

The Legal Implications of Social Media Marketing & Advertising

Social media has transformed the way people interact and how business—big and small, traditional and emerging—is being done. As businesses of all types are transformed, social media platforms in turn provide advertisers the ability to individualize messages, target specific groups, interact in real-time with potential consumers, and reap the potential benefits of instantaneous referrals among trusted individuals and/or groups. With these opportunities, however, comes a host of legal issues.

Pillsbury's Social Media Team

Pillsbury's multidisciplinary Social Media focuses on social media companies and any companies that use social media or encounter legal issues involving social media. As social and mobile platforms continue to raise new legal questions, our team is working at the forefront of these emerging business and legal issues related to advertising and marketing, privacy, employment, and information management. We provide clients with counseling on handling such issues and any related litigation.

Social Media as Corporate Speech

Most major brands and companies today maintain their own social media accounts for marketing efforts and promoting brand awareness. Posts from such accounts can be considered a form of corporate speech, and have the same liability risks. For example, posts could be used against a company to support claims of libel, defamation or false advertising. Information that is available and easily accessible on social media may be deemed to put companies on constructive notice of legal violations, or render these risks foreseeable. Social media posts may be discoverable, used as an admission, admitted as evidence of mental state in future litigation against a company, or might be contrasted with what a company is saying internally. It is important for brands using such company accounts to know of these potential issues and have a written policy in place on how these accounts are maintained and used, and by which authorized users.

Legal & Regulatory Risks

Social media marketing is subject to a number of regulatory laws and agency oversight, including the Securities & Exchange Commission (SEC), the National Labor Relations Act, the Federal Trade Commission (FTC), Food & Drug Administration (FDA), and Health Insurance Portability and Accountability Act (HIPAA). Marketers today face heightened regulatory scrutiny of marketing practices at the core of many popular digital media campaigns, and recent actions

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demonstrate that the FTC and other regulatory authorities are expanding enforcement actions. Some examples include:

- **SEC Regulation Fair Disclosure.** Regulation FD addresses the selective disclosure of information by publicly traded companies and other issuers, and the SEC has clarified that disseminating information through social media outlets like Facebook and Twitter is allowed so long as investors have been alerted about which social media will be used to disseminate such information.
- **NLRA.** While crafting an effective social media policy regarding who can post for a company or what is acceptable content to post relating to the company is important, companies need to ensure that the policy is not overly broad or can be interpreted as limiting employees' rights related to protected concerted activity.
- **FDA.** Even on social media platforms, businesses running promotions or advertising online have to be careful not to run afoul of FDA disclosure requirements.
- **HIPAA.** Health care organizations often maintain websites or social media accounts that promote the organizations and the care provided with photos of happy patients or featured stories. However, patient-specific information must be kept private and secure in compliance with the industry-specific privacy regulations of HIPAA unless a proper and informed release is obtained to post any patient-specific content.

Effective Terms of Service

Subject to limited exceptions, the terms of service (TOS) for social media sites set the contractual rights, limitations, obligations and liabilities, and use of the site. Unlike the traditional two-party agreement TOS used to cover, in the age of social media TOS is a multi-party contract. As a result, it's critical that a company's TOS consider the unique aspects of the social media platform, its business model and its audience (e.g., children) yet also avoid overreach, lest the provisions prove unenforceable.

To add to the complexity, many of the legal issues in play have not been fully addressed by the courts. This requires those who draft a TOS to have a high level of understanding of as-yet-unraised issues and monitor them as they develop.

Key issues our team has handled include:

- Drafting and updating TOS
- Providing counsel and advise on TOS compliance
- Challenging statutory False Advertising Claims
- Defending fraud allegations
- Handling California Consumer Legal Remedies Act Claims

- Defending Unfair Competition Suits
- Handling California Auto-renewal and other consumer protection statutes
- Drafting and implementing enforceable arbitration clauses for TOS and amendments.

User-Generated Content and Product Endorsements

The ability to leverage user-generated content (UGC) represents a powerful business benefit from social media platforms. However, due to the interactive nature of the medium, companies run the risk that submitted content may violate the rights of others, or include negative content about a sponsor's brand. (This is especially the case with contests requiring submission of user-created content.)

- **Companies that use social media to spread their message are responsible for the message.** They must show reasonable effort to ensure anyone who promotes their products (bloggers, for example) disclose any material connections to the advertiser.
- **Permission needs to be obtained before using user-generated content.** Just because a user posted a photo related to your product and with your brand's hashtag does not give you the right to now re-post that photo as part of your advertising campaign.
- **Endorsements in social media are covered by FTC and FDA regulation.** Advertisers are liable for actions of ambassadors and influencers they support, and companies must provide substantiation or a reasonable basis for claims being made.
- **Every social media platform has its own terms of use that determine issues of content ownership.** Besides complying with laws and regulations, companies must comply with a platform's terms of use.
- **The DMCA provides some protection, but it has limits.** By instituting and adhering to a well-crafted DMCA policy, you can minimize and even prevent liability.

IP Protection and Monitoring for Infringement

Social media sites create a host of new issues for companies to consider regarding protecting and monitoring for infringement of its intellectual property. Companies need to strike a balance between protecting intellectual property and maintaining the principles of openness and sharing of information.

- **How to Develop an IP Protection Strategy: Patents.** There is a statutory bar for patents in which one has one year to file a patent application after the invention is first described in a "printed publication." Electronic

publications, including online databases and Internet publications, fall within the definition of "printed publication." A shared photo or description of the invention in a blog post or on a social networking site could be a possible public disclosure that starts the clock ticking.

- **Trademarks.** The explosive growth in social networking means a corresponding increase in the number of different forums in which trademarks may be infringed. At the same time, the very rules of what can and cannot be trademarked are being explored and redefined.
- **Copyrights.** Social media websites, blog posts, tweets, pictures taken or created and posted on a website, or other content-driven expression are all potentially copyrightable.
- **Trade Secrets.** Confidential information may be unknowingly disclosed by an employee or related party on social media sites such as Twitter, Facebook or LinkedIn or third party forums such as blogs and chat rooms. Precautions should be taken to prevent the inadvertent disclosure of confidential information such as client projects, price lists, vendors, competitors, or intellectual property such as trade secrets.

Recent publications, presentations, details on upcoming events and additional information about the Social Media Team can be found at pillsburylaw.com/socialmedia or visit our blog at socialgameslaw.com.

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