



Content Marketing: Breaking Through the Legal Bottleneck In New Zealand

Is Your Legal Department Mutilating Your Content, Killing its Impact and Delaying Your Deadlines?

In this short guide and checklist – based on interviews with New Zealand's top media law experts – we show you that how you the type of content you choose has a direct bearing on what laws apply when, and how you can use this information to get your legal department on side.

The marketing director of a large Australasian multi-national told us recently that she had given up on content marketing.

“We just can’t get anything through legal,” she said. “They either bottleneck to the extent we miss our deadlines, or it goes into the ‘too hard basket’ and never sees the light of day.”

Similar experiences are becoming commonplace in the corporate environment, but is legal really the problem?

Talk to digital agency staff and the marketing and digital departments in most corporate companies about ‘legal’ vetting content and you’ll most likely get a grimace. At first blush it seems like legal, unable to understand the bright new world of ‘content marketing’, are becoming the fly in the ointment. But a closer look suggests that things may not be all they appear.

Regardless of who might or might not be too blame for the bottlenecks, or drastically altered pieces of content and missed deadlines, the legal challenge to content marketing in New Zealand is a very real issue that is, and will increasingly, impact the ability of brands to engage their customers.



Introduction

The Legal Challenge to Content Marketing.



The Problem

Why marketing can't give up on content.

Customers hate ads; they don't like being sold but still love to shop – that means giving them content they want instead of forcing commercial messages on them.

The editor of Netherlands based technology news site Guru3D.com, discovered recently that ad blocking has eaten into 50 per cent of their ad revenue, in spite of their growing audience. This kind of thing is hurting publishers and making it hard for marketers to get cut through.

The upshot is that brands have to become publishers. They have to start thinking and behaving like journalists because consumers want to be informed, educated, inspired and entertained. That makes content marketing possibly the most powerful strategy for building brand profile and trust.

The marketing world it seems has come to recognise this. That's why content marketing was recently voted the most important digital marketing trend three years in a row.

It seems that some legal departments however, may still be playing catch up when it comes to recognising the shift in the way we market to customers. On the other hand, marketing may have to play catch up on the legal side of things.



The Law Department's Problem

Marketing is a trading activity.

Objective, value added content notwithstanding, content marketing is a trading activity which promotes goods and services, even if indirectly.

As such, it's subject to laws like The Fair Trading Act 1986, and potentially Advertising codes of Practice. Then there are sector specific laws, like the Financial Advisers Act 2008.

But that's not all, when brands begin acting like publishers they're also more likely to be dipping their toes into issues like copyright law and even the Harmful Digital Communications Bill (among others).

Avoid Making 'Claims'

Best practice is to learn from journalism

Simpson Grierson media and communications lawyer Tracey Walker, tells us that content marketers need to be wary of making claims without the same rigour applied to marketing compliance.

"If you make a claim about your product or service for instance, you should be able to substantiate it. If you are going down the editorial road, best practice is to pay attention to fundamental tenets of good journalism."

The things which brands should be taking into account when publishing content:

- Declare conflicts of interest
- Be transparent about who you are
- Make clear what is fact and what is comment.

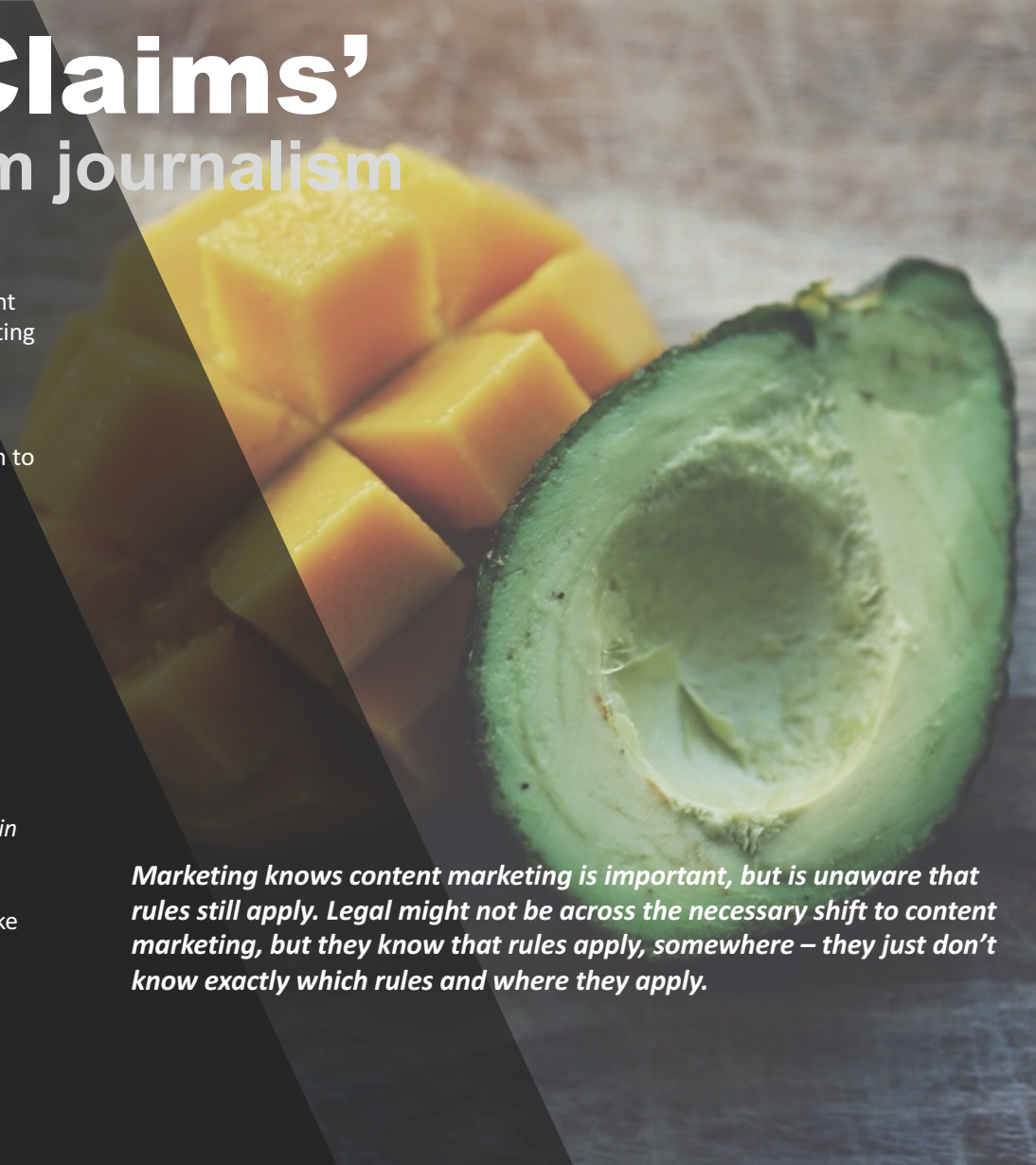
Legal departments within corporates recognise that they have legal responsibilities, particularly around commercial laws like The Fair Trading Act 1986.

Few have recognised the trend towards content marketing, and may even be a bit slow in realising the need to get across laws pertaining to media and copyright, for instance.

"There's no question that in-house legal teams are going to have to brush up on and take into account aspects of media and copyright law as content marketing becomes more prevalent," says Ms Walker.

That in a nutshell seems to be a large part of the problem.

Marketing knows content marketing is important, but is unaware that rules still apply. Legal might not be across the necessary shift to content marketing, but they know that rules apply, somewhere – they just don't know exactly which rules and where they apply.



Content Diversity The Roadblock

Advertising Vs. Editorial

A black and white photograph of a man in profile, looking out of a train window. The window shows a blurred landscape, suggesting motion. The man is holding a newspaper, which is partially visible in the lower right corner. The overall mood is contemplative and forward-looking.

A major stumbling block for all is the diversity of content and overnight proliferation of content providers.

“Corporate publishing can range from ‘very editorial’ through to advertorial and then to native advertising,” says Ms Walker. “There are different considerations requiring more nuanced consideration; part of the challenge is deciding where on the spectrum a piece of content sits.”

Ms Walker raises a very important point. The nature of a company, which is to make a profit, means that it may be producing all types of so-called content, from advertisements to opinion articles to ‘how to videos’ – and legal departments are suddenly faced with the challenges of recognising the nuances in each and applying the appropriate slide rule.

Part of the problem is the broad adoption of the word *content* to apply to anything that is produced – movies, advertisements, opinion pieces, blogs, advertorials... but few of those things are actual content marketing, by definition.

Content marketing is defined as: “The marketing and business process for creating and distributing relevant and valuable content to attract, acquire, and engage a clearly defined and understood target audience – with the objective of driving profitable customer action.”

The keywords here are ‘valuable’ and ‘relevant’ – advertising and advertorials (messages with an overt commercial agenda) are rarely relevant or valuable to the consumer. Advertisement campaigns and case studies do not fit the definition of content marketing.

“However, the definition of advertising applied by bodies such as the Advertising Standards Authority is incredibly broad, embracing advertising in any form, even that which advocates ideas or beliefs. I think the ASA will take an interest in many forms of content marketing dressed up as editorial content.

“The key to my mind is to act with integrity, with an eye to ethical standards applying to real journalism and you will find there is a degree of symmetry; you earn trust for the brand and will avoid legal problems. For example, declare any conflict of interest, be transparent and value accuracy.”

“The more content leans towards editorial, the better shielded the company may be from falling foul of the law,” says Ms Walker.

Who creates your content could influence its legal status

Advertorial is not an op-ed is not an ad

It seems sound advice for companies to clarify what they mean by content marketing, to define a strategy and to ensure that their content providers understand the nuanced differences between, for example, a press release, an opinion piece and an advertorial.

For example, companies might be better off relying on qualified journalists to create editorial content like articles, blogs and white papers, than on an advertising agency, because not only do journalists put first the interests of the customers (which is the essence of good content marketing), but they will most likely have a better understanding of media and copyright rules.

When it comes to advertising and making representations that are more commercial in nature, then obviously advertising agencies are best qualified to work in that area. Advertising agencies and public relations companies' work well together, and there's no reason why content agencies can't enjoy a similar relationship.

What muddies the waters, however, is when one tries to be everything to everyone.

The best way forward, through what are essentially uncharted and untested waters, are for the marketing department and legal departments to leave the silos behind and begin talking.

Leave the silos behind



Remove the roadblocks in with these 4 steps

Work hand-in-hand with legal

Ms Walker says the conversation should be about managing corporate reputation.

“The legal advisers have to work hand-in-hand to enable content to be published, rather than as an obstacle. They need to show the way it can be done while managing the legal risk. Yes, those legal risks are a very grey area, but they can be managed by being very clear about the ethical or integrity standards that need to underpin content marketing. If everybody is clear on that, the likelihood is that legal risk is avoided. It is a discussion that has to be had.”

1. Clearly define the difference between your marketing initiatives e.g. understand and document the difference between content marketing, advertising, public relations and advertorial as they apply to your organisation;
2. Define the content marketing strategy for your company e.g. ‘how to’ advice, ‘thought leadership’. Understand what you are trying to achieve with your content marketing;
3. Work with your legal department to establish compliance checklists so that you can produce content that has a better chance of getting through, as well as the legal department’s understanding of what rules apply where;
4. Consider using ‘disclosure statements’ and other indemnifying statements e.g. “the opinions expressed are the opinions of the writer and not...” etc.
5. Work with suppliers who understand the law and the differences in marketing tactics to ensure you keep your initiatives clearly defined and the waters un-muddled.



The Legal Checklist

It is essential define content by type

Clearly define what type of content you are creating, because that will have bearing on how it is treated from a legal perspective.

- **Commercial Messaging:** Is this content a commercial message? E.g. advertorial, advertisements, promotions, public relations press releases. Consumer legislation may apply;
- **Editorial Messaging:** Is this content editorial? E.g. presents the opinion of the writer or people quoted in the article;
 - If this article is editorial, is there an attempt to be objective? To provide valuable guidance, education, information or news? For example, it is perfectly alright to report on a change to legislation, and then to present comment and opinion from company experts and practitioners about what they believe the implications of that legislation may be for the reader.
- **Thought Leadership:** Does the content present the thoughts, ideas and opinions – even controversial opinions – of the writer or presenter? E.g. blogs and op-eds (opinion editorials).

The Legal Checklist

- ☐ Is this content defamatory, libelous or slanderous to anyone or any brands?
 - ☐ Is the intent of this content editorial or advertorial? (different criteria may apply);
 - ☐ Is this content 'opinion' and presented as such, or is it advertorial / commercial messaging? (different criteria may apply);
 - ☐ Do we distinguish between what is fact and what is comment? Usually referencing the words 'comment', 'opinion', 'said' or quotations will suffice;
 - ☐ If not opinion, can we back-up all the claims made in this content? For example, is it the opinion of an expert or somebody who has experience or qualifications in the relevant area? (e.g. mortgage broker or financial adviser's opinion is sufficient provided it is expressed as their opinion or experience);
 - ☐ As a commercial entity, do we have a disclosure statement about our commercial interest at some point in the newsletter / website / content piece?
 - ☐ Is the opinion or 'how to' advice presented in a general or generic way, or is it too specific? If the latter, does, could industry legislation apply e.g. Financial Advisers Act 2008;
 - ☐ Are all quotations, sources, opinions and facts properly attributed? E.g. references and or hyperlinks;
 - ☐ Has the source of the story – those that provided input, opinion or comment – signed off the content?
- A journalist in the media would not normally do this, but the brand will not be served by courting controversy;
- ☐ Copyright: When quoting from a published work, does the content deal fairly with the published work?
 - ☐ Does the content avoid substantive quoting of the referenced work? i.e. brief references;
 - ☐ Is the copyrighted work referenced or quoted from for the purposes of review or criticism?
 - ☐ Is the copyrighted work referenced or quoted from for the purpose of reporting, information, news, education or inspiration? E.g. to emphasise a point?

In the above copyright instances, the publisher does not have to seek the consent of the publisher to quote the reference (does not apply to photographs);

- ☐ Does the person creating the content have an understanding of media law? E.g. a lawyer, a former journalist or media/public relations consultant. If not, closer scrutiny might apply.



Conclusion

Sometimes content marketing is confused with public relations, and while both functions can support each other, they are different disciplines. The role of public relations is to present information that is in the interests of the company, to protect and promote the organisation's reputation.

Content marketing may be viewed as a customer service, where the company attempts to educate, inform or inspire the audience with objective comment, news or opinion based on expertise, opinion and knowledge – content puts the interests of the audience first.

In essence, New Zealand law provides more protection for non-commercial (editorial) content than it does for commercial content (even if the editorial is published by a brand). Individual opinion is virtually immune from legal consequences (the consequences of public opinion might be another matter, however).

The closer content marketing leans toward its editorial heritage, the better shielded the content creator may be from the regulatory arm of the state.



Iron Road is a content marketing and communications agency, and a HubSpot agency partner.

Our Content Marketing and Communications Services:

- Content Marketing Strategy;
- Content Creation;
- Publishing for brands;
- Content Syndication;
- Content Amplification;
- Content Marketing and Communications Strategic Workshop Facilitation;
- Marketing and Social Media; Automation;
- Public Relations;
- Inbound Marketing;
- Social Media Strategy and Tactics.

M: 027 2456060
T: 09 357 6474
E: colin.kennedy@ironroad.co.nz
W: www.ironroad.co.nz
A: 308 Parnell Road, Parnell, Auckland, New Zealand

IRON ROAD