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Social Media Advertising and Consideration of New York Privacy Laws

What Businesses and Advertisers Should Know Before Advertising on Social Media Websites

The social media rise through websites including Facebook¹ and Twitter² and the increased use of electronic communication has dramatically shifted advertising to the Internet. Google³ and Facebook are among those websites with lucrative and growing advertising revenues. Facebook's online advertising business, in particular, is rapidly growing, taking in an estimated \$1.86 billion in worldwide advertising revenue in 2010, with estimates of revenues more than tripling to \$5.74 billion by 2012.⁴ Companies both large and small advertise on Facebook and use many creative means to market their products to Facebook's over 750 million active users.⁵

Many methods exist to advertise a product on Facebook, most of which are quick and inexpensive, making Facebook advertising appealing and especially attractive to newer businesses. At the same time, the ease and inexpensiveness with which companies may now promote products means companies may neglect safeguards against any illegal or infringing conduct, especially with younger, less well-funded companies with fewer resources.

The subject of this article is to highlight the New York privacy laws, specifically New York State Civil Rights Law §§ 50 and 51 (the "Privacy Laws"), of which businesses and advertisers should be aware before using individual names or pictures for Facebook or other social media advertisements and the consequences busi-

nesses may face when using an individual's name or picture without consent. A business or advertiser likely violates the Privacy Laws by using celebrity and non-celebrity names and pictures for trade or advertising purposes without consent. It is therefore wise to first obtain a person's permission before using his or her name or picture on a social media website for advertising purposes, rather than risk exposing a business or advertiser to potential liability to the non-consenting individual.



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Facebook Does Not Adequately Address or Inform Users of New York's Privacy Laws

Before addressing New York's Privacy Laws, companies and advertisers must first understand Facebook's own terms of use and advertising guidelines. While Facebook generally prohibits users from violating the rights of others, it does not adequately apprise users of the potential legal issues in using someone's name or picture for commercial purposes and does not warn users of how easily a violation of privacy laws – such as New York's – may occur.

A. Facebook's Statement of Rights and Responsibilities

Facebook's Statement of Rights and Responsibilities (the "Facebook SR&R") generally acknowledge the protection of individual rights.⁶ The Facebook SR&R states that a user will not post content or take any action that infringes or violates someone else's rights or otherwise violates the law.⁷ This is the only directive the Facebook SR&R dedicates to how a user must protect individual rights. Thus, Facebook's SR&R inadequately

addresses individual privacy rights and specific privacy laws.

Facebook's SR&R also includes a section about "Advertisements and Other Commercial Content Served or Enhanced by Facebook."⁸ This section directly addresses Facebook's use of an individual's name or picture for commercial purposes and essentially gives Facebook permission to exploit an individual's publicity rights.⁹ However, even Facebook is vulnerable to New York's Privacy Laws,¹⁰ despite the Facebook SR&R language. Moreover, Facebook's SR&R – as applied to businesses or advertisers – fails to adequately address New York's Privacy Laws. Facebook users – be it businesses, advertisers or otherwise – must be aware of such laws to avoid any legal pitfalls when advertising online by using an individual's name, portrait or picture.

B. Facebook's Advertising Guidelines

Facebook's Advertising Guidelines¹¹ similarly stop short of adequately addressing concerns about laws such as New York's Privacy Laws. Interestingly enough, the Advertising Guidelines explicitly mention and prohibit "endorsement of [a] product, service, or ad destination by Facebook"¹² but do not address endorsement of a product, service or ad destination by individuals. Facebook generally addresses privacy rights where it prohibits ads including "any content that infringes upon the rights of any third party, including copyright, trademark, privacy, publicity or other personal or proprietary right." This is inadequate, however, as it does not outline New York's Privacy Laws' specific prohibitions, which are typically unknown to Facebook users, new businesses or certain advertisers.

Thus, for example, something as innocuous as a clothing company post-

a fashion trend or news item. An advertisement used to promote sales that includes a celebrity's name or likeness may constitute a privileged use not subject to the Privacy Laws if the use of the celebrity's name is incidental to the use for which the reproduced material was originally generated.²⁷ For example, a newspaper could use a past cover page that includes the picture of a celebrity in renewal subscription advertisements to its subscribers; such a use likely does not violate the Privacy Laws because the use of the celebrity's image is incidental to the original intended use – dissemination of news. However, this strategy has not been well-tested in social media case law and obtaining written consent from the individual beforehand is still the preferred practice. If the prior protected use and the latter use is not the same, a business or advertiser could still be liable under the Privacy Laws.

C. Hyperlinking Issues Under the New York Privacy Laws

It is not clear if posting a hyperlink from a business' Facebook page or website to a third-party website - such as a news website – containing the news-worthy article in its original form but for the purposes of utilizing an individual's picture and/or name also violates the Privacy Laws. All indications are, however, that this too would be a violation of the Privacy Laws, despite the article's original newsworthy status. There are no Privacy Law cases yet directly discussing this kind of hyperlinking, but it would appear that that this practice conflicts with the broad terms of the statute which prohibit the use of any person's name, portrait, picture or voice for advertising purposes or for trade without written consent.²⁸

A company must therefore proceed cautiously in hyperlinking to or republishing an article containing an individual's name or picture on a social media website. As a practical matter, many companies appear to engage in the practice of linking or even posting pictures of celebrities or individuals wearing their apparel; some individuals may take no issue or be flattered by the publication. While there is a lack of case law addressing the violation of Privacy Laws by hyperlinking from a social media website to third-party websites containing celebrity pictures or names, it is advisable to first contact the individual and ask for approval to post his or her picture or, in the absence of such, simply reprint the

company's own ads.

Privacy rights and New York's Privacy Laws in particular are a very real consideration for anyone or any company deciding to advertise on Facebook. As Facebook continues to grow and online advertising is utilized more, privacy and publicity rights law suits will increase. Thus social media users should be aware of New York's Privacy Laws in conducting their business and advertising activities on social media websites such as Facebook and Twitter. Republication of an individual's name, portrait or picture onto a business or advertiser website or social media webpage without consent likely violates the New York Privacy Laws and subjects the infringing party to civil liability including injunctive relief and damages. Obtaining written consent from an individual before using his or her name, portrait or picture can help avoid costly legal pitfalls in online social media marketing and advertising.

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1. Facebook, <http://www.Facebook.com> (last accessed August 22, 2011).
2. Twitter, <http://www.Twitter.com> (last accessed August 22, 2011).
3. Google, <http://www.Google.com> (last accessed August 22, 2011).
4. Lee, Edmund. Facebook Books \$1.86 Billion in Advertising; Muscles In on Google Turf. <http://adage.com/article/digital/estimate-facebook-books-1-86b-2010-advertising-muscles-google-turf/148236/> (January 17, 2011).
5. Statistics, <http://www.facebook.com/press/info.php?statistics> (last accessed August 22, 2011).
6. Facebook Statement of Rights and Responsibilities, <http://www.facebook.com/terms.php?ref=pf> (last accessed August 22, 2011).
7. *Id.* at section 5(1).
8. *Id.* at section 10.
9. According to Facebook's SR&R, a user agrees to the following: (i) the user may use his or her privacy settings to limit how his or her name and profile picture may be associated with commercial, sponsored, or related content served or enhanced by Facebook; (ii) the user gives Facebook permission to use the user's name and profile picture in connection with that content, subject to the limits the user places; (iii) Facebook does not give a user's content or information to advertisers without consent; and (iv) the user understands that Facebook may not always identify paid services and communications as such.
10. In *J.N. v. Facebook, Inc.*, No. 11-cv-2128 (E.D.N.Y. 2011), the plaintiff brought a Privacy Law § 51 class action for misappropriation of the names and likenesses of minors such as himself. The suit sought compensatory damages, injunctive relief and

exemplary damages due to alleged violation by Facebook of New York Civil Rights Law § 50. *Id.* Facebook argued the complaint should be dismissed and that it failed to state a claim for violation of the Privacy Laws because Facebook's alleged republication of users' "Likes" to express their political interests, consumer preferences and other interests on Facebook falls within the newsworthy exception and thus does not violate the Privacy Laws. *Id.* The plaintiff countered that there is no such exception where it is determined that the primary use of the name or likeness is advertisement or commercial gain, which occurs in Facebook's case. *Id.* The plaintiff voluntarily dismissed the action without prejudice while Facebook moved for an order transferring the action and four other similar actions to the Northern District of California District Court. *Id.*

11. Facebook Advertising Guidelines, http://www.facebook.com/ad_guidelines.php (last accessed August 22, 2011).
12. *Id.* at section 3(a)(ii).
13. McKinney's New York Civil Rights Law § 50 (West, 2011).
14. McKinney's New York Civil Rights Law § 51 (West, 2011).
15. *Id.*
16. *Id.*
17. *See*, Messenger ex rel. *Messenger v. Gruner + Jahr Printing and Pub.*, 94 N.Y.2d 436, 706 N.Y.S.2d 52 (2000); *Velez v. VV Pub. Corp.*, 135 A.D.2d 47, 51, 524 N.Y.S.2d 186, 189 (1st Dept. 1988) ("As long as the article involves a matter of public interest, the publication is protected.")
18. Messenger ex rel. *Messenger v. Gruner + Jahr Printing and Pub.*, 94 N.Y.2d at 441-42.
19. *Bement v. N.Y.P. Holdings, Inc.*, 307 A.D.2d 86, 90, 760 N.Y.S.2d 133 (1st Dept. 2003) (citing Messenger, 94 N.Y.2d at 444).
20. *Bement v. N.Y.P. Holdings, Inc.*, 307 A.D.2d at 90 (citing Messenger, 94 N.Y.2d at 442-443).
21. *Pearce v. Manhattan Ensemble Theater, Inc.*, 528 F. Supp. 2d 175, 182-83 (S.D.N.Y. 2007).
22. *Id.*
23. *Velez v. VV Pub. Corp.*, 135 A.D.2d at 52.
24. Pollyana Kwok, The Use of a Celebrity's Name and Likeness in News Stories in Conjunction With Advertisements – Celebrities Seeking Broader Protections, 32 Sw. U. L. Rev. 761, 765-66 (2003).
25. Kwok, *supra* note 24, at 766. Consumers would buy the advertiser's product, believing the celebrity was endorsing the product, indicating the advertiser used the celebrity's name and likeness to generate business. *Id.* at 765. *See also*, *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276 (1959).
26. *Beverly v. Choices Women's Medical Center, Inc.*, 78 N.Y.2d 745, 753 (1991). Further, a commercial advertiser may not neutralize the Privacy Laws "by wrapping its advertising message in a cloak of public interest," regardless of the message's educational or informational value. *Id.*
27. *Stern v. Delphi Internet Services Corp.*, 165 Misc.2d 21, 30-31, 626 N.Y.S.2d 694, 700-01 (Sup. Ct. New York Co. 1995) (An online electronic bulletin board which used Howard Stern's picture without his permission to advertise its online news service in a debate about Stern's campaign for governor of New York was a protected incidental use. Delphi and its service was a news disseminator entitled to First Amendment protection.)
28. *See* note 14.