Social and Mobile and Law, Oh My!

Legal Implications of Social Media and Mobile Technology

Presented by

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Law & Regulation in a Digital Ecosystem

Our Agenda: So Much to Cover, So Little Time

- Basics
- Implications of Social Media and Mobile Technology
- Proprietary Rights
- Privacy and Security
- 30 Second Hot Spots
  - Native Advertising
  - Rebates and AVBs
  - Programmatic Advertising
  - Bot Fraud
- Putting it All Together
- Lessons Learned
- Questions
The Regulatory Landscape

- Federal
- State
- Self Regulation
FTC’s “Operation Full Disclosure”

Fall 2014, over 60 advertisers sent warning letters

- Adequate disclosure requirements still apply
- FTC’s re-education on basic advertising principles:
  - Failure to disclose material terms so that omission makes the net impression misleading constitutes deception under Section 5 of the FTC Act
  - Disclosure must be made reasonably calculated to ensure they are noticed, read and understood
Advertising law is designed to protect the consumer, not the advertiser.

Deceptive or unfair acts or practices are unlawful. That means:

- Not Deceptive
- Claims Substantiated (in advance)
- Not Unfair
- Puffery Can Be OK!
Deceptive Advertising

- EXPRESS (lying)
- IMPLIED
- OMISSION
- NET IMPRESSION
Deception by Implication

vitamin water

flu shots are so last year

more vitamin c.
more immunity
less stuffy noses
Deception by Omission

Even if truthful, ads can be deceptive if material information isn’t disclosed.
Overall (Net) Impression

AMERICA'S OLDEST BREWERY

FREE
BEER
AIR CONDITIONING!
FROM AROUND THE WORLD!

40 TAPS
Since 1829
WINBlog.org
Substantiation Is Not Required

Opinions, exaggerations, hyperbole or claims that:

- Cannot be proven or disproved

or

- No reasonable person would believe (or consider material)

*Advertiser’s right to lie,*

*since no reasonable (rational) person will believe it*
Examples of Puffery?

Probably

- What does “world’s best pencil” mean?
- Different, equally correct, opinions possible
- Difficult or impossible to prove

Probably not

Overall context defines meaning

- “#1 in volume sales”
- “#1 in brand awareness”
- “#1 in household penetration”
I Thought You Can’t Lie?
Disclaimers Done Right…

- Clear link between claim and disclosure
- “Disclosure” explains, doesn’t contradict
- Disclosure is readable by consumers (not in mice type, buried in 80 pages of legalese, blah, blah, blah, in difficult to read type color and font, or located far from the claim it explains)
Unfair Advertising

- Injures consumers
- Violates established public policy
- Unethical or unscrupulous

Examples:
- Forcing consumers to buy unwanted goods;
- Selling consumers defective goods on an “as is” basis;
- Locking consumers in expensive, long-term contracts
FTC’s “Operation Full Disclosure”

- Wake-up call across all media
- Reminder for advertisers to evaluate whether advertising achieves adequate disclosure
- Increased scrutiny over Hispanic advertising, where there hasn’t been much enforcement
The Rise of the Machines!

The emergence and convergence of innovative digital technology continues to challenge our legal and regulatory systems. Confusion and uncertainty creep into every aspect of law and regulation, while the enabling effects of technology fundamentally shift the balance of rights, responsibilities and power!
“...activities, practices and behaviors among communities of people who gather online to share information, knowledge, and opinions using conversational media.”

WHY SHOULD YOU CARE?

BECAUSE SOCIAL MEDIA IS A FORCE TO BE RECKONED WITH!
The Rise of Mobile

- Discount Coupons
- Tickets to Events
- Newspapers & Magazines
- Web Access
  - Search & E-mail
- Text, Image
  & Voice
- Payments
- Books
- Currency
- Bluetooth
- ID & Security
- GPS
- TV, Radio & Movies
- Music
- Prescriptions
- DVR
- Podcasts
Proprietary Rights
Proprietary Rights Are Changing

Copyright

Trademarks

Distinctive Voice

Rights of Publicity

ahaa

STARBUCKS COFFEE

SIX BUCKS COFFEE

ReedSmith

The business of relationships.
Trademark vs Reputation Management

The Official Starbucks page has over 35 million people who said “Like” and there are thousands of ‘unofficial’ pages put up by Starbucks’ fans, local Starbucks’ locations and loyal employees. NONE licensed by Starbucks to use the brand . . .

but even if you risk allowing people who 👍 you, what do you do about THESE people ??
Copyright vs Licensing
Infringement? Fair Use? Parody?
Talent and Rights of Publicity

What is prohibited?
- Use of a name, likeness, persona, image or voice
- Without permission
- For commercial purposes

What’s the risk?
- Celebrities are litigious
- Case law inconsistent; most settle out of court
The Queen Was Not Amused

How long do you want to wait to become the boss?

www.jobsite.co.uk The fast way to a better job.
Signed a Talent Release?
Privacy & Data Protection
Social Media and Mobile Technology Magnify Privacy Concerns

- User Search & Input
- Geo Targeting – Location, Location, Location
  - Coupling Location with Context
  - Coupling Location with Behavior
- Location Sharing
  - Among Users
  - Among Devices
  - Among Social Networks
- Surveillance Capabilities
Social Media & Mobile Technology Can Target Individuals

- Age
- Preferences
- Gender
- Relationship Status
- Activities
- Location
- and more...
Geo-Location Apps Collect Even More

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‘Checking in” motivated by value exchange

Reed Smith
The business of relationships.
Digital Mobile Technology and Social Media Shifts Social Expectations

We traditionally ("normally") assume our conversations are private and made public only when one or more of the participants takes some affirmative action.

But, in the online and mobile environments, conversations are generally public by default and you have to work to make them private.
Want to stop this from happening?

Take Action!

Replay the movie?
Privacy is Paradoxical

People **say** they cherish privacy and are anxious about unauthorized disclosure or use of their personal information:

But they often **act** in ways that allow, even encourage, others to monitor and track them, know their preferences, where they are and what they are doing;

and in their daily life often

**disclose information virtually indiscriminately** to strangers, both individuals and businesses

**Most people aren’t sure if any actual harm has occurred**
IN FACT, most people are disturbed if they search for themselves and don’t find much. They rarely change their privacy settings and almost always search for information about people they plan to meet.

If I search for you on Google and don’t find you . . .

. . . do you exist?

Scientists found bragging and boasting feels rewarding at the level of brain cells and synapses. “Talking about ourselves--whether in a personal conversation or through social media sites like Facebook and Twitter--triggers the same sensation of pleasure in the brain as food or money.”

47 States (and D.C.) have data breach notification laws if “personal information” is breached:

- Name + Social Security Number
- Name + Driver’s license number of State ID card number
- Name + Financial, credit or debit card account number in combination with the security or access code

Currently 20 states also include:

- Medical and health insurance information
- Unique biometric data (e.g., fingerprint, voiceprint, retina or iris images) covered;
- Mother’s maiden name

Handful of states require specific content be included in the notice and some have defined deadlines for notice.
Privacy and Security

- **Transparency**: Regulators are concerned that consumers do not understand the advertising and data-broker relationship (i.e., how tracking is used on websites and on mobile apps).

- **Restrictions on Data Brokers**: Focus on the use of the data collected, not just collecting and storing indefinitely.

The FTC will be vigilant and will use Section 5 of the FTC Act to enforce its regulations.
Privacy and Security

What Must You Do?

- Monitor Data Breach Laws
- Be Transparent
- Understand Third Party Practices
- Disclose Practices
- Keep Your Promises
- Appreciate that Prevention is Key
- Have a Crisis Management Plan & Team
30 Second Hot Spots

Native Advertising
Rebates and ABVs
Programmatic Advertising
Bot Fraud
Native advertising is a method by which an advertiser gets a consumer’s attention by providing messaging in the context of the user’s experience.
Native Advertising

✓ Subset of content marketing (paid, owned, and earned media).
✓ Make paid advertising feel less intrusive
✓ Increase likelihood of user engagement
✓ Focus on paid, not (yet) owned or earned, media

ANA Study:
- ¾ of all respondents feel there is an ethical boundary for the advertising industry when engaging in native advertising
Disclosure and ethics are key issues:
- Review paid media that involves product placement or brand identification
- Monitor public relations
- Determine if absent disclosure, a consumer may believe there is an independent endorsement
Rebates & Agency Volume Bonuses (AVBs)

Media Rebates/Incentives Require Full Transparency

The industry practice of media companies providing rebates/incentives to agencies for referring or influencing client spending towards that media company, and then the agencies not reimbursing those funds to the client, has long been acknowledged as a common practice outside the United States. However, a recent ANA/Reed Smith survey confirms that this practice also exists in the U.S. Details and implications for advertisers follow.

Background
From late May to mid-June 2012, ANA members were surveyed to uncover:
• Awareness among advertisers of media companies providing incentives to agencies for referring client spending towards that media company.
• The specific media involved.
• Whether clients have language in their media agency contracts that addresses incentives.
• Whether clients conduct periodic audits to ensure that undisclosed rebate/incentive activity is not occurring with their agency.
One hundred eighty-eight members responded to the survey.

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WFA advice on obtaining transparency
and return of media income

In association with:
Anteus Consulting Ltd
Rebates & AVBs

Monies/inventory agencies receive from media suppliers not directly related to individual client spend

Payments or value generally based on overall agency spend, not based on any individual client spend

- May be contingent on incremental growth, share and/or payment terms
- May range from <1% to >15%
Rebates & AVBs

Advertiser spend builds the agency’s negotiating power but there is no established “currency” for measuring consumer engagement in digital advertising and advertisers are increasingly concerned benefits don’t always flow back, so you should . . . .

expect agencies to increasingly be asked to certify there are no undisclosed rebates or AVB’s, so you should . . .

- Have clear mechanisms for tracking and reporting
- Clearly memorialize standards in contract
- Communicate terms internally to ensure compliance
Only 23% of marketers say they understand it and have used it; 41% have either never heard the term or have heard it, but don’t know what it is.

Source: Forrester/ANA “Media Buying’s Evolution Challenges Marketers,” 2014
Programmatic Advertising

Automated buying, selling and placement of online advertising
Done by machines in real-time, instantly
Based on algorithms and technology
So marketers can deliver a hyper-targeted advertising at the right time

Subset of online behavioral advertising using automated exchanges, drawing upon vast amounts of data and analytics
  Relies on cookies and other tracking technologies to create profiles based on technical and behavioral data

Audits of media buying companies are likely to increasingly focus attention on programmatic buying controls, so you should . . .

- Understand the technology
- Review and consistently update privacy policies
- Adhere to privacy policies
- Track the law and press
- Identify and implement controls
FTC has been attentive to the programmatic ecosystem for years

FTC Self-Regulatory Principles for Online Behavioral Advertising in 2009; FTC Privacy Report (2012); FTC “Data Brokers: A Call for Transparency and Accountability” (May 2014)

The FTC has called out the practice of buying lists from brokers for tailoring campaigns and cautioned advertisers against using lists to target based on health, ethnicity, or financial status and has:

- Adopted a lower harm standard when a company’s practices “unexpectedly reveal previously private information even absent physical or financial harm, or unwarranted intrusions”
- Expanded scope of covered information to extend privacy protections to all “consumer data that can be reasonably linked to a specific consumer, computer, or other device”
- Initiated enforcement actions and in recent consent decrees uses the term “covered information”, which includes IP addresses, User IDs, persistent identifiers, physical location, as well as any information combined with personally identifiable information (PII).
Bot Fraud: Non-Human Traffic

Bots — computer-generated signals designed to mimic human web traffic in order to trick advertisers to pay for phony non-consumer visits to websites.
Bot Fraud: What You Need to Know

The recent ANA study revealed that almost a 25% of video ad impressions and more than 50% of third party sourced traffic is non-human. Bot fraud levels vary and seem to peak when users are sleeping, but their computers are up. Bots find their way onto premium content sites and they are difficult to track because they are not evenly or predictably distributed. So you should . . .

- Expect to see more audits of media buys with specific attention to non-human traffic
- Expect to see more contract language pushing liability back to the media buying company
Putting it All Together

What is an ‘ad’ these days?
We Never Talk Anymore
Advertising is Now a Conversation

CONSUMERS ARE CONTENT CREATORS AND POWERFUL INFLUENCERS

MEDIA / ENTERTAINMENT COMPANIES ARE AD SUPPORTED REVENUE ENGINES

TECHNOLOGY AND SEARCH COMPANIES ARE NETWORK PUBLISHERS

TELECOMMUNICATIONS AND GAMING COMPANIES DISTRIBUTION PLATFORMS

DISTINCTIONS BETWEEN CONSUMERS, CONTENT PRODUCERS AND ADVERTISERS ARE BLURRING AS A RESULT OF SOCIAL MEDIA, USER GENERATED CONTENT, MOBILE AND CLOUD COMPUTING TECHNOLOGY

DISTINCTIONS BETWEEN ADVERTISING, INFORMATION AND ENTERTAINMENT ARE BLURRING
Web Campaign

Your Makeover

HOLLYWOOD'S SEXIEST NEW HAIRSTYLES
InStyle

HELLO, Gorgeous!

SELECT A STAR STYLE

SELECT ALL STYLES

Anne Hathaway  Ashanti  Beyoncé Knowles

Cameron Diaz  Carrie Underwood  Eva Longoria

Size  Rotate  Flip  Reset  Clear

Zoom  Show  Hide  Re-Trace
Proprietary Worlds
Online In-Game Advertising

SCORE 38544
TIME 053:18
032/100

35 BANANAS LEFT
25 km/h
FLOOR 5

BONUS FLOOR
Online Game World Environments
Augmented reality

Vuzix Goggles
Buzz Can Launch New Products
“Apps” and Location Based Advertising

This type of location based targeted advertising was hailed as marketing nirvana - when consumers can receive targeted and timely advertising that is actionable and immediate.
• Nike erected a large, interactive billboard in Times Square and people could use their mobile phones to text their own custom design and a chance to win receive a free pair of Nike IDs

• People went nuts when they saw their own shoes posted live on the Jumbotron in front of them

• Nike gave away 3000 pairs of shoes in this promotion and participants were just as excited about seeing their design on the billboard, as they were by the free footwear
QR codes automate your mobile devices scanner/browser functionality. These codes can be used on retail merchandise tags and clothing imprints, as well as on billboards, bus shelters, print and web-based advertising.
Bluetooth

Cash Spot.
Come closer, you could win pago cash.

With pago you can now send digital cash mobile to mobile. Get started right here. We’ll send a pago message directly to your mobile, and you could win pago cash.

1. Activate your infrared or Bluetooth and change your settings to ‘Visible’, ‘Shown To All’ or ‘Find Me’.

2. Point your infrared port at the circle above and wait to accept the pago message.
Social media facilitates strong community interaction. Electronic Arts, H&M & Yahoo! partner for a user generated content contest.
Bloggers and advertisers held accountable:

- Obligation to guide and correct errors;
- Disclose payments (consideration);
- Disclose connections (material); and
- Opinion must be honest, free of unsubstantiated or false claims.

Endorsements in social media (e.g., blogs, buzz, viral, word of mouth) are covered by FTC regulation. If there is a relationship between the advertiser and promoter that would affect the consumer’s perception of the promoter’s credibility, it must be disclosed.

Note: “Expert” bloggers may have independent obligations.
Advertisers liable for actions of ambassadors & influencers they “support”

Ambassadors & influencers can be held personally liable for failing to disclose material connections to advertisers

Ambassadors & influencers must be transparent and honest

Substantiation or a reasonable basis for claims being made is required
Blogs, Buzz & Word of Mouth

- Commercial blogs & vlogs are subject to Section 5 of the FTC Act and actionable if they are false or deceptive (*FTC v. EnterNet Media, Inc., et al*).

- “Sponsored” opinions ("splogs") enjoy less protection than blog or vlog opinions.

- Blogs, buzz, viral and word of mouth advertising and marketing campaigns MUST disclose any material connection between speaker and advertiser.
Website Terms & Privacy Policies

Claims Apply to Terms of Use & Privacy Policies

- Failure to honor a stated privacy policy is deceptive and misleading under Section 5 of the FTC Act AND a breach of contract.
- FTC construes online privacy policy to also apply to offline data collection unless expressly stated.
- Don’t misrepresent purpose for which data is being collected.
- Don’t overstate sophistication / protection of security technology.
Be Careful Using Social Media Platforms

Pinterest - Social site that is all about discovery. Largest opportunities. Users are: 32% male, 68% female.

Twitter - Micro blogging social site that limits each post to 140 characters. Largest penetration. Users happen every second. 5,700 tweets.

Facebook - Social sharing site that has 1 billion users worldwide. Largest opportunities. Users share 2.5 billion pieces of content each day.

Instagram - Social sharing site all around pictures and now 15 second videos. Many brands are participating through the use of #hashtags and posting pictures consumers can relate to.

Google+ - Social network built by Google that allows for brands and users to build circles. Not as many brands active, but the ones that are tend to be a good fit with a great following.

LinkedIn - Business oriented social networking site. Brands that are participating are corporate brands giving potential and current associates a place to network & connect.

Designed by: Leverage - leveragenewagmedia.com

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SNS Play At Home Promotion

Play along from the comfort of your home for a chance to win $10,000. Watch “Deal Or No Deal” on NBC and text your chosen case number to 59595, before the case is opened.

The winner will be randomly chosen from those that correctly picked the Lucky Case. Up to ten (10) entries per person per show.

There is a charge of $0.99 per entry or enter online for free.
Content, applications and processing anywhere, anytime

Distinctions among devices are irrelevant

Business models shift value exchanges to digital

Distinctions between businesses are dynamically evolving

Distinctions between individual, consumer, family member, employee, citizen are blurring, straining traditional legal and regulatory distinctions.
United Did What?

Yes, there is even a clip on YouTube entitled: “Hitler Finds Out United Breaks Guitars.”
“Yes, these videos have struck a chord with all of us here. The second video is suggesting we do something that we’ve already done — and that is to provide our agents with a better way to escalate and respond to special situations. While his anecdotal experience is unfortunate, the fact is that 99.95 percent of our customers’ bags are delivered on-time and without incident, including instruments that belong to many Grammy award-winning musicians.”

United spokesperson Robin Urbanski
United Airlines Breaks Guitars, Loses $180 Million

After Canadian singer Dave Carroll takes his story to YouTube

Luggage mishaps are known to happen on airplanes, be it at the airport, or because of the way the packages are stored and transported. Either way, the flight company eventually owns up to them and finds some form of compensation for the respective passenger. This did not happen to Canadian singer Dave Carroll, who had his Taylor acoustic damaged on United Airlines and who took his plight to YouTube. United stock fell by ten percent because of it, amounting to a loss of $180 million, the Daily Mail informs.

The incident occurred in 2008, when Carroll saw his guitar being thrown around by airport personnel before being loaded. As he arrived in Chicago, he saw that, indeed, his Taylor was broken, so he took his complaint to United Airlines. The company, in its
United: Legislative Implications

S-213
Airline Passenger Bill of Rights Act of 2009

Passenger rights debate on glide path to Congress

By Bill McGee, special for USA TODAY

You may not have read much about airline passenger rights recently, but there's little doubt the topic will be garnering more attention. Despite its busy legislative calendar, Congress may soon end years of debate by making an Airline Passenger Bill of Rights into law.

Last week I was among a group of proponents and opponents of such legislation who gathered for a Passenger Rights Stakeholder Hearing in the Rayburn House Office Building in Washington. The event, which was sponsored by FlyersRights.org and the Business Travel Coalition (BTC), had an air of certainty about it—for many, such a law is now all but certain since being approved as a provision in the latest Federal Aviation Administration reauthorization bill. Three out of five members on the expert witness panel stated they thought some form of passenger rights legislation is now inevitable.

RELATED: Flights on delayed planes get more support

Testimony unplugged

It was a dynamic morning, highlighted by testimony from passengers who suffered through abysmal treatment by airlines during irregular flight operations in recent years. This included Kate Hanni, the executive director of FlyersRights.org, who has become the face of this movement. The airline industry's primary trade organization, the Air Transport Association of America, was invited but chose not to participate. However, cautionary words about the unintended consequences of legislating airline service were heard from industry and academic critics.

The keynote address was delivered by Sen. Barbara Boxer (D-Calif.), who declared the battle for Passenger Rights won, and asserted the bill would soon become law. "It will happen." We were even entertained by Dave Carroll and his band, who offered an unplugged version of United Breaks Guitars, the mishandled baggage anthem that has generated 5.6 million views on YouTube.
United Becomes a Case Study

A new video, entitled “I’ve Got a Book Comin’ Out,” launching Mr. Carroll’s new book was uploaded to YouTube in May 2012.

https://www.youtube.com/watch?v=_Hd8XI42i2M

The band generated enormous publicity, Mr. Carroll’s music and career have become enormously successful without a single recording or music company involved and Carroll has given lectures on the power of social media and the paradigm shift in consumer activism and customer service.
Lessons Learned

- Current IP laws often ineffective or unenforceable
- Reputation management replacing trademark protection
- Licensing and subscription models replacing copyright protection
- New, unimaginable forms of digital content continue to replace traditional advertising
- Peer to peer interaction and location based marketing are increasingly dominant
Lessons Learned

• Privacy no longer only about personal sensitivity, but growing as an economic link in the chain of consumer marketing
• Data breaches are increasingly more damaging, but inconsistent legal and regulatory approaches to privacy and security continue to challenge the industry
• “Big Data” and “Cloud Computing” pose opportunity and challenge for advertisers and agencies
Lessons Learned

- Consumer complaints and ‘influencers’ are visible, vocal and impactful
- Legislators and regulators strive to ‘keep up’ with premature or ill-informed action ineffective
- Traditional distinctions blur between advertisers, endorsers, bloggers, employees and consumers, creating liability and regulatory issues
- Distinctions blur between advertising, information, editorial-opinion, gaming and entertainment

危機
Danger Opportunity
The Lesson Learned

In a world where social media, mobile technology and digital innovation is relentless, understanding the legal and regulatory framework within which this dynamic ecosystem is evolving is critical for advertisers and agencies.

Since it’s now all about the conversation, if you have learned one lesson today it’s that you must include your lawyers in the conversation.
We’re Not in Kansas Anymore

Social Media

www.LegalBytes.com

www.adlawbyrequest.com

Cloud Computing

http://www.reedsmith.com/cloudcomputing

www.reedsmith.com/networkinterference
Questions??

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