The Advocate
Official Publication
of the Idaho State Bar
Volume 55, No. 2
February 2012

The Role of Legal Counsel in Social Media Strategy

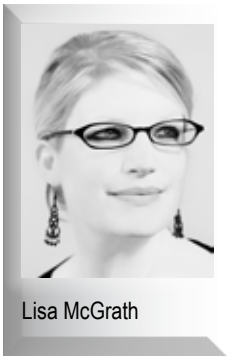
Lisa McGrath
lisa mcgrath llc

After over two years since the FTC issued the Revised Guides, companies have been largely noncompliant. Eighty percent of social media users monitored in company programs do not follow through on marketing disclosures and the FTC has taken note.

As companies rush to deploy social media technologies, legal departments have been left without a seat at the strategy table. A 2011 study of 144 enterprise-class social media programs was conducted. Of the 14 companies identified as advanced in social business, none had legal as part of their corporate social media team.[1] Marketing and corporate communications departments house over 75 percent of the formalized customer-facing social media efforts, and many times, in-house or other counsel do not understand social media well enough to inject legal programmatic review or training.[2] Only within the last few years have companies recognized the critical role of legal in corporate social media strategy and addressed ways to bridge the lawyer-social media manager divide.[3] This social media law update will shine a light on some of the most pressing legal issues corporate clients are facing in modern social media markets.

Social media marketing

In October 2009, the Federal Trade Commission ("FTC") revised the Guides Concerning the Use of Endorsements and Testimonials in Advertising ("Revised Guides") to include promotions on blogs and online social networks such as Facebook and Twitter.[4] Specifically, the Revised Guides require disclosure of material connections (cash and in-kind payments) between advertisers and endorsers of an advertised product if the connection is not reasonably expected by the audience.[5] Advertisers are subject to liability for failing to disclose material connections between themselves and their endorsers, and both advertisers and endorsers may be liable for false or unsubstantiated statements made through endorsements.[6]


Lisa McGrath

Clear and prominent disclosure

After over two years since the FTC issued the Revised Guides, companies have been largely noncompliant. Eighty percent of social media users monitored in company programs do not follow through on marketing disclosures and the FTC has taken note.[7] In 2010, the FTC found that Reverb Communications, Inc. ("Reverb Communications"), a public relations and marketing company hired by video game developers, engaged in deceptive advertising by having employees pose as ordinary consumers posting game reviews at the online iTunes store and failing to disclose that the reviews came from paid employees working on behalf of the developers.[8] In addition to requiring Reverb Communications to take reasonable steps to remove any previously posted endorsement that misrepresented the authors as independent reviewers or endorsers, the FTC also prohibited the company from making any representation about a product or service unless they disclose "clearly and prominently" a material connection when one exists.[9]

Advertiser monitoring

More recently, the FTC fined Legacy Learning Systems, Inc. ("Legacy") $250,000 for using misleading online consumer and independent reviews.[10] Specifically, Legacy 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 materials. Without clearly disclosing that the affiliates were paid for every sale they generated, the FTC found that Legacy disseminated deceptive advertisements by representing that online endorsement written by affiliates reflected the views of ordinary consumers or independent reviewers.[11] Most importantly, despite the fact that Legacy required its affiliates to sign a contract requiring them to comply with the Revised Guides, the FTC concluded that the contract without monitoring was insufficient because Legacy failed to implement a reasonable monitoring program to ensure that the affiliates clearly and prominently disclosed their relationship to Legacy.[12]

In addition to the $250,000 fine, for the next 20 years, Legacy is required to monitor and submit monthly reports to the FTC about their top 50 revenue-gathering affiliate marketers and make sure that they are following disclosure guidelines.[13]

Safe harbor

Had Legacy implemented a reasonable monitoring program, it may have avoided liability through a safe harbor provision in the Revised Guides. Specifically, the Revised Guides state that "[t]he Commission . . . in the exercise of its prosecutorial discretion, would consider the advertiser's efforts to advise these endorsers of their responsibilities to monitor their online behavior in determining what action, if any, would be warranted."[14] This issue was central to the FTC's investigation of AnnTaylor Stores Corporation ("Ann Taylor").[15]

In that case, Ann Taylor's LOFT division provided gifts to bloggers in exchange for them posting blog content about the LOFT's Summer 2010 collection.[16] The FTC initiated the investigation when the bloggers failed to disclose that they received gifts for blogging about the event. Ultimately, the FTC determined not to recommend enforcement action, among other reasons, because LOFT posted a sign at the preview that told bloggers that they should disclose the gifts if they posted comments about the preview, and more importantly, LOFT adopted a written policy in February 2010 stating that LOFT will not issue any gift to any blogger without first telling the blogger that the blogger must disclose the gift in his or her blog.[17] In a letter to Ann Taylor's

attorney, the FTC stated that it "expects that LOFT will both honor that written policy and take reasonable steps to monitor bloggers' compliance with the obligation to disclose gifts they receive from LOFT."[18]

Brand protection

Fines aside, noncompliance with the Revised Guides can irreparably damage corporate brands. If one googles "Reverb Communications" and "Legacy Learning Systems," the majority of the search results are splashed with FTC investigation and deceptive advertising headlines. Before leveraging Facebook, Twitter, and blogs to execute a paid promotion, companies, public relations firms, and advertising and marketing agencies should have legal disclosure provisions in their social media policies and monitoring programs in place for all relevant employees and emerging media platforms.

Social media account ownership

When CNN fired controversial radio host Nick Sanchez, did Sanchez or CNN own his Twitter account with over 140,000 followers?[19] The cases below attempt to answer that question.

Social media account ownership agreements

In the 2011 case, Ardis Health, LLC v. Nankivell, an employee ("Nankivell") responsible for producing videos, websites, blogs, and social media pages was terminated.[20] Upon termination, Nankivell refused to provide her employer with passwords for its social media accounts and Websites. Prior to termination, Nankivell signed an agreement with her employer transferring ownership in her work product to the employer and requiring the return of all confidential information to the employer upon the employer's request. The employer sued, seeking injunctive relief. Relying on the written agreement, the court held that it was uncontested that the employer owns the rights to the social media accounts and Website access information and that the employer's inability to access and update their sites constitutes irreparable harm.[21] The court ordered Nankivell to provide the access information pending the resolution of the suit.[22]

Misappropriation of trade secrets and conversion

In another case, PhoneDog v. Kravitz, PhoneDog gave former employee Noah Kravitz ("Kravitz") the Twitter account "@PhoneDog_Noah" (the "Account") to transmit written and video content to followers, with the Account eventually generating over 17,000 followers.[23] Kravitz later ended his employment with PhoneDog. PhoneDog requested that Kravitz relinquish use of his Twitter Account and in response, Kravitz changed the Account handle to "@noahkravtiz," and continued to use the Account. PhoneDog alleged that it had suffered at least $340,000 in damages as a result.[24] In a preliminary ruling, the court declined to dismiss the lawsuit, finding that PhoneDog's allegations that Kravitz misappropriated PhoneDog's trade secrets and converted its property by retaining control over the Account were sufficient to state a claim.[25]

It is important for employers to obtain employee agreements regarding social media account ownership, and to retain social media account and website access information.

Unauthorized use

Most recently, in Maremont v. Susan Fredman Design Group, Ltd., Maremont sued her former employer for unauthorized access of her social media accounts.[26] Maremont created a Facebook account and blog for her employer and subsequently suffered an accident. While Maremont was in the hospital, her employer accessed and posted from Maremont's accounts. Maremont sued her employer for, among other things, violations of the Lanham and Stored Communications Act.[27] The court recently denied her employer's motion for summary judgment on the basis of lack of evidence of damages, and the case is moving forward.[28]

It is important for employers to obtain employee agreements regarding social media account ownership, and to retain social media account and Website access information. The only company I have seen address this issue correctly in its social media policy is Dell as set forth below:

> **Social Media Account Ownership**
> This section isn't a Social Media Principle, but it's still important enough to be in this policy. If you participate in Social Media activities as part of your job at Dell, that account may be considered Dell property. If that account is Dell property, you don't get to take it with you if you leave the company – meaning you will not try to change the account name or create a similar sounding account or have any ownership of the contacts and connections you have gained through the account. That doesn't apply to personal accounts that you may access at work, but would certainly apply to all Dell branded accounts created as part of your job.[29]

National Labor Relations Board

The National Labor Relations Board ("NLRB") has been aggressive in investigating and prosecuting unfair labor practices related to employees' use of online social networks. The NLRB reviewed over 129 cases involving social media in 2011.[30] In August 2011, the NLRB issued a report of the most significant social media cases in 2011 in order to provide guidance to employers and practitioners on how the National Labor Relations Act ("NLRA") applies to employees' rights on online social networking platforms.[31] Most frequently before the NLRB were cases alleging that an employer's social media policy was overbroad and restricted employee use of social media, or that an employer unlawfully discharged or disciplined one or more employees over contents of social media posts.

Social media cases

Section 7 of the NLRA, which applies to both unionized and non-unionized employees, protects employees' rights "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection."[32] In American Medical Response of Connecticut, the NLRB filed a complaint that alleged, among other things, that an employer maintained numerous overbroad policies that prohibit employees from "making disparaging, discriminatory, or defamatory comments when discussing the company, or the employee's superiors, co-workers, and/or competitors."[33] The complaint also alleged that the employer asked an employee to prepare a written incident report and denied the employee's request for union representation.[34] After this incident, the employee, along with other employees, criticized her supervisor on Facebook and the employer terminated her.

The Division of Advice (the "Division") issued a memorandum, finding that the employee engaged in protected activity "by discussing supervisory actions with coworkers in her Facebook post," and that the employer's social media policy was overbroad and unlawful because it prohibited employees from making disparaging comments "while discussing the employee's superiors, co-workers, and/or competitors" without making it clear that it did not apply to Section 7.[35] On February 8, 2011, the employer reached a settlement agreement with the NLRB, agreeing to "revise its overly-broad rules to ensure that they do not improperly restrict employees from discussing their wages, hours, and working conditions with co-workers and others while not at work, and that they would not discipline or discharge an employee for engaging in such discussions."[36]

In Lee Enterprises, Inc. d/b/a/ Arizona Daily Star, the managing editor of a newspaper told his reporter-employee to "stop airing his grievances or commenting about the employer in any public forum," instructed him not to tweet about anything work-related, and told him to "refrain from using derogatory comments that may damage the goodwill of the company."[37] Despite this, the reporter posted unprofessional tweets to a work-related Twitter account and the employer discharged him. Although the Division found that the managing editor's collection of statements to the employee could be interpreted to prohibit activities protected by Section 7, it stopped short of finding the statements overbroad, orally promulgated rules. The statements did not constitute overbroad policies, according to the Division, because they were "made solely to the [employee] in the context of discipline, in response to specific inappropriate conduct," and they were not communicated to other employees or characterized as new rules.[38]

The Division also found that the employer did not violate Section 8(a)(1) of NLRA by terminating the reporter for his unprofessional tweets.[39] Section 8(a)(1) provides that it is an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 … ."[40] Some of the tweets that the reporter posted included: 1) "You stay homicidal, Tucson, See Star New for the bloody deets"; 2) "What?!?!? No overnight homicide? WTF? You're slacking Tucson"; and 3) "I'd root for daily death if it always happened in close proximity to Gus Balon's."[41] The discharge did not violate Section 8(a)(1), the Division found, because his tweets did not involve protected concerted activity. Specifically, the posts did not relate to the terms and condition of employment or seek to involve other employees in issues related to employment.[42]

Conclusion

In 2010 alone, the U.S. Equal Employment Opportunity Commission saw more than 99,000 charges of discrimination filed as a result of social-media-background checks.[43] In 2011, the FTC proposed significant revisions to the Children's Online Privacy Protection Rule to account for the evolution of social media technology.[44] As new laws continue to be made in response to online activity in 2012 and beyond, the role of legal in corporate social media strategy is critical to legal compliance for you and your clients.

Specifically, the posts did not relate to the terms and condition of employment or seek to involve other employees in issues related to employment.

About the Author

Lisa McGrath *runs lisa mcgrath llc, an exclusive flat fee law firm that focuses on solving legal problems related to new media, technology, e-commerce, and the Internet. McGrath is a graduate of American University, Washington College of Law in Washington, DC. She is a former commercial litigator in private practice, United States Senate Counsel, and previous law clerk for the Chief Justice of the Idaho Supreme Court. She is also co-founder and program director of Social Media Club Boise and organizer of two Idaho Startup Weekends. McGrath can be reached at mcg@iammcg.com.*

Endnotes

[1] Altimeter Group, Social Readiness: How Advanced Companies Prepare (2011), available at http://www.web-strategist.com/blog/2011/08/31/report-social-media-crises-on-rise-be-prepared-by-climbing-the-social-business-hierarchy-of-needs/ (last visited December 19, 2011).
[2] Id.
[3] SXSW, Bridging the Lawyer-Social Media Manager Divide (2011), available at http://panelpicker.sxsw.com/ideas/view/11198 (last visited December 19, 2011).
[4] See 16 C.F.R. § 255.0 (2009).
[5] 16 C.F.R. § 255.5 (2009)
[6] 16 C.F.R. § 255.1 (2009).
[7] Advertising Age, CMP.LY: Keeping Your Social-Media Marketing Legal (2011), available at http://adage.com/article/digital/cmp-ly-a-start-up-social-media-marketing-legal/231100/?utm_source=pulsenews&utm_medium=referral&utm_campaign=Feed:+AdvertisingAge/LatestNews+(Advertising+Age+-+Latest+News) (last visited December 19, 2011).
[8] See In the Matter of Reverb Communications, Inc., FTC Docket No. C-4310 (December 19, 2011), available at http://www.ftc.gov/os/caselist/0923199/100826reverbagree.pdf.
[9] Id.
[10] See In the Matter of Legacy Learning Systems, Inc., FTC Docket No. C-4323 (December 19, 2011), available at http://www.ftc.gov/os/caselist/1023055/110315llsagree.pdf.
[11] Id.
[12] Id.
[13] Id.
[14] See 16 C.F.R. § 255.0 (2009).
[15] Federal Trade Commission, Letter to Kenneth A. Plevan, Esq. (2010), available at http://www.ftc.gov/os/closings/100420anntaylorclosingletter.pdf (last visited December 19, 2011).
[16] Id.
[17] Id.
[18] Id.
[19] RWW, CNN's Social Media Pioneer Gets Fired: What Happens to Rick Sanchez on Twitter? (2010), available at http://www.readwriteweb.com/archives/cnns_social_media_pioneer_gets_fired_what_happens.php (last visited December 19, 2011).
[20] Ardis Health, LLC v. Nankivell, 2011 WL 4965172 (S.D.N.Y. 2011).
[21] Id.
[22] Id.
[23] PhoneDog v. Kravitz, WL 5415612 (N.D. Ca.2011).
[24] Id.
[25] Id.
[26] Maremont v. Susan Fredman Design Group, Ltd., et al., 10 C 7811 (N.D. Ill. 2011).
[27] Id.
[28] Id.
[29] Dell, Global Social Media Policy (2011), available at http://content.dell.com/us/en/corp/d/corp-comm/social-media-policy.aspx (last visited December 19, 2011).
[30] U.S. Chamber of Commerce, A Survey of Social Media Issues Before the NLRB (2011), available at http://www.uschamber.com/sites/default/files/reports/NLRB%20Social%20Media%20Survey%20-%20FINAL.pdf (last visited December 19, 2011).
[31] NLRB, Report of the Acting General Counsel Concerning Social Media Cases (2011), available at http://www.huntonlaborblog.com/uploads/file/NLRB_Provides_Guidance_For_Social_Media.pdf (last visited December 19, 2011).
[32] 29 U.S.C. § 157 (2011).
[33] Advice Memorandum, American Medical Response of Connecticut, Case No. 34-CA-12576 (October 5, 2010).
[34] Id.
[35] Id.
[36] NLRB News Release: Settlement Reached in Case Involving Discharge for Facebook Comments (February 8, 2011).
[37] Lee Enterprises, Inc. d/b/a/ Arizona Daily Star, Case No. 28-CA-23267 (April 21, 2011).
[38] Id.
[39] Id.
[40] 29 U.S.C. § 158 (2011).
[41] Lee Enterprises, Inc. d/b/a/ Arizona Daily Star, Case No. 28-CA-23267 (April 21, 2011).
[42] Id.
[43] Human Resource Executive Online, Social-Media Privacy Concerns Go Global (2011), available at http://www.hreonline.com/HRE/story.jsp?storyId=533342580 (last visited December 19, 2011).
[44] FTC Press Release: FTC Seeks Comment on Proposed Revisions to Children's Online Privacy Protection Rule (2011), available at http://ftc.gov/opa/2011/09/coppa.shtm (last visited December 19, 2011).