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BRAND REPUTATION

As social media evolves into a standard marketing tool, companies must be aware of the issues and pitfalls these marketing opportunities present. Adopting clear policies for consumers and employees is an absolute must, and appropriate monitoring and education should be made part of standard corporate procedure, the authors write in a review of the major issues facing companies seeking to safeguard brand reputation.

This article is part of a Social Media Law & Policy Report series on social media developments in 2013 in selected industries and practice areas.

Social Media Marketing in 2013: Best Practices for Safeguarding Brand Reputation in an Uncertain World

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Social media has become an integral, and perhaps necessary, component of any company's marketing strategy. A recent Vanson Bourne survey found that almost 70 percent of marketing directors and managers surveyed now place a greater emphasis on

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social media than traditional media.¹ And while advertising and marketing campaigns have traditionally been developed by outside agencies, many companies now have teams of employees dedicated to creating social media campaigns and tracking how they and their competitors are "trending" in the media. The focus of advertising on social media is attributed to the enormous potential market to be captured: An estimated 1.4 billion people worldwide use social networks, and that

¹ Erik Sass, "Consumers Punish Brands Which Annoy Them On Social Media," *MediaPost Blogs* (Nov. 21, 2012), available at <http://www.mediapost.com/publications/article/187775/consumers-punish-brands-which-annoy-them-on-social.html#axzz2HheBa7IS>.

number is forecast to increase to 1.85 billion by 2014.² Currently, Facebook has more than 1 billion active users (including 66 percent of adults in the United States),³ there are 400 million tweets per day,⁴ more than 11 million Pinterest visitors per month,⁵ and 5 billion Instagram photos with 80 million Instagram users.⁶

In addition to the sheer number of potential eyeballs to be captured, social media is viewed as a particularly effective marketing tool, as consumers are likely to trust and rely on the opinions of their friends and colleagues. The Vanson Bourne survey found that 68 percent of consumers investigated a product recommended by a friend online and 15 percent actually made a purchase based on an online recommendation.

Yet, as with any other “new” marketing tool, companies that race to adopt social media campaigns may fail to fully comprehend and appreciate the risks involved with such initiatives. In addition to the legal risks that may be implicated, brands also need to be aware of and sensitive to the reputational issues that these campaigns raise. For example, a high-profile social media marketing campaign recently went awry when Oprah tweeted about Microsoft’s new tablet, the Surface, from her iPad. It was evident to anyone who saw the “sent from my iPad” signature line that Oprah was not as enamored with her Surface as she claimed to be, thereby eviscerating Microsoft’s expenditure in securing the coveted endorsement. After all, consumers want to believe they are getting the honest opinion of the speaker, whether it is a friend or a celebrity, and Oprah’s endorsement was construed as nothing more than a paid statement by the company, rather than by a trusted user of the Surface.

As social media marketing continues to mature, brands looking to safeguard their reputations should pay close attention to the following trends:

- **Endorsements:** The issue of what constitutes an endorsement—from celebrities and individuals—will continue to develop as brands find new ways to engage consumers to promote their products.
- **Reuse of Social Media Content:** As companies seek to adopt, retweet, repost and repin user-generated content—both words and images—to enhance their marketing campaigns, and as new social media platforms continue to proliferate, the copyright, trademark, and publicity laws governing these practices will continue to lag behind and create uncertainty.
- **Privacy:** Privacy likely will remain a priority for consumers, legislators, regulators, and self-

² eMarketer, Social Media <https://www.emarketer.com/Coverage/SocialMedia.aspx>.

³ Yahoo, “Number of Active Users on Facebook Over the Years,” <http://finance.yahoo.com/news/number-active-users-facebook-over-230449748.html>.

⁴ Mediabistro.com, “Twitter Now Seeing 400 Million Tweets Per Day, Increased Mobile Ad Revenue, Says CEO,” http://www.mediabistro.com/alltwitter/twitter-400-million-tweets_b23744.

⁵ TechCrunch.com, “Pinterest Hits 10 Million U.S. Monthly Uniques Faster Than Any Standalone Site Ever,” <http://techcrunch.com/2012/02/07/pinterest-monthly-unique/>.

⁶ The Next Web, “Facebook Officially Welcomes Instagram Into its Family as it Passes 5 Billion Photo Milestone,” <http://thenextweb.com/facebook/2012/09/06/facebook-officially-welcomes-instagram-family-passes-5-billion-photo-milestone/>.

regulatory bodies. As technology continues to change, and the ability to collect, maintain, and process data increases exponentially, companies will need to stay abreast of such developments, the laws governing such practices, and industry efforts to maintain control for their members. In particular, companies should look for increased attention paid to geolocation and facial recognition technology.

- **Social Media in the Workplace:** Employers need to develop and implement clear and balanced social media policies for their employees’ personal and professional use to ensure that employees understand all expectations of acceptable (and unacceptable) behavior.

Use of Endorsements.

One of the key components of an effective social media campaign is the use of endorsements, both by consumers and celebrities. Marketers have historically used celebrity endorsements to promote their products, relying on star power to produce sales. But, with the increased use of social media sites, which allow consumers to share their experiences with millions of people at the click of a button, and more importantly, the trust that consumers place in others like them, the new star power is “word-of-mouth” marketing.

If consumers are to rely on other consumers’ reports before making a purchase decision, it is imperative that the integrity of such reports is maintained. To that end, experiences should be truthful, not misleading, and objective. To ensure the objectivity of such reports, a consumer must disclose whether his or her opinion is in any way biased. To address this issue, the Federal Trade Commission authored guidelines for use of endorsements and testimonials in advertising (Guides).⁷ The Guides were first issued in 1980 and revised in late 2009 to reflect changes in advertising applicable to social media, word-of-mouth marketing, and other promotions where individuals are induced to endorse products or services.

The new star power is “word-of-mouth” marketing.

Under the revised Guides, endorsements and testimonials have the same meaning and refer to “any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinion, beliefs, findings or experiences of a party other than the sponsoring advertiser, even if the views expressed by the party are identical to those of the sponsoring advertiser.”⁸

Among other things, the Guides require the endorser to disclose any “material connection” between an advertiser and the endorser when the relationship is not otherwise apparent from the context of the endorsement. Thus, the Guides require the disclosure of free

⁷ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. pt. 255.

⁸ 16 C.F.R. § 255.0(b).

gifts, an employment relationship, and/or the receipt of any tangible incentive (e.g., coupons, discounts, sweepstakes entries, gifts, free samples). Both the company and the endorser can be held liable for failure to make the required disclosures.

Disclosure of material connections in social media has been a major issue for the FTC. Most recently, the agency investigated but declined to take action against Hewlett-Packard Co. and its public relations firm, Porter Novelli Inc., for alleged violations of the Guides arising from an advertising campaign where gifts were provided to bloggers who encouraged consumers to use HP products. Specifically, the agency was concerned that bloggers received two \$50 gift certificates (one for the blogger and one to give away to readers) as well as printable items, and most of the bloggers who posted after receiving the gift pack said that HP gave them a \$50 gift card to give away and/or a holiday gift pack with printables, but failed to disclose that they received the \$50 gift card to keep for posting blog content about HP Inkology.⁹ Nevertheless, the agency declined to pursue enforcement against HP and the PR firm.

The HP investigation was factually very similar to the FTC's 2010 investigation into the retailer Ann Taylor for providing gifts to bloggers who attended a runway show in the hopes that they would blog favorably about the brand. Like the Ann Taylor investigation, the minimal number of noncompliant bloggers and the fact that the companies revised their social media policies played a significant role in the decision not to pursue enforcement, as described in the agency's closing letter.¹⁰

Disclosure of material connections in social media has been a major issue for the FTC.

By contrast, the agency did pursue and settle charges against Reverb Communications Inc., a public relations agency hired by video game developers, over allegations of deceptive advertising that arose from employees posing as ordinary consumers posting game reviews at the online iTunes store, without disclosing that the reviews came from paid employees working on behalf of the developers.¹¹

In addition to the disclosure of material connections, another question raised by the Guides is what consti-

⁹ FTC Closing Letter re HP Inkology, FTC File No. 122-3087, available at <http://www.ftc.gov/os/closings/staff/120927hpinkologycltr.pdf>.

¹⁰ *Id.* (Noting that the decision not to pursue enforcement does not necessarily mean that no violation has occurred); see also FTC Closing Letter to Ann Taylor Stores Corp., FTC File No. 102-3147, available at <http://www.ftc.gov/os/closings/100420anntaylorclosingletter.pdf>; FTC Closing Letter re Hyundai Motor America, FTC File No. 112-3110, available at <http://www.ftc.gov/os/closings/111116hyundaimotorletter.pdf> (declining to pursue enforcement where it was clear that bloggers' failure to disclose incentives were not because of a company's employees, but an individual working for a media firm hired to conduct a blogging campaign, and were contrary to the social media policies of the media firm and company in question).

¹¹ *In the Matter of Reverb Communications Inc., et al.*, FTC File No. 092-3199; see also *Legacy Learning Systems*, FTC File No. 102-3055.

tutes an endorsement—from individuals or celebrities. A recent National Advertising Division (NAD) case found that the display of “likes” on Facebook and other social platforms may reasonably be understood by consumers as conveying a message of general social endorsement.¹²

Of course, if an employee posts a review or comment about a product or service, that is an advertising message that may not be attributed to the sponsor, and the employee must comply with the Guides and disclose his or her material connection—employment—to the advertiser. However, if an employee does not post a review of a product but simply posts a link to where to buy the product on his or her Facebook or Pinterest page, is that an endorsement? Similarly, if the employee simply linked to his or her employer's Facebook or Pinterest page, is that an endorsement? Although a material connection to the advertiser exists, the employee arguably is not expressing any opinions, beliefs, or experiences about the product.

Similar questions also arise with respect to celebrities. A celebrity posting a favorable comment about a brand may not constitute an endorsement; however, if the celebrity, who was not initially paid by the brand, then starts to receive free products or services in appreciation for her posts, which she continues to do, the answer may change.

Similarly, the issue of what constitutes an endorsement from an ordinary consumer may not always be clear. For example, companies have begun paying consumers for sharing or recommending products to friends via a Facebook post, Twitter message, or Pinterest pin. These consumers are paid modest amounts to post product links that companies believe will drive sales.¹³ Whether this constitutes an endorsement likely turns on whether the link to a product can be held to constitute an opinion, belief, finding, or experience of the consumer. Although the consumer is not necessarily posting a review, the mere link to a product and the fact that a consumer wants to share it with others may be considered to constitute the expression of a favorable opinion.

Different industries may have specific rules or guidelines for promoting their products or services in any medium, including social media.

In addition to the Guides, individuals who may be considered endorsers also must comply with the policies of the applicable social networking sites. Twitter allows individuals to post referral-based links, so long as they are manually, as opposed to automatically (computer-or auto-generated), posted, but encourages users to disclose they are getting paid. Twitter also dis-

¹² *Coastal Contacts Inc. (Coastal Contacts Inc. Advertising)*, NAD Case Report # 5387 (Oct. 25, 2011).

¹³ Stephanie Clifford, “Sites That Pay the Shopper for Being a Seller,” *New York Times* (Oct. 2, 2012), available at http://www.nytimes.com/2012/10/03/business/media/shopping-sites-pay-contributors-who-drive-traffic-to-retailers.html?_r=0.

courages users from posting the same tweets.¹⁴ On the other hand, Facebook prohibits direct incentivizing (e.g., rewarding users, such as by providing a rebate, for the sole act of posting a stream or sending a request) but allows referral-based rewards for indirect incentivizing (e.g., rewarding users based on the number of friends that accept an invitation to an app). Thus, Facebook's policies appear to prohibit users from obtaining rewards for the mere act of posting a link but do not appear to prohibit users from earning rewards if their friends purchase a product. As such, companies can indirectly benefit from a Facebook user's feed stories, check-ins, or likes.¹⁵

Assuming some of the aforementioned scenarios do in fact constitute endorsements, brands should pay close attention to the continued evolution of guidelines for disclosing a material connection to the advertiser in limited real estate. The Word of Mouth Marketing Association (WOMMA) released a new version of its Social Media Marketing Disclosure Guide in 2012,¹⁶ intended to highlight best practices in social media and to help marketers and advocates comply with the Guides. The WOMMA Guide includes model disclosures for various platforms (e.g., suggesting a short phrase or hashtag like #spon, #paid, or #samp should be used to indicate a material connection exists). However, technology changes so often, and new platforms are constantly emerging, so it is difficult to craft rules that will translate across any app or platform. Although the aforementioned hashtags are appropriate for Twitter, how do you make a similar disclosure on one of the newest and most popular social media sites, Pinterest? If a user receives a free product, payment, or sweepstakes entry in exchange for posting a pin on Pinterest or liking a company's pinboard, it is reasonable that the user's mere action constitutes an endorsement and that the user would be required to disclose its material connection to the advertiser. This may be accomplished through the comment section (e.g., "Company X gave me this product to try").

In addition to fleshing out the manner of disclosures, brands need to consider the timing and frequency of such disclosures. For example, actor Ashton Kutcher recently made headlines for promoting companies in which he had investments via Twitter but failing to disclose his investment.¹⁷ Is it enough for celebrities such as Kutcher, or even ordinary consumers who might be bloggers or brand ambassadors, to make a one-time disclosure concerning their connection to a brand, or should these individuals remind their followers about their connection to the brand every time they post, pin, tweet, or blog about a product or service? Brands should communicate their expectations clearly to their endorsers.

¹⁴ Twitter, Policies for Tweets with External Sponsorships, available at <http://support.twitter.com/groups/33-report-abuse-or-policy-violations/topics/148-policy-information/articles/20169940-policy-for-tweets-with-external-sponsorship#>.

¹⁵ Facebook, Rewarding Users, available at https://developers.facebook.com/docs/guides/policy/examples_and_explanations/Rewarding_Users/

¹⁶ WOMMA, Social Media Marketing Disclosure Guide, available at <http://members.womma.org/d/do/4>.

¹⁷ Adam Clark Estes, "Ashton Kutcher Endorses His Investments on Twitter, Too," *The Atlantic Wire* (Aug. 19, 2011), available at <http://www.theatlanticwire.com/technology/2011/08/ashton-kutcher-twitter-endorsements/41487/>.

Although the law is largely unsettled in this area and brands should be alert to what constitutes an endorsement and how to make the appropriate disclosures, industry guidelines also are instructive. Different industries may have specific rules or guidelines for promoting their products or services in any medium, including social media. For example, the distilled spirits industry has issued guidelines for advertising in social media,¹⁸ the Food and Drug Administration describes crafting social media guidelines as being a priority and has issued draft guidance for drug companies with respect to their use of social media,¹⁹ and the Financial Industry Regulatory Authority has spoken out on the issue as well.²⁰

Reuse of Social Media Content.

Because marketing experts know that consumers rely on the opinions of their friends and colleagues, they want to maximize user statements about their products and services. Thus, user-generated content (UGC) is highly valuable to advertisers, and as such, they will likely want to look for innovative ways to use such content, whether it involves statements about their own brand or comments about a competitor's brand, including use in ad campaigns. In addition to reusing consumer statements or reviews, marketers may want to simply link to UGC, or retweet or repin certain content that appears in social media. Yet, companies need to proceed with caution when it comes to UGC, particularly when they reuse such content in other forms or media, or repeatedly. The reuse of such content may give rise to claims of copyright or trademark infringement, defamation, violation of the rights of privacy and publicity, false association or endorsement, false advertising, and more.

One of the earliest cases involving UGC was a false advertising case that stemmed from videos posted by consumers to a contest sponsored by Quiznos, where Quiznos asked consumers to post videos about their sandwiches in a manner that clearly invited comparisons with its competitor, Subway. Quiznos asked consumers to compare the amount of meat in each sandwich.²¹ Subway, obviously, sued. Although the case ultimately settled, it did so only after the court denied Quiznos's motion for summary judgment, which suggested that if continued, the case would turn on whether Quiznos merely published information provided by third parties or was actively responsible for the creation and development of the disparaging representations about Subway in the contestant videos.

The potential pitfalls of reusing UGC from the right of privacy and publicity perspectives also are evident

¹⁸ Distilled Spirits Council's Guidance Note on Responsible Digital Marketing Communications, available at http://www.discus.org/assets/1/7/DISCUS_Digital_Communications_Guidelines.pdf.

¹⁹ Pamela Lewis Dolan, "FDA Issues Draft Social Media Rules for Drug Companies," *American Medical News* (Jan. 25, 2012), available at <http://www.ama-assn.org/amednews/2012/01/23/bisf0125.htm>.

²⁰ FINRA Regulatory Notice 11-39, available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p124186.pdf>; FINRA Regulatory notice 10-06, available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p120779.pdf>.

²¹ *Doctor's Assocs. Inc. v. QIP Holders LLC*, No. 3:06-cv-1710 (V.L.B.) (D. Conn. Feb. 19, 2010).

from the recent Facebook litigation involving the company's Sponsored Stories.²² Here, Facebook assembled ads by using the likes of a Facebook user's friends and crafting an advertisement—often using those friends' names and photos—for the Facebook user, touting that his or her friend “liked” a particular advertiser. Because plaintiffs established that their names and likenesses had commercial value, Facebook's motion to dismiss was denied, and a federal judge recently signed off on a settlement allowing users whose images appeared in the company's sponsored stories to claim a cash payment of up to \$10 each, among other things.²³

These recent cases provide the backdrop for best practices with respect to how brands should treat UGC. However, it is also important to comply with the specific rules of the social media site from which the UGC is obtained. For example, Facebook and Twitter both provide that its users own the content and information they post on the respective sites and set forth procedures under the Digital Millennium Copyright Act (DMCA)²⁴ for reporting allegations of copyright infringement.²⁵ Therefore, if a brand wants to reuse user content from a social media site, permission should be requested from the user.

Reuse of user generated content also could give rise to false advertising claims.

However, how a brand intends to use the content must also be considered, as Facebook actually prohibits companies from using data they receive from Facebook concerning a user in any advertising created, even if a user consents to such use. Therefore, although a company may be able to use UGC from Facebook in certain ways, using Facebook user comments in ads is currently prohibited.²⁶

Twitter, on the other hand, allows republishing UGC so long as permission from the user is obtained, proper attribution is provided, and it is disclosed that the tweet is a “retweet,” although automatic retweeting of other users based on a particular keyword is discouraged.²⁷ Additionally, should a brand wish to use Twitter content in advertising, or on a commercially durable good or product, in a manner that implies the endorsement or sponsorship of the user, explicit permission from the

original content creator is required.²⁸ Moreover, where Twitter content is the primary basis of the advertising sale, Twitter may need to be compensated, and ads cannot resemble or reasonably be confused by users as a tweet.²⁹

Pinterest requires proper attribution when repining on the site. Although Pinterest is silent on the issue of reuse of user content outside the site, because users retain the rights to their content, it is advisable to seek permission before reusing, in order to mitigate against claims of copyright infringement.

Additionally, the manner by which brands collect UGC is important, as sites such as Facebook and Pinterest actually prohibit scraping for content or user information using automated means. Brands also should ensure they have adequate security on their own websites to prevent third parties from scraping for content to resell to data brokers and/or marketing affiliates.

As hinted at above, rather than reuse a consumer review or statement, a brand may simply want to link to a user's posted UGC. Although linking likely would not give rise to a copyright infringement claim and permission may not be required, there are, nevertheless, other issues to consider, such as whether the linked content is appropriate for the intended audience and whether the link creates an implied association or endorsement. This issue arises with both ordinary consumers and celebrities. With respect to celebrities, there is also a strong argument that their opinions have commercial value and, therefore, there is also a potential right of publicity claim. Thus, advertisers likely want to secure permission from a celebrity before linking to or retweeting content. However, the Facebook Sponsored Stories litigation demonstrated that commercial value may attach to the content of ordinary consumers as well. Ordinary individuals also have been on the other side of litigation, facing the threat of legal action because of comments they posted on the Internet. In November 2012, it was reported that Lord McAlpine of England was pursuing legal action against thousands of Twitter users for libel for referring to a BBC report wrongly linking the former Conservative party official to sexual abuse of a child.³⁰ Indeed, it will be interesting to see whether this novel claim succeeds and the potentially chilling effects on dissuading ordinary consumers from linking to or retweeting content on social media.

Reuse of UGC also could give rise to false advertising claims. Advertisers have an independent duty to ensure the accuracy and adequate substantiation of any claim they make, including claims made through UGC.³¹ Thus, if a consumer makes a hyperbolic claim about a company's product or service, which the company in some form adopts, both the company and the individual could be liable for any unsubstantiated claims. With respect to competitive claims, the Quiznos case is instruc-

²² *Frale v. Facebook Inc.*, No. 3:11-cv-01726-RS (N.D. Cal. Dec. 3, 2012).

²³ *Id.*

²⁴ Pub. L. No. 105-04, 112 Stat. 2860 (Oct. 28, 1998).

²⁵ Facebook Statement of Rights and Responsibilities, available at <https://www.facebook.com/legal/terms>; Twitter, Terms of Service, available at <http://twitter.com/tos>; see also Pinterest Terms & Privacy, available at <http://pinterest.com/about/terms/> (users retain rights to user content, as opposed to third-party content).

²⁶ Facebook Platform Policies, available at <https://developers.facebook.com/policy/>.

²⁷ Twitter, Developer Rules of the Road, available at <https://dev.twitter.com/terms/api-terms>; Twitter Automation Rules and Best Practices, available at <http://support.twitter.com/groups/33-report-abuse-or-policy-violations/topics/121-guidelines-best-practices/articles/76915-automation-rules-and-best-practices#>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Eric Pfanner, “Libel Case that Snared BBC Widens to Twitter,” *New York Times* (Nov. 25, 2012), available at http://www.nytimes.com/2012/11/26/technology/26iht-twitter26.html?_r=0.

³¹ FTC Policy Statement Regarding Advertising Substantiation, <http://www.ftc.gov/bcp/guides/ad3subst.htm>. See also, *Doctor's Assocs. Inc. v. QIP Holders LLC*, No. 3:06-cv-1710 (VLB) (D. Conn. Feb. 19, 2010).

tive: Brands should be sure they are in no way inducing content that is infringing or disparaging. This can be accomplished if the brand provides guidelines for posting content to a social media site (or rules in the case of a contest), and if the brand is actively soliciting content, for example, for a contest through examples provided to users and/or directions about the content that is being requested.

Privacy.

With the increased use of social media, consumers are sharing an extraordinary amount of personal information that is stored, reshared, reposted, retweeted, repurposed, and aggregated. As a result, the term “Big Data” has entered the everyday lexicon, and privacy concerns have become a front burner issue for consumers, legislators, and regulators. These concerns will only increase with the growing use of social media and will not only be limited to legal issues but also to reputation. Thus, it is incumbent upon, if not necessary, for brands to pay close attention to these issues.

In March of this year, the FTC released its privacy report titled “Protecting Consumer Privacy in an Era of Rapid Change.”³² The report followed enforcement actions by the agency against social media sites such as Facebook, Google, and Myspace, as well as a proposal by the White House for a Consumer Privacy Bill of Rights, and draft federal legislation.

The FTC’s enforcement actions against the social media sites generally alleged that the companies made promises to their users that they then failed to keep (e.g., with respect to sharing of personal information); and/or failed to maintain reasonable data security. The consent orders shaped the framework of the FTC Report, which among other things, delineates a privacy framework for how companies should collect, use and share data, based on the following principles: (i) Privacy by Design; (ii) Simplified Consumer Choice; and (iii) Transparency. Notably, the report calls for companies to obtain express consent from consumers before using data in a materially different manner from that which was originally collected and not reasonably expected by the consumer (e.g., third-party sharing) and in connection with the collection of sensitive data (e.g., medical and financial data, Social Security numbers, and precise geolocation data).

Brands, as well as regulators, are likely to continue to grapple with these issues in the coming year. Precise location data are likely to be on the regulatory forefront, as consumers spend more time on their mobile devices and mobile marketing continues to grow. It is predicted that by 2014, access to the internet via mobile devices will surpass desktop internet usage.³³ Even now, consumers are using their mobile devices to access social content, with nearly half of all mobile users reportedly using their smartphones for social networking. In fact, nearly one-third of Facebook’s users use Facebook mobile, half of Twitter’s users use its mobile app, and more than 200 million YouTube views occur on mobile devices every day.

Despite the growth of mobile, however, recent studies show that consumers are not ready to embrace loca-

tion marketing, at least when it comes to receiving offers on their smartphones during or after visiting a retailer.³⁴ Studies show that a notable trust gap exists in regard to mobile marketing. Thus, when conducting a mobile promotion, brands are advised to follow best practices and obtain express consent from consumers before collecting geolocation data. The timing and frequency of such consent also will likely be an issue to be addressed by regulators. The Mobile Marketing Association Guidelines recommend that consent be specific to a program, i.e., brands should not seek blanket consent for all programs and/or products.³⁵ Although they are only guidelines, failing to follow them jeopardizes consumer trust, and brands risk losing not only the time and effort invested in novel promotions but also in alienating existing and prospective customers.

As noted above, brands must also pay attention to “Big Data.” Although many issues are raised by the collection, aggregation, and use of massive amounts of consumer data, one area of concern relating to social media involves the consolidation of such sites. As many mature (indeed, a relative term) social media sites look to increase their service offerings and remain relevant to consumers, they are buying emerging sites and services, many of which have a loyal and growing user base but limited or no revenue. To justify these purchases, the larger sites are under pressure from investors to monetize their new assets. One obvious path has been to consolidate their user bases and to combine such information in an attempt to develop more robust user profiles for more efficient (and increased revenue-generating) targeted advertising. With such consolidation, both legal and reputational issues arise.

For example, Google and Facebook both witnessed a firestorm in response to proposed changes that would allow the sites to share information with their affiliates/partners. Google faced a public relations headache when it consolidated the privacy policies of all of its properties, including YouTube. In addition to the public outcry, many privacy advocates filed complaints with the FTC, alleging that the merging of the policies (and databases) violated its privacy settlement with Google.³⁶

In late 2012, popular photo-sharing site Instagram and its parent, Facebook, faced a public showdown over the former’s posting of a revised privacy policy and terms of use. Among other things, Instagram announced that it had revised these policies to inform users that it will allow third-party companies to use user photos in advertising and that such use may not be labeled as advertising. These changes caused some consumers and companies to fear that Instagram could sell posted photos to advertisers and others. Many users expressed frustration and disgust, and threatened to leave, most notably, the highly followed socialite Kim Kardashian. Upon hearing of this, Instagram’s chief ex-

³⁴ Mark Walsh, “Consumers Wary of Mobile Location Marketing,” *Media Post News*, available at <http://www.mediapost.com/publications/article/188374/consumers-wary-of-mobile-location-marketing.html#axzz2Elu7o6Dw>.

³⁵ Mobile Marketing Association, *Consumer Best Practices*, <http://www.mmaglobal.com/bestpractices.pdf>.

³⁶ Elinor Mills, “Consumer Group Files FTC Complaint Against Google,” CNET, http://news.cnet.com/8301-27080_3-57382912-245/consumer-group-files-ftc-complaint-against-google/.

³² <http://ftc.gov/os/2012/03/120326privacyreport.pdf>.

³³ Smart Insights, *Mobile Marketing Statistics 2012*, available at <http://www.smartinsights.com/mobile-marketing/mobile-marketing-analytics/mobile-marketing-statistics/>.

ective officer quickly posted an apology, clarifying that it was never the company's intention to sell user photos. Further, Instagram promised to clarify the revised Terms of Use and Privacy Policy before implementing the revised terms.

In a similar scenario, Facebook announced just a month earlier its intention to implement changes to its data use policies that were intended to help users better manage their own privacy controls and for the company to more easily implement changes to its policies. Specifically, Facebook proposed to eliminate user voting rights in connection with its policy changes. Despite significant adverse user reaction, only about 650,000 Facebook users voted to save their "right to vote," which was woefully shy of the 300 million votes needed to defeat such a proposal. The change now allows Facebook to change its policies without user approval, although it has promised to provide users with notice of, and an opportunity to comment on, such changes in the future.

In light of these events, marketers must acknowledge the fact that consumers do care and will act when their (perceived) rights are challenged. It is therefore necessary to understand and seriously consider the implications of drafting policies that contain broad usage rights and how subsequent changes to address business needs will be received.

Last, companies engaged in social media marketing should employ best practices when using new technologies, such as geolocation and facial recognition capabilities. Last year, the FTC released a report on these subjects, recommending that social networks "provide consumers with clear notice about how the feature works, what data it collects, and how [the] data will be used." The report further advised that certain circumstances may require affirmative consent from consumers prior to using facial recognition technology, such as, before using facial recognition to identify anonymous images of a consumer for a stranger and when images or biometric data are used differently by a company than originally represented when the data were collected. Thus, even if brands have the option to use facial recognition technology on social networks, they are best advised to obtain the express consent of their users before tagging them in any pictures or sharing the images along with personally identifiable information with third parties.

Social Media in the Workplace.

Given the proliferation of social media and that individuals are spending an increasing amount of time on social media websites, it is not surprising that issues involving social media often arise in the workplace. These issues might arise with respect to employees' use of social media for personal and/or professional purposes. Thus, it is critical that companies develop clear social media policies to govern their employees' use of social media.

With respect to employee use of social media for personal reasons, employers must balance free speech with safeguarding their reputations. Over the past few years, the Office of the General Counsel for the National Labor Relations Board (NLRB) has issued various reports detailing the outcome of hundreds of investigations involving the use of social media and employers' social and general media policies. These reports indicate that employers have a right to protect their reputa-

tion and may have grounds to fire an employee for criticizing the company in social media in a manner (i) unrelated to working conditions, (ii) following a warning, and (iii) where there was no effort to involve other employees.³⁷ Furthermore, companies can prohibit employees from disparaging company products or sharing confidential information in social media. Under Section 7 of the National Labor Relations Act, however, employees do have protection to discuss their work conditions on social media sites, and those who feel they are being retaliated against for such postings can air such complaints before the NLRB.

Employee use of social media for professional reasons is less clear cut. One uncertain issue is whether employers can require their current and/or prospective employees to provide their usernames and passwords for social media accounts as a condition of employment. Although employers argue that doing so is necessary to prevent liability, it may invite legal trouble in light of privacy, fraud, and antidiscrimination laws. Various bills recently introduced would bar employers from requiring employees to provide the usernames/passwords and/or any other means to access their social media accounts.³⁸ Additionally, California, Delaware, Maryland, and Illinois have all passed legislation banning employers from asking for such information, and similar legislation is pending in other states. Facebook itself has denounced the practice. Thus, out of caution, and to avoid liability, companies should not ask their employees or job applicants for the usernames and passwords to their social media accounts.

Another unresolved issue concerning employer use of social media involves ownership of the account(s) themselves. In *Phonedog LLC v. Kravitz*, a company filed suit against a former employee who wrote product reviews and posted videos on the company's social media sites. The suit sought to stop the former employee from using the company Twitter account after leaving his job.³⁹ The company argued that the continued use of the account, even under a different name, should be treated like an unauthorized use of a company customer list, and thus worthy of protection, because of the built-in following of the account. The complaint survived the defendant's motion to dismiss, although it eventually settled. Similar issues were raised in *Christou v. Beatport LLC*,⁴⁰ where a plaintiff nightclub owner brought suit against a club promoter who used the plaintiff's list of Myspace friends to market a competing nightclub.

Although the law in this area remains unsettled, it is advisable for employers who engage employees to use social media to promote their brands to implement social media policies that, at a minimum, make clear that the company owns the account(s) and all contacts/information obtained through the account and that the employee is authorized to post, tweet, or blog only as

³⁷ National Labor Relations Board, Acting General Counsel Releases Report on Social Media Cases, available at <http://www.nlrb.gov/news/acting-general-counsel-releases-report-social-media-cases>.

³⁸ Similar bills prohibiting educational institutions from requiring the same from their students also are pending.

³⁹ *Phonedog LLC v. Kravitz*, Case No. C11-03474 (N.D. Cal. July 15, 2011).

⁴⁰ *Christou v. Beatport LLC*, Case No. 1:10-CV-02912 (D. Colo. March 14, 2012).

part of his or her employment responsibilities. The policy should be drafted generally enough to cover new social media sites as they arise and reviewed continually to make sure the policy captures the latest technological developments. Of course, the social media policy also should include procedures for training and monitoring employee use of social media, particularly for compliance with the FTC's Endorsement Guides, including with respect to periodic audits and any other industry specific guidelines and requirements. Finally, brands may also want to require that employees use separate social media accounts for personal use, so that they can demand access to the username/password for the professional account and be careful not to overly restrict employees' personal use.

Conclusion.

As social media evolve into standard marketing tools, companies must be aware of the issues and pitfalls these opportunities present. Adopting clear policies for consumers and employees is an absolute must, and appropriate monitoring and education should be made part of standard corporate procedure. As new technologies, such as facial recognition and geolocation capabilities, develop and become as ubiquitous as sending a text message, companies will need to understand the implications they present, as well as the laws that may apply, in order to avoid liability and maintain a trusting relationship with their customers and employees.