

Facebook's 10 legal and crisis management mistakes when dealing with criticism of their newsfeed manipulation

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Speed read

In October, months after the problems arose, Facebook acknowledged error on its much criticised social contagion research on customer use. FB had selectively fed either more or less positive newsfeeds to their guinea pig customers to see how they would emotionally react. FB seems to have weathered this problem despite its series of PR and legal mistakes.



At least so far.

One of the problems is that there comes a point for large providers where they end up failing once too often and the damage can become irreversible. For example, in commenting on the adequacy of FB's future approach, the New York Times noted last month (highlighting added):

"Consumer advocates and academics who do social science research, including some who advised the company on its new procedures, said the company's promises were a first step, but that it will need to do more to quell criticism of its research."

"This is a company whose lifeblood is consumer data. So mistrust by the public, were it to reach too critical a point, would pose an existential threat to the company," said Ryan Calo, an assistant professor at the University of Washington School of Law, who had urged Facebook to create a review panel for research. *"Facebook needs to reassure its users they can trust them."*

How FB handled this looks like a behemoth failing to see what should be done; failing to see what their customers need and want; failing to do Comms 101 and legal things right; and failing to see how a folly like this can lead to bigger problems down the track.

It started with the decision to do this research without getting customer buy in. But, then when the problems were outed and FB had to be particularly careful, there was the classic "sorry but" by FB's COO, Sheryl Sandberg, which was not only a Clayton's apology but it was incorrect in its characterisation of the position. Plus there's more including claims that there is no regulatory breach when there may be. This all led to regulatory review – such as by the UK data protection/privacy regulator - which may have driven last month's announcements.

While FB have got through this problem for now, it's quite a big withdrawal from the reputational bank: too many of these, given that customer trust is so important for a business such as FB, and the downward spiral can be fatal.

We've identified 10 mistakes below as that may help inform others when facing PR and legal choices.

Of course we can't see behind the scenes but it is hard to get around the negative look and feel of this.

The Detail

So, what happened that led to this drama?

Press articles we've seen are confusing on this. So we checked the academics' research paper around which the problems pivot.

FB users are well aware that the service revolves around the so called newsfeed, made up mainly of messages to the member from other members/friends (plus, there's FB- sourced ads, etc). If a user got all the messages and "likes" etc, that other connected friends provided,

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that would be unwieldy. There's too much. So, FB has an algorithm (a programme) which prioritises and sorts which messages you get. The algorithm is based on things like the member's preferences (e.g. if the member likes to get videos, she'll get more videos under the algorithm).

So far, so good. All part of a sensible commercial service. And it's also entirely appropriate for FB to do surveys and research to fine tune its services, possibly – as with this research under attack – by providing different services in parallel to a sample set of customers, to see how the service runs in relative terms. All that is sensible and valid testing and gets the best services to customers.

But here's the thing. As part of this 2012 research, FB monkeyed with that algorithm so that, instead of getting the normal selection of messages over the news feed, some FB users got more negative messages than the normal and some got more positive. And that's where this social contagion idea comes in: the research showed that selection of more negative newsfeeds had a negative effect on statuses and 'likes' and vice versa. The study covered around 690,000 FB customers and ran for only a week. That's a small time slot, and a relatively small percentage of the total FB customers,

The omitted feeds would be available to FB users by other paths, but the reality is that most would not look beyond the newsfeed decided by FB with its algorithm, monkeyed with or not. So how the algorithm functions is central to the FB service.

Is that OK?

Businesses do entirely legitimately improve their services by changing things for some customers to see how that works as we outline above. That's great in terms of getting better outcomes for FB and for customers.

But that is quite different from selectively changing things so that more or less positive information goes to customers so that they react more or less positively from an emotional perspective. It is difficult to see how that can

be seen as legitimately improving the service to FB's customers. This has the look and feel of doing research with a view ultimately to adjusting the algorithm so that customers get messages that might make them sadder or happier. FB gave no explanation as to their agenda that we have seen, beyond comments such as the COO's statement that *"This was part of ongoing research companies do to test different products..."*. In its most recent announcement, FB said:

"In 2011, there were studies suggesting that when people saw positive posts from friends on Facebook, it made them feel bad. We thought it was important to look into this, to see if this assertion was valid and to see if there was anything we should change about Facebook. Earlier this year, our own research was published, indicating that people respond positively to positive posts from their friends."

Whatever the legitimacy, this has the look and feel of FB playing God with social engineering, rather than tweaking the algorithm to better service customers' legitimate interests.

We think this has led to at least 10 mistakes (assuming there's nothing under the FB bonnet pointing elsewhere):

Mistake No 1: doing the study without customer buy in

The negative and flaming public reaction was predictable even back in 2012, before Edward Snowden heightened our focus on these things.

Researching social contagion is an appropriate and highly desirable research subject for academics. Let's not overlook the importance of this research and throw the baby out in the bath water.

But things are quite different for a supplier dabbling in this area as opposed to pure university research.

Getting people in the sample to consent by opting in of course has its own major set of problems including distorting the study (a sort of placebo effect) and the difficulty of getting

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a sufficient sample, let alone an unbiased sample. But that concern does not answer a self-benefitting corporate getting involved. That is quite a different thing.

Essentially, what FB appear to be doing could be framed as this:

"We're not sure whether we should change our BAU algorithm that selects what you read so you get more positive stories (or less) as that might emotionally impact you. So we're doing research to see what we should elect to do: give you more or less positive stories, or leave things as they are so that you react more positively; more negatively or just the same"

It's a nanosecond to figure how FB's customers would react if that was put to them back in 2012. Put this way, few customers would be enthralled with this type of customer service? FB plays God.

Even if FB says they were doing something different, there is the comms problem that the look and feel in public is like what is described above. The belated explanation as to why this was done is not strong.

Mistake No 2 – relying on the small print to justify this

FB's initial reaction was to say that their customer terms permitted this research, according to a report in The Guardian. As we'll explain below, there are multiple potential problems with the legal enforceability of those terms. But let's just deal with what this looks like to the public: that might be framed like this:

"FB, you 'inform' me in the small print that I have given permission to you to do this social engineering research, research which may lead to wider social engineering (after all why else are you doing this but to monkey with the relative happiness and sadness in the feeds you select for me). Well I don't like what you are doing, whatever you think I've signed up to in the small print."

In other words, this does not have a good look and feel in terms of how the public would react.

Worse as we'll explain below, it turns out the approach was wrong.

Mistake No 3- Clayton's elliptical apology

As FB continued to get bad press, FB then trotted out its COO to "apologise". By this stage, FB were well into a comms crisis nightmare and would have had very heavy comms thinking and advice going on, even if they didn't before.

Here's what the COO, Sheryl Sandberg, said:

"This was part of ongoing research companies do to test different products, and that's what it was; it was poorly communicated. And for that communication we apologise."

Run that past again. The study "was poorly communicated. And for that communication we apologise".

What?

Fact: There was no communication. Full stop. This was getting a lot of media attention and such an approach is risky. It may irritate the regulators: they are the folk who sue and prosecute. It may irritate FB's customers.

A lot of thought should go into statements like this.

Fact: There was no apology for the underlying research, which has, rightly or wrongly, the look and feel of FB playing God with their customers' feelings.

None of this is slip of the tongue: the senior manager was brought in to deal with a crisis.

Imagine if FB said, in straightforward fashion: *"We did not communicate by telling you what we were doing and we should have. Sorry. We got it wrong. This is what we are doing to make sure this never happens again: A, B and C"*.

Mistake No 4- Fudging what happened

Then Ms Sandberg also said:

"[The experiment] was one week and it was a small experiment. It has been communicated as an experience to shift emotions, it's not exactly what it was. It was an experiment in showing people different things to see - to see how it worked."

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Hmmm. Nothing there suggests this was anything but research around shifting emotions of FB's customers, and the longer term implications of that for FB's business. Elliptical explanations like this can make things worse. If an animal looks like and scratches and barks like a dog, it's a dog. PR specialists would often say that, if you can't explain it away, wear it, and wear it VERY quickly. Fudging it is worse when this is getting so much media attention.

Mistake No 5- FB saying it takes privacy "incredibly seriously" when the facts say otherwise.

And under no circumstances carry on, as she does in the next sentence and say, as quoted in the Wall Street Journal:

"Again, what really matters here is that we take people's privacy incredibly seriously because that is something that allows people to share opinions and emotions", Sandberg said.

Privacy is not just about protecting information from being hacked etc. It is also about how the information is being used. There are plenty of signs here that FB did NOT "take people's privacy incredibly seriously". It is a little frightening that FB would come out and make these claims when there is this series of apparent errors.

Imagine if FB instead had said (even if they thought their research might be ultimately legitimate):

"We stuffed up by doing this research without getting buy in from you, our customers. Without that, we shouldn't have done it. We shouldn't have treated you like that. We're really sorry for our mistake. What we are going to do to give you confidence we won't do this again and that you can trust us is to do A B and C."

They could have regained their customers' confidence. As GE's former legendary CEO, Jack Welsh, has pointed out, a crisis like this calls for quick action, the right action, and owning the problem. FB seems to have been

at sixes and sevens from the get-go. Maybe they hoped the problem would blow over quickly. What in fact was a small crisis in the making – it only involved a few days' incursion for relatively few customers – becomes major news.

Would their customer's trust them again, going forward, especially when another player comes along to challenge their dominant space, as inevitably will happen? So far, it's worked out OK for FB. But these sorts of things can end up being turning points, or accumulating as problems, even though, as here, the underlying problem occurred only for a week and only for a small fraction of FB customers.

Mistake No. 6 – Digging deeper into the hole

Given a chance to clarify what Ms Sandberg said, FB dug in deeper by effectively justifying the underlying study:

"A Facebook spokesman told The Huffington Post Wednesday that Sandberg was not apologizing for the study itself, and that she was simply acknowledging that the company is investigating its internal review process for research following the public outcry."

Well, that certainly rams home that they are OK with the underlying study when in terms of look and feel at least, it doesn't look flash.

Mistake No. 7 - Claiming no breach when there is exposure

FB has said that it is confident that there is no regulatory breach.

It's not surprising various regulators are looking into this. What a red rag to a bull for FB to say that it is confident when the position looks to be quite exposed, as we explain below. While the regulators might have addressed this anyway, FB might have been better to say nothing on that topic.

Imagine if FB had fessed up to errors and set in place changes to fix things for the future? The regulators would likely see things more benevolently. An experiment two years ago – only one of many - in a large corporate might have been explained away.

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Mistake No 8 - Rely on legal permission in the small print, when that permission didn't exist

When this study was done, the privacy policy did not cover research such as this. The policy was extended to include "research" for "internal operations" later (and that is too late).

In a number of countries, that reference to "research" by the way won't permit any old research: contracts and privacy law will typically be interpreted having regard to context and purpose: "research" would likely have to be constrained to research around core business (probably in this country at least and the UK too). Research around monkeying with emotions may well be outside the policy due to those context and purpose considerations.

Mistake 9 – Rely on the small print when that may not be legally binding – informed consent

In a number of countries, small print privacy policies won't bind the customers as insufficient attention has been drawn to the terms. (Or at least the policies won't be binding as to more extreme terms). Merely clicking accept is often not enough especially as to relatively large incursions into privacy, as this is. That is a legal variation of the so-called informed consent model.

FB will or should be highly attuned to privacy considerations and law throughout their international footprint. It is unthinkable that they were not aware of a substantial risk that the privacy policy was not wide enough to constitute legal consent, due to its wording and/or due to not being sufficiently shown to the customer. No capable lawyer with experience in this area would conclude otherwise. Thus, whatever the ultimate legal position in various countries, FB would have known that simply relying on the privacy

policy carve out carried legal risks. That would clearly be the case in New Zealand and we expect would be so in other countries (for example, NZ law has overlaps with UK law).

Mistake 10 – expressing confidence that there's no regulatory exposure – legal aspects

We'll use New Zealand as an example, but the same kind of issues crop up elsewhere too.

The NZ statutory law materially says that *"An agency [such as FB] that holds personal information that was obtained in connection with one purpose shall not use the information for any other purpose unless the agency believes, on reasonable groundsthat the use of the information for that other purpose is authorised by the individual concerned"*

This for example closely overlaps the UK legal position: that is not surprising as EU countries are applying the same OECD rules as NZ applies. So, NZ is not an outlier in this story.

Such "personal information" will include a high proportion of messages on FB.

So, does this research, by which FB monkeys with its algorithm to separate for research purposes positive messages from negative (instead of BAU), come within being in connection with the purpose for which the information as obtained. By playing God in this way, it seems quite arguable that is not the case. This seems quite different from relatively non-intrusive research such as testing for better and more reliable ways of getting better quality newsfeeds to customers.

And so it may be in other countries such as the UK.

Does the Privacy Policy rescue FB by confirming the user has authorised this use? Assume the words in the privacy policy have that effect – they don't – FB still has the problem above that there hasn't been enough reference to the policy. That's a legal problem.

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Regulators tend to look for high profile companies to use as an example, pour encourager des autres. The history here, and the prominence of FB, might make this the sort of case in which regulators would be interested. The way in which FB has handled this may well make them a more attractive target.

We're not saying that FB has breached any privacy or data protection law. We are saying that this has the hallmarks of a risky scenario from a regulatory point of view.

What to learn from this?

We all stuff things up. Even what happened in 2012 for FB might be understandable. What seems big now was just a small part of what FB were doing. But to compound the problems in these ways is hard to understand. PR experts will often say: move quickly; understand quickly; if there's a problem, fess up and own it quickly and don't use weasel words. In that way today's newspaper becomes tomorrow's trash.

In these times of great sensitivity about use of information, has FB compounded its problems?

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1. The "personal information" may be about the sender not the recipient but that will make little difference in this analysis. The passage quoted above is applicable whether the information is about the sender or the receiver.

Wigley+Company

PO Box 10842
Level 6/23 Waring Taylor Street, Wellington
T +64(4) 472 3023 E info@wigleylaw.com

and in Auckland
T +64(9) 307 5957
www.wigleylaw.com

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