YOUR AD HERE: THE PERILS AND REWARDS OF ADVERTISING IN SOCIAL MEDIA

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I. INTRODUCTION¹

The online platform allows virtually instantaneous communication at very little cost. Online advertising and correspondence form an integral part of advertising and marketing for various businesses, including franchised businesses. Social media networks have quickly become an important advertising and marketing tool for these businesses.

Social media is an evolving concept that generally refers to interactive electronic communications websites that can be accessed through computers, tablets and mobile devices and that allow users to share, exchange and create publications, ideas, information, pictures, articles, videos and other content. Merriam-Webster defines social media as “forms of electronic communication (as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos).”² Social media is not synonymous with the internet. Instead, social media refers to those websites and services that cultivate communities and interaction. Through multi-faceted, interactive and communal communication platforms, social media allows users to simultaneously provide and obtain information, offers, comments and reviews with respect to businesses, contacts, preferences, hobbies and other endeavors. Examples of popular social media sites include Facebook, Twitter, LinkedIn, Pinterest, Google Plus (or Google+), Tumblr, Instagram, Flickr, Vine, and MySpace.

Social media has changed the way businesses and individuals interact, both in person and through electronic and web-based platforms. Compared to traditional media, which only allowed communication from one party to another as part of a unilateral transmission model, social media represents an important innovation that continues to take shape in the realm of marketing and advertising. Given the general ease of use and accessibility of social media, as well as its instantaneous impact and broad visibility, it is not difficult to understand why businesses have taken to advertising on social media: from product launches to new store openings, from promotions to reviews, from employee retention strategies to recruitment, businesses of all sizes have demonstrated marked creativity in their approach to advertising through social media. The ability to reach vast audiences and various generations for a relatively minimal cost makes social media advertising essential for many modern businesses.

Social media also allows the collection and use of various forms of data regarding employees, customers and other users, such as preferences, experiences and purchasing habits, all of which allow behavioral and targeted marketing initiatives to have a greater impact. Through social media advertising campaigns, businesses can achieve greater website traffic, brand awareness and positive brand association, as well as more meaningful communication with key audiences, such as customers, franchisees and employees. For example, they can learn what their most important contractual and marketplace counterparts expect and desire, and can use their experiences to create and enhance manuals and best practices.

Although social media offers significant marketing benefits to businesses, it also poses important legal and business risks. For example, the broad visibility and permanence of social media communications, as well as the inherent difficulties in controlling the quality of third-party

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content and the use of trademarks, trade names and slogans, make it difficult to contain the
impact of negative messages regarding businesses or their products or services. This can lead
to damaged reputations, decreased brand value and various forms of legal liability, such as
claims for defamation, intellectual property infringement, and false advertising. Collecting, using
and processing personal information in order to manage user preferences can also lead to
greater exposure in the event of breaches of confidentiality and data security.

This paper provides an overview of the general legal principles that apply to social media
advertising. We do not include an exhaustive analysis of the legal rules that apply to each
industry sector or business that may engage in advertising through social media, but have
provided a general synopsis of applicable law in the United States and Canada. Wherever
possible, this paper also offers practical tips for getting the most out of social media advertising
and minimizing the associated risks.

II. INTRODUCTION TO ADVERTISING LAW

The laws on advertising in the United States and Canada arise from various sources and
have developed as a result of a multitude of social and political influences. Many of the legal
restrictions applicable to advertising were implemented before social media existed, but many
apply to all forms of advertising, including advertising through social media. We have provided
below an outline of the types of law that may have an impact on advertising through social
media.

Both federal and state laws regulate advertising in the United States. Depending upon
the advertising activity, a number of potential laws apply. False advertising is regulated by
Section 5 of the Federal Trade Commission Act (“FTC Act”), Section 43(a) of the Lanham Act,
and state statutes and common law. The National Advertising Division of the Better Business
Bureau (“NAD”) is also heavily involved in resolving disputes. In general, all of these various
laws and regulations prohibit advertising that deceives consumers, although the precise
contours of each law vary.

A. U.S. Law

1. FTC Rules/Enforcement

Section 5 of the FTC Act makes unlawful “unfair or deceptive acts or practices in or
affecting commerce[.]” An advertisement is deceptive when it contains a material
representation or omission that is likely to mislead a reasonable consumer acting reasonably
under the circumstances. In determining whether an advertisement is likely to mislead a
consumer, the FTC does not need to rely on consumer surveys or other actual evidence.
Instead, the FTC is free to make the deception determination based on its own informed
judgment and experience. The FTC also does not have to show scienter or actual damages. In

4 FED. TRADE COMM’N, FTC Policy Statement on Deception, October 14, 1983, https://www.ftc.gov/public-
statements/1983/10/ftc-policy-statement-deception.
5 See e.g., F. T. C. v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965) (stating that the Federal Trade Commission's
judgment is to be given great weight by reviewing courts, especially with respect to allegedly deceptive advertising.).
addition to pursuing persons for false advertising, the FTC also investigates whether advertising claims are substantiated by a reasonable basis in fact. This substantiation must be in place before the advertisement is disseminated - i.e. post-hoc undertakings to justify advertisements are ineffective in FTC enforcement actions. There is no private right of action under the FTC Act.

2. **Lanham Act**

The right to sue is available, however, under Section 43(a) of the Lanham Act. Under Section 43(a), a person may bring suit against a business competitor who made a false or misleading material statement in a commercial advertisement. Consumers, however, lack standing to bring suit. A business competitor may obtain injunctive relief without showing actual damages, but a party must show actual damages to obtain monetary relief. The plaintiff bears the burden to show that the express or implied advertising claim is false or deceptive. Consumer survey evidence is often used to prove deception, as a plaintiff may not simply rely on its experience and judgment as the FTC may in enforcement actions under the FTC Act.

3. **NAD/BBB**

The National Advertising Division of the Better Business Bureau (“NAD”) is a self-regulatory organization that exists to resolve disputes among advertisers and inspire public confidence in advertising. NAD only regulates national advertising. NAD proceedings are similar to an administrative proceeding, but participation and compliance are voluntary. If a party fails to comply with a NAD determination, however, the matter is referred to the FTC. NAD offers a forum that is generally less expensive and quicker than court proceedings. Although most NAD claims are brought by competitors, the forum is also available to consumers.

4. **State Law Claims**

State law also regulates false advertising. All states have enacted statutes regulating unfair or deceptive trade practices. Most of these statutes are based on the FTC Act, but many do allow for a private right of action by business competitors and consumers for unfair or deceptive practices. The state statutes are often referred to as “little FTC Acts” as they are often modeled after the FTC Act and some expressly reference the FTC Act. Some of these statutes specifically authorize class actions, whereas others provide more limited remedies to

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9 Id.
10 Id.
consumers.\textsuperscript{11} Many states have also enacted consumer protection statutes, which may allow claims based on harm experienced due to false advertising. Many states have also passed statutes providing narrow regulation of specific types of advertising, for instance referral sales, telemarketing, and promotions and contests.\textsuperscript{12}

B. \textbf{Canadian Highlights}

Many of the same principles applicable to advertising in the United States apply in Canada. We have provided below a brief overview of some of the most important rules applicable across various industries, which should be considered in the context of advertising through social media.

1. \textbf{Misleading and Deceitful Advertising}

In Canada, the federal government regulates advertisement generally through the Competition Act (Canada) ("Competition Act"), which prohibits any advertisement that is false or misleading in a material respect. Advertising will be considered false or misleading in several specified cases, including where it contains false testimonials, misstates prices or contains warranty or guarantee information or other promises that are misleading. The materiality of the representation is considered in light of whether it may influence a consumer to buy or use the product or service advertised.\textsuperscript{13}

Following the enactment of Canada’s Anti-Spam Law (discussed in greater detail in Section V.C. below), the Competition Act prohibits false or misleading advertising in electronic messages, including with respect to the identity of the sender, the subject matter or the data source on a computer system (i.e., the URL).\textsuperscript{14}

The general impression conveyed by an advertisement, in addition to its literal meaning, will be taken into account when determining whether it is false or misleading.\textsuperscript{15} The general impression is considered to be a function of the text and the layout of an advertisement, regardless of the medium through which it is conveyed. Any disclaimers provided in the advertisement will also be considered in this context. The general impression is also studied from the point of view of a "credulous and inexperienced" consumer who does not spend a considerable amount of time interpreting an advertisement.

The Competition Act covers representations made in any form, including electronic messages and internet advertisements.\textsuperscript{16} Therefore, advertisements through social media are governed by the Competition Act.

\textsuperscript{12} CCH, \textit{supra} note 8.
\textsuperscript{13} Competition Act (Canada), R.S.C., 1985, c. C-34, s.52 & s.74.01.
\textsuperscript{14} \textit{Id.} at s.52.01, s.74.011.
\textsuperscript{15} \textit{Id.} at s.52(4) for criminal regime, s. 74.03(5) for civil regime.
\textsuperscript{16} Competition Act, \textit{supra} note 13, at s.52, s.74.
Advertising Standards Canada administersthe Canadian Code of Advertising Standards, which sets out criteria for acceptable advertising and has provisions prohibiting inaccurate, deceptive or otherwise misleading claims, statements or representations, price claims, and guidelines for comparative advertising and testimonials.

Violations of the Competition Act may be sanctioned by criminal charges; offenders may be liable for fines that can reach as much as several million Canadian dollars or even imprisonment. The Competition Act also provides for civil liability, and violations may lead courts ordering such violations to cease, or requiring offenders to publish corrective notices, pay administrative monetary penalties and compensate parties having suffered damages as a result of the breach.

2. Comparative Advertising

Comparative advertising that is false, misleading or deceitful will generally be sanctioned under the Competition Act, as described above.

Comparative demonstrations with respect to the relative effectiveness of products should be shown under equivalent conditions and should not compare products in uses or under methods of application for which they were not designed or recommended. In other words, comparative data should not be used to imply the general superiority of a product, unless such a claim is valid over a comprehensive range of normal conditions of use. If the superiority of a product is limited to certain conditions of use, then any related claims should be qualified accordingly.

Another concern that arises in the context of comparative advertising is the possibility of inadvertently infringing on others’ intellectual property rights. For example, displaying a registered trademark on packaging or in advertisements in a manner that may negatively affect their goodwill under Canada’s Trade-marks Act could constitute infringement, while displaying a third party’s copyrighted logo or slogan in an advertisement without that party’s written consent would constitute a violation of Canada’s Copyright Act.

3. Provincial Restrictions

In addition to the Competition Act, most Canadian provinces also have legislation regarding consumer protection and/or business practices, many of which include prohibitions on

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17 This is Canada’s advertising self-regulatory body.


19 Competition Act, supra note 13, at s.52(1) & (5).

20 Id. at s. 74.01(1)(a), 74.1.


22 R.S.C., 1985, c. T-13, s.22.

23 R.S.C., 1985, c. C-42, s.3.
false, misleading or deceptive representations made to consumers.\textsuperscript{24} Certain such legislation also contains specific prohibitions, such as restrictions on using representations that products confer any particular benefit or standard of quality, and restrictions on inaccurately advertising price advantages. Certain provincial legislation provides for more serious protections with respect to the unfair practice of making unconscionable representations.\textsuperscript{25}

As with the federal legislation, provincial laws apply to advertising in a broad range of media, including over the internet and through social media.

\textbf{C. Privacy and Data Security Laws}

Privacy laws have been adopted in jurisdictions worldwide to curtail the effects of invasive and careless methods that businesses use to share personal information, including demographic data, preferences, habits and other similar information. For instance, the United States has enacted a law specifically aimed at protecting children’s privacy, the Children’s Online Privacy Protection Act (“COPPA”).\textsuperscript{26} COPPA imposes requirements on operators of websites or online services that are directed at children under the age of 13.\textsuperscript{27} It also imposes rules on websites that do not cater to children under 13, but whose website owners or operators have actual knowledge that they are collecting personal information from a child.\textsuperscript{28} COPPA dictates provisions that must be included in regulated websites’ privacy policies, when consent is required from a parent or guardian to engage in certain activities, and imposes marketing restrictions.\textsuperscript{29} These marketing restrictions impose liability on website operators for noncompliant data collection.\textsuperscript{30} The FTC has published a concise and user friendly for understanding the basics of COPPA compliance.\textsuperscript{31}

\textbf{1. Prevalent Types of Statutes}

In Canada, the federal \textit{Personal Information Protection and Electronic Documents Act} (“PIPEDA”) contains significant protections for individuals whose personal information may be collected, used and shared by people or entities with which they have dealings. In particular, if they unknowingly or unwittingly agree for their personal information to be processed and shared by a website operator (such as a social media user or host) who collects, uses or discloses it for any unexpected or unreasonable purpose, their consent will likely not be valid for such purposes. In other words, where the purposes for collecting, using, storing and disclosing an

\textsuperscript{24} For example, see \textit{Consumer Protection Act, 2002} (Ontario), S.O. 2002, c. 30, Sched. A, s.14.
\textsuperscript{25} \textit{Id.} at s.15.
\textsuperscript{26} \textit{15 U.S.C. 6501–6505} (West).
\textsuperscript{28} \textit{Id.}
\textsuperscript{29} \textit{FED. TRADE COMM’N, Complying with COPPA FAQ}, https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions.
\textsuperscript{30} \textit{Id.}
\textsuperscript{31} \textit{FED. TRADE COMM’N, supra note 27.}
individual’s personal information are not clearly explained, the individual will likely not have provided valid consent to use the personal information. While many individuals may understand that the privilege of being able to use social media tools free of charge is in large part based on the social media operators being able to share, sell and otherwise monetize their personal information, the policy goal is to ensure that consent is tied to the specified purpose for which personal information is collected, used or transmitted.

Similar legislation applies in other jurisdictions, including the United Kingdom and continental Europe, where personal information may be used only where informed consent has been obtained from the individual to whom the information relates. The United States has not adopted a broad sweeping statute analogous to PIPEDA. The United States has more limited legislation that applies only to certain types of information or certain industries, for instance the Health Insurance Portability and Accountability Act regulates medical information and the Fair Credit Reporting Act regulates credit reporting agencies. Some states, most notably California, have passed or are considering more sweeping legislation.

For purposes of PIPEDA and similar legislation, simply stating in standardized terms of use that participants who use social media or certain site functionalities are deemed to have given consent to the use of their personal information is not necessarily sufficient to constitute informed consent, particularly since the terms of use of a social media platform or website are not always read or understood by users. In order to validly collect, convey or make use of personal information, the projected uses of the data must be disclosed. In Canada, the law also requires disclosure where data may be processed or stored in other countries or by entities other than the one collecting the data, whether domestically or abroad, even if such processing or storage is done on behalf of the entity collecting the data.

2. Impact on Targeted Advertising Initiatives

Privacy laws tend to regulate behavioral and targeted advertising, meaning advertising that tracks online activities over time for the purpose of delivering advertisements aimed at the inferred interests of a given user. Tracking data is collected through a user’s internet use and allows the creation of a profile from which inferences may be drawn about the user’s preferences and interests.

This practice is quite common on many social media platforms. Since the data collected is used to create a detailed profile with respect to a user’s habits and is linked to identifiable information about that user, privacy laws will generally apply to data used in connection with behavioral advertising.

In addition, although the United Kingdom does not prevent data tracking, it has even adopted legislation that requires websites to disclose the types of cookies they use to track user behavior online.


33 Id.

D. Defamation and Other Torts

A general awareness of defamation and related tort law is important for advertisers for two reasons. First, advertisers themselves may bring tort claims against competitors or others for libelous statements in efforts to protect their corporate brand and reputation. Second, advertisers face potential tort liability for statements contained in their own advertisements and for statements contained in content generated by others at the advertisers’ behest.

1. Types of Claims

Three common torts in this context are defamation or trade defamation, misappropriation of name or likeness and violation of the right of publicity.

The precise elements of defamation vary somewhat depending on the jurisdiction, but in general, defamation is harming the reputation of another by publishing a false statement to a third person. Due to freedom of speech concerns, the applicable standard of care hinges on whether the allegedly defamed individual is a public figure. For public figures, the First Amendment requires that a defamatory statement be published with “actual malice.” This means that the defendant must have made the statement with knowledge of its falsity or reckless disregard of its truth or falsity. This places a high burden on plaintiffs to prove a defamation claim regarding public figures.

Claims for misappropriation of another’s name or likeness and violation of the right of publicity are also implicated in advertising. These claims arise when an advertisement uses a person’s name, likeness, or identifying information without permission. The availability and elements of these claims vary by jurisdiction.

2. Additional Considerations

On the internet and in social media, anonymous speech raises further complications. Much of the communication conducted on the internet is anonymous or pseudonymous. When a plaintiff brings suit against an anonymous defendant, many courts require that a plaintiff meet heightened pleading requirements in order to “pierce” anonymity. Further complications arise because of immunity provided to content hosts by the Communications Decency Act (“CDA”). Section 230 of the CDA immunizes a mere content host from liability for defamation and other claims arising from messages or other content posted on the internet. It does not, however, protect authors of the content from liability for publishing defamatory statements. Section 230 is discussed in more detail below.

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35 53 C.J.S. Libel and Slander; Injurious Falsehood § 1 (Updated June 2014).
37 Id.
38 See e.g., Stephanie Barclay, Defamation and John Does: Increased Protections and Relaxed Standing Requirements for Anonymous Internet Speech, 2010 BYU L. REV. 1309, 1317 (2010).
E. Advertising Globally

When advertising online, it is important to remember that advertisers can be subject to the jurisdiction of regulators outside the United States. Generally, in the area of advertising and marketing, U.S. law is more developed and comprehensive than the law of many developing countries. Thus, following U.S. law is a good starting point for online advertising campaigns, even though it does not ensure that a marketing campaign will pass regulatory muster globally.

For instance, the Advertising Standards Authority (“ASA”) in the UK takes the position that advertisers are required to comply with the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (“CAP Code”) if their advertising targets UK consumers. The ASA is focused on online advertising, as complaints about internet ads in 2014 were up 13% from the previous year. As a result, it is critically important for advertisers targeting UK consumers to be familiar with and conform to the CAP Code. Similarly, in many other jurisdictions around the world, including Germany, Japan and, most recently, China, regulators are taking a closer look at the online advertising practices of global companies to ensure that consumers are protected.

III. LEGAL FRAMEWORK APPLICABLE TO SOCIAL MEDIA

Advertisers using social media must comply with traditional advertising laws and prohibitions against false advertising. They must also comply with the advertising policies and procedures of each social media site that they use and must understand how to protect their intellectual property rights from infringement.

A. Social Media Advertising Policies

Nearly all major social media sites have policies that regulate advertising and must be taken into account when implementing social media advertisements. Most of these policies expressly ban deceptive, false, or misleading advertisements. And of course, even if the policy itself does not ban false advertising, the same rules applicable to advertising in general discussed above apply to social media advertising.

The social media policies of the major sites are largely similar, but they contain notable differences as well. In addition to banning false advertising, most of the sites expressly retain discretion to remove advertisements that are offensive or contain sensitive content. For instance, Pinterest’s advertising rules state that it may remove ads “for any reason” including “[a]ds or categories of ads, that get lots of negative feedback[.]” Advertisers should familiarize themselves with a site’s policy before advertising. Some social media sites contain rules or policies that an advertiser might inadvertently violate. For instance, Facebook expressly bans advertisements that contain “[b]ad grammar or punctuation” and notes that “[s]ymbols, numbers, and letters must be used properly.”

B. Trademark Rights and the Digital Millennium Copyright Act

All of the major social media sites also have policies or practices in place providing remedies for parties injured by misuse of their intellectual property. The Digital Millennium Copyright Act ("DMCA") created safe harbor provisions that allow internet service providers to insulate themselves from monetary damages for infringing activities of their users and third parties on the internet. In other words, a mere content host is not liable for the content that third parties post on its site as long as the host follows certain procedures. As part of fulfilling the safe harbor requirements, an internet service provider must comply with notice and takedown requirements. Essentially, injured parties who believe their copyrights have been infringed notify the content host, and the content host must take down the offending content. The party that posted the content then has an opportunity to contest the takedown.

The DMCA applies only to copyrights and does not extend to trademarks. The major social media sites, however, have adopted procedures for trademark infringement mirroring notice and takedown copyright infringement procedures. Some courts and commentators have suggested that such procedures can or should insulate website hosts from liability for contributory infringement. On most social media sites, protecting one’s trademark is as simple as submitting a form stating that one’s trademark is being infringed. In the usual course, such brand protection will be less expensive and quicker than trademark litigation.

C. Practical Considerations

1. Business Issues to Consider when Managing Brand/Reputation in Social Media

Advertisers must think carefully about whether it is appropriate to respond to social media posts or engage in social media conversations. Due to the proliferation of social media sites, it is also important for franchisors to develop a comprehensive social media strategy that clearly identifies the social media platforms where they want their brands to be featured. There are several benefits to this approach. Franchisors can control the number of sites where their brands appear, thus allowing them to better police their trademarks and create appropriate rules for posting in social media and protocols for de-identification when franchisees leave the system. Franchisors can also create a process for managing social media sites in the same way that they manage other guest assistance channels. For example, while it is tempting for brands to want to remove every post that is negative, it is important to resist that temptation and to think critically about the impact of responding versus not responding. To be sure, some comments


44 See e.g., Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc., 658 F.3d 936 (9th Cir. 2011) (holding entity liable for contributory trademark infringement for failure to respond appropriately to take-down notice for trademark infringement); Jason R. Breg & Kelli A. Ovies, Taking Down Trademark Bullying: Sketching the Contours of A Trademark Notice and Takedown Statute, 12 WAKE FOREST J. BUS. & INTELL. PROP. L. 391, 392 (2012) (suggesting adoption of a formal statute regulating trademark notice and takedown procedures).

45 A brief word of caution: Section 512(f) of the DMCA provides that a party is liable for any damages arising out of material misrepresentations made in a DMCA takedown notice. At least one court has held that something as seemingly innocuous as using a DMCA form instead of a trademark infringement form may expose a company to potential liability under Section 512(f). See CrossFit, Inc. v. Alvies, No. 13-3771 SC, 2014 WL 251760, at *2 (N.D. Cal. Jan. 22, 2014).
and circumstances demand a response, but there are times when responding can escalate a
conversation that would not otherwise get much attention. So ultimately the legal decision to
respond, not respond or take down a post should always be balanced with a sound
communications strategy.

One effective strategy that brands can use to navigate the social media space is to
leverage existing offline guest assistance processes and procedures. When a company has an
effective guest assistance program in place with representatives who are properly trained to
effectively manage guest complaints, this team is exceptionally well placed to handle complaints
posted on social media channels. This ensures consistency in the handling of guest issues.
The company also benefits by not creating the impression that social media complaints are
handled more expeditiously than complaints that come through regular channels, which then
motivates other customers to share their grievances on social channels.

2. Consideration of Rules that may Apply Outside the United States

Global brands must focus on and become familiar with the many social media sites
outside the United States. While most U.S. companies are very familiar with domestic social
media networks, there is frequently less focus on social media sites outside the United States.
This can present risk for brands particularly in countries where the size of the social networks is
significant. For example, at least one site has reported that approximately 97% of the more
than 46 million Brazilians who are online use social media.46 While Brazilians are heavy social
media users (Facebook has 65 million users and Twitter has 41.2 million Tweeters), the third
most visited social media site in Brazil is Badoo.47 Similarly, a recent survey conducted by
OgilvyOne in China revealed that 55% of “Chinese netizens . . . had initiated or participated in
online discussions about companies.”48 These statistics underscore the importance of
understanding the terms of use and local regulations that apply to marketers who use these
sites, as well as the conversation that takes place on these sites about brands. The statistics
also underscore the need to develop a comprehensive social media strategy that takes account
of global social media markets.

D. Types of Social Media Advertising: Additional Considerations

There are a variety of methods to advertise via social media. These methods include
endorsements, promotions and sponsorships, user-generated content, branded pages, and
native advertising. Many advertisers use more than one of these methods. It should be noted
that these different forms are not exclusive of one another. For instance, an advertiser could
use a native advertisement that includes an endorsement or could include a contest on its
branded page. The particular method affects both the applicable legal rules and the pragmatic
business considerations of how to use the format.

46 SPOTISTIC, Everything you need to know about social media usage in Brazil, February 4, 2014,
47 Ryan Holmes, The Future of Social Media, FORBES, September 12, 2013,
48 Thomas Crampton, Social Media in China, CHINA BUSINESS REVIEW, January 1, 2011,
1. **Endorsements**

The FTC applies the same general principles to endorsements in social media as to traditional endorsements. But due to the nature of the medium, slightly different considerations apply to endorsements in the social media context. An endorsement is “any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.”\(^{49}\) There are three basic principles underlying the FTC’s treatment of endorsements. First, endorsements, like any advertisement, must be truthful and not misleading. Second, a connection between an endorser of a product and the advertiser must be disclosed, clearly and conspicuously. Third, if the advertiser lacks proof that an endorser’s experience is typical, then this must be disclosed, clearly and conspicuously.

When an endorsement is obvious or expected, no disclosure is required. For instance, if a film star endorses a food product in a television commercial regarding its taste and individual preferences and receives monetary compensation, then no disclosure is required because such payments are ordinarily expected by viewers.\(^{50}\) There is no deception. Whereas if this same film star writes on a social media site that she enjoys the food product and recommends it to everyone, then disclosure is required. Because of the medium involved, according to the FTC, absent a clear and conspicuous disclosure a reasonable consumer might not realize that the star is being paid for creating the content.\(^{51}\)

A real world example occurred in a NAD decision involving Chobani, Inc. and General Mills, Inc. General Mills ran an advertising campaign regarding a particular yogurt product, and as part of this campaign provided a $4 gift card and taste test kits to 5,000 bloggers. NAD recommended that advertisers remind bloggers and others about their disclosure obligations when given an incentive to write product reviews. Moreover, NAD noted that an advertiser must disclose incentives when reposting reviews on social media.\(^{52}\) Thus, even a small incentive should be disclosed by the blogger and an advertiser must disclose a connection when reposting content, even if the blogger fails to do so.

Similarly, the FTC brought an enforcement action against an advertising agency related to an advertising campaign for Sony.\(^{53}\) The advertising agency had some of its employees tweet positive remarks on Twitter about the Sony PlayStation Vita, a handheld gaming device. The employees did not disclose that they were employees of an advertising agency and they appeared to be writing in their personal capacity. The FTC alleged that this was deceptive because they were endorsements without disclosing the clear connection between the employees, the agency, and Sony. The takeaway from these matters is that disclosure obligations remain in the social media context and may in fact be somewhat enhanced given the medium involved and the potential for deception.

\(^{49}\) **FED. TRADE COMM’N, Guides Concerning the Use of Endorsements and Testimonials in Advertising**, 16 C.F.R. § 255.0-255.5.

\(^{50}\) See 16 C.F.R. § 255.5, Disclosure of material connections, example 2.

\(^{51}\) See 16 C.F.R. § 255.5, Disclosure of material connections, example 3.

\(^{52}\) **In re General Mills, Inc.,** NAD Case No. 5715 (May 19, 2014).

\(^{53}\) **In the Matter of Deutsch La, Inc., A Corp.,** 2015-1 Trade Cas. (CCH) ¶ 17225 (MSNET Nov. 25, 2014).
While it is clear that disclosures are required in the social media context, the small size of many online and social media ads leaves little room for comprehensive disclosures. Thus, lawyers must think creatively about how to disclose material terms in an ad. To alert consumers to the existence of sponsored content, advertisers should use “#ad” immediately after posting sponsored content, particularly on sites like Twitter or Facebook where there are character limitations.\(^\text{54}\) It is also important to remember that disclosures cannot be made in a series of tweets or seemingly unrelated posts, as the rules regarding clear and conspicuous disclosure of material terms do not change simply because marketers are using social media platforms.

Finally, in addition to reminding employees and paid sponsors about the importance of disclosing material connections, it is also important to remind advertising agencies and other third-party vendors that their employees should not post positive reviews about a brand that the agency or vendor is working for without disclosing the material connection between the agency or vendor and the company.

2. **Sponsorships, Promotions, Contests and Giveaways**

Sponsorships, promotions, contests and giveaways are popular forms of social media advertisements. Examples of these activities include giving the first hundred people to “like” a post a prize. In the United States and Canada, contests or sweepstakes cannot include payment to participate. Additionally, state laws include their own requirements, as do certain Canadian provincial statutes, some of which require significant disclosures with respect to contest rules and the payment of administrative fees based on prize values. Social media sites themselves often address whether these types of activities are permissible on their sites, whether advance permission is required and whether there are any particular requirements. For instance, Facebook allows promotions, but has particular rules that prohibit advertisers from asking people to tag themselves (list themselves as being pictured in the post) in content that they are not actually depicted in.\(^\text{55}\) Google+ does not allow promotions that offer potential rewards for using most features of the site. For example, a contest may not offer rewards for “+1ing” content, following a user or voting in polls.\(^\text{56}\)

a. **Negotiating and Drafting Sponsorship, Partnership and Licensing Agreements**

When negotiating the right to use a third party’s trademarks in a license agreement, it is also important to obtain the specific right to use the third party’s trademarks in social media channels. Typically, when negotiating brand integration agreements, networks provide a very limited license to use their marks and they are very specific about the advertising platforms that can be used and the duration of the license. As a result, it is important to understand exactly how marketers intend to exploit the integration and consider which social media channels they will want to use, whether they would want to run promotions on these channels and negotiate these rights specifically. Similarly, when sponsoring athletes or other professionals, it is also important to negotiate the specific right to advertise the sponsorship in social media channels in

\(^{54}\) *Fed. Trade Comm’n, supra* note 49.


addition to more traditional media channels. In most instances, the specific social media channels that will be used should be noted in the contract. Advertisers should be encouraged to develop a comprehensive social media strategy when entering into these types of license deals. On the flip side, when brands are giving third parties a license to use their marks, photos or other content, it is important to be equally thoughtful, specific and judicious about the scope of the license so as not to inadvertently lose the ability to control third-party use of trademarks in social media.

b. Global Promotions

As companies become increasingly global, some advertisers have a desire to create global promotions. However, it is rare that “one size fits all” when conducting campaigns globally and dealing with a patchwork of regulations that vary across regions, countries and even within countries. However, because online/social media promotions intended for a U.S. audience can be viewed and accessed in other jurisdictions, it is important to be mindful of several issues. For example, Puerto Rico has a non-discrimination law that precludes companies from excluding its citizens from the benefits of advertising and marketing campaigns. In general, more jurisdictions have fewer legal requirements for games of skill, so if an advertiser is seeking to run a promotion across a large number of jurisdictions, it may want to choose one that involves skill instead of chance. Running contests that allow a winner to be selected by votes from online communities should be discouraged because this frequently leads to consumer dissatisfaction over the results (which tend to be skewed for the entrants with the largest social networks). This is an area where a close reading of the social media site’s policy and of applicable law is particularly important. As Tumblr’s contest guidelines put it, “keep in mind that you’re always responsible for the legality of your contest, sweepstakes, or giveaway whether it happens on Tumblr or elsewhere, and lots of detailed state and federal laws apply (at least in the U.S.), so we urge you to take them seriously and ask a lawyer if you have questions or concerns.”

Finally, when developing online advertising campaigns, do not create a hashtag using the trademarks of another company or organization.

3. User Generated Content – Encouraging Users to Create Content

User-generated content is content that an advertiser encourages a third party to create. User-generated content is often linked to contests or promotions. For instance, an advertising campaign may offer a prize for the most popular picture taken and posted to a social media site incorporating the advertiser’s product. There are particular concerns about when user-generated content constitutes “advertising” on the part of the advertiser. Is an advertiser liable for false or deceptive content a user creates at the behest of the advertiser?

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a. **Advertiser Liability for User-Generated Content**

In *Doctor’s Associates, Inc. v. QIP Holder LLC*, the court addressed whether an advertiser is liable for user-generated content. Quinos (QIP Holder LLC) created an advertising campaign with a nationwide contest component, the “Quinos v. Subway TV Ad Challenge.” Doctor’s Associates, Inc. is associated with Subway. The campaign’s theme was “meat, no meat,” with Quinos attempting to highlight that it allegedly had more meat in its sandwiches than Subway. Quinos encouraged people to submit videos demonstrating “why you think Quinos is better” to a website and a winner would be chosen. Subway brought suit, including a claim for false advertising under Section 43(a) of the Lanham Act, alleging in part that some of the user-generated videos constituted false advertising.

The threshold question was whether the user-generated videos constituted “commercial advertising or promotion” under the Lanham Act. Given the encouragement by Quinos, the purpose behind the contest, and the widespread dissemination, the court held that the user-generated videos constituted commercial advertising.

Quinos also argued that it was immune under Section 230 of the CDA as a mere content host. The court found that the “critical inquiry with respect to CDA immunity in this case is whether [Quinos] merely published information provided by third parties or instead [was] actively responsible for the creation and development of disparaging representations about Subway contained in the contestant videos.” The court held that it could not determine at the summary judgment stage whether Quinos was actively responsible for the user-generated videos.

This case also illustrates another open issue regarding the relationship between Section 230 immunity under the CDA and false advertising claims. Section 230 by its terms does not provide immunity to “any law pertaining to intellectual property.” That is, the CDA is not a shield for infringement of intellectual property. Courts disagree whether false advertising claims are intellectual property claims barred by Section 230, and whether state intellectual property based claims are barred by Section 230.

From this and related cases, it is unclear whether an advertiser may successfully assert immunity for user-generated content under § 230 of the CDA. What is clear, however, is that an advertiser may face legal action based upon user-generated content that it encouraged.

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59 Id. at *23.


61 See *Perfect 10, Inc. v. CCBill LLC and CaveCreek Wholesale Internet Exchange d/b/a CWIE LLC*, 488 F.3d 1102, (9th Cir., March 29, 2007) cert. denied, 128 S.Ct. 709 (2007); *Atl. Recording Corp.*, 603 F. Supp. 2d at 704 (“I conclude, as a matter of law, that Section 230(c)(1) does not provide immunity for either federal or state intellectual property claims.”); *Black v. Google Inc.*, No. 10-02381 CW, 2010 WL 3222147, at *1 (N.D. Cal. Aug. 13, 2010) aff’d, 457 F. App’x 622 (9th Cir. 2011) (dismissing Lanham Act claim for false advertising because immune under Section 230).

62 Compare, *Perfect 10, Inc. v. CC Bill LLC*, 488 F.3d 1102, 1119 (9th Cir. 2007) (holding that “intellectual property” means “federal intellectual property” and does not include intellectual property claims under state law), with *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 302 (D.N.H. 2008) (holding that Section 230 applies to state-based intellectual property claims, not just federal ones).
Contest and promotional rules should therefore ban false or misleading claims. Additionally, as noted in the endorsements section above, advertisers should encourage users to disclose any material connection between the user-generated content and the contest. And, relatedly, an advertiser who “reposts” or otherwise redistributes user-generated content on social media should state that the content was created in connection with the contest.

b. **Additional Considerations When Reposting User-Generated Content**

Advertisers also need to carefully consider privacy implications when reposting user-generated content. For example, if a hotel guest tweets that she stayed at a hotel, it may well be improper for the brand or hotel to retweet that post because the guest would have an expectation of privacy, and the hotel would not have the right to exploit that guest’s content for commercial gain without obtaining appropriate releases and approvals. Practically speaking, if a consumer uses the company’s hashtag in a tweet, consent might be implied, but this does not extend to others who may be featured in the photograph, so a good rule of thumb is to obtain permissions before reposting user-generated content.

Similarly, if a guest tweets that she saw a famous person shopping at a store, the store would not have the right to retweet that post because the famous person would have the right of publicity in his or her image, and the store would not have the right to use the person’s name or image for commercial gain. Reinforcing the importance of this principle, last year Katherine Heigl settled a lawsuit with Duane Reade after suing them for $6 million, claiming that the pharmacy chain violated the false advertising provision of the Lanham Act and New York civil rights statutes protecting use of a person’s likeness for commercial purposes. At issue were Facebook and Twitter posts of photos taken by paparazzi, which included the following tweet: “Love a quick #DuaneReade run? Even @KatieHeigl can’t resist shopping #NYC’s favorite drugstore!”

When posting brand content on web sites or making content available for third parties to repost, brands must also ensure that they have the full rights to the content they are posting. The terms of use of most social media sites require that posters have the right (either owned or licensed) to post their content. This means before posting photos or other third-party content, advertisers should ensure that they negotiated the right to use such content in all media in perpetuity to avoid claims from third parties later. This is particularly important because information posted online can have a long lifespan, and damages for lengthy periods of unauthorized use can be high.

Before allowing third parties to re-pin or repost content from a brand web site, advertisers should consider how much control they are willing to lose with respect to posted content. The Pinterest terms of use provide that once content is posted, “[y]ou grant Pinterest and its users a non-exclusive, royalty-free, transferable, sublicensable, worldwide license to use, store, display, reproduce, re-pin, modify, create derivative works, perform, and distribute your User Content on Pinterest solely for the purposes of operating, developing, providing, and using the Pinterest Products.” As companies typically spend a substantial amount of money

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on professional photography, it is critically important that advertisers understand these terms before permitting employees or franchisees to post proprietary brand content on social media sites.

4. **Brand Pages**

Brand pages are pages an advertiser creates to advertise its product or service on social media. For instance, a company or product may have its own Facebook page or Twitter handle. These pages are, of course, still regulated by the FTC Act and by other applicable laws.

Special considerations arise with respect to the manner in which a company deals with impersonator pages or impersonator accounts. For instance, on Twitter, one will often see an account with the same name as a famous individual, company, or product, but the Twitter handle is merely an impersonator. Closely related are “fan pages.” Fan pages are pages created by fans, supporters, or consumers of a product to show their support for the product. Other pages may be disparaging of the product or brand. As discussed above, advertisers should develop cohesive and intentional strategies for dealing with impersonator pages, fan pages and other internet and social media content.

5. **Native Advertising**

Native advertising refers to advertising that attempts to blend into the user or editorial content on a social media site - for instance, a Facebook post that appears in a person’s news feed, in contrast to the advertisements on the side of the page, or an ad on Instagram included next to user-created images. A recent commentary aptly describes native advertising on Facebook:

> Upon logging onto Facebook every day, over 800 million users are inundated with posts by their friends and family on their “Newsfeed.” Users see a status update from their niece who just got a new car. They scroll to see that their co-worker “likes” the new comic book hero movie and that their old friend from high school posted pictures of her newborn. After scrolling a little further down the screen they see that they can save up to $423 on their auto insurance by switching to Liberty Mutual Insurance and that their mom and two other friends have “liked” the company. Although it may appear to be another post by the user’s friends or family, the Liberty Mutual Insurance posting is actually a paid-for advertisement, purchased by the company with the hopes that seeing the ad in this context will have a greater likelihood of influencing the user to purchase its product than a traditional advertisement appearing on the side of the screen.\(^{65}\)

Most research has shown that native advertisements are more effective than traditional social media advertisements.\textsuperscript{66}

Native advertisements are, by their nature, designed to look similar to other content. This raises particular issues with respect to disclosure requirements and avoiding deception. Arguably, the first FTC enforcement action concerning native advertising dates back to 1917 (a newspaper ad for an electric vacuum cleaner).\textsuperscript{67} But native advertisements in social media have raised new and further complications. The FTC has not issued formal guidance on best practices for native advertising, but it has held a workshop on the topic, and an industry group has released a best practices guide.\textsuperscript{68}

In the search engine context, the FTC has stated that search engines must disclose whether results are sponsored listings or regular search results.\textsuperscript{69} The FTC has stated that no one particular method is required, but that it must be noticeable and understandable to consumers. Methods include both visual cues and text labels. These same types of requirements likely apply to native advertising in social media. However, these types of disclosures can be more difficult in some forms of social media or on mobile devices, due to lack of space and other considerations discussed above.

The bottom line is that although the FTC has not issued formal guidance, native advertisements should include disclosures or be presented in such a way that a reasonable consumer can distinguish paid content from unpaid content.

IV. ANTI-SPAM AND ANTI-TEXTING LAWS IN THE UNITED STATES AND CANADA

A. Overview of Anti-Spam and Anti-Texting Laws and their Relevance to Advertising in Social Media

Over the past 15 years, as a result of threats involving unwanted and misleading electronic communications, including the loss of productivity of businesses and individuals,\textsuperscript{70} as well as growing concerns with respect to identity theft, phishing, spyware and viruses, several jurisdictions have implemented legislative restrictions on the types of conduct that may be


adopted with respect to online advertising and correspondence. While these rules do not apply solely to advertising through social media, they establish significant restrictions on the types of communication permitted through social media advertising initiatives, especially given their application to unsolicited electronic communications. However, given that social media involves users as active participants in the experience, franchisors and franchisees alike may benefit from the P2P nature of many of the connections and communications that occur through social media platforms.

The Controlling the Assault of Non-Solicited Pornographic And Marketing Act (“CAN-SPAM Act”), adopted in the United States in 2003, imposes restrictions on the types of advertising and suggestive communications that may be conducted through electronic means. It requires the sender of an electronic message to obtain the consent of recipients prior to sending them an electronic message of a commercial nature. The Act does provide a certain level of flexibility to senders of such messages and imposes a duty on the recipient to take active steps to “opt out” of receiving further electronic correspondence from a business, failing which they may be deemed to have implicitly consented to continue receiving similar electronic messages from that sender.

Canada’s Anti-Spam Legislation (“CASL”) entered into force more than a decade later, on July 1, 2014. CASL imposes significant hurdles for businesses and individuals wishing to reach out to customers, potential customers and other connections over the Internet. It may well be the most severe legislation governing e-mail and text message communication in any jurisdiction in the world. In much the same way as the CAN-SPAM Act, CASL prohibits sending commercial electronic messages to recipients unless they have provided their consent to receive them.

Because these laws will apply to various forms of messaging that may be used for purposes of encouraging recipients to participate in a commercial activity, including through social media, franchisors and franchisees who use social media for advertising should be aware of the implications of the CAN-SPAM Act and CASL.

Generally speaking, campaigns based on messages and other communications that are posted, published or broadcast “at large” will not violate these statutes. That would not be the case, however, where messages are sent directly to the target audience, whether on an individual basis or through mass messaging applications. Nonetheless, the importance of these rules cannot be overstated, especially since many businesses will be tempted to automatically include participants and responders in their mailing lists well after a campaign has been completed, and social media advertising may lead to subsequent electronic communications with members of the target population.

B. United States - The CAN-SPAM Act

1. General Overview

The CAN-SPAM Act does not prohibit all unsolicited commercial e-mails, but sets out specific requirements for their content and requires that recipients have a method of opting out of receiving the messages for the future.
2. **What is a “Commercial Electronic Mail Message”?**

The CAN-SPAM Act applies to any electronic message that has as its primary purpose the commercial advertisement or promotion of a commercial product or service.\(^{71}\)

The primary purpose of a message is determined by considering the following criteria:\(^{72}\)

- If a message is exclusively commercial, then the message has a commercial primary purpose;

- Where a message has both “commercial content” and “transactional or relationship content”, the primary purpose of the message is commercial if (a) a recipient reasonably interpreting the subject line of the message would likely conclude that the message contains a commercial advertisement or promotion of a commercial product or service; or (b) the message’s “transactional or relationship” content does not appear (in whole or in substantial part) at the beginning of the body of the message;

- Where a message has both commercial content and content that is neither commercial nor transactional or relationship, the primary purpose of the message is commercial if (a) a recipient reasonably interpreting the subject line of the message likely would conclude that the message contains the commercial advertisement or promotion of a commercial product or service; or (b) a recipient reasonably interpreting the body of the message likely would conclude that the primary purpose of the message is the commercial advertisement or promotion of a commercial product or service. Factors that may be taken into consideration in this interpretation include the color, graphics, type size, style and other methods used to emphasize text and other content;\(^{73}\)

- If a message consists exclusively of transactional or relationship content, the primary purpose of the message is “transactional or relationship”.

3. **What is a “Mobile Service Commercial Message”?**

A mobile service commercial message is defined under the Act as a commercial electronic mail message transmitted directly to a wireless device. The Act therefore also governs messages sent to mobile phones and other mobile devices. Consent for e-mails or other commercial electronic messages sent to a mobile device must be expressly obtained in writing if the text message is commercial in nature. Consent may be obtained verbally in the case of informational text messages such as those sent by non-profit organizations, for political or other non-commercial purposes.\(^{74}\)

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\(^{72}\) Id.

\(^{73}\) Id.

Under the Telephone Consumer Protection Act, commercial e-mails and texts may not be sent to a mobile device unless the recipient's prior written consent has been obtained. This consent must be unambiguous, meaning that it is provided following a clear and conspicuous disclosure that commercial messages will be sent by an identified advertiser, and that the consent box and phone number are not pre-populated.

4. What is Consent?

The CAN-SPAM Act assumes that recipients of unsolicited electronic messages have implicitly consented to their receipt until they take steps to opt-out of the receipt of such messages. The CAN-SPAM Act also does not provide any specific requirements for obtaining express consent, and does not require the disclosure of specific information in order to receive consent. Consent is simply implied until the recipient opts out of receiving messages that are subject to the provisions of the Act.

5. Content and Form Requirements

a. Opt-Out Option

The CAN-SPAM Act requires any commercial electronic message covered by the Act to include a clear and conspicuous explanation as to how recipients can opt out of receiving future e-mails at no cost to them. The notice must be easy to understand and must clearly provide for a return e-mail address or an internet-based way for people to communicate their intention to opt out. Any request to opt-out must be honored by the sender within 10 business days, and the recipient of a message must be able to opt-out for a period of at least 30 days after a message has been sent.

b. Sender Identification

The sender must specify in the “From” header and the routing information of any message governed by the Act, their originating domain name and e-mail address in such a way that permits the recipient to accurately identify the sender of the message. In addition, the message must include the sender's valid physical mailing address.

These requirements also apply where an e-mail or website allows a user or recipient to forward an advertisement or offer to a friend, since the original sender is seen as the sender or initiator of the “forward-to-a-friend” function.

76 Id. at ss. (a)(4), (a)(5), (b)(1)(C), (b)(2)(B)(i); see also FED. TRADE COMM’N, supra note 74.
77 FED. TRADE COMM’N, supra note 71.
78 Id.
79 Id.
80 Id.

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In addition, where a single commercial electronic message contains commercial content regarding more than one sender, each sender is subject to the same requirements and must be identified in accordance with the CAN-SPAM Act.

c. Message Content

The CAN-SPAM Act generally prohibits a sender from using false or misleading information in headings to regulated messages, as well as deceptive subject lines. More particularly, messages governed by the CAN-SPAM Act must be clearly and conspicuously identified as advertisements. However, the Act allows considerable leeway as to how this identification may occur.

d. Penalties and Other Consequences in Case of Failure to Comply

The CAN-SPAM Act allows affected Internet access service providers to sue unwanted senders for statutory damages. Each separate e-mail in violation of the Act is subject to penalties of up to $16,000. The law also provides for criminal penalties such as fines and imprisonment for acts such as accessing someone’s computer to send spam without permission or using false information to register for multiple e-mail accounts.

The FTC and other enforcement authorities may also seek injunctive relief in case of breaches of the CAN-SPAM Act.

The CAN-SPAM Act does not expressly provide for vicarious liability. However, even where a business engages another company to manage and process e-mail marketing, it cannot contract out of its legal responsibility to comply with the Act. Both the company whose product is being advertised in the message and the company that actually sends the message can be held liable.

Businesses that use third-party service providers to manage their online commerce or marketing programs must closely monitor the actions of those service providers, given that the person or entity on behalf of which a regulated message is sent may ultimately be responsible for compliance with the CAN-SPAM Act. The same reasoning applies to franchisors who allow employees and franchisees to send messages with commercial content on their behalf. As discussed in greater detail below, this is one reason why developing and implementing an adequate social media policy is absolutely critical where franchisees are given the latitude to participate in social media advertising.

81 Fed. Trade Comm’n, supra note 71.
82 Id.
83 Id.
84 Id.
85 Id.
86 Id.
e. **Exemptions**

Messages that contain only transactional or relationship content are messages that, *inter alia*, facilitate or confirm an existing transaction, provide updates about an ongoing transaction, deliver goods or services, or provide warranty, product recall or safety information about an item purchased. These types of messages are exempt from most provisions of the CAN-SPAM Act, as long as they do not contain false or misleading routing information.\(^{87}\)

It is important to note, however, that where a message’s transactional or relationship content does not appear mainly at the beginning of the message, the primary purpose of the message may be considered commercial.\(^{88}\)

f. **Managing Risks Related to New Technologies**

As new technologies come online, attorneys should work closely with advertisers to ensure that risk is appropriately apportioned with vendors who introduce these technologies. For example, there is now technology that allows advertisers to send text messages to people who interact with their smart TVs. As these technologies are rapidly developed and deployed, software companies may not be thinking about the CAN-SPAM compliance regime and they seek to shift the risk of compliance to the advertisers. Working closely with advertisers to understand how these new technologies work is critical to mitigating the risk associated with the rollout of these technologies.

g. **Importance of Centralizing the Opt-Out Process**

As discussed above, franchisors can take a number of approaches when thinking about how to engage in social media with their franchisees. While a centralized approach is probably the least risky from a brand perspective, it also doesn’t allow franchisees to build upon the personal relationships they establish with their customers. That said, even if franchisors decide to decentralize the management of social media networks, it is highly recommended that they centralize the opt-out process. It is incredibly difficult to manage opt-outs that are widely dispersed among franchisees, and violating opt-outs presents much greater risk to the franchisor than to individual franchisees.

C. **Canada - Canada’s Anti-Spam Law**

1. **Significant Differences between Canada’s Anti-Spam Law and the CAN-SPAM Act**

CASL contains several significant differences from the CAN-SPAM Act. Given CASL’s extra-territorial reach and the significant monetary penalties and private rights of action it provides, it is important to understand these differences where social media advertising campaigns may apply to, or attract participants from, across borders.

\(^{87}\) *Fed. Trade Comm'n, supra* note 71.

\(^{88}\) *Id.*
a. **Consent Must Be Obtained on an "Opt-In" Basis**

Unlike the CAN-SPAM Act, which is based on an “opt-out” model, CASL provides for an “opt-in” consent regime, which prohibits the sending of commercial electronic messages unless the recipient has provided express or implied consent in advance.

Obtaining valid "opt-in" consent requires that toggle boxes not be pre-checked.

Express consent can be obtained if the holder of an e-mail address has agreed to a request for consent from the sender of the message, presented in the form prescribed by CASL. This requires, *inter alia*, that a request for consent not be “bundled” with another request or interaction: for example, the confirmation of a purchase transaction or the participation in a contest cannot be contingent upon a user providing consent to receive emails from the business concerned.

Express consent to receive commercial electronic messages does not expire, and remains valid until it is expressly withdrawn by the holder of the address having provided the consent.

Certain exceptions apply, however; for example, consent is implied where a business relationship or a non-business relationship exists that meets certain statutory requirements. The sender of the message must be able to make a connection between an e-mail address in its database and either (i) a purchase made by the holder of that e-mail address within the previous two-year period, or (ii) an inquiry made by the holder of that e-mail address within the previous six-month period. In addition, where individuals’ e-mail addresses are conspicuously published on a website or in a trade publication, or where they voluntarily provide their business card or otherwise publish their contact details, their consent to receive e-mails that relate to their activities is implied.89

It should be noted that mechanisms available on social media websites such as clicking "like", voting for or against a link or post, accepting someone as a "Friend", or clicking "Follow"—will generally be insufficient to establish a relationship for which implied consent will be assumed to exist.90

CASL does however provide for a transition period. If a sender of commercial electronic messages can make a connection, as of June 30, 2014, between an e-mail address in its database and either (i) a purchase made by the holder of that e-mail address, or (ii) an inquiry made by the holder of that e-mail address, there will be a grace period ending on June 30, 2017 for the sender to send commercial electronic messages to that person. This provides a period that is one year longer than the other derogations provided under CASL. Many businesses will use this transition period to send e-mails to these persons in order to obtain their express consent to receive commercial electronic messages after the grace period has expired.

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Finally, unless consent is stated to apply only to specific types of messages, consent to receive commercial electronic messages (whether express or implied) will apply to all messages sent by a particular organization.⁹¹

b. Obtaining Express Consent Requires Disclosure of Prescribed Information

CASL provides that a request for consent may be presented in any form (such as e-mails, website pop-ups, in-store sign-up forms, or contest participation ballots) but must contain each of the following:

→ a description of the purposes for which consent is being sought;

→ the name of the business seeking consent (or the business on behalf of which the request is sent);

→ the mailing address of the business seeking consent (or the business on behalf of which the request is sent);

→ a telephone number or e-mail address or web address for the business seeking consent (or the business on behalf of which the request is sent); and

→ a statement indicating that a person whose consent is sought can withdraw that consent.

For example, in the context of social media, an unchecked box beside a brand’s newsletter sign-up, a pop-up window or a dialog box seeking consent could allow for social media users to manifest their consent to receive messages.

There is no requirement under the CAN-SPAM Act to obtain express consent from recipients of electronic messages or to provide any disclosure in respect thereof.

c. Broad Notion of “Commercial Electronic Message”

CASL regulates “commercial electronic messages” (CEMs); this concept is defined broadly in the legislation and includes any electronic message that has as its purpose, or as one of its purposes, the encouragement of or participation in a commercial activity.⁹² This is a significant contrast to a message that has a commercial objective as its primary purpose, as required under the CAN-SPAM Act.

In addition, CASL applies broadly to all CEMs while the CAN-SPAM Act is meant to apply to messages that contain some element of fraud or deceit.

⁹¹ GoVernment of Canada, supra note 89.

⁹² An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act, also known as Canada’s Anti-Spam Law, S.C. 2010, c. 23, s.1(2) “meaning of commercial electronic message.”
A commercial activity is defined as any transaction, act or conduct that is of a commercial character, whether or not the person who adopts the conduct does so with the expectation of profit. This characterization could result in many messages that are not personal in nature being characterized as CEMs.

Electronic messages are considered to be any message sent through electronic means, including e-mail messages, text messages, social media messaging, sound messaging and image messaging. In the context of social media, the Canadian Radio-television and Telecommunications Commission (“CRTC”) has clarified that it considers “direct” messages (those considered to be individualized communications) sent through social media systems to be electronic messages for purposes of CASL, while messages that are posted, published or broadcast through these systems are not considered electronic messages, such as Facebook “posts” or Twitter “tweets”.

In the social media context, it is important to distinguish between commercial messages sent privately and broadcast messages viewable by all recipients who have actively decided to follow or subscribe to a business’s social media platform. The CRTC has clarified that it draws a distinction between direct messages sent through social media messaging systems, such as Facebook direct messages and LinkedIn direct messages, which would be viewed as being sent to an electronic address, and messages posted, published or broadcast on social media websites and blogs, such as a Facebook wall post, which would not be viewed as being sent to an electronic address. The former therefore falls under the category of commercial electronic messages regulated by CASL, whereas the latter are exempt from CASL’s strict requirements.

Even if the electronic message is not itself related to a commercial activity, it may still qualify as a CEM if it contains hyperlinks to other content or websites or the contact information contained in the message.

d. Prohibition against Soliciting Consent Electronically

Unlike the CAN-SPAM Act, CASL explicitly states that an electronic message that seeks to obtain consent to send CEMs is itself a CEM. Therefore, it is not possible to send a CEM to request consent to send future CEMs. Businesses must therefore have or create an existing relationship with proposed recipients of their CEMs or otherwise benefit from an exception under CASL in order to use an electronic message to request an express consent. Finally, businesses may use traditional methods of soliciting express consent, such as providing sign-up forms in stores or online or including an “opt-in” box when an online purchase is completed.

e. Vicarious Liability for Directors and Officers

Corporate directors, officers and agents may be held personally liable for violations of CASL if they direct, authorize, or participate in a breach of CASL, although a due diligence

93 Id. at s.1(1) “commercial activity.”

94 Id. at s. 1(1) “electronic message.”

95 Id. at s.1(1) “ electronic address”; “electronic message.”

96 Id. at s.1(3) “other commercial electronic message.”
defense is available.\textsuperscript{97} Employers may also be held vicariously liable for violations of CASL by their employees unless they conducted themselves diligently, including by taking reasonable measures with a view to preventing such violations by employees.\textsuperscript{98} It is also an offense under CASL to aid, induce, procure or cause to be procured any acts contrary to certain sections of the law, including sections relating to CEMs.\textsuperscript{99}

The CAN-SPAM Act does not specifically provide for vicarious liability, although courts may impose vicarious liability in certain circumstances.

\textbf{f. Extra-Territorial Application}

CASL has significant extra-territorial reach given that it applies to any computer system located in Canada that is used to either send or access a CEM. This means that any person or entity that sends a CEM from Canada or to recipients in Canada, must comply with CASL. As a result, businesses located outside Canada that conduct business in Canada or wish to communicate with Canadian consumers through electronic means must ensure that they are in compliance with CASL. The CAN-SPAM Act, conversely, does not contain any provisions regarding extra-territorial application.

\textbf{g. Private Right of Action}

Finally, CASL creates a private right of action for message recipients to claim damages suffered as a result of any breach of CASL. Such claims may reach up to CAD $200 per day, per breach (for an aggregate of CAD $1 million per day).\textsuperscript{100} This liability includes compensation for losses, damages and expenses. This private right of action may even serve as the basis for class action claims. To give businesses time to adapt their practices, CASL provides for a transition period. A private right of action will only be possible for claims arising after the third anniversary of CASL’s coming into force (that is, July 1, 2017).

Only internet service providers can claim statutory damages under the CAN-SPAM Act.

\section*{2. Content and Form Requirements}

As of July 1, 2014, all CEMs (and not only requests for consent) must contain an unsubscribe function and properly identify the sender.

Every CEM must allow the person receiving the message to unsubscribe from the mailing list at no cost. This may be through a link to a website or through any other clear and simple form. Unsubscribe requests must be given effect within 10 days and the unsubscribe feature must remain valid for at least 60 days after the message is sent.\textsuperscript{101}

\textsuperscript{97} \textit{Id.} at s.31.
\textsuperscript{98} \textit{Id.} at s.32.
\textsuperscript{99} \textit{Id.} at s.9.
\textsuperscript{100} Canada’s Anti-Spam Law, \textit{supra} note 92, at s.51.
\textsuperscript{101} \textit{Id.} at s.11.
In addition, all CEMs must contain:

→ the name of the business sending the message (or, where sent by one business on behalf of another, the name of the business on behalf of which the message is sent, as well as a statement identifying the sender);

→ the mailing address of the business sending the message (or, if different, that of the business on whose behalf the message is sent); and

→ a telephone number or an e-mail address or a web address for the business sending the message (or, if different, that of the business on whose behalf the message is sent).

The disclosed contact information must remain valid for at least 60 days after the message is sent.102

3. Penalties and Other Consequences in Case of Failure to Comply

In addition to potential vicarious liability and private rights of action, CASL empowers the court to order significant administrative monetary penalties in the event of violations, ranging up to CAD $1 million for individuals and CAD $10 million for businesses.103

4. Exemptions

Certain kinds of CEMs are exempt from the requirement to obtain consent prior to sending the CEM or from both the consent and the content and form requirements applicable to CEMs.

Some examples of CEMs that are exempt from both the consent and the content and form requirements are messages sent in response to a request, inquiry or complaint and messages where the sender and recipient have a “family” or “personal” relationship, as defined under CASL.

If implied consent can be relied upon, then the requirement to obtain consent prior to sending a CEM does not apply, but the content and form requirements still apply to the message itself. A few examples of this type of message include CEMs sent by registered charities or political parties, CEMs sent to satisfy a legal obligation, CEMs sent by an employee of one organization to an employee of another organization (so long as the organizations have a relationship and the message relates to the recipient’s organization’s activities) and CEMs sent to facilitate, complete or confirm a transaction between the parties where the recipient agreed to enter into the transaction.104

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102 Id. at s.6(3).

103 Id. at s.20(4).

104 Canada’s Anti-Spam Law, supra note 92, at s.51.
5. **Practical Tips for Ensuring Compliance when Advertising in Social Media**

Given the complexity of anti-spam and anti-texting laws in the United States and Canada, it is important to consider the rules and exceptions that may apply to any given business or division with a view to establishing an approach that is consistent with and tailored to each business’ operations and marketing strategy.

a. **Obtain and Document Consent for Purposes of CASL**

Many organizations are now using the CASL transition period to seek express opt-in consent from existing entries on distribution lists in order to confidently maintain them on e-mail distribution lists into the future.

In addition, a business that purports to rely on either express or implied consent of a recipient must be in a position to prove such consent, in particular in the event that the business ever faces any audit, inspection, penalty, claim, suit or other measure by relevant authorities or individuals. It is therefore important to maintain records of validly obtained consents meeting statutory requirements.

b. **Consider the Recipients of Advertisements and Other Messages**

It is also important to consider who the recipients of the advertisement or message will be, given the extra-territorial reach of CASL. A sender must determine whether recipients will be accessing such CEMs in Canada to know whether it will be necessary to comply with CASL’s requirements.

Additionally, the risk of violating the CAN-SPAM Act and CASL would generally be diminished where messages are posted, published or broadcast through social media instead of directly sent to members of the target population through their social media accounts. However, businesses should consider that messages and other forms of more individualized correspondence that may follow from a campaign will likely fall squarely within the ambit of the CAN-SPAM Act and CASL, and must therefore comply with the relevant requirements.

c. **Monitor Message Content**

Best practices would include implementing an auditing and monitoring program to help prevent and detect misconduct and assess the effectiveness of the corporate compliance program for the CAN-SPAM Act and CASL. It may be favorable to put the monitoring program into practice as part of a franchisor’s general oversight of franchisees’ social media presence.

d. **Administer Training and Information Sessions for Employees and Franchisees**

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105 Id. at s.13.
It is important to understand the CAN-SPAM Act and CASL and to identify how the rules may apply to an employer, a franchisor or a franchisee and their respective online business practices. These requirements must be harmonized with franchise e-mail practices and a broad social media advertising program. In addition, a member of management should be named as the business’ chief compliance officer, responsible and accountable for the development, management, and execution of a compliance program. Training programs should be implemented to educate staff on what constitutes prohibited conduct and to deal with such conduct.106

It is certainly advisable to include CAN-SPAM Act and CASL compliance as a representation and warranty in contracts with franchisees or employees.

V. ESTABLISHING AND IMPLEMENTING A SOCIAL MEDIA POLICY

In light of the complex legal framework that applies to advertising in social media, as well as the use of social media for franchised businesses more broadly, it is important for a franchisor to consider whether a social media policy should be developed and implemented. Such a policy can offer guidance to employees and franchisees (and their employees and representatives) with respect to accepted practices in the use of social media from a brand perspective.

Operational and marketing guidelines may provide a certain degree of guidance on the use of trademarks, copyrighted materials, testimonials, and other aspects of more traditional business operations. However, these guidelines may not contain adequate approval mechanisms or other adaptations necessary for internet-based tools and initiatives, including advertising through social media. As a result, careful consideration should be given to broad controls and general rules contained in operational and marketing guidelines that may not be applied to the use of social media in accordance with a franchisor’s expectations.

It is becoming increasingly important for franchisors to create and implement social media policies that apply to their employees and franchisees. Whether or not a business plans to engage in social media advertising, and whether or not it retains significant control over the management and content of any social media accounts, the business must strive for clarity with respect to the types of activities permitted for employees and franchisees where social media is concerned. A set of guidelines tailored to the business reality and expectations of a given franchisor can be just the right solution. Accordingly, advisors should be mindful of any issues that should be specifically addressed in a social media policy as a result of a given business’ industry, products, services or target market.

A. Determining the Scope of Desired and Permissible Social Networking for a Brand or Product

A brand must determine whether its products or services lend themselves to advertising through social media and, if so, which types of social media campaigns may have the most significant positive impact. To establish where the investment in social media advertising will generate the greatest return, it is important, as with any marketing strategy, to consider the

target audience and its patterns and habits in using social media. By engaging in social media advertising, franchisors create an opportunity to take part in a dialogue with their potential franchisees, employees and customers alike.

Businesses and individuals are increasingly likely to seek information through social media to confirm or corroborate information received through other means. Given that information made public through social media is generally considered in the public domain, it is not unlikely that potential franchisees, employees and customers will seek information about a brand or its products or services through social media. As a result, the potential impact of information and content on social media must be carefully considered.

B. Determining Who Controls a Brand or Product’s Social Media Initiatives and Related Advertising and Correspondence

Where a brand’s social media efforts are less centralized, franchisees may benefit from greater flexibility to adapt to local markets; however, a less centralized approach may lead to inconsistencies in brand appearance, social media content and other issues related to the franchise network.

Given the important influence of information, publications and offers made available through social media, franchisors must consider how their interests will be best protected, both in terms of increasing brand awareness, loyalty and credibility and in terms of the potential risks associated with allowing too much flexibility in social media initiatives.

The structure of a brand’s traditional marketing program may not be determinative of its approach to social media advertising. For example, a franchisor that has enjoyed success through centralizing its efforts in traditional marketing channels may prefer to allow its franchisees to determine the best social media initiatives to adopt in their respective locations or regions.

Finally, it may be important to contemplate whether franchisees and their employees or representatives have the time and skills required to monitor and engage in social media advertising initiatives in a manner consistent with the franchisor’s expectations and its brand image. This may be an influential factor in determining whether franchisees will be given any control over social media advertising.

1. Centralized Franchisor Control

Where control over social media advertising is centralized with a franchisor, it will be easier for a franchisor to manage campaigns and their content on social media. It can also allow a franchisor to test various strategies before implementing them at regional, national or international levels.

Centralized social media initiatives may have the benefit of reaching a broad audience in a broad geographic realm. However, they will, of necessity, tend to be targeted to less specific audiences.

In addition, where a franchised business operates in an industry that is particularly sensitive to the unauthorized use or disclosure of confidential information, it may prove more
prudent and conservative to avoid relinquishing a significant level of control over social media advertising initiatives, so that content and use can be monitored more closely by the franchisor.

2. Franchisee Control with Franchisor Approval

A hybrid approach may be better suited to franchisors who seek to retain approval rights over social media campaigns and their content, without necessarily requiring the retention of significant control over how the campaigns are executed or implemented.

It should be noted that, in the context of social media, where time is of the essence and the immediacy of a response or reaction is paramount, a franchisor may seek to retain monitoring rights (as opposed to approval rights) as a more practical solution to possessing a certain level of control without unduly impeding the speed and efficacy of advertising through social media.

Where the franchisor transfers the responsibility of managing the social media use, franchisees must be prepared to respond to inquiries, audit user-generated content and make adjustments where needed. Franchisees also must be equipped to provide updates and refresh their own contributions within the timeframes expected by the franchisor or as appropriate for purposes of the business.

3. Decentralized Franchisee Control Based on Guidelines Established by Franchisor

Where the components of a franchised business vary from one location or region to the next, and where different franchisees may have patrons with different demographic characteristics, it may be beneficial to encourage franchisees to put their own social media advertising campaigns in place.

In addition, franchised businesses that give rise to personal relationships, such as in-home service providers, health and beauty businesses, wellness centers and other similar businesses, may benefit from having franchisees manage their own social media advertising. Generally speaking, this will require less intensive involvement from the franchisor; however, certain controls should be put in place to ensure a consistent brand image and a generally consistent content and online presence created by franchisees’ social media involvement.

C. Items to Address in a Social Media Policy

We have analyzed below certain items that businesses should consider in establishing a social media policy. Nevertheless, the success and efficacy of a social media policy will depend largely on how closely it corresponds to the realities of a given franchised business and its industry. It is essential to strive to put in place the most tailored policy possible to achieve any given organization’s objectives. This will often require significant input from marketing and operations teams, but will ensure the most effective results and a policy offering the greatest degree of clarity and, ultimately, protection.
1. **Advertising Concerns**

The issues described below should be considered by every business engaging in any form of advertising and marketing in social media in order to better manage the risks associated with such advertising.

a. **Adequate Trademark Protection for Brand or Product**

A social media policy must ensure that a franchisor has adequate trademark protection, which may take many forms, such as simply including an approval right for all content or posts that make use of the trademark, or allowing the trademark to be used within certain size and pixel guidelines.

It may also be possible to set out the types of accounts and the format of user names that may be adopted by employees and franchisees for purposes of social media advertising.

b. **Approval Process with Respect to Content (if Applicable)**

It is important to provide for controls with respect to social media content generated by employees or franchisees. This may require a franchisor to retain a general approval right for all content prior to its use. Alternatively, a franchisor may prefer to monitor the content that appears on social media pages and reserve the right to demand that it be removed or modified in its discretion. A combination of the foregoing approaches may also be appropriate based on the nature of the content.

Franchisors may also opt to push certain mandatory minimum content to their franchisees to ensure a certain level of quality and consistency. A social media policy should specifically provide for the obligation of franchisees to comply with any requests from the franchisor to include specific content on its social media page.

Finally, franchisors may wish to specify general prohibitions on the types of content that may be included on social media sites, such as offensive or shocking content, religious content or content containing political messages.

c. **Compliance with All Applicable Laws and Contractual Terms**

To the extent not already covered in agreements and operational guidelines, a social media policy should require that employees and franchisees comply with all applicable laws in their use of social media. For example, the legal principles generally applicable to use of trademarks and copyrighted materials, confidentiality, advertising, defamation, harassment and discrimination all apply to conduct exhibited through use of social media.

Additionally, it may be useful to include explicit prohibitions from disclosing proprietary information and from using a competitor’s name, trademarks or copyrighted materials in any social media content. It may also be important to set out specific limits within which product endorsements and testimonials may be used.
d. **Rights of Franchisor and/or Duties of Franchisee to Monitor, Alter or Remove Unauthorized or Harmful Content**

In addition to any rights that a franchisor may retain to control or provide content to be used for social media, it may be useful to provide the right for the franchisor to continuously monitor its franchisee’s social media pages and accounts, and to remove, or compel the franchisee to remove, any content that it considers inappropriate, unauthorized or harmful.

However, it should also be specified that the franchisor has no obligation to engage in any such monitoring and that any monitoring does not constitute an acknowledgement that a franchisee is in compliance with its franchise agreement, the social media policy or any applicable law.

e. **License or Assignment in Favor of Franchisor with Respect to Third-Party Content**

To have the full benefit of the goodwill associated with advertising through social media, a franchisor must retain, to the extent possible, the rights to all content relating to its business, brand, products and services as it appears on social media platforms. This includes providing for a waiver of moral rights, where applicable.

Admittedly, retaining the rights to all such content may lead to certain risks with respect to liability for any illegal, defamatory or infringing content. This is one reason why the disclaimers and limitations described in the following section are of significant importance.

f. **General Disclaimers and Limitations of Liability**

A franchisor may wish to require that any social media page that makes use of its name or trademarks conspicuously publish a disclaimer to the effect that the franchisor is not responsible for the content. Moreover, the policy should unequivocally state that the franchisor will not be responsible or have any liability in connection with any use of social media by its employees or franchisees (or their employees or representatives).

However, it is important to consider that in the event that such a disclaimer is contested, certain legal principles, such as those relating to vicarious liability, may lead to a franchisor being held liable nonetheless.

Generally speaking, a social media policy should also specify that employees and franchisees are solely responsible for any content provided by them or on their behalf, including any issues that may arise in connection with links to third-party sites, any content that infringes on the intellectual property rights of others, and other content that causes the franchisor or any third party to suffer damages.

2. **Other Concerns**

Additional issues arise in connection with social media policies that are not directly related to advertising and marketing, but should be considered as the policy is developed. Each
business will inevitably be required to address its own specific concerns, but we have provided below a few examples of issues which may be applied across business models and industries.

a. **Ownership of Social Media Pages and Related Domains and Related Content and Goodwill**

Franchisors should ensure that they retain the rights to all social media pages and related domains, together with all related content and goodwill. This protection should extend to any accounts or pages that make use of a franchisor’s trademarks or any similar trademarks. This will ensure that employees and franchisees will be prevented from making any claim to such pages, domains, content or goodwill.

Franchisors should also retain the right to approve any use of social media for sites or networks that are not dealt with specifically in the policy, as well any sites or networks that may be developed in the future.

b. **Confidentiality Provisions and Limitations on Disclosure of Proprietary and Other Harmful Information**

A social media policy should specify which types of disclosure are permissible through social media, both in connection with the franchised business and otherwise. This is especially important given that interactions through social media are often instantaneous, and any monitoring and interference by a franchisor may not happen quickly enough to address all inadequate claims, disclosures or other improprieties. Franchisors also should retain the right to respond to situations that unfold online, in a timely manner and regardless of whether franchisees or employees are required to do so.

c. **Duty to Transfer Accounts and Related Rights to the Franchisor on Demand**

Whether or not a franchisor creates, maintains or manages a social media account or allows its franchisees to do so during the term of their agreement, franchisors should ensure that all rights to any such accounts be automatically assigned to the franchisor once a franchise relationship has terminated. This protection should extend to any accounts or pages that make use of the franchisor’s trademarks or any similar trademarks or copyrighted material.

If a brand’s accounts are managed centrally, it should be made clear that any employee who manages or administers such an account does not acquire any rights to it, and must relinquish all access to it in favor of the franchisor upon demand.

These controls should also apply to any accounts on sites or networks that are not dealt with specifically in the policy, and sites or networks that may be developed in the future.

Finally, employees and franchisees should be required to cooperate with the franchisor to assign or transfer any accounts, as needed, and to sign any documents required to effect the foregoing assignments or transfers.
d. **Personal Liability for Social Media Activities**

It should be made clear that if franchisees or employees make any offensive or inaccurate statements with respect to the franchised business, the brand or its products or services (or encourage or assist others in doing so), they will be held responsible and may suffer other consequences, especially in circumstances where the goodwill of the franchisor may be affected.

e. **Broad Brand Protection, Deidentification Rules, Tips**

Whether or not a franchisor decides to centralize or localize its social media marketing efforts, it must develop a comprehensive social media marketing strategy that includes a list of approved social media sites where franchisees can engage with consumers. In addition, franchisors should extend the quality assurance process to include some monitoring and oversight of the franchisee's engagement with customers in the social media space. This will ensure that the franchisor can maintain control over its brand and trademarks, particularly after franchisees leave the system. Applying these principles will allow franchisors to develop a comprehensive process to ensure that franchisees stop using brand trademarks in social media upon termination of the franchise relationship.

f. **NLRB Implications for Social Media Policies**

Companies understandably need to create comprehensive social media policies to protect their brands, confidentiality and trade secrets. When considering and drafting a social media policy, companies must also consider the restrictions and boundaries imposed by the National Labor Relations Board (“NLRB”). Social media policies need to address at least two aspects of concern to the NLRB. First, the NLRB regulates the scope of restrictions on the use of social media that may impact labor relations concerns. But social media policies can come under scrutiny if they appear to prohibit otherwise-protected conduct. The National Labor Relations Board (“NLRB”) over the last two years has issued decisions and guidelines that govern employee communication through social media, focusing on policies they deem to be overbroad and thus illegal. For example, under the National Labor Relations Act (“NLRA”), employees have the right to confer with one another about their wages and other terms and conditions of their employment. Thus, a social media policy cannot prevent employees (whether or not they are unionized) from discussing the terms and conditions of their employment in social media, and the NLRB focuses on ensuring there are no impediments that would interfere with employees engaging in union activity or protected concerted activity.

This means that any rule in a social media policy that would seek to prohibit employees from stating that they are opposed to a company policy, or discussing wages, health insurance, names and addresses of employees, and other benefits on any social media site or other method of internet or other communications would violate the law.

The NLRB’s General Counsel would look at any social media policy to determine whether an employee would reasonably construe the policy to prohibit legal activity. Social media policies that are too broad or ambiguous, with no limiting language, may be deemed unlawful by the NLRB.
Second, a franchisor may inadvertently expose themselves to the potential for joint liability for a franchisee’s alleged misconduct. Recent NLRB decisions should inform whether (or to what extent) a franchisor's social media policy should be extended to franchisees or employees of franchisees. There are obviously compelling reasons why a franchisor might want to develop a very comprehensive social media policy that extends to the employees of franchisees. However, the NLRB recently authorized complaints asserting that McDonald's Corporation is a “joint employer” of certain employees of franchisees involved in a labor dispute. The NLRB reviewed many operational practices of the McDonald's Corporation and determined that the franchisor exerted sufficient operational control over its franchisees and the employees of its franchisees to justify this outcome. This recent development suggests that the NLRB may adopt a less stringent standard that could result in joint employer status in a much broader range of commercial circumstances. Thus, it is important that franchisors balance brand protection elements of their social media policies with the need to ensure that franchisees maintain sufficient independence and operational control over their enterprise and employees.

D. Items to Address in Employment and Franchise Agreements

It is important to recall that all social media policy content must be linked to employment and franchise agreements in order to ensure compliance by employees and franchisees (and their employees and representatives).

Employees and franchisees must be made aware of their obligation to comply with the social media policy established by the franchisor, even if it is amended or updated from time to time. Incorporating the policy into the employment or franchise agreement by reference will be an effective way to draw employees’ and franchisees’ attention to the policy.

Generally, employees and franchisees should be specifically required to comply with a franchisor’s social media policy and with any other policies or guidelines the franchisor may adopt or update with respect to e-mail and text message communications, privacy and data security and advertising and marketing more generally. Specific defaults may be created for any failure to comply with such policies or guidelines.

E. Establishing and Implementing an Effective Social Media Policy

Businesses must consider whether they should adopt one policy to apply to all users of social media, or whether their interests may be best served by having different policies or guidelines applicable to different groups.

1. Target the Right Audience(s)

To ensure that a social media policy achieves the best results, it is important to consider the contexts and users to which the policy (or policies) will be applied. Franchisors may wish to establish a social media policy for franchisees that sets out the authorizations and limitations applicable to the use of social media for purposes of the franchised business, consistent with the objectives and expectations of the franchisor.

Franchisors may also wish to establish a social media policy that applies to their internal employees and representatives allowing them to administer and implement centralized social
media-based advertising and related communications. This type of policy may be more tailored to the context of these employees being able to obtain approvals in a more timely manner than franchisees may generally hope to, and may lend itself to a top-down approach for publishing content and responding to inquiries from external social media users, including franchisees.

Finally, franchisors may wish to establish a social media policy that applies to employees of franchisees (or require its franchisees to implement such policies). Alternatively, such employees may simply be required, per the terms of their employment, to comply with the policy that applies to the franchisor’s employees or the franchisee, with such adaptations as may be necessary.

2. **Ensure Consistency with General Terms of Use of a Brand or Product’s Website**

   Social media policies should not overlap with or contradict terms of use applicable to websites, intranets, or other electronic platforms used by employees or franchisees. This will ensure seamless application and should minimize difficulties in interpretation by employees and franchisees.

3. **Provide Adequate Training to Ensure Compliance with the Policy**

   Finally, to maximize the impact of a social media policy and to effectively implement the authorizations and limitations in the policy, franchisors must train their employees and franchisees regarding the risks and advantages associated with the use of social media. This will allow them to make more informed decisions as they engage in social media use, and to better understand the purpose and scope of the franchisor’s social media policy.

   Franchisees should also be made aware of the importance of ongoing training and monitoring of their employees’ use of social media and should be required to continuously train and monitor their employees’ actions in that regard.

**VI. CONCLUSION**

Social media advertising offers immense benefits to advertisers, but it also presents legal and business risks. Control of a franchisor’s social media presence is essential to ensure brand consistency and to maintain brand image. To prudently use social media as a marketing platform, franchisors must work with franchisees to develop a system that will be suitable for their particular business and will remain relevant despite new developments in the evolving sphere of social media technology.

Of course, what is necessary to safely navigate the complexities of social media will vary according to each franchisor’s business needs and concerns. Franchisors must therefore develop plans that work for their particular businesses and objectives. By developing a social media policy which ensures that business and legal risks are efficiently controlled and can be addressed quickly when they materialize, a franchised business will be positioned to reap the benefits of social media advertising.
We hope that this paper provides useful insights into the general applicable legal principles and practical business tips for navigating this evolving arena. Social media is here to stay and effective use of social media is essential for successful marketing in the twenty-first century.
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Bruno Floriani is a senior partner who co-chairs LAPOINTE ROSENSTEIN MARCHAND MELANÇON, L.L.P.’s Franchising, Licensing and Technology Department. He is a leading practitioner in business law, with a particular focus on franchise, license and technology, and distribution law. For over 30 years, Bruno has advised a wide range of business clients, from large corporations and public companies to SMEs, in various industries, including the franchise, retail, food & beverage, manufacturing and IT industries.

Bruno regularly advises clients on matters related to advertising and e-commerce and has taken on an important role in guiding clients in various industries through the challenges they face in the rapidly-evolving sphere of online marketing and business operations. His experience with general commercial matters, combined with his expertise in the fields of domestic and international franchising, licensing, technology transfer and distribution allow him to provide clients with a broad and invaluable perspective on matters which concern them, both locally and abroad.

Given his proficiency in these areas, Bruno has frequently been solicited to lecture at various conferences on domestic and international franchising, licensing, distribution and joint ventures, as well as intellectual property issues and privacy law. He has also written extensively on these topics in various national and international legal journals and trade periodicals, and currently writes quarterly for the International Law Office, an Internet newsletter, as its exclusive contributor in the area of Canadian franchise law. Bruno has been the editor of the multinational annual practical guide Getting the Deal Through: Licensing since 2009 and the Canadian contributor to Getting the Deal Through: Franchising since 2008.

Bruno is recognized in Canada and abroad as a leading practitioner in the franchise field by Chambers, LEXPERT, The International Who’s Who of Franchise Lawyers and Who’s Who Legal: Canada, in the license field by Global Law Expert, in business law by The International Who’s Who of Business Lawyers and in the technology field by Best Lawyers.
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Ama began her career at White & Case, where she represented multilateral financial institutions in connection with a broad range of lending transactions. She then moved to Trinidad where she worked at M. Hamel-Smith & Company, the country’s oldest and most prestigious law firm, representing local banks on commercial and financing transactions and serving as local counsel to US Bank for the refinancing of a natural gas fractionation facility. Upon returning to the United States, she joined Morrison & Foerster, representing investment banks, broker dealers, and investment advisers in connection with the purchase and sale of equity and debt in the secondary debt trading industry. Immediately prior to joining Hilton, Ama was the Senior Counsel for Commercial Contracts at Choice Hotels International, where she was responsible for negotiating a broad range of commercial agreements and served on the company’s Supplier Diversity Committee.  

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