

KTS Advertising Law Guides

Social Media Engagement

Top 10 Legal Issues and Risk Mitigation Strategies

While individuals can interact with celebrities, brands, and anyone else on social media with impunity and little legal risk, companies may not. Companies and the brands they manage occupy a different space because companies sell things, and therefore benefit from a lower standard of protection under the First Amendment. While individuals, as well as media companies in most instances, benefit from the highest level of First Amendment protection, companies only benefit from the lower level protection afforded to “commercial” speech.

This lower level of First Amendment protection necessarily means heightened legal risks to companies. In today’s always-connected, always-sharing environment, not engaging in social media is a non-starter, yet it can be difficult to navigate the mine field of problematic posts, potentially damaging opinions, infringing content, and uncontrollable consumer griping. Legal counsel overseeing a company’s or brand’s social media engagement efforts must be well-versed in the most effective ways to respond in the event of a problem, as well as ensure that all company executives are coordinated so that responding can be quick and efficient.

1 Social Media Policies. Develop social media policies both internally for employees, as well as externally to manage brand engagement with the world. Bring senior management into the process of creating these policies, and train employees and agencies about what those policies say and require. If someone violates a term in the company’s social media policy, the company is in a far better position to respond to a complaint by anyone – government regulator, celebrity, or another party – by saying human error, rather than saying no policy existed in the first place.

2 Be Familiar with Platform Rules. The social media platform itself is often the most appropriate, fastest source for a resolution to a problematic social media post. Most, if not all, court systems are simply not equipped to respond quickly enough to resolve issues associated with legally problematic social media posts. As such, lawyers are well-advised to become familiar with complaint procedures for the most popular social media platforms, such as Facebook, Twitter, Instagram, Snapchat, and YouTube.

3 Former Employees. Former employees can often be a source of problems. Ensure when all employees start work – at the time they are most amenable – that they sign appropriate

post-employment documents acknowledging the company’s legal position and rights. Furthermore, for employees that operate a company’s or brand’s social media accounts, ensure that the account credentials are held in the company’s name and known to others, not just one employee who could be terminated and hold the account credentials hostage.

4 Celebrities – Handle With Care. Among the biggest threats to companies is social media engagement with celebrities, who are highly protective of their right of publicity. Celebrities’ ability to maximize the value of their status may be reduced by a company that tries to associate itself with the celebrity, without consent and without paying the celebrity. Celebrity status can be fleeting, and the licensing or revenue opportunities can be limited - companies should not “dam a celebrity’s revenue stream” by reducing their ability to sell their official endorsement. If a company does post about a celebrity without consent, even if the celebrity is in the current news cycle, the celebrity could assert that the company is only posting about the celebrity to bring attention to the company and enhance the value of the company’s brand. Depending on the format or positioning of the company’s social media posts, the possibility of a false association or sponsorship claim may be mitigated, but certainly not eliminated.

5 Not Every Problem Post Must Be Addressed. Problems can be made worse by addressing them. Marketers must be aware of the “Streisand Effect” which recognizes that attempts to take down or specifically address a problem may wind up bringing far more attention to the problem than if no action was taken in the first instance. It is wise to push back on clients demanding immediate action and ask whether problematic content posted on social media is truly harming the brand, and whether the legal expense to be incurred in seeking its takedown is worth the potential spotlight that may shine on the takedown request

6 Plan ahead. Having a social media resolution plan in advance of an issue can avoid a host of problems, both internal and external. High level company executives who have not been involved with the team or thought through the various consequences of problematic social media posts may have unrealistic expectations of how difficult it may be to take down offensive posts. Additionally, categorizing the types of social media posts the company will expend resources responding to is an excellent way to make sure company stakeholders’ ideas and thoughts are aligned.

7 Influencers. The FTC actively enforces their Endorsement Guides, and has sent letters to influencers and endorses questioning whether their social media disclosures were sufficiently in compliance with the Endorsement Guides. Advertisers have active and affirmative obligations to ensure that any material connections they may have with influencers are properly disclosed to social media followers and the public in general.

8 Intellectual Property Rights. Photos; Videos; TV Shows; Movies. The owners of intellectual property that may be copied, referenced, or even just alluded to by an advertiser in social media postings may assert intellectual property infringement claims. The parameters of such claims are highly dependent on the circumstances. Phenomena unique to social media such as hashtags and memes may also implicate the intellectual property rights of a third party, so care must be taken when using any third party property.

9 Safe Harbors. The Digital Millennium Copyright Act and Section 230 of the Communications Decency Act provide companies with some measure of insulation from claims by third parties. It is important for all companies that maintain any social media presence to ensure that they are in compliance with the requirements of these safe harbors, such as appropriate registrations with the U.S. Copyright office and the inclusion of take down notice procedures in the company’s website terms of use.

10 Old Rules Still Apply. Social media may seem new, but the law, rules, and regulations that apply are not. The same rules that apply to traditional print and television advertising similarly apply to social media advertising and engagement. Whether on the big screen or the small (smart phone) screen, the law – while it always evolves – continues to apply.

Being knowledgeable and prepared to engage in the trenches of social media before problems arise can ensure that your client does not get bogged down in costly and long-lasting battles when they do.

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