Brigit:** Okay.

**James:** Let's say we have a customer who's very unhappy, and you weren't able to service them. And they asked for a refund and you decide to offer them a full or partial refund, and you use the words, without prejudice. What does that mean?

**Brigit:** Without prejudice means, I'm going to give you this, but don't think you can come back and hold this against me at a later stage and say, Look, you must have been in the wrong because you did the partial refund.

**James:** Exactly. So it's basically saying, it's not an admission of liability. And you can't use this against me.

**Brigit:** Exactly. Yeah.

**James:** What about when I use the words, It's my opinion? Why do you think I'm saying that?

**Brigit:** So, I guess, there's two reasons that you'd want to be saying that. The first is that you want to make it clear that you're not stating a fact. So if, for example, you were sued for defamation, one of your defenses might be that it was your honest opinion on reasonable facts. So that's great. And also, you want it to be clear that you're not necessarily making a recommendation to everybody to do X. It's just your opinion.

**James:** Great. And why do the news agencies use the words alleged or allegation?

**Brigit:** Because they just want to make it clear that nobody has actually yet been found guilty or liable for anything. It's just, at this stage, someone said that someone did something. It's nothing more than that.

**James:** Great. All right. So that's very helpful. I think that's just like a little basic toolkit that might help someone stay out of that first line of fire. I'm really interested, in terms of, a lot of people in our industry affiliate, they sell products, other people's products for commission, but what they probably don't realize if they have their own affiliates, they're most likely, completely liable for the claims of the affiliate. Whatever the affiliate says to make that sale, if it's not true, they can still be caught on that, right?



**Brigit:** Absolutely. So the example that I gave you about ASIC and the insurer, they were actually liable. Many of those representations weren't even made by them, they were made on a third-party website, Expedia. So you are definitely liable. If you have some element of control over the whole process, and it's your product that's being promoted in some way, there can definitely be potential liability.

**James:** And one of the ones that really used to piss me off and probably, it was in my top three reasons why I axed my own affiliate program, or I'll use another legal term here, but I found quite a few affiliates were passing off. I'm wondering if you can explain what that means in layman's terms.

**Brigit:** Sure. So basically, we all know, competition is inevitable. Most of us understand that you can't protect a business idea. But if somebody crosses that line, in a way that they make their product look so much like yours, either through their marketing material, either through copying your marketing material, or your social media, through the packaging, or through the product itself, if they copy it in such a way that consumers are going to be confused between the two products, and therefore, they are passing off their goods as yours.

So people are buying goods from the copycat thinking that they're buying, Wow! This is James Schramko. This must be fantastic. I'm definitely going to buy this. And it's some cheap knockoff from wherever.

**James:** Or from JamesSchramkoreview.com, or whatever, you know, like, they used to cybersquat my names, they would take images directly from my website and put it on theirs. Now, some of them were actually my own affiliates. So they were selling my stuff as an affiliate, but not disclosing they were an affiliate, and people would think that was my site.



And the one thing that annoyed me the most, probably, apart from when they made claims, were like, they would misrepresent what I actually sell to get the sale, which is a classic old sales dog trick, right? You've got to rein in the salespeople. They would squish my images. They'd take a perfectly good image of me, and then mutate it and stretch my face wide or make me tall and skinny like, so it basically impeded on my brand values, it's like, I want to be at this level in the market, and they'd bring me down to the gutter with some cheap ass, horrific website that's on my name domain.

**Brigit:** And they didn't make you look good.

**James:** And people come to me like, Man, I can't believe you're putting out this junk. Like, you're better than that. I'm like, This isn't mine. And like, Okay, that's it. And then I asked them, Please just stop. I put an express condition in the affiliate terms, you know, not to bid on my own name, not to use a domain name with my brand names in it.

## Why it pays to get trademarked

I then trademarked at least SuperFastBusiness and [SilverCircle](#), and my [surf brand](#), because I've had people use my own name, and I've had to tell them to stop. But the scariest one of all, was when people started saying, Man, you're really big in the UK. And I'm like, I'm big? I mean, maybe 15 or 18 percent of my business is.

But I found out that British Telecom had set up their superfast internet divisions, and they were running events, and they registered SuperFastBusiness.co.uk. And they were building out YouTube channels and social media stuff. And putting, I'm going to guess, millions upon millions of dollars into budget, and starting to drown me out a bit on my own name.

I was like, Okay, I haven't protected the UK market. They'd beat me to trademark, so I couldn't tell them to stop. And I just had to wait it out until they just suffocated themselves, like all large enterprises eventually do, almost all of them. They moved on to the next thing, which was good. But it was really painful for a while there, it looked like I might have to move brands just because I didn't protect myself enough.

**Brigit:** Yeah, so lots of lessons there. The first lesson is, register your trademark in all the countries you plan on doing business. You don't have to wait until you've actually started trading in that country to register in that country. You just have to have an intention to do so. And you definitely want to do that right away. In terms of passing off, there are also remedies in terms of the Australian Consumer Law.

We just wrote an article on our blog about copycats. And of course, if someone copies your website content or anything like that, there's also copyright infringement, which, although you wouldn't be able to sue for trademark infringement in the UK without having a registered trademark, you would be able to pursue copyright infringers in the UK and America, if they copy any of your images, or any of your marketing material or anything like that.

And obviously, what you identified, James is, it's not just the lost sales that you can almost deal with, it's the fact that it seriously can damage your reputation if some arbitrary person is selling inferior services or products under your name, the damage is potentially, really, really significant.

**James:** It's huge. If you're like me, your name is a big part of the business. I'm not going to compare myself to Elon Musk, or Richard Branson, or Bill Gates, or Steve Jobs. But when I say those names, we know all about them and their business, they use that halo. So it's worth having the brand perpetuate if you possibly can.

**Brigit:** Yeah. Well, in your case, you are the brand.

**James:** I am. Yes, to a large extent. And a lot of the work I do now, thankfully, is helping people grow their business. So they are the brand, but I'm always advocating for them. Just having a little legal toolbox is enough to stay out of trouble. I mean, I actually, when I take on students, one of the things I check is, do they even have a trademark on their own business?

And I'd say, probably seven out of 10 don't. And in two out of 10, someone else does have the trademark for the brand that they're actually trading as, and I'm like, Did you realize you're built on sand here? Like at any point, you can get that nice little phonebook, and the phonebooks, for our younger folks, they used to be these thick things, a thick pile of documents arrive at the door saying you're going to lose everything, and they want you to hand over everything and give them all the money that you've made and everything. That's like, it's crazy.

**Brigit:** And rebrand.

**James:** It can happen. So Brigit, thanks so much. This has been a lot of fun. I'm going to mention your website, [leveluplegal.com.au](http://leveluplegal.com.au).

**Brigit:** Thanks, James.

## What you can do after listening

**James:** Clearly, you're across these topics. What would be your intention for someone who's listened to this episode that they could do as an action step for today? What would you like to have them do?

**Brigit:** Yeah, so I think, really, what people need to do is educate themselves as much as they can about social media marketing, and a really good place for them to start is the ACCC website. And once you've got those basics, if you are ever going to start a business, if you're going to produce a lot of marketing collateral, I would definitely consult a lawyer in that space, to just make sure that your foundations are really solid.

As James said, we've had many, many clients that are six months down the road, they get a frightening cease-and-desist letter, and they've got to basically shut down their business and start again. So get it right to begin with, and a good starting point, at least in terms of what you should know about, it's not going to tell you everything, but it should tell you what you'll be aware of, is the ACCC website.

**James:** Nice. And it sounds like you're putting some blog posts up there at [leveluplegal.com.au](http://leveluplegal.com.au).

**Brigit:** Yeah, we've got lots of really helpful, plain English blog posts, specifically for businesses and startups that are trying to understand their obligations around marketing, also trademarking, copyright, all of those issues. We have lots to read and learn from.

**James:** Thank you so much. So we're going to put up some show notes on episode 886 at SuperFastBusiness.com. We'll put this recording, we'll have a full transcription available. And I've really enjoyed getting to know you, Brigit. I think this is such an important thing. It's really like putting armor on when you head out to battle.

You don't want to be the only person out on the battlefield with no armor, because it just takes one swing of the axe, and you're out of the game. So thanks so much for helping us be a bit stronger out there. And, of course, I feel like there's probably more things we could talk about in the future. We may get you back.

If you've got a question around law stuff, or you'd like Brigit to come back and go deeper into some of these things, then send me an email, let me know, and we'll send out a polite invitation.

**Brigit:** Thanks so much, James. So lovely to chat to you.

**James:** You too.

**Brigit:** Bye.



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