



## SOMEBODY’S WATCHING YOU — SOCIAL MEDIA AND LITIGATION

*Catherine Ramnarine*

“I always feel like somebody’s watching me”.

That lyric has never felt more relevant than it does today, when so much of our everyday lives is catalogued on social media. If you happen to be involved in a lawsuit, one of the people watching you might be your opponent’s lawyer. Here are just a few examples of how your social media activity can negatively impact you in Court.

### Your Posts Can Be Used As Evidence Against You

In the recent case of *George v Allen and Others (unreported, CV2007-02244)* the Court had to consider whether to allow a claimant’s Facebook posts to be used as evidence against her. The claimant had been involved in a motorcycle accident. She claimed that this accident had left her with long term injuries, and in particular that she could not walk, sit or stand for long periods of time and that she had been unable to work since the accident. Unfortunately, she posted pictures of herself on her Facebook page which appeared to be inconsistent with these claims. The defendant found these pictures and applied to the Court to use them in order to show that the claimant had exaggerated her injuries. The claimant argued that the defendant should not be able to use the pictures as they were intended for her private use and the defendant had obtained them without her consent. The Court disagreed.

The Court ruled that Facebook was a public platform and that it provided a public stage for sharing and communicating with others. In these circumstances, the claimant did not have any legal entitlement to or reasonable expectation of privacy. The pictures were relevant to the

Court’s assessment of the claimant’s injuries, and also reflected on her credibility. Moreover, as the pictures came from her own Facebook page, she could not claim any surprise or unfair disadvantage from their use in Court. The Court allowed the pictures to be admitted into evidence. It went on to caution users of social media platforms to take responsibility for the reach of any information that they choose to put online.

### You Can Be Served With Court Documents

The Courts in the UK recently granted a claimant permission to ‘serve’ Court documents on a defendant through Instagram. The defendant was out of the country, and so could not be served with physical copies of the documents but was active on social media.

Normally, a Court claim must be served – i.e. delivered to a defendant – personally or, where the defendant is a company, by post. The service of a Court claim is extremely important as once the claim has been served, the defendant has only 8 days to file a document known as an ‘Appearance’ with the Court. If the defendant fails to file the Appearance, the claimant can then obtain a ‘Default Judgment’ against them. The claimant will obtain an official Order from the Court stating that the defendant is liable to pay the claimant’s claim. This Order can then be enforced against the defendant’s assets.

There have not yet been any cases in Trinidad and Tobago in which our Courts expressly allowed documents to be served through Instagram, Facebook or other social media platforms. However, our rules of Court do provide for service by ‘alternative’ methods. In theory, a claimant need only prove that a defendant would have been able to ascertain the contents of a Court claim served on them via social media, in order for such service to be considered valid. In practical terms, this means that any social media account that you have created - even the throwaway Instagram profile that you made years ago in order to check out your childhood friend’s wedding pictures and then barely used again - could potentially be used to serve you with Court claim. If you don’t check that account regularly or are not familiar enough with how the platform works to tell when you’ve received a direct message, and don’t happen to notice the Court claim sitting in your inbox until after the 8 day period for filing an Appearance has passed, you risk having a Default Judgment entered against you. While you can apply to have that Judgment set aside, this can be an expensive and time-consuming process. It is therefore important that you carefully monitor any social media account that you own, or close ones that are no longer used, where possible.

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# BLOCKCHAIN-THE DEATH OF A MIDDLEMAN

Luke Hamel-Smith



*"Blockchain, is a form of distributed ledger in which a record of consensus is created with a cryptographic audit trail which is maintained and validated by several separate nodes. This cryptographically assured and synchronized data can be spread across multiple institutions. It can be either decentralized, granting equal rights within the protocol to all participants or centralized, designating certain users particular rights."*

If your curiosity has ever led you to google 'What is Blockchain?', you have probably run into an utterly impenetrable definition such as the one above. If it makes sense to you, then brilliant - there is no need to continue reading this article - indeed, I imagine with the time saved, you could solve a Rubik's cube, blindfolded, while simultaneously unravelling the mysteries of time travel.

If on the other hand you find definitions such as these more perplexing than illuminating, then I hope that this article will go some way to helping shed light on what is sure to be a revolution inducing technology.

## **Blockchain is not Bitcoin**

The first, and perhaps most useful, step in understanding Blockchain technology is, somewhat paradoxically, to understand what it is not - Blockchain and Bitcoin are not the same thing: Blockchain is a sophisticated form of technology used for maintaining ledgers (or registers), while Bitcoin, is a sort of made up form of money called a crypto-currency, that uses the Blockchain technology to work. That is to say, the Blockchain is the technology that underpins cryptocurrencies like Bitcoin but Blockchain can be used in multiple applications other than cryptocurrencies.

Moreover, while many people are circumspect about the usefulness of crypto-currencies as a means of exchange, there is consensus that Blockchain technology is going to play an ever increasing, and potentially revolutionary role, in how business is conducted in the future.

## **So...what is Blockchain?**

Having established what Blockchain is not, we must now face the more vexing question of what it is.

The best way of approaching Blockchain is to not get bogged down in understanding the technology. Rather, we need to first step back and get a clear idea of the purpose of Blockchain technology. Armed with this knowledge, we can then peer in closer to examine the inner workings of the technology that achieves this purpose.

At its most fundamental, Blockchain is a mechanism for creating trust.

This is no simple task. Business, and indeed all other forms of human interaction, at their core are dependent on trust. It is what makes society work. However, as societies grow, expand and prosper, that very growth and prosperity make the establishment of trust more necessary and yet more difficult to achieve.

As a simple illustration, consider a farmer growing corn in a small village. To sell the corn, the farmer may set up a stall and sell the corn directly to other villagers - the farmer is paid immediately so she knows that she has received payment for the corn and the villager, who puts the corn directly into his basket, knows he has

received the corn. There is little need for trust as the transaction is immediate both in time and in place.

If however, we change the variables of time and space slightly, then the need for trust grows - if the villager says he will pay the following week, the farmer must trust that the villager will pay later. Similarly, if the villager pays right away but asks the farmer to deliver the corn to his barn, the villager has to trust that the farmer will make the delivery.

As the sophistication of a transaction grows, so that the corn sale takes place in different countries, and now includes shippers, bailors...stevedores - the need for trust increases. Ironically, at the same time, as the need for trust increases, the natural presence of trust decreases - villagers living in one village who have known each other since birth are more likely to trust each other than strangers living in separate countries.

Faced with this problem, the solution that we have traditionally relied on is the trusted intermediary or middleman- I may not trust you and you may not trust me, but if we both trust a third person, we can use that shared trust in the intermediary to facilitate our transaction. Examples of such intermediaries include banks, international credit card companies and escrow agents.

What Blockchain does is augment and possibly even replace the role of the trusted intermediary by creating trust directly between individuals through the use of computer software.

## **How does the Technology work?**

Blockchain acts as a giant ledger that is maintained across a network of computers which run the Blockchain software. This ledger keeps track of the different parts of the transaction - whether the corn has been shipped, where it's being stored, if the money has been paid, and so on.

Therefore, to really understand Blockchain, it helps to start by looking at a traditional ledger.

If I wanted to transfer \$10.00 from my bank account to my beloved favourite aunty, rather than actually sending the physical money to her by FedEx or another express courier company, I just give my bank instructions to transfer the money - my bank will make an entry in its ledger indicating that my account now has \$10.00 less than before and my aunt's bank would make a corresponding entry on its ledger indicating she has \$10.00 more. The system works because we trust the banks to make the correct entries - one in my bank's ledger and one in my aunt's ledger.

There are however drawbacks with this system - in order for an intermediary to be trusted by persons all around the world, they tend to be large institutions, with history, gravitas and, most likely, corporate team-building weekends. Often, they will need to be regulated by a government authority of some type. The problem with all this is that large institutions of this sort are expensive to run, and the necessary bureaucracies needed to manage such an institution adds cost to a transaction.

This is where Blockchain comes in - Blockchain replaces the separate ledgers held by my bank and my aunt's bank, with one ledger that is shared by all parties to the network.

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# BLOCKCHAIN-THE DEATH OF A MIDDLEMAN

Luke Hamel-Smith



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A great analogy (which I have borrowed from an article by William Mougayar) would be to think of the traditional ledger as being a Microsoft document that you email back and forth between someone each making their changes, while the Blockchain is like Google Docs where both parties simultaneously have access to the same document, and the single version of that document is always visible to both of them.

The question then becomes, if the ledger is shared by all the persons accessing it, and it is not controlled by a large trusted institution, how on earth can we trust the ledger? Won't all the people who have access to the ledger try to change it for their benefit, for example by increasing the balance in their account in the example above?

This is where the brilliance of Blockchain comes in.

At its core, Blockchain turns the classical method of creating trust on its head - instead of creating trust by centralising the process in one large institution, it creates trust by a process of decentralisation - so many people with such different and competing interests are required to approve a transaction using Blockchain that it is theoretically not possible for them to get together to rig the system.

Each time there is a proposed change to the ledger, the network works together to ensure that the change is legitimate. If the network agrees that the change is legitimate, only then is this change broadcast across the network and the ledger updated accordingly.

This process of validation is done through something called a consensus algorithm. There are many different types of consensus algorithms with arcane names like Delegated Byzantine Fault Tolerance, Directed Acyclic Graphs, Proof of Work and Proof of Stake. What consensus algorithms generally have in common though is that:

- a) they consist of a complex mathematical problem that is difficult to solve, but once it has been solved, it is easy to verify that the solution is correct (at this point I find it is best to have faith that the mathematicians have found a way to do this); and
- b) solving this consensus algorithm has some cost, in one form or another, associated with it. For example, in the case of proof of work consensus algorithms, a considerable amount of computer technology (and the associated cost of electricity) is required to solve the consensus algorithm.

That's all a bit abstract though; let's take a look at an example of the consensus algorithm in practice.

Let's say that the Blockchain ledger indicates that I currently have \$100.00 in my account (probably accurate unfortunately), and that my aunt has \$50.00 in her account. I would like to transfer \$10.00 from my account to my aunt. I therefore give instructions for the ledger to be updated to reflect that \$10.00 has been transferred from my account to my Aunt's account. In giving these instructions, a consensus algorithm is sent out to all the computers on the network.

Before the ledger can be updated, all the computers forming the network have to agree on a solution to the consensus algorithm.

When one computer solves it (which is hard to do), all the other computers on the network can easily verify that the solution is correct (as this is easy to do). Once the consensus algorithm is solved and verified by the network, the ledger is updated so that my account will now decrease by \$10.00 and my aunt's account will increase by \$10.00.

If someone were trying to steal my money, he would have to have falsely verify a solution to the consensus algorithm that was not correct. To do that we would have to have more computing power than 50% of the persons on the network who were also trying to solve the consensus algorithm. The cost of dedicating that much computing power to stealing my money would be much greater than the \$100.00 in my account, so it simply is not worth it.

That in a nutshell is Blockchain. Of course, the Blockchain ledger isn't relegated to keeping track of money. It can keep track of any information - whether a contract has been signed, whether the corn has been delivered or who owns valuable intellectual property.

## What can Blockchain be used for?

The truth is we are only now discovering what Blockchain can be used for.

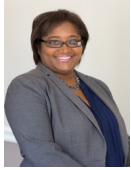
The primary benefit of Blockchain is that it facilitates trust between disparate parties without the need for an intermediary. By removing the intermediary, the speed of transactions is increased, and the cost lowered. Consequently, any transaction which involves reliance on an intermediary may potentially benefit from the use of Blockchain.

Some of the fields in which Blockchain solutions are being considered include:

- a) in real property, to effortlessly keep track of land titles;
- b) in the management of medical information, allowing teams of doctor to seamlessly work together to care for a patient;
- c) in the financial industry to facilitate instantaneous commercial payments, using fiat currency such as US Dollars (as opposed to a cryptocurrency) - indeed, in December 2018, the New York Department of Financial Services authorised the use of a new Blockchain-based platform called Signet for commercial payments; and
- d) in supply chain management, allowing the global food supply chain to be monitored and tracked in an entirely transparent manner.

Now that you hopefully have a better idea of what Blockchain is (and what it is not), you can get busy coming up with the next brilliant use for Blockchain that will change the world - what are you waiting for?

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## HEAR THAT TIGET ROAR PROTECTING YOUR BRAND *Fanta Punch*

Tiger Woods' made an exciting comeback by winning his 5<sup>th</sup> Master's Tournament and 15<sup>th</sup> major title. It was a marked change from the position that he found himself in a few years ago, when his personal and professional challenges resulted in a number of major sponsors like Procter & Gamble, Gatorade and Tag Heuer choosing to end their relationship with him, as a way of protecting their own brand reputation.

Brand reputation is how a company's products are perceived by its investors, customers and the market as a whole. It reflects customer experience, association with the brand and the company. The risk or damage to a company and its reputation can come from many fronts, such as competition from the entry of new and improved goods into the market, supply chain issues, or negative publicity.

Protection of a brand can also be achieved through effective management of intellectual property rights such as trademarks, patents, industrial design and copyright, which can be valuable in the growth of a business. Exploitation of these rights, through licensing or merchandising for instance, can add commercial value and strengthen profitability. A company with a well-respected brand can enjoy a strong market presence built on the loyalty and trust of its customers. Achieving this means having a robust strategy in place to protect intellectual property rights and the brand's reputation.

### **Protecting Your Brand**

One place to start is by taking steps to ensure the intellectual property rights being used to promote your brand are properly owned and registered in all relevant jurisdictions. There should also be maintenance of the ownership of these rights in keeping with the laws of the respective countries where protection is sought. This is can be particularly helpful in bringing infringement actions against illegal activity.

Monitoring online sites and social media continues to be integral today for all business in managing any risk to brand reputation. Threats include online sites selling counterfeit goods, misspelt domain names, misdirecting online users, and 'fake news' being posted and quickly disseminated to the public. Being able to respond just as quickly using the same media to address the issue at hand is required to stop the hemorrhaging of information calculated to erode or destroy reputation.

The damage to reputation might not be product related or from market competition, but through merchandising or endorsement agreements. Reputational risk can arise where for example the actions of a well-known personality has a detrimental effect on a brand and that association may need to be terminated.

With the benefit of hindsight, perhaps those brands who dropped Tiger Woods all those years ago, could have stayed with him through the difficult times and would have reaped the benefits of such a move today, but navigating reputational risk is not easy.

Being prepared and having a multi-disciplined pragmatic approach to crisis management is the best way forward. Having the capacity to assess the full extent of the problem, gather all the facts, calculate the cost, consider all the risks, the pros and cons of acting or not, having a good well-trained team in place are only a few factors a business should face in decisively mitigating risk and protecting its reputation.

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### **SOMEBODY'S WATCHING YOU — SOCIAL MEDIA AND LITIGATION**

#### **You May Be Responsible for What Others Do With Your Accounts Or Posts**

In *DRA and Others v Burke* (unreported, CV2016-02974), the claimant alleged that the defendant had posted defamatory and malicious posts about her on Facebook. In order to succeed in her lawsuit, the claimant had to prove that the posts were actually made or 'published' by the defendant. The defendant claimed that a group of children, including her own children as well as the claimant's child, had created a Facebook account under her name and that these children had unlimited access to that account and to her computer. She claimed that the posts could have been made by any person having access to the account, and that the claimant could not prove that the defendant herself had made them.

The Court ruled that, outside of situations in which a person's social medial accounts were genuinely compromised by a security breach, the holder of a social media account would be held accountable for any posts made by third parties using that account where (a) the holder authorised or enabled a third party to use it or (b) where a post was made without the holder's permission, but the holder failed to delete the post once they became aware of it. The defendant was found liable for the defamatory posts made by her Facebook account.

In another defamation case, *Joseph v Charles* (unreported, CV2016-02996), the Court held that by 'tagging' persons in her Facebook post, the defendant had implicitly given permission for those persons to forward the post to others. She was accordingly responsible for the fact that the post ended up on a Facebook page belonging to the claimant's employer, where it was seen by her supervisor and co-workers.

Whether you 'like' it or not, everything that you share on social media can become part of the public record and can be used against you in Court. It is therefore important to be mindful of how your social media activity can impact you 'IRL'.

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