Minimizing Legal Risks for Clients Using Social Media to Advertise and Market Their Brands

BY KYLE-BETH HILFER, ESQ. *

Have your clients joined in the social media revolution? Social media describes a series of social networking websites, each of which is a community of people interacting not only with brands and commercial applications, but also with each other. Social media has emerged as a viable and necessary business tool for finding a consumer base and developing brand awareness. Historically, businesses spoke to consumers through one-way messages delivered through print or broadcast media such as direct mail, advertising, commercials, or press releases. With social media, consumers do not just receive messages passively. Instead, consumers interact actively with businesses, and through these conversations, consumers are shaping brand images.

Because of the viral nature of social media communications on the internet, both positive and negative attributes of a brand spread almost instantaneously. It is impossible for a brand owner to monitor every social networking site or blog to police online chatter about the brand. Instead, the prudent business will try to initiate and influence the conversation by launching its own social media applications. Inevitably, clients will approach attorneys for advice on how to enter the brave new world of social media prudently. While the legal issues in marketing a brand via social media are still emerging, several issues deserve immediate attention when a client seeks legal advice in this area.

* Kyle-Beth Hilfer, Esq., is Of Counsel at Collen IP Intellectual Property Law in Ossining, New York. Kyle-Beth Hilfer has practiced for over twenty years, specializing in advertising, marketing, promotions, intellectual property, and licensing law. In this capacity, she frequently advises clients who are launching a presence in social media. Ms. Hilfer sits on the Intellectual Property and ADR committees of the WCBA. Ms. Hilfer can be reached at kbhilfer@collenip.com or at 914-941-5668. You can also follow her on Twitter @ kbhilferlaw, connect with her on Linkedin, or read her blog at www.kbhilferlaw.com/blog.

I. FORMAT CHOICE FOR SOCIAL MEDIA

At the outset, the brand owner must determine what type of social media site to launch. On the most conservative end, the business can develop websites and blog to publish carefully vetted information about the brand. These techniques alone, however, miss the power of social media marketing since they do not allow the consumer to interact with the brand. If the brand owner can get people talking in a positive light about the brand, the brand becomes more powerful and respected. Many businesses, therefore, are setting up Facebook[1] pages or Twitter[2] accounts. In all cases, an attorney advising such clients should be familiar with the legal terms and rules governing these existing social media pages before advising a client as to how to develop a presence in social media. The attorney should be sure to review the rules established by each of the "platforms," *e.g.*, Facebook, Twitter, etc. Many are hidden in FAQ's or guidelines. Pay special attention to the policies established by the platforms on intellectual property, privacy, and prize promotions.

Annexed hereto, as Exhibit A,[3] is a summary of the four major platforms (Twitter, Facebook, foursquare,[4] and YouTube[5]) and their treatments of trademarks, copyrights, and privacy. This summary is current as of February, 2012. In addition, Facebook's latest Promotions Guidelines (May, 2011) are included as Exhibit B.[6] The platforms change their policies constantly. So anyone advising in this space should always check current terms and conditions.

In addition, the emerging series of class action lawsuits requires constant due diligence when advising clients. For example, in *J.N. v. Facebook, Inc.*, Case No. 1:11-cv-02128-FB –ANC, a class action lawsuit was filed in the Eastern District of NewYork on May 4, 2011 alleging that Facebook has no permission from minors for use of their photographs in commercial messages, thus violating their statutory rights of privacy.

II. CREATING POLICIES FOR EMPLOYEES/THIRD PARTY REPRESENTATIVES

Read sample policies at www.socialmediagovernance.com. Remember that social media policies are not one size fits all. Legal counsel needs to be experienced at conforming and creating policies that work for a particular client and corporate culture.

Consider that there are both employment law and advertising law considerations in creating these policies. If you are not familiar with both areas, bring in co-counsel who specializes in this area.

A. Employment Law Issues

Multiple employment issues arise in connection with a company's use of social media. First, a company must decide how to use social media. Company-sponsored pages on social media can be used to promote the company and even to recruit job applicants. If a company executive has his own social media page or blog, sometimes his/her persona may be indistinguishable from the company, and anything he/she posts may reflect on the company. It is important to establish guidelines to require executives and other employees to distinguish personal use from professional use. The blog

that turns into a rant may be perceived as the position of the employer company, not only creating public relations issues, but also raising legal issues of defamation, privacy violations, etc. These issues may conflict radically with free speech concerns, and the courts are considering the boundaries for such speech.

In addition, a company should consider whether its employees should be able to access social media pages at work. What if the employee divulges trade secrets or posts defamatory or harassing statements? Does the employer bear liability? Can the employer monitor personal social media pages that an employee accesses on company owned equipment without violating privacy rights? Will a social media site cooperate if the company asks them to remove defamatory information? While the social media site's usages statements typically prohibit posting content that may be or actually is threatening, defamatory, infringing, or unlawful, they may be less likely to address confidential information. In addition, the standard regarding removal varies from possibly unlawful material to actually unlawful material.

Companies need to develop stated policies on use of social media by employees. Such a policy should cover personal use of social media, inappropriate posts on professional and personal pages, and policing of social media. At the same time, companies need to be familiar with the lessons of two reports issued by the NLRB's Office of the General Counsel on August 18, 2011 and January 24, 2012.[7] These reports are required reading for any attorney practicing in this area. While each case's disposition was fact specific, certain trends emerge. First, overbroad policies put companies at risk under the NLRA. Second, policies that threaten employees' protected rights to concerted activity in the workplace are problematic. The reports call into question policies, for example, that restrict social media conversations, prohibit insubordination, or prohibit identifying themselves as company employees. It can be difficult to fathom that such policies could be problematic, but the NLRB wants employers to put their policies into context. It wants employers to make it clear that any restrictions on employee speech are not meant to restrict employees' rights to discuss or improve workplace conditions.

In the wake of the NLRB's first report, in early September, 2011, the NLRB classified social media chatter as "water cooler" concerted employee activity that is protected speech.[8] It had previously investigated American Medical Response in early 2011 for an overbroad social media policy that prohibited all social media activity (the case settled).[9] Its investigation of Hispanics United of Buffalo led to a fact-specific finding that employees complaining about workplace conditions on Facebook could not properly lead to a firing.[10]

In addition, considerable thought is necessary on how to monitor compliance with any company's social media policy and what to do about violations. If a company cannot enforce its policy, then it should probably be redesigned. In American Medical Response mentioned above, the company's policy would likely have been considered overbroad because it banned all social media interaction that had not been preapproved.[11]

In sum, since the NLRB's inquiries are so fact specific, it is important to scrutinize a client's practices and help the client develop a social media policy that meets the standards the NLRB is announcing in its social media reports.[12]

B. Advertising Law Issues

Familiarize yourself with the FTC's Endorsement and Testimonial Guidelines (16 C.F.R. Part 255), last revised in 2009. *See* http://www.ftc.gov/opa/2009/10/endortest.shtm. Create a policy with these guidelines in mind. These guides provide that advertisers must disclose "material connections" between themselves and endorsers, and those endorsers, themselves, may bear legal liability for their statements.

In two examples provided by the FTC at Part 255.5 (examples 7 and 8), the FTC suggests that if a blogger receives behind the scenes compensation to try a product or receives a free sample of a product and then promotes the product online, the blogger should disclose the "material connection." Similarly, if an employee posts reviews of his employer's product on an online discussion board, the employee should conspicuously disclose his employment connection or the employer and employee could run afoul of the guidelines. Best practices, then, require a company to develop policies regarding how it promotes its products or services, how it discloses its relationships with product promoters and employees, and how it monitors online activity of such people.

The legal community continues to explore the issue of what is a "material connection." The above examples are obvious. Other connections may be less obvious and may require some legal research or expertise in order to advise clients properly and minimize risk.

For guidance in this area, we look at the FTC's investigations since 2010.

a. Ann Taylor (April, 2010)[13]

In April, 2010, the FTC investigated Ann Taylor for providing a gift and a sweepstakes entry to a small group of bloggers in the hopes they would blog positively about the company's new spring line. The FTC dropped the investigation. The case remains, however, a cautionary tale for brands. The FTC only failed to take action here for fact-specific reasons. Firstly, it was the first enforcement action of its new guidelines, and the FTC wanted to give marketers an opportunity to catch up with the new requirements. In addition, there were a small number of bloggers involved here for a one day event, and finally, Ann Taylor took steps to create a policy requiring disclosure of the material connection. The investigation teaches about the FTC's mindset in reviewing a case of this matter. It also is important because it establishes that a sweepstakes entry can be a material connection between a brand and an endorser.

b. Reverb (November, 2010)[14]

Reverb was a public relations agency that posted phony customer reviews about its clients' gaming application on iTunes. The employees had posed as ordinary consumers and failed to disclose that they were paid employees. In its Final Order of Settlement in November, 2010,[15] the FTC ordered that disclosures be made "clearly and prominently" in the future. The FTC mandated the disclosures should be in understandable language/syntax and in the same language as the predominant language of the ad. It also specified how to make disclosures in various media. For text communications (including words displayed on a computer screen), the disclosure must be of a type, size, and location "sufficiently noticeable" for an "ordinary consumer" to

read and comprehend.[16] For interactive media communications (including internet), the disclosures must be "unavoidable" and presented as described above.[17] (The Final Order also describes audio/video communications requirements.)

c. Legacy Learning Systems, Inc. (March, 2011)[18]

In March 2011, the FTC announced that it had settled its complaint against Legacy Learning Systems, Inc. and its individual owner. Legacy had been promoting its learn the guitar at home DVDs and written materials. The FTC alleged that it advertised using an "online affiliate program, through which it recruited 'Review Ad' affiliates to promote its courses through endorsements in articles, blog posts, and other online editorial material, with the endorsements appearing close to hyperlinks to Legacy's website." The endorsements appeared to be the views of "Ordinary consumers or 'independent' reviewers", and they did not disclose that Legacy paid a commission for sales their referrals generated. The FTC alleged that these paid endorsements resulted in more than $5 million in sales for Legacy.

In its settlement, Legacy agreed to pay $250,000 to settle the FTC's charges. The FTC noted that Legacy had required affiliates to link to its website in close proximity to the review, but Legacy was not monitoring affiliates' activities. In most cases the disclosures were not made, and if they were made, the hyperlinks were in relative obscurity at the bottom of the affiliates' pages. The FTC said that Legacy's efforts failed to ensure the affiliates' "clear and prominent" disclosure of their relationship with Legacy. In addition, the FTC required a comprehensive monitoring program of its affiliate marketing programs to ensure that affiliates neither misrepresent their relationship with Legacy nor fail to disclose their material connection to Legacy. The FTC settlement included monthly monitoring and monthly reports for twenty years. This case demonstrates not only that a brand must mandate disclosure of material connections, but also it must ensure the disclosures are being made.

It is noteworthy that in both of the Reverb and Legacy Learning cases, the FTC used "clear and prominent" as a standard for disclosure while its guides use a "clear and conspicuous" standard. We have yet to see whether this differing standard is important.

d. Hyundai (November, 2011)[19]

In the FTC's November 2011 investigation of Hyundai Motor America regarding potential violations of the FTC's Endorsement and Testimonial Guidelines, an employee at Hyundai's media agent had sought to induce a small group of bloggers with gift certificates to comment on Hyundai's Super Bowl ads or link to videos. There was a happy ending for Hyundai in this investigation since the FTC determined that Hyundai did not know that its agency had provided the incentives, that the blogger recipients were few in number, and that some had disclosed the material connection.[20] The FTC noted that Hyundai and the media partner had established policies requiring bloggers to disclose compensation. Furthermore, the media firm rectified the situation as soon as it learned that its rogue employee had instructed bloggers improperly.

In publicly discussing the matter, the FTC reminded the public that this was a fact specific inquiry and that advertisers are responsible for the actions of its agencies.[21] The

FTC's Business Center blog offers the first practice point here. In December, describing the Hyundai case, it offered a new mnemonic, "M.M.M." to help guide brands into compliance with the FTC's Endorsement Guides: 1) Mandate a disclosure policy that complies with the law; 2) Make sure people who work for you or with you know what the rules are; and 3) Monitor what they are doing on your behalf.[22]

III. CREATING POLICIES FOR INTELLECTUAL PROPERTY IN SOCIAL MEDIA

Attorneys must be sensitive to protecting intellectual property on the social media platforms.

A. Trademarks

Trademark highjacking is a priority concern. The social media sites do little to prevent users from adopting usernames that incorporate third party trademarks, thus misdirecting traffic and creating confusion in the marketplace. While Twitter threatens suspension of accounts that manifest a clear intent to mislead others and Facebook has a registration process for trademarks and a reporting option for infringement, there is little consistency in enforcement. Will the social media sites police similar trademark usages or trademarks that are not registered with the United States Patent and Trademark Office (USPTO)? What about foreign registrations? At this point, the trademark owner bears the responsibility of monitoring the marketplace and cannot rely on the social media website to do so. Audits should be done in foreign languages as well, since the marketplace is international.

B. Copyright

In the area of copyright, the pending case of *Agence France Presse/Morel*, 2011 WL 147718, Case No. 10-CV-2730 (S.D.N.Y., Dec. 23, 2010) has already led to changes in social media platforms' treatment of copyrights. The social media site Twitpic[23] has clarified that users still own their copyrights to their photographs. Twitpic, however, has changed its policies on distribution of content from its platform to allow Twitpic to control, on a nonexclusive basis, the monetization stream from photos posted on its website. So a company might want to reconsider whether it will allow employees to post its copyrighted work on platforms such as Twitpic if that material is potentially newsworthy or capable of producing an income stream.

We can also examine the emerging social media website Pinterest[24] for an example of copyright dilemmas in social media. Pinterest has taken social media by storm. Reports state that it is the third most accessed social media site in the United States.[25] Pinterest relies on its members "pinning" content from the Internet on its online bulletin boards. Unlike Google that only uses thumbnails of content, thus driving traffic to the originating website, Pinterest takes the entire image for reposting. While the Terms of Use require its members to own or have acquired a license for the copyright, many of Pinterest's members are pinning content in which they have no rights. Pinterest claims immunity under the Digital Millenium Copyright Act, and in late March, 2012, it updated its Terms of Use (to go into effect on April 6, 2012) to clarify

that it will not seek to license or sell member content.[26] Pinterest does offer a code that a website can use to prevent a third party from pinning its content. It has yet to be seen, however, whether this opt-out system will be practical to apply.

As of the writing of this article (March, 2012), there has not yet been a challenge of Pinterest or any of its members for copyright infringement. Would a court uphold a fair use defense? The question is open, although many commentators have opined that it would be difficult for a Pinterest member to establish a fair use defense. And what about Pinterest? Is it the next Napster? Will it be able to sustain DMCA immunity? While these questions remain unresolved, brands have to weigh the costs and benefits of launching Pinterest pages and of policing content on Pinterest.

For more information about the copyright concerns on Pinterest and tips for branding on Pinterest, see this author's four-part blog post published between February 28, 2012 and March 26, 2012.[27]

C. Unsolicited Ideas

Unsolicited ideas are consumer generated product or marketing ideas that they donate unsolicited to brands. Examples are ideas for gadgets, games, products, or marketing strategies. In the offline environment, companies typically do not accept such ideas without a signed release and copyright transfer. With postings to social media sites, however, it is impossible to prevent the submission of unsolicited ideas. A policy stating that the company will not accept unsolicited ideas does not provide adequate protection against third party infringement claims. Companies need to monitor what consumers are posting and be sure not to violate their own stated policies by making use of an unsolicited idea accidentally. Part of developing a policy in this area is determining marketing goals. Perhaps a company wants to develop a viral marketing plan that invites submissions of unsolicited ideas or user generated content (UGC). Attorneys need to develop customized policies based on each client's needs.

D. Miscellaneous Issues

Other intellectual property questions remain unanswered. With the increasing use of avatars in virtual worlds, rights of publicity and privacy are at stake and potentially clash with First Amendment rights. Then there is the question of whether a tweet is subject to copyright protection. The short answer is most likely not, making it crucial for tweeters and other social media users to contemplate how to protect their copyrights. Since the law is so undeveloped at this stage and has not caught up with the technology, intellectual property owners need to be vigilant about policing their properties, while being cognizant of the limitations of their ability to catch every violation.

E. Ownership of Social Media Accounts

Finally, the issue of who owns social media content is undecided. The ongoing case of *PhoneDog v. Kravitz*, No. C11-3474, 2011 WL 5415612 (N.D. Cal. Nov 8, 2011) will be most instructive. PhoneDog, an "interactive mobile news and reviews web resource," brought suit against Noah Kravitz, a former employee. During his employment, Kravtiz used a Twitter handle entitled "@PhoneDog_Noah" and used the account to disseminate information and promote PhoneDog's services on behalf

of PhoneDog. Kravitz generated approximately 17,000 followers during the course of his employment. When Kravitz left the company in October, 2010, he changed the account handle to "@noahkravitz" and continued to use the account. PhoneDog brought suit asserting claims for misappropriation of trade secrets, conversion, intentional interference with prospective economic advantage, and negligent interference with prospective economic advantage.

The district court granted Kravitz' motion to dismiss the last two claims. In so doing, the court noted that PhoneDog failed to allege sufficiently the existence of an actual economic relationship between it and the account followers and that Kravitz' actions had caused an actual disruption of business relationship.

The remaining two causes of action are open issues. So are Twitter followers trade secrets? And who owns the account? The court noted that "the nature of that [ownership] claim is at the core of this lawsuit." The district court hinted that where the employer registered the account, and used it to promote the employer's business, the employer will have a stronger argument for ownership. Presumably the outcome of this could impact other social media accounts too.

While PhoneDog is pending, employers should take steps to claim ownership of their social media accounts. They should file trademarks for the handles, and they should control the administration and passwords for the accounts to strengthen their claims of ownership. *See also Ardis health, LLC v. Nankivell*, No. 11 Civ. 5013 (NRB), 2011 WL 4965172 (SDNY, October 19, 2011) (demonstrating the ability of employers to avoid the unsettled issues of PhoneDog through a work product agreement at the start of employment).

IV. PROMOTIONS IN SOCIAL MEDIA

Companies are using social media to launch sweepstakes and contests to spread brand awareness. Again, the first step is to check the guidelines and legal terms of the social media website that the client wishes to use. The social media websites rules are constantly changing, and indeed could have changed in the time this article went to press. Therefore, before running a promotion, it is essential to do a current check on social media sites' terms and conditions governing promotions. Foursquare currently requires permission to run prize promotions on its platform. Twitter has guidelines to encourage the flow of traffic on its site and discourage spam. Facebook has comprehensive guidelines that were last revised on May 11, 2011. Prize promotions cannot use Facebook's "native" functionality to run a promotion. The promotion cannot allow entry by becoming a fan of a company on Facebook or by posting an entry on a Facebook wall. (*See* the full guidelines at http://www.facebook.com/promotions_guidelines.php attached hereto as Exhibit B.)

In addition, even in the social media context, sponsors must accomplish full compliance with offline promotions laws and limit eligibility to those countries in which they have completed legal due diligence. It is essential to confer with co-counsel who specializes in this complex area of law to insure that a promotion is not an illegal lottery. This will require examination of the thorny issues of consideration, alternate

method of entry, skill, and prize structure.

Because of the abbreviated nature of social media, we are seeing a blurring line between sweepstakes and contests. As a client structures its promotions and drafts rules, remember that the concept of "substantial effort," as defined by the fifty states' sweepstakes laws, in the consideration continuum may need to be reevaluated continuously. If a promotion involves the expenditure of substantial effort, it can be said to require consideration according to prevailing sweepstakes laws, and thus require an alternate method of entry in order to avoid classification as an illegal lottery. The question of what is "substantial effort" in social media is still evolving. Generally speaking, "liking" a page does not seem to constitute substantial effort, although no court precedent has confirmed this concept. What about navigating a website to answer a Twitter trivia contest? Is that "substantial effort" or does it require skill and take the promotion out of a sweepstakes classification into a skill contest category? Again, there is no definitive court case answering this question, but specialized promotions law counsel should have the experience to help ascertain the level of risk with any social media promotion. In addition, counsel should advise on how to make abbreviated disclosures in advertising and collateral material that protects the client's reliance on its official rules as a contract with participants.

Many promotions attempt to facilitate consumer interaction with the brand through user-generated content (UGC). Many brands are launching UGC promotions in which consumers are invited to post content which they have created, perhaps videos or songs, to sponsor sites for judging. Judging may be done by the brand or by a combination of brand and public vote. Typically, this content is posted directly to the sponsor website without internal vetting.

The legal issues abound. Is the promotion an illegal lottery? Attorneys need to seek out specialized co-counsel if they are not fully familiar with the laws of promotions. How will the sponsor handle issues of violations of third party intellectual property rights or rights of publicity? Should a consumer post something libelous, obscene, or infringing on third party rights, even the most diligent monitoring service will not be able to remove it instantaneously. The result can be damage to the public image of the brand and legal vulnerability for the brand owner. To limit such dire consequences, brands that use UGC contests need to police activity practically 24 hours a day. Such contests, and their submissions, will also be subject to the terms and conditions of the third party posting site. Some companies are now insisting on submission to them directly for posting on the sponsor sites to help gain control of the monitoring process.

In addition, contest rules must be carefully drafted as to submission requirements, creating guidelines prohibiting infringing or offensive content. The rules should also strongly protect the sponsor's right to reject or delete ineligible submissions. Then, in advance of launching the promotion, an attorney reviewing this kind of contest must discuss with the client how it will use submissions, who will own them, and what releases the client may need to obtain. Public judging is a legal quagmire. It is difficult to monitor voting to be sure the promotion is judged accurately and is not an illegal lottery. Again, specialized counsel can help implement public judging to minimize

risk. One of the most important measures is not having the outcome of the prize promotion rest solely on the public judging and learning best practices for implementing public judging.

Attorneys also need to counsel clients on how they can use UGC. What releases need to be obtained? Who will own the copyright? What derivative works can be created? Properly drafted rules should address these issues at the promotion's inception.

V. GEO-LOCATION TECHNOLOGY

Geo-location technology refers to any technology that allows the user to locate the real-world location of individual or an object. Examples are GPS, tracking, or device pinpointing technologies. Geo-location technology provides highly interactive marketing opportunities for the brand. Consumers can receive coupons on their mobile devices as they walk by a store or as they check in on foursquare. Counsel needs to be familiar with the complex opt-in requirements for mobile marketing and be prepared to work with clients to ensure compliance. (*See* Mobile Marketing Association Industry Guidelines for some instruction.)

If clients are collecting data using this pinpointing technology, legal counsel should consider all privacy issues. There is an increasing amount of pending legislation in the area of privacy. On the federal level, these include the following bills introduced in the Spring, 2011: Senator Rockefeller: Do Not Track Online Act of 2011—covering Internet and mobile marketing; McCain/Kerry: Internet Privacy Bill—calling for notice and consent from consumers and allowing for a clear opt out; Markey/Barton: Do Not Track Kids Act—seeking to amend the Children's Online Privacy and Protection Act (COPPA) to include mobile devices.

There is also pending state legislation including bills in California and Pennsylvania. Florida, in particular, has been quite active in enforcement through its state Attorney General investigations.

Massachusetts is now enforcing its Identity Theft Protection Rules 201 CMR 17:00 (effective March 2010). These rules call for any entity storing/transmitting personal information of any Massachusetts resident to have a written information security plan (WISP), encryption of personally identifiable information (PII) across public networks, encryption on laptops or other portables, and coordination with third party vendors. Marketers are still struggling to figure out how to comply with this state's rules.

For best practices on data collection, look at the guidelines of the various industry groups [Direct Marketing Association (DMA), Mobile Marketing Association (MMA), or CTIA-The Wireless Association (CTIA)]. Focus on notice and consent and informing consumers. Avoid lengthy, complex privacy documents and prechecked boxes as a way of ascertaining consent. Think about whether your client needs all the data it is collecting and whether it really has a way to safeguard it. If working with affiliates, be sure the client has monitoring systems in place. Consider use of the advertising industry's self-regulatory "aboutads.com" program as a way of ensuring compliance.

In addition, if advising application developers, counsel should be attuned to several issues. A good guide on privacy is the MMA's Mobile Application Privacy Policy

Framework, announced in December, 2011,[28] that put the onus on apps to abide by certain core privacy principles. In addition, on February 7, 2012, the FTC warned marketers that "mobile applications that provide background screening apps …may be violating the Fair Credit Reporting Act."[29] The FTC warned six mobile applications that "if they have reason to believe the background reports they provide are being used for employment screening, housing, credit, or other similar purposes, they must comply with the Act."[30] A final issue of concern for application developers is COPPA. With the proliferation of mobile phones, many children carry these devices. Application developers must take care not to market to children and to comply with COPPA.

VI. CONCLUSION

Social media is a powerful tool for advertising and marketing one's brand. Because fact patterns and case law are still developing, companies who join the conversation are traveling in a new frontier of legal issues. In creating social media programs for clients, attorneys need to draft flexible policies that a client can enforce and train risk management departments to monitor social media activity. Beware the use of forms. Each client's issues are unique and need to be addressed in the context of its individual goals and industry needs. All laws that apply offline still apply in the social media world, but risk and remedies could be different online. If a trade secret is leaked via social media in hours or minutes, there is no injunction that can really correct the damage. Attorneys need to help their clients influence the online conversation so that engagement in social media helps brands rather than hurts them.

EXHIBIT A[31]

(The information in Exhibit A has been verified only as of February, 2012.)

PLATFORM TREAMENTS OF TRADEMARKS, COPYRIGHTS, AND PRIVACY

Trademarks

Twitter:

- Does not allow confusing use of its trademarks, including use that might imply a false sense of partnership. Encourages users to use the accurate and current version of the Twitter name and trademark in connection with information about an account. *See* Guidelines for Use of the Twitter Trademark prior to use.
- Will reclaim user names on behalf of businesses that hold legal claim or trademark on those user names, and prohibits "name squatting." *See* Trademark Policy for steps on reporting a potential violation.

Facebook:

- Allows use of the Facebook name and trademark only in connection with ads that have a Facebook page, application, event, group, or connect, provided that the use does not imply endorsement by Facebook.
- Prohibits fake accounts used to impersonate businesses, which can be reported by contacting Facebook.

foursquare:

- Allows users to provide an "Add-to-foursquare link," on a website, provided that the user's website title and trademarks appear at least as prominent as foursquare's trademark and logos in the link, and that the link is not displayed in a manner that implies partnership or endorsement by foursquare, or that disparages foursquare. *See* Terms of Use for full requirements.
- Will investigate complaints of TM infringement. *See* Trademark Policy to report.

YouTube:

- YouTube provides a list of approved uses of its trademark and name in connection with advertising. It authorizes use of pre-approved badges, such as "Powered by YouTube," or "YouTube" ready that can be used so long as they are not used in a confusing or misleading manner. *See* Branding Guidelines in YouTube's API Tools Website for further information.
- Will remove usernames and content that violates TM rights. Recommends that trademark owners first attempt to resolve disputes directly via YouTube's private messaging feature

Copyright

Twitter:

- Users retain copyright in all content submitted, but grants Twitter broad license that includes a sub-license to other users to re-use and create adaptive works.
- DMCA reporting and removal procedure. Sends all cease and desist letters to "chillingeffects.org." Deletes accounts of serial infringers.
- Allows parody/commentary accounts, provided that the user's profile information makes clear that she is not the same person as the parody/commentary.

Facebook:

- Users retain copyright in content posted, but grant Facebook broad, sub-licensable license. This license ends when the user deletes the IP content on her account (except to the extent the information is already in the hands of third parties).
- DMCA reporting and removal procedure. Deletes accounts of serial infringers.
- Requires all third party developers and operators to have a policy for removing infringing content and terminating repeat infringers that complies with the DMCA and the Video Privacy Protection Act ("VPPA").

foursquare:

- Users retain copyright in content submitted, but grant foursquare broad, sub-licensable license.
- DMCA reporting and removal procedure.

YouTube:

- Users grant YouTube a broad, sub-licensable license to all uploaded material, but other users need to obtain YouTube's written consent prior to exploiting any content. This license terminates "within a commercially reasonable time" after removal of the content from YouTube.
- DMCA reporting and removal procedure. Will place a "strike" on the account of any user from whom it has had to remove infringing material, and deletes accounts of serial infringers.
- Content ID allows copyright owners to upload copyrighted material, which YouTube then compares to other uploaded videos to automatically identify potential infringements. Content ID allows the copyright owner to monetize, track, or block the infringing material.

Privacy

Twitter:

- Twitter, by default, makes all information public, including the metadata accompanying tweets and personal account information. Public information is searchable by search engines and immediately delivered to a wide range of third party services.
- Twitter's servers automatically record log data.
- Users can make certain information private ("account settings"). Users can also set their tweets to be protected (or block certain users), so that they are available only to approved followers.
- Users may not publish or post other people's private information without their express authorization.

Facebook:

- Logs the following material: (1) transaction details (users can remove a payment source account number on the payments page); (2) all actions a user takes; (3) information about a user provided by other users; (4) information from the device used to access Facebook (including browser type, location, IP address, and the pages the user visits); (5) information from third party platforms about the user's actions; and (6) a user's viewing of, and interaction with, advertisements.
- All information provided (including metadata in content shared) is made public to the extent provided for in the account settings (the default "everyone" setting makes that information publicly available, including to third party search engines.
- Uses personal information to target advertisements, but does not share personally identifiable information with advertisers without permission, and users can opt out of the placement of cookies by advertisers.
- Adheres to Safe Harbor privacy principles.

foursquare:

- Stores any information provided to it or entered on its services, including user location. Provides aggregate information to its commercial partners about collective use.
- Shared information can be limited at user settings page.
- Users can request removal of a venue from the foursquare database (including home address) via email.
- Uses Google Analytics.

YouTube:

- Some information about registered users will be available to other users. Privacy settings can be adjusted at the "accounts profile" page.
- Records information about all usage; uses cookies, web beacons, and log files.
- The DoubleClick cookie allows advertisers to target ads based on categories associated with non-personally identifiable online activity. Users can view and edit this information, and may opt out of the DoubleClick cookie.
- Individuals can file privacy complaints seeking removal of videos in which they are readily identifiable.
- Adheres to the Safe Harbor privacy principles.

EXHIBIT B

FACEBOOK PROMOTIONS GUIDELINES

Date of Last Revision: May 11, 2011

These Promotion Guidelines, along with the Statement of Rights and Responsibilities, the Ad Guidelines, the Platform Policies and all other applicable Facebook policies, govern your communication about or administration of any contest, competition, sweepstakes or other similar offering (each, a "promotion") using Facebook.

If you use Facebook to communicate about or administer a promotion, you are responsible for the lawful operation of that promotion, including the official rules, offer terms and eligibility requirements (e.g., age and residency restrictions), and compliance with regulations governing the promotion and all prizes offered in connection with the promotion (e.g., registration and obtaining necessary regulatory approvals). Please note that compliance with these Guidelines does not constitute the lawfulness of a promotion. Promotions are subject to many regulations and if you are not certain that your promotion complies with applicable law, please consult with an expert.

1. Promotions on Facebook must be administered within Apps on Facebook.com, either on a Canvas Page or an app on a Page Tab.
2. Promotions on Facebook must include the following: a. A complete release of Facebook by each entrant or participant. b. Acknowledgment that the promotion is in no way sponsored, endorsed or administered by, or associated with, Facebook. c. Disclosure that the participant is providing information to [disclose recipient(s) of information] and not to Facebook.
3. You must not use Facebook features or functionality as a promotion's registration or entry mechanism. For example, the act of liking a Page or checking in to a Place cannot automatically register or enter a promotion participant.
4. You must not condition registration or entry upon the user taking any action using any Facebook features or functionality other than liking a Page, checking in to a Place, or connecting to your app. For example, you must not condition registration or entry upon the user liking a Wall post, or commenting or uploading a photo on a Wall.
5. You must not use Facebook features or functionality, such as the Like button, as a voting mechanism for a promotion.
6. You must not notify winners through Facebook, such as through Facebook messages, chat, or posts on profiles or Pages.
7. You may not use Facebook's name, trademarks, trade names, copyrights, or any other intellectual property in connection with a promotion or mention Facebook in the rules or materials relating to the promotion, except as needed to fulfill your obligations under Section 2.

Definitions:

a. By "administration" we mean the operation of any element of the promotion, such as collecting entries, conducting a drawing, judging entries, or notifying winners.

b. By "communication" we mean promoting, advertising or referencing a promotion in any way on Facebook, e.g., in ads, on a Page, or in a Wall post.

c. By "contest" or "competition" we mean a promotion that includes a prize of monetary value and a winner determined on the basis of skill (i.e., through judging based on specific criteria).

d. By "sweepstakes" we mean a promotion that includes a prize of monetary value and a winner selected on the basis of chance.

Endnotes

1. Facebook, http://www.facebook.com/ (last visited Apr.11, 2012).

2. Twitter, http://twitter.com/ (last visited Apr. 11, 2012).

3. The information in Exhibit A has been verified only as of February, 2012, and can be found in the following online policies: *Terms of Service*, Twitter, http://twitter.com/tos; *The Twitter Rules*, Twitter, http://support.twitter.com/articles/18311-the-twitter-rules#; *Trademark Policy*, Twitter, http://support.twitter.com/groups/33-report-a-violation/topics/148-policy-information/articles/18367-trademark-policy#; *Name Squatting Policy*, Twitter, http://support.twitter.com/groups/33-report-a-violation/topics/148-policy-information/articles/18370-name-squatting-policy#; *Impersonation Policy*, Twitter, http://support.twitter.com/groups/33-report-a-violation/topics/148-policy-information/articles/18366-impersonation-policy#; *Guidelines for Use of the Twitter Trademark*, Twitter, http://support.twitter.com/groups/33-report-a-violation/topics/149-developer-and-media-guidelines/articles/77641-guidelines-for-use-of-the-twitter-trademark#; *Parody, Commentary, and Fan Accounts Policy*, Twitter, http://support.twitter.com/groups/33-report-a-violation/topics/148-policy-information/articles/106373-parody-commentary-and-fan-accounts-policy#; *Copyright and DMCA Policy*, Twitter, http://support.twitter.com/groups/33-report-a-violation/topics/148-policy-information/articles/15795-copyright-and-dmca-policy#; *Reposting Content Without Attribution Policy*, Twitter, http://support.twitter.com/groups/33-report-a-violation/topics/148-policy-information/articles/16205-reposting-content-without-attribution-policy#; *Twitter Privacy Policy*, Twitter, http://twitter.com/privacy; *Safety: Abusive Uses*, Twitter, http://support.twitter.com/groups/33-report-a-violation/topics/166-safety-center/articles/15794-safety-abusive-users#; *Guidelines for Contests on Twitter*, Twitter, http://support.twitter.com/groups/31-twitter-basics/topics/114-guidelines-best-practices/articles/68877-guidelines-for-contests-on-twitter#; *Statement of Rights and Responsibilities*, Facebook, http://www.facebook.com/legal/terms; *Copyright Policy*, Facebook, http://www.facebook.com/legal/copyright.php?howto_report; *How to Appeal Claims of Copyright Infringement*, Facebook, http://www.facebook.com/legal/copyright.php?howto_appeal=1; *Data Use Policy*, Facebook, http://www.facebook.com/about/privacy/; *Privacy*, Facebook, http://www.facebook.com/help/?page=187475824633454; *Privacy External Resources*, Facebook, http://www.facebook.com/help/?page=131587346915649; *Safe Harbor Notice*, Facebook, http://www.facebook.com/safeharbor.php; *Promotions Guidelines*, Facebook, http://www.facebook.com/promotions_guidelines.php; *Terms of use*, foursquare, https://foursquare.com/legal/terms; *Trademark Policy*, foursquare, https://foursquare.com/legal/tmnotice; *Copyright Policy*, foursquare, https://foursquare.com/legal/dmca; *Privacy Policy*, foursquare, https://foursquare.com/legal/privacy; *Privacy 101*, foursquare, https://foursquare.com/privacy/; *Sharing on foursquare*, foursquare, https://foursquare.com/privacy/grid; *foursquare FAQ*, foursquare, http://support.foursquare.com/forums/191152-privacy; *Authorized Venue and Event Platform Terms of Use*, foursquare, https://foursquare.com/legal/venueterms; *Terms of Service*, YouTube, http://www.youtube.com/t/terms; *Copyright Center*, YouTube, http://www.youtube.com/t/copyright_center; *Content ID*, YouTube, http://www.youtube.com/t/contentid; *Copyright Infringement Notification*, YouTube, http://www.youtube.com/t/dmca_policy; *Why Do I Have a Strike on My Account?*, YouTube, http://www.youtube.com/t/copyright_strike; *Privacy Policy*, YouTube, http://www.google.com/intl/en/policies/privacy/; *YouTube Community Guidelines*, YouTube, http://www.youtube.com/t/community_guidelines; *Promoted Videos*, YouTube, http://www.youtube.com/t/advertising_promoted_videos.

4. foursquare, https://foursquare.com/ (last visited Apr. 11, 2012).

5. YouTube, http://www.youtube.com/ (last visited Apr. 11, 2012).

6. Facebook Promotions Guidelines, Facebook, https://www.facebook.com/page_guidelines.php#promotionsguidelines (last visited Apr. 11, 2012).

7. Report of the General Counsel, National Labor Relations Board Office of the General Counsel (Aug. 18, 2011) *available at* http://www.nlrb.gov/news/acting-general-counsel-issues-second-social-

media-report; Report of the General Counsel, National Labor Relations Board Office of the General Counsel (Jan. 24, 2012) *available at* http://www.nlrb.gov/news/acting-general-counsel-issues-second-social-media-report.

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9. Seth Borden, *NLR, Parties Settle "Facebook Firing" Case*, Labor Relations Today, Feb. 7, 2011, http://www.laborrelationstoday.com/2011/02/articles/nlra/nlrb-parties-settle-facebook-firing-case/.

10. *Hispanics United of Buffalo*, *supra* note 6, at 10.

11. *Id.*

12. *See supra* note 5.

13. Letter from Mary K. Engle, Associate Director, Federal Trade Commission, to Kenneth A. Plevan (Apr. 20, 2010), *available at* http://www.ftc.gov/os/closings/100420anntaylorclosingletter.pdf.

14. http://wwwftc.gov/opa/2010/08/reverb.shtm

15. *In the Matter of Reverb Comm.*, FTC File No. 0923199 (Aug. 26, 2010) (agreement containing consent order) available at http://www.ftc.gov/os/caselist/0923199/100826reverbagree.pdf.

16. *Id.*, at p. 3.

17. *Id.*

18. http://www.ftc.gov/opa/2011/03/legacy.shtm.

19. http://business.ftc.gov/blog/2011/12/using-social-media-your-marketing-staff-closing-letter-worth-read.

20. Letter from Mary K. Engle, Associate Director, Federal Trade Commission, to Christopher Smith (Nov. 16, 2011), *available at* http://www.ftc.gov/os/closings/111116hyundaimotorletter.pdf.

21. Leslie Fair, *Using social media in your marketing? Staff closing letter is worth a read*, Bureau of Consumer Protection Business Center Blog, Dec. 22, 2011, http://business.ftc.gov/blog/2011/12/using-social-media-your-marketing-staff-closing-letter-worth-read.

22. *Id.*

23. Twitpic, http://twitpic.com/ (last visited Apr. 11, 2012).

24. Pinterest, http://pinterest.com/ (last visited Apr. 11, 2012).

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29. Press Release, Federal Trade Commission, FTC Warns Marketers That Mobile Apps May Violate Fair Credit Reporting Act (Feb. 7, 2012), *available at* http://www.ftc.gov/opa/2012/02/mobileapps.shtm.

30. *Id.*

31. The information in Exhibit A has been verified only as of February, 2012, and can be found in the following online policies: *Terms of Service*, Twitter, http://twitter.com/tos; *The Twitter Rules*, Twitter, http://support.twitter.com/articles/18311-the-twitter-rules#; *Trademark Policy*, Twitter, http://support.twitter.com/groups/33-report-a-violation/topics/148-policy-information/articles/18367-trademark-policy#; *Name Squatting Policy*, Twitter, http://support.twitter.com/groups/33-report-a-violation/topics/148-policy-information/articles/18370-name-squatting-policy#; *Impersonation Policy*,

Twitter, http://support.twitter.com/groups/33-report-a-violation/topics/148-policy-information/articles/18366-impersonation-policy#; *Guidelines for Use of the Twitter Trademark*, Twitter, http://support.twitter.com/groups/33-report-a-violation/topics/149-developer-and-media-guidelines/articles/77641-guidelines-for-use-of-the-twitter-trademark#; *Parody, Commentary, and Fan Accounts Policy*, Twitter, http://support.twitter.com/groups/33-report-a-violation/topics/148-policy-information/articles/106373-parody-commentary-and-fan-accounts-policy#; *Copyright and DMCA Policy*, Twitter, http://support.twitter.com/groups/33-report-a-violation/topics/148-policy-information/articles/15795-copyright-and-dmca-policy#; *Reposting Content Without Attribution Policy*, Twitter, http://support.twitter.com/groups/33-report-a-violation/topics/148-policy-information/articles/16205-reposting-content-without-attribution-policy#; *Twitter Privacy Policy*, Twitter, http://twitter.com/privacy; *Safety: Abusive Uses*, Twitter, http://support.twitter.com/groups/33-report-a-violation/topics/166-safety-center/articles/15794-safety-abusive-users#; *Guidelines for Contests on Twitter*, Twitter, http://support.twitter.com/groups/31-twitter-basics/topics/114-guidelines-best-practices/articles/68877-guidelines-for-contests-on-twitter#; *Statement of Rights and Responsibilities*, Facebook, http://www.facebook.com/legal/terms; *Copyright Policy*, Facebook, http://www.facebook.com/legal/copyright.php?howto_report; *How to Appeal Claims of Copyright Infringement*, Facebook, http://www.facebook.com/legal/copyright.php?howto_appeal=1; *Data Use Policy*, Facebook, http://www.facebook.com/about/privacy/; *Privacy*, Facebook, http://www.facebook.com/help/?page=187475824633454; *Privacy External Resources*, Facebook, http://www.facebook.com/help/?page=131587346915649; *Safe Harbor Notice*, Facebook, http://www.facebook.com/safeharbor.php; *Promotions Guidelines*, Facebook, http://www.facebook.com/promotions_guidelines.php; *Terms of use*, foursquare, https://foursquare.com/legal/terms; *Trademark Policy*, foursquare, https://foursquare.com/legal/tmnotice; *Copyright Policy*, foursquare, https://foursquare.com/legal/dmca; *Privacy Policy*, foursquare, https://foursquare.com/legal/privacy; *Privacy 101*, foursquare, https://foursquare.com/privacy/; *Sharing on foursquare*, foursquare, https://foursquare.com/privacy/grid; *foursquare FAQ*, foursquare, http://support.foursquare.com/forums/191152-privacy; *Authorized Venue and Event Platform Terms of Use*, foursquare, https://foursquare.com/legal/venueterms; *Terms of Service*, YouTube, http://www.youtube.com/t/terms; *Copyright Center*, YouTube, http://www.youtube.com/t/copyright_center; *Content ID*, YouTube, http://www.youtube.com/t/contentid; *Copyright Infringement Notification*, YouTube, http://www.youtube.com/t/dmca_policy; *Why Do I Have a Strike on My Account?*, YouTube, http://www.youtube.com/t/copyright_strike; *Privacy Policy*, YouTube, http://www.google.com/intl/en/policies/privacy/; *YouTube Community Guidelines*, YouTube, http://www.youtube.com/t/community_guidelines; *Promoted Videos*, YouTube, http://www.youtube.com/t/advertising_promoted_videos.