

Social Media Marketing: A Practical Legal Checklist

Aaron M. Gregory[†] and Katherine A. Kannenberg[‡]

ABSTRACT:

Social media has become a powerful weapon in a marketing professional's promotional arsenal. However, improper use of social media can land a brand – and its marketing agency – in legal trouble. Too often legal issues are overlooked or are misunderstood. Properly identified, these risks can be effectively mitigated or eliminated. The purpose of this article is to provide marketers a straightforward explanation of the legal issues associated with various social media strategies, the proper means with which to mitigate or eliminate potential legal liability, and a handy checklist of legal considerations to reference when considering the use of social media as part of a marketing strategy.

Social media is revolutionizing marketing. It is disrupting traditional “top-down” or “push” marketing models by empowering consumers to publicly express their opinions and quickly share personal recommendations and trusted content. The resulting democratization of influence has significant marketing implications. According to a recent survey by the Nielsen Company, recommendations from personal acquaintances are by far the most trusted forms of advertising, with an astonishing 90% of consumers reporting that they “completely” or “somewhat” trust recommendations from people they know.¹ Marketers are increasingly realizing that a recommendation from a trusted friend on Facebook or a positive mention by an influential blogger may prove more powerful and cost-effective than traditional advertising methods.

Marketers are also turning to social media campaigns as a means to build brand loyalty, exposure, and engagement.

Recognizing these trends, marketers have moved aggressively into “word of mouth” social media advertising, which includes using paid content by consumers, creating contests to build brand awareness, and tapping into the creativity of the crowd by encouraging consumers to generate promotional content. While social media tools have become powerful weapons in any marketing professional's promotional arsenal, improper use of social media can land a brand – and its marketing agency – in serious legal trouble. Too often legal issues are overlooked or are misunderstood. Properly identified, potential risks can be effectively mitigated, if not avoided entirely. The purpose of

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[†]Aaron M. Gregory is an attorney at the law firm of SNR Denton US LLP specializing in federal regulatory law. He can be reached at: aaron.gregory@snrdenton.com.

[‡]M.S., expected December 2012, Medill School of Journalism, Media, Integrated Marketing Communications, Northwestern University.

this article is to provide marketers a straightforward explanation of the legal risks associated with various social media strategies, the proper means with which to mitigate or eliminate potential liability, and a quick checklist of legal considerations to reference when considering using social media as part of a marketing strategy.

A. Third-Party Endorsements: Content and Disclosure Requirements, Best Practices

For many years marketers have engaged trusted individuals to communicate a brand's value to potential customers. Think of a baseball player pitching pain relievers or a former Senator intoning about the value of term life insurance. By tying a brand to the perceived credibility of a third party, marketers seek to align their brands with the image and credibility of a respected individual. Social media has democratized the concept of the trusted individual by enabling consumers to broadcast their opinions, likes, and dislikes to a receptive audience. By tapping into the trust inherent in social networks, social media enables individual consumers to become powerful advocates within their spheres of influence.

However, unlike celebrity endorsements, when an individual consumer promotes a company's brand on Facebook or posts a favorable restaurant review on Yelp!, it is not readily apparent that the speaker may have been compensated for their statements. For example, consider a situation in which an advertiser plans to give gift certificates to bloggers to encourage them to comment about the launch of a new product and to post a promotional video that links through to the advertising party's webpage to build "buzz" around the product launch. Absent additional information, the relationship between the compensated blogger and the advertiser may not be apparent to consumers.

The federal government has recognized that when a speaker is compensated for issuing a promotional message on behalf of an advertiser, consumer awareness of the payment could materially affect the trustworthiness of the speaker's message. For these reasons, the Federal Trade Commission ("FTC") has issued a set of guidelines that require any party who

endorses a product to disclose the connection between themselves and the ultimate advertising party and to ensure that any statements made on the advertiser's behalf be truthful and substantiated.² Failure to abide by these requirements can subject the ultimate advertiser to significant enforcement orders and potential litigation.

The challenge for marketers lies in ensuring that otherwise independent third parties comply with these requirements, while maintaining the marketer's flexibility to creatively, but transparently, engage consumers as brand or product advocates. Below, we suggest straightforward steps that marketers can take to ensure compliance with federal requirements while tapping into the power of social media.

1. Determine Whether Third Party Messages Constitute Regulated "Endorsements"

To determine whether a marketer must take independent action to ensure compliance with the FTC's requirements, the first step is to determine whether third parties will be compensated for their statements on behalf of the sponsoring advertiser. If the speaker is acting independently, no endorsement is present and no requirements attach. However, if the speaker is compensated for their statements, the presence of this "material connection" might affect the weight or credibility of the speaker's statements.

Compensated content, like those in the "gift certificates for blog posts" example discussed above, are presumed to be made on behalf of the advertiser, turning the speaker's blog post, product review, or other sponsored content into an "endorsement" regulated by the FTC. In addition to the requirement that any such statement be truthful and adequately substantiated, these statements are required to be accompanied by a statement disclosing the connection between the ultimate advertiser and the endorser. The forms of compensation that require disclosure include, but are not limited to, the following:

- Cash payments;
- Gift cards;
- Free products or services;
- Royalties or commissions;

- Special or early access, such as a test drive or exclusive “first looks”;
- Awards points that can be exchanged for prizes, products, or services;
- A relationship, such as employment or a contractual relationship, with the advertiser; or
- The promise of any of these forms of compensation

To determine whether a third party statement constitutes a regulated endorsement consider whether knowledge of the compensation might materially affect the weight or credibility of the statement in the eyes of a reasonable consumer. For example, the credibility of a consumer’s favorable review of a video game on a gamer blog might be materially impacted if a reader knew that the reviewer received the game free of charge from the developer in exchange for writing the review. If such a “material connection” exists, marketers must comply with the FTC’s requirements.

2. Advise Endorsers to Prominently Disclose Material Connections and to Make Only Statements that are Truthful and Substantiated

If an endorsement is present, marketers must ensure that any message regarding the product communicated by the third party is accompanied by a disclosure of the material connection and that all endorsement statements are both truthful and substantiated.

First, if a “material connection” disclosure is required, marketers should ensure that the endorsing party presents the disclosure clearly and conspicuously, taking into consideration the space and formatting limitations of the platform being used. While there are no “magic words” that need to be stated in order to satisfy the disclosure requirement, the message should effectively communicate the existence of the material connection to potential readers. The FTC has explained that the disclosure can be as simple as “Company X gave me this product to try” for a blog post, or, for a video review, “Some of the products I’m going to use in this video were sent to me by their manufacturers.” For character limited platforms such as Facebook posts or Twitter messages, a disclosure hashtag such as “#paid” or “#ad” may be a space-efficient alternative. For social

media platforms like Pinterest, where a comment box is prominently displayed next to the posted content, users can indicate sponsored content in the comment box. The disclosure should be placed within the text of the message or within close proximity to the post itself, rather than be incorporated into a footnote, printed in small font, set off by an asterisk, or linked through to separate disclosure page.

Second, endorsers should be reminded that their statements about the product or brand must be factually accurate and substantiated. The FTC has been clear, if a third party endorser makes false or unsubstantiated claims it is the ultimate advertiser who can be held liable for those statements. Providing a set of talking points, pre-approved factual statements, or properly substantiated statistics or facts may serve as helpful guideposts for endorsers while simultaneously discouraging attempts to improvise or exaggerate claims.

3. Establish a Written Policy for Third-Party Endorsements

Consistent with the above considerations, marketers should consider adopting a written policy that establishes guidelines for the use of third-party endorsements. In addition to the beneficial effects of having a checklist of compliance obligations, the presence of such a policy has helped to protect marketers from liability in cases where endorsing parties failed to comply with their obligations in a manner inconsistent with the ultimate advertiser’s social media policy. The policy should set forth standards of conduct for claims made in promotional communications about company’s product or services and must require that all endorsing statements made on behalf of the company:

- Reflect the endorser’s honest opinions, findings, beliefs and experiences;
- Not include any statements about the advertiser, its products or its services that lack substantiation or are otherwise false or misleading; and
- Disclose, if true, that the endorser has received or will receive compensation or other benefit in exchange for their statements.

The policy should make clear that these requirements apply to all statements made by or on behalf of the advertising party, whether they are engaged directly by the advertiser, or are retained through an agency or sub-agency. In the event that an agency is engaged to conduct promotional activities on the advertiser's behalf, the policy should also ensure that the agency's contract or statement of work mandates compliance with the advertiser's social media policy as well as FTC requirements. The policy should also explicitly require that the agency or sub-agency engage in reasonable monitoring of paid endorsers to ensure ongoing compliance. Finally, the policy should ensure that the ultimate advertising party is itself provided with a reasonable number of endorsing statements to facilitate appropriate oversight of third party endorsers. If the advertiser is directly dealing with endorsing parties without an intermediary, the advertiser should monitor the endorsing statements itself.

4. Use Contractual Terms to Ensure Third Parties or Outside Agencies Comply

In the realm of social media marketing, where third party agencies or consumers are likely to be acting on behalf of an advertiser, the ultimate advertiser may see fit to include specific contractual language that addresses the FTC requirements as well as the company's endorsement policy and assigns duties accordingly. Essentially, the considerations discussed above, which apply internally to the company, should be made to apply externally to the company's service providers.

Marketers seeking to mitigate their exposure to potential liability should consider including, either in the master service agreement between the advertiser and the agency or in the statement of work document thereunder, the following contractual provisions, where appropriate:

- A specific reference to the advertiser's social media policy, possibly attached as an exhibit or appendix and incorporated by reference into the body of the contract, and a requirement that the service provider abide by the terms of the advertiser's policy;
- A requirement that the service provider review and

comply with the FTC's *Guides Concerning the Use of Endorsements and Testimonials in Advertising*;

- Language requiring the service provider to advise potential endorsers, in advance, that they must disclose any compensation received in exchange for their statements and a requirement that the endorsers make only statements that are true and substantiated;
- If applicable, a requirement that the service provider engage in reasonable monitoring of any third party endorsement statements it may obtain on behalf of the ultimate advertising party; and
- Provisions for ongoing monitoring and reporting by the service provider to the advertiser of endorsement statements, along with representative samples.

While these contractual requirements largely mirror applicable legal requirements, the express delegation of this responsibility ensures that the advertiser has made a good faith effort to comply with the letter and spirit of the law, while also providing a clear path towards indemnification in the event that noncompliance by an agency or endorsing party triggers an enforcement proceeding or litigation.

5. Engage in Reasonable Monitoring of Endorsers

The FTC requires that advertisers develop reasonable programs to train and monitor endorsers. While the FTC does not specify the measures that advertisers must take to adequately monitor the activities of third party endorsers any such program must be "reasonable." The reasonableness of any monitoring program will turn on the specifics of the campaign, but the FTC has made clear that certain products, such as those that impact consumer health and wellness, may be held to a higher standard than those that apply to consumer products generally.³ No matter the ultimate size of the campaign, records of the endorsing statements should be obtained and some, if not all, should be reviewed for compliance at some level by the advertiser or its agents.

In practice, the reasonableness of a firm's monitoring of endorsers will turn on the size and scope of the campaign and the product or service at issue. The FTC

has also recognized that an advertiser is not required to “be aware of every single statement made by a member of your network.”⁴ For a small campaign, an advertiser may be well advised to have its agent or the endorsing party provide copies of the endorsing statements for a compliance review by an employee familiar with the FTC’s requirements. For more complex campaigns, agents may be delegated the task of reviewing posts and content for compliance, while reporting findings and representative sample statements to the ultimate advertiser. For products that impact health, additional precautions and more thorough review is advisable.

6. In the Event of Misconduct, Take Prompt Corrective Action

In the event that monitoring reveals evidence that endorsers made false or unsubstantiated statements or failed to provide the appropriate disclosure, the marketer should take prompt corrective action. Depending on the circumstances of the noncompliance, it might be appropriate to remind the party to review the advertiser’s and the FTC’s endorsement policies and to correct the offending statements. In more severe cases, or in the case of repeat offenders, it may be appropriate to suspend or terminate the relationship with the party who fails to comply with their obligations. In the past, the FTC has cited a firm’s prompt action to address endorser misconduct as a reason for not bringing enforcement action.

For additional background on social media compliance, a helpful resource is the Word of Mouth Marketing Association’s (“WOMMA”) recently updated *Social Media Marketing Disclosure Guide*.⁵ In addition to providing useful social media compliance guidance, the WOMMA Guide provides disclosure best practices for marketers to consider and highlights emerging social media practices that may require additional consideration. While every social media marketing strategy will be unique, understanding the requirements that apply and planning accordingly can mitigate the associated legal risks.

B. User-Generated Content: Do’s and Don’ts

User-generated content (“UGC”) has exploded in

popularity in recent years, enabled by – and in turn enabling – some of the most successful digital brands, such as YouTube, Pinterest and Wikipedia. Amateurs, once purely consumers of media, are now active creators of content. Recognizing this fact, marketers are increasingly embracing UGC as a cost-effective means of generating creative commercial content and creating buzz around a particular product or brand. Indeed, a well-designed UGC campaign can create intense consumer engagement and amplify a brand’s exposure in the marketplace. While these benefits have driven marketers to incorporate UGC into marketing campaigns with great success, UGC necessarily involves sacrificing a substantial amount of control over content and messaging to outside third parties. While user autonomy can lead to unexpectedly brilliant results, it can also create certain risks.

Consider, for example, a campaign in which users are asked to submit an independently created 30-second commercial video for a well-known fast food chain. Scattered among the submitted content may be instances of copyright infringement, perhaps in the form of background music, or false claims about the beneficial health effects of eating the chain’s trademark sandwiches. Perhaps some UGC submissions make controversial claims about a competitor’s product. The key is to identify the risks that UGC content are likely to implicate and plan accordingly. Taking a few basic steps at the outset can mitigate these risks, while preserving the flexibility to create and execute a successful UGC campaign.

1. Create Clear Submission Guidelines

UGC campaigns should be defined at the outset, with a clear set of guidelines, before any content is submitted. If the UGC campaign is being administered through an established social media platform, such as Facebook, marketers should review and comply with any platform-specific UGC and promotions policies. While the specifics of the campaign will dictate specific risks that should be directly in the terms, certain basic terms should be included to ensure that content:

- Not contain any false or unsubstantiated claims;

- Not contain any copyrighted works, trademarks, or content that may infringe the intellectual property rights of third parties;
- Be suitable for display and publication (i.e. – not include nudity or profanity);
- Not contain defamatory statements or threats to any person, place, or group;
- Not invade the privacy of any person or entity; and
- Will be reviewed for compliance with rules before being accepted.

Other terms can be included if there are specific concerns that are likely to be implicated by the nature of the campaign. For example, if a college football-themed UGC campaign is envisioned it may make sense to clarify that the use of NCAA trademarks or logos is prohibited. Competitive claims can also be a potential source of conflict, so a clause that the content must not feature or refer to any competitive brands or products may be appropriate. To preserve the maximum flexibility to use submitted content, the terms should include an unconditional license to use, adapt, or modify the submission in any way for any purpose without consideration. →Marketers should also ensure that it is clearly stated that the site operator has the right to remove content at its discretion. Finally, marketers should require potential submitters of UGC to affirmatively accept the terms and conditions before content can be submitted.

In order to mitigate these risks, while also retaining a measure of control over submitted content, some marketers have seen fit to provide potential submitters with pre-approved brand and product assets to aid in the content creation process. Approved assets may include available trademarks, cleared copyrights, pre-approved music, and samples of brand and product logos. If the UGC campaign has been run before, consider posting submissions from previous contest winners or finalists to provide participants with examples of previously approved, exemplary content. By approaching legal considerations creatively, risks can be mitigated without interfering with the goal of facilitating the submission of high quality content.

2. Implement a Notice and Take-Down Process for Infringing Content

Marketers who contemplate running a UGC-based campaign are afforded some protection from copyright infringement claims by federal law. Specifically, the Digital Millennium Copyright Act provides a “safe harbor” from money damages and legal costs resulting from alleged acts of copyright infringement that may arise as marketers solicit and post UGC. While the courts are still determining the precise contours of the protections, the safe harbors provide substantial protections for UGC campaigns.

In order to qualify for this safe harbor, the marketer or its agency service provider must:

- Lack actual knowledge that the UGC material or its use is infringing a copyright or be aware of facts or circumstances that make the infringement apparent; and
- Quickly take down the infringing material upon 1) receiving a takedown notice from a copyright holder, or 2) otherwise obtaining knowledge of the infringement.

Further, the marketer or its agency must designate an agent, either an individual employee or a department within its organization, to receive notices of alleged infringement. Designation of an agent can be done directly by the marketer, by its agency, or by a service provider that is ultimately hosting the content. The agent’s name and contact information, including address, telephone number, and email address, should be made available in a publicly accessible location on its website. Finally, the agent should be registered with the U.S. Register of Copyrights, by submitting a form available at: www.copyright.gov/onlinesp/agent.pdf along with a modest \$105 filing fee. Marketers who take advantage of these protections greatly reduce their risk exposure in running a UGC-based social media campaign.

C. Social Media Contests: Rules of the Game

Creating social media contests on brand websites or platforms like Facebook and YouTube has become a popular way to expose brands to a larger audience,

attract new followers, and engage with existing customer and followers in a cost-effective and targeted manner. Many UGC campaigns are structured as contests, such as a video submission contest or an idea for a new product. Consider, for example, a potato chip producer soliciting suggestions for a new flavor of chip, with the winning creator to be awarded a substantial cash prize. The key to running a successful contest is to remember that contests are regulated both by state laws and by the social media platforms that the contest may be hosted on. To avoid any potential issues, follow three basic steps.

1. Establish Official Contest Rules

Each promotion must be governed by official rules that disclose the material terms of the promotion. The official rules of a contest are considered to be a contract between the sponsor and entrants. Thus, once the rules are finalized and posted, they must be followed as written. When structuring a contest, make sure that contest rules should include the at least the following terms:

- The name of the contest sponsor
- Who is eligible to participate
- Contest start date and deadlines
- How users may enter
- What users must submit to be considered
- How winners will be selected
- Odds of winning
- A description of the prizes available.

While a purchase requirement may be permissible for entry under some state laws, they are not allowed in others. For a national campaign a purchase requirement should be required only after careful consideration. If no purchase is required, the rules should present the alternative means of entry option.

2. Award Prizes Objectively and on the Basis of Skill

The major legal consideration in running a contest is ensuring that winners are selected on the basis of skill and not by chance, such as a random drawing. Chance-based promotions are more highly regulated than skill-based contests and should receive careful consideration before being implemented. Marketers can ensure that

a contest is considered skill-based by establishing, in the contest's official rules, the objective criteria for evaluating submissions and provide for the use of a qualified judge or judges to evaluate entries based upon the stated basis for selection. Assigning relative weights to certain desired criteria can provide participants with guidance on content and better ensure objective judging.

3. Adhere to Platform-Specific Contest Requirements

Before launching a contest on a social media platform, marketers should familiarize themselves with the platform's specific contest requirement. Failure to abide by the site's requirements could result in the contest being removed from the site or even getting the brand banned from the platform entirely.

Social media platforms generally restrict the types of promotions you may run through their sites. For example, Facebook requires that brands run contests and promotions through a special app page. Facebook also prohibits using its "Like" button as a voting mechanism as well as requiring companies to make various disclosures, explicitly disassociating Facebook from the contest, and banning brands to notifying winners through Facebook. YouTube allows contests but, like Facebook, does not allow its "Thumbs Up-Thumbs Down" button to be used to cast contest votes. LinkedIn and Google+ prohibit contests and promotions from being run on their sites entirely. Other sites, like Twitter and Pinterest, are more permissive. Current versions of popular platforms' contest policies are provided in the attached social media legal checklist. The platform-specific requirements are constantly changing, so marketers should review them carefully before selecting a specific platform for the contest.

* * *

While social media has evolved into a powerful marketing tool, marketers must take care to avoid taking unnecessary legal risks. Improper use of social media can land a brand or its marketing agency in legal trouble. Properly identified, these risks can be effectively mitigated if not avoided entirely. By taking the steps outlined above and referring to the attached checklist when considering a social media campaign, marketers can steer clear of potential legal pitfalls and confidently

tap into the power of social media as part of a marketing strategy. While many of these considerations may seem straightforward, consulting a legal checklist at the

design phase of a social media campaign can serve as a strong reminder not to skip any steps or overlook any potential risks. ■

Social Media Marketing: Legal Compliance Checklist

Prepared by Aaron M. Gregory, SNR Denton US LLP.

Author email: aaron.m.gregory@snrdenton.com

Endorsements

Does the campaign envision the use of brand advocates?

Will the advocates be compensated in any of the following?

- Employment by the advertiser
- Cash
- Gift cards
- Free products or services
- Royalties or commissions
- Special or early access to the product
- Awards points
- The promise of any of the above

If yes to both, complete the following checklist.

- Advise advocates of need to conspicuously disclose the compensation and source
 - Provide sample disclosure language
 - If using agency, remind of this duty
- Advise advocate or agency of need for all statements to be truthful and substantiated
- Adopt a written social media endorsement policy to apply to all agents and advocates
 - Include reference to 16 CFR Part 255, the FTC's Endorsement Guides
- Incorporate policy and FTC Endorsement Guides into master agency contract or SOW
- Monitor brand advocates for compliance
 - Delegate review if necessary, but ensure reasonable level of review
 - If review delegated, review reports and representative sample statements
- If non-compliance, take corrective action
 - Remind first time offenders of duties
 - Consider suspension or termination of repeat offenders

Social Media Based Contests

- Check platform-specific requirements, if third party platform is to be used
- Establish official contest rules
 - Name the contest sponsor
 - Define eligibility
 - Set start and end dates
 - Set submission guidelines
 - Set submission restrictions
 - Explain how winners will be selected
 - Explain odds of winning
 - Describe prizes available
- Adhere to contest rules once established
- Set objective criteria for evaluating contest submissions
- Recruit or appoint qualified judges
- Award prizes on basis of skill only

User-Generated Content

- Create clear submission guidelines
 - No false or unsubstantiated claims
 - No use of copyrights, trademarks, or content of third parties
 - No nudity or profanity
 - No defamatory statements or threats to any person, place, or group
 - All individuals in submission gave consent to appear
 - Optional: Insert campaign-specific restrictions to deal with specific issues
 - Optional: Insert license grant into terms
- Optional: Provide tool-kit of approved assets
- Review submissions for compliance with rules before being accepted
- Implement notice & takedown procedures for potentially infringing content

Social Media Resources

WOMMA Guide to Disclosure in Social Media Marketing: <http://womma.org/ethics/disclosure/>

Federal Trade Endorsement Guides: www.ftc.gov/os/2009/10/091005revisedendorsementguides.pdf

Facebook Pages Contest Terms: www.facebook.com/page_guidelines.php#promotionsguidelines

YouTube Contest Policies: <http://support.google.com/youtube/bin/answer.py?hl=en&answer=1620498>

Twitter Contests Guidelines: support.twitter.com/articles/68877-guidelines-for-contests-on-twitter#

About the Author

Aaron M. Gregory is an attorney at the law firm of SNR Denton US LLP specializing in federal regulatory law. He has practiced extensively before the Federal Trade Commission, where he has represented companies on advertising practices investigations, claim substantiation, product labeling, and rulemaking proceedings. Mr. Gregory draws on his business background to assist clients develop creative solutions to complex marketing issues. He can be reached at: aaron.gregory@snrdenton.com.

Please contact the authors at aaron.gregory@snrdenton.com with questions about this article.

This guide is for informational purposes only and does not constitute legal advice. Do not act on this legal information alone; if you have any specific legal problems, issues, or questions, seek a complete review of your situation with a licensed lawyer.

References

¹ *The Nielson Company, Global Advertising: Consumers Trust Friends and Virtual Strangers the Most, Nielsenwire* (July 7, 2009), available at: <http://blog.nielsen.com/nielsenwire/consumer/global-advertising-consumers-trust-real-friends-and-virtual-strangers-the-most/>.

² Federal Trade Commission, 16 C.F.R. Part 255, *Guides Concerning the Use of Endorsements and Testimonials in Advertising* (2009), available at: <http://www.ftc.gov/os/2009/10/091005revisedendorsementguides.pdf>

³ Federal Trade Commission, *The FTC's Revised Endorsement Guides: What People are Asking*, at 6 (June 2010).

⁴ *Id.* ("It would be unrealistic to say you had to be aware of every single statement made by a member of your network.")

⁵ Word of Mouth Marketing Association, *Social Media Marketing Disclosure Guide* (2012), available at: <http://womma.org/ethics/disclosure/> (registration required).