

Advertising and Intellectual Property Law Primer for Social Media

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Protecting Your IP: Social Media Do's and Don'ts

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1. Clear Branding and Innovations Prior to Use
2. Prevent Disclosure of Proprietary Information
3. Ensure Trademarks are Used Properly and Consistently
4. Implement Social Media Usage Policies and Training
5. Monitor Social Media for Infringement

#1: Clearance

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- Conduct IP due diligence to protect investment and avoid third-party infringement claims
- Branding/Trademarks
 - Make sure your desired branding is available and not already protected or in use by someone else
- Inventions
 - Be aware of what your competitors in the space are doing
 - Hire an attorney to conduct a freedom-to-operate analysis

#2: Prevent Disclosure of Proprietary Information

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- Public disclosure of confidential or proprietary information can lead to loss of IP rights
 - Social media reaches a huge audience—potential customers, but also competitors and copyists
- Protect, before you disclose
 - Unregistered trademarks and non-patented inventions can be copied.
 - Patents are only granted for inventions which are novel and have not been previously disclosed to the public
- Or don't disclose at all
 - Trade secret information must remain a secret!

#3: Ensure Trademarks are Used Properly and Consistently

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- **Avoid generic usage.**
 - Don't use trademark as a noun or a verb, in a pluralized or possessive form, or as the generic or common name of your products.
- **Use proper markings.**
 - Use “®” symbol if your mark is registered, or “™” symbol if it isn't
 - Include trademark notice on all packaging, brochures, and websites.
- **Use your mark distinctively.**
 - Alert competitors with special type, script, capitalization, color, etc.
- **Use your trademark consistently.**
 - If your trademark is registered, use it as set out in the registration—no additions or alterations of spelling or design.

#4: Implement Social Media Usage Policies and Training

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- Trademark usage guidelines with clear examples or templates
 - Consider developing a style guide or brand standards “one-pager”
 - Caution against misuse points discussed previously
- Strictly prohibit disclosure of proprietary and trade secret information in any advertising
 - Educate employees on what types of information this includes.
- Establish official social media accounts
 - Regularly monitor to ensure compliance with policies and guidelines.
- Review all outside advertising copy before it goes live to ensure proper trademark usage.

#5: Monitor Social Media for Infringement

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- Regularly monitor social media channels for use of your trademarks and inventions
- All major social media platforms have procedures for requesting the removal of infringing material
- Monitor USPTO patent and trademark filings
 - Know your competition!

Advertising Law Basics

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- All advertising must be truthful and not misleading or deceptive.
- Any claims about products or services must be substantiated.
- Advertising cannot be unfair.
- Comparative advertising must not cause consumer confusion.
- Paid partnerships, sponsorships and endorsements must be disclosed.
- Violations can lead to actions brought by government, competitors or private citizens.

FTC's Truth in Advertising Rules

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- **Must be truthful and not misleading or deceptive**
 - Ad is deceptive if it:
 - Is likely to mislead consumers acting reasonably under the circumstances; and
 - Is “material,” i.e. likely to affect to a consumer’s decision to buy or use the product.
 - FTC will look at both affirmative statements AND omissions
- **Must have substantiation**
 - Must have a “reasonable basis”—i.e. objective evidence that supports the claim—before making any claims.
 - The kind of evidence depends on the claim.
 - At minimum, advertiser must have the level of evidence it says it has.
- **Must not be unfair**
 - Must not cause or be likely to cause substantial consumer injury which a consumer could not reasonably avoid; and
 - Potential injury must not outweigh the benefit to consumers.

Comparative Advertising

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- Two types of comparative advertising:
 - Superiority claims: convey, either explicitly or implicitly, that the product is the MOST EFFECTIVE or BEST at something, or BETTER than competitors.
 - Parity claims: tout that the advertiser's product provides equivalent performance to all, a subset, or one of its competitors.
- Avoid trouble under FTCA by following truth in advertising rules
 - Truth and substantiation are key
- Avoid trademark issues under Lanham Act by not causing consumer confusion

Substantiating Comparative Claims

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- Considerations:
 - Similarity of products compared
 - Availability of compared products
 - Truthfulness and accuracy of claim
- Testing vs. Surveys
 - For claims about product attributes or performance → TESTING
 - For claims about consumer preference → SURVEYS
- Monitor marketplace for competitive changes that may render comparison inaccurate.

Using Another's Trademark in Comparative Advertising

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- Not trademark infringement to truthfully compare competing products in advertising, and to identify the competitor's goods by its trademark, so long as it does not cause consumer confusion.
- Advertiser may make “nominative fair use” of a competitor's trademark.
 - Use of another's trademark to refer to the trademark owner's actual goods and services associated with the mark.
 - The approach to analyzing the situation varies
 - In general, nominative fair use is permissible where:
 - (1) the product or service in question is not readily identifiable without use of the trademark,
 - (2) only so much of the mark as is reasonably necessary to identify the product or service is used; and
 - (3) use of the mark does not suggest sponsorship or endorsement by the trademark owner.

Advertising Rules for Endorsements

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- **FTC's Endorsement and Testimonial Guides**

- Updated in 2009, FTC now seeking public comment on several questions
- Covers: *“any advertising message that consumers are likely to believe reflects the opinions, beliefs, findings, or experience **of a party other than the sponsoring advertiser**”*

- **Key Principles**

- Must reflect honest opinions, findings, beliefs or experiences of endorser
- Must not convey claims that would be deceptive or unsubstantiated if made directly by the advertiser
- Must **disclose** any material connection between endorser and advertiser that might materially affect weight or credibility of the endorsement
- Both advertisers AND endorsers can be liable for false statements by the endorser and failure to disclose material connections

When is Disclosure Necessary?

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- What is an “endorsement”?
 - “any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) 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.”
- What is a “material connection”?
 - Compensation (\$\$, free product, free entry to event)
 - Incentivized (sweepstake entry, discounts, coupons)
 - Affiliation (employee, agency, relative)
 - Business relationship (other compensation structure at play)

When is Disclosure Necessary?

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- Where a connection is not reasonably expected by the audience
 - Bloggers/box openers
 - Non-professional influencers
- Generally not required in traditional advertising or PR setting
 - Public generally understands that celebrity, expert, spokespeople are being compensated in traditional advertising

- FTC does not mandate specific language
 - In general, consumers must be made aware of the nature of the relationship (Paid? Free product? Free trial?)
 - Organic within post (“I’ve partnered with Brand to...”)
 - Hashtags where space constrained, but avoid multiple (#Sponsored, #Paid, #ad, #[brand]ambassador)
 - Disfavored: #thanks, #collab, #spon, #ambassador
- Placement
 - Must be in close proximity to the “endorsement statement”
 - Must be clear and conspicuous

Required Disclosures – FTC Guidance

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- ***A single disclosure on a home page will not suffice*** because people visiting the site might read individual reviews or watch individual videos without seeing the disclosure on the home page.
- ***Placing a required disclosure in the description area below a video uploaded on YouTube or other video site will not suffice*** because consumers can miss disclosures in this location. Plus, if the video link is copied and sent to another person, only the video may show and the disclosure may not “travel” along.
- ***A required disclosure in the description of an Instagram post must be within the first two lines of the post, otherwise it may be hidden and only appear after clicking “more.”***
- ***Placing a required disclosure behind a link labeled “DISCLOSURE,” “LEGAL,” or similar will not suffice*** as does not convey the importance, nature, and relevance of the information to which it leads and it is likely that many consumers will not click on it and therefore will miss necessary disclosures.

- Promotions regulated by state and federal law
- Lotteries (other than government sponsored) are illegal!
 - Promotion = lottery, if it has (1) chance, (2) a prize, and (3) consideration.
- “Sweepstakes” (random drawing for a prize) generally not a lottery, because they lack consideration
- “Contests” (tests of skill) generally not a lottery because they lack element of chance, in exchange for ability and effort.
- Best Practice: permit some offline method of entry for online promotions.

Sweepstakes Considerations

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- Consideration: Does the entrant give up and promoter obtain something of value?
 - Keep entrant's efforts, and promoter's benefits to a minimum
- Official Rules: entry procedures, limits, deadlines, eligibility requirements, geographic scope, selection and notification methods and procedures, list of prizes w/value AND "no purchase necessary" statement
- Special case: Giveaways

Contest Considerations

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- Must be a game of skill, not chance
- Most states apply a “predominance” test: If contest gives entrants real opportunity to exercise skill, outcome is not determined by chance.
 - Skillful entrants win more often than unskilled entrants
 - Skill can be developed through experience, training or learning
 - Effort has meaningful effect on the outcome
 - The public generally considers the contest to be one of skill
- Purchase or entry fee – some states do not allow; value of prize should not depend on entry fees collected
- Official Rules: entry rules, eligibility, limits, judging criteria and standards, tie-breakers, consideration required to win, time frame for determining winner.

Thank you!

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