Here's The Term You've Been Looking For: Social License

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Hillary Sale, *Social License and Publicness* (June 13, 2019), available at SSRN.

Why can't Facebook persuade senators to help the company get its new Libra cryptocurrency off the ground? Why is VW running strange apology ads with Simon & Garfunkel's *Sounds of Silence* and an allusion to light ahead? Many more questions could follow in this vein and the concept we've been looking for is an erosion of "social license."

Sometimes an article has an idea so sticky that once you read it, you see relevant examples everywhere. You have a better vocabulary to discuss a phenomenon that you have long observed and might otherwise have used many words to describe. Professor Hillary Sale's new article *Social License and Publicness* achieves all of this and more.

Most importantly, Sale brings the sociological theory of social license into the business law discourse, enabling a deeper discussion of the dynamic, real-world context in which corporations act. Few corporate law scholars follow the sociology literature and Sale makes a valuable contribution by importing it and offering trenchant legal and business analyses.

As Sale explains, social license refers to the idea that businesses are social institutions that "exist with permission from the communities in which they are located," as well as from other stakeholders, and are subject to public accountability. Businesses receive social license by developing "legitimacy, credibility, and trust." In short, operating a business requires both legal license and social license—the former "can be applied and paid for," but the latter "must be earned with consistent, trustworthy behavior."

The magic of understanding this concept and giving it salience with a label is that you can then see predictable consequences that arise when a business loses this essential ingredient for sustainable operation. Sale illustrates the loss of social license with two case studies, Wells Fargo and Uber. While other scholars have studied these companies and their scandals, Sale offers a unique perspective that is grounded in her highly influential concept of "publicness."

She starts the case studies by carefully detailing how the companies originally established their social license. Taking, for example, Wells Fargo, she recounts how it had been one of the top-ranked banks in the U.S. and one of the largest companies in the world. It had, quite amazingly, come out of the financial crisis of 2008 relatively unscathed and with a good reputation. Sale is a great storyteller here, building the narrative tension with positive details and then bit by bit taking the reader through the cultural and organizational problems that allowed for widespread illegal activity to grow at the bank.

Further, she highlights the Los Angeles Times articles that brought the Wells Fargo consumer account scandal to light and sparked public outrage and a series of costly consequences. Her discussion particularly shines in describing the aftermath as the reader can clearly connect the loss of social license with the outcomes of publicness crashing down on the bank. The article collects the wide range of responses that can flow from eroding public trust, including everything from negative publicity, protests, and consumer boycotts, to new regulation, enforcement, and litigation.

Sale's insights will be enormously helpful to scholars working on issues of compliance, ESG (environmental/social/governance), corporate culture and reputation, human rights, political activity, board oversight, and more. The article has already informed my analysis of the social pushback that can arise as a constraint on regulatory arbitrage and undoubtedly others will also owe Sale an intellectual debt.

Moreover, the article enriches not only academic debate, but also gives corporate directors and executives a valuable tool to implement stakeholder-based corporate governance practices and engage in risk management. Sale provides specific actions that corporate boards can take to avoid losing social license. Notably, with the pre-IPO Uber case study, she also shows that being a private company does not equate to operating under the radar. Startups as well as listed companies should keep an eye on their public responsibilities and their impact on stakeholders.

Finally, the article could not have come at a better time—the CEO of one of the world's largest institutional shareholders has recently called on corporate leaders to pay attention to the precise issue of social license and to account for the public nature of their actions. Interest in corporate ESG initiatives is at an all-time high. Daily headlines capture Big Tech's destruction of public trust and the intensifying outcry for a regulatory overhaul. All of the above, from content to timing, makes *Social License and Publicness* a must-read article.

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