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Social Media Advertising Practice

Hannah Taylor, Frankfurt Kurnit Klein & Selz



Advertising on social media requires a combination of compliance with existing advertising regulations and adapting compliance approaches to ever-changing technologies.

Bloomberg BNA's Joseph Wright posed questions to Hannah Taylor, chair of Frankfurt Kurnit Klein & Selz's Social Media Task Force, about the firm's social media advertising practice.

BLOOMBERG BNA: How does Frankfurt Kurnit Klein & Selz's practice intersect with social media?

Taylor: Almost every practice group at FKKS advises clients on social media. For example, our advertising practice, of which I am a member, counsels clients, writes and speaks frequently on the legal implications of advertising and creating branded content in social media.

Our litigation group has handled intellectual property and defamation cases related to social media posts, our ethics group presents frequently on the ethics rules governing lawyer advertising and solicitation in social media, and our labor and employment practice counsels and speaks on employment law and First Amendment issues involved in posting on one's personal social media account and enduring subsequent employment retaliation.

BLOOMBERG BNA: Social media has become a large force in advertising. From a legal compliance standpoint, how does social media advertising differ from traditional advertising, either in print or on television?

Taylor: Advertising in social media is, of course, no longer a one-way street. It has become a conversation, both on companies' own websites and on social media

platforms, with consumers actively participating in the development of content.

The rise of user generated content has created a whole host of new issues for marketers, including moderation, control and tone issues, as well as more hard-hitting legal concerns about the scope of protections under the Digital Millennium Copyright Act and the Communications Decency Act.

Also, with social media advertising, instead of simply contending with general advertising and intellectual property laws, advertisers have to work within the confines of the social media platforms' own terms and guidelines to avoid getting their account, content or promotion removed.

The terms and conditions of the various host platforms are dense and change quite frequently. Contending with these can be a serious challenge.

That said, although sites like Facebook, Twitter, Instagram, Pinterest and Snapchat have transformed traditional notions of advertising, as the law in this area develops, it is becoming increasingly clear that the legal principles governing "traditional" advertising equally apply to advertising in social media.

As Andrea Levine, the director of the National Advertising Division of the Better Business Bureau, once said about advertising in social media, “Even though the medium changes, the rules stay the same.”

That means, for example, that advertisers cannot be deceptive or unfair. It also means that if advertisers are making claims, they should have support for them and if a disclosure is required to prevent a claim from being misleading, it needs to be made clearly and conspicuously (even when using Twitter and other media with space limitations).

BLOOMBERG BNA: What are some of the compliance pitfalls you commonly run into with social media, and how can they be avoided?

Taylor: As mentioned above, one of the hardest aspects of legal compliance in social media is making proper, clear and conspicuous disclosures, since the information is the same, but the places in which we convey them have gotten much smaller.

Since small, space-constrained ads, such as banner ads and tweets, are now ubiquitous, advertisers attempting to comply with state and federal laws must somehow effectively communicate material limitations or qualifying information to consumers using smartphones and small screens. It’s a challenge!

The Federal Trade Commission (“FTC”) has been clear, particularly in its 2013 guidance *.com Disclosure: How to Make Effective Disclosures in Digital Advertising*, that if a particular platform does not provide sufficient opportunity to make clear and conspicuous disclosures, that platform should not be used.

Helping advertisers render proper disclosures and communicate effectively in social media is a large part of my practice.

Of course, there are also intellectual property concerns. For the most part, the same intellectual property rules that apply to advertisers offline also apply to advertising through digital media.

And it’s different when posting on behalf of a brand than when you’re posting as an individual; there are things that we as individuals can post that we just cannot post when speaking on behalf of a national advertiser.

The bottom line is that, in social media, like in all advertising, compliance with intellectual property laws is paramount.

BLOOMBERG BNA: What should any company know if they are working with endorsers on social media?

Taylor: First, they should familiarize themselves with the FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising (the “FTC Endorsement Guides”), 16 C.F.R. Part 255, which set forth the FTC’s views on the use of consumer, celebrity, expert, and organizational endorsements in advertising, including in social media.

While FTC Endorsement Guides — like other FTC guides — do not have the force of law, and are simply advisory in nature, they provide an excellent resource for anyone working with endorsers as to the FTC’s thinking about various marketing activities involving endorsements and how Section 5 of the FTC Act might apply.

Endorsements must be truthful, non-deceptive, and be substantiated (i.e. backed up by evidence) by the advertiser. And any connection between an advertiser and an endorser and that might materially affect the weight or credibility of the endorsement (in other words, a relationship not reasonably expected by the audience), has to be disclosed.

This “material connection” disclosure requirement is often one of the biggest challenges in social media, since there’s not only limited room to make the disclosure, but also because advertisers are consistently looking for celebrities or “influencers” to interact with their brand in “organic” ways.

Because the FTC doesn’t mandate the specific wording for the “material connection” disclosure, a lot of the challenge comes from advertisers trying to figure out how to make it clear that they’ve paid, or otherwise have a relationship with, an endorser.

Some advertisers make this disclosure in a conversational way such as, “Proud to partner with Brand XYZ . . .” Or, on a platform like Twitter, where character space is limited, hashtags like #ad or #sponsored are also used as disclosure mechanisms.

Advertisers have to be a bit careful in this area, as this has been an area of particular enforcement focus for the FTC in recent years. (See, e.g. *FTC v. Machinima* (2015) (20 ECLR 1267, 9/16/15); *FTC v. Yahoo, Inc.* (2014) ; *FTC v. ADT* (2014); *FTC v. Nordstrom* (2013) (18 ECLR 556, 3/20/13)).

BLOOMBERG BNA: Law firms are also becoming social media marketers themselves. How does your firm manage both conducting its own social media campaigns and advising clients on social media compliance? Are there benefits or drawbacks to being on both sides of the issue?

Taylor: As a firm with a leading advertising practice, our clients expect us to be able to “walk the walk” on social media and so we regularly engage clients, potential clients, alumni and other friends on our firm’s Facebook, LinkedIn (Firm), LinkedIn (Alumni), and Twitter (@frankfurtkurnit) pages. And our coverage of major social media developments on @fk_socialmedia, an account which I run personally.

Most recently, we have also begun to live-stream our education events and CLEs to followers on Periscope. It’s wonderful to be able to reach clients in other cities and countries so easily.

BLOOMBERG BNA: What is your role as the chair of the firm’s Social Media Task Force, and how do you keep up to speed on new developments in social media technology?

Taylor: In my role as chair of the Social Media Task Force, I’ve been tasked with keeping abreast of developments in social media, changes to platform terms, key cases involving social media, and generally understanding how all of the technology functions.

It’s hard to advise your clients on legal risks using a certain platform if you don’t understand, for example, that a Snap can be ephemeral, or an Instagram comment can’t include a live link for rules or disclosures. It’s my job to stay on top of all of that and advise clients and colleagues on how it all works.