

# AGRIMARKETING IN A SOCIAL MEDIA WORLD

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## I. INTRODUCTION

Since 2009, DuPont Crop Protection has sponsored the annual “All Aboard Wheat Harvest” tour, which follows the progress of the wheat harvest in real time through social media stalwarts Facebook, Twitter, and YouTube.<sup>1</sup> Growers are encouraged to post their thoughts and pictures from their own har-

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1. *All Aboard for the 2011 Wheat Harvest*, HIGH PLAINS/MIDWEST AG J., [http://www.hpj.com/archives/2011/may11/may23/0518Edit\\_hmjml.cfm?recomend=yes](http://www.hpj.com/archives/2011/may11/may23/0518Edit_hmjml.cfm?recomend=yes) (last visited Aug. 23, 2014).

vest on social media and have the opportunity to win prizes.<sup>2</sup> The number of unique viewers in 2010 was more than 155,000 and has continued to expand every year, offering DuPont a relatively cheap and effective marketing campaign to build its brand and grow its customer base.<sup>3</sup>

Social media has been defined as “a set of technologies and channels targeted at forming and enabling a potentially massive community of participants to productively collaborate.”<sup>4</sup> Savvy agrimarketers of all sizes and product offerings are using social media to better market their products,<sup>5</sup> but because social media is a new and emerging technology, a level of legal uncertainty surrounds the practice.

Before jumping into social media marketing, companies should understand the legal risks involved and be aware of the potential issues which could arise. Presently, the rule of law specifically surrounding social media marketing is confusing, as case law, statutory law, and regulatory law are limited.<sup>6</sup> For agrimarketers, this can be further complicated by multiple regulatory authorities overseeing marketing efforts.<sup>7</sup> To meet these challenges and stay within the bounds of the law, agrimarketers must be well-versed in the current state of the law, and at the same time have their “ear to the ground” for changes.

This Note is a topical survey of legal issues facing agrimarketers who use or who contemplate using social media to market their products. However, because of the evolving nature of the medium, not all potential issues that may arise for agrimarketers can be addressed. As a result, this Note attempts to be a guide for implementing legal protections in an agrimarketing strategy. Additionally,

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2. *Id.*

3. *All Aboard Wheat Harvest Tour Kicks Off Third Season*, CORN & SOYBEAN DIG. (Mar. 7, 2011), <http://cornandsoybeandigest.com/issues/all-aboard-wheat-harvest-tour-kicks-third-season>.

4. Anthony J. Bradley, *A New Definition of Social Media*, GARTNER BLOG (Jan. 7, 2010), [http://blogs.gartner.com/anthony\\_bradley/2010/01/07/a-new-definition-of-social-media/](http://blogs.gartner.com/anthony_bradley/2010/01/07/a-new-definition-of-social-media/).

5. See Carolyn Baumgarten, *The Agriculture Industry Goes Social*, MASHABLE (Aug. 31, 2012), <http://mashable.com/2012/08/31/agriculture-industry-social-media/> (showing seventy-six percent of farmers ages 18 to 25 use social media).

6. See, e.g., Kellie B. Combs, *FDA Social Media Warning Letter: A Fragmented Approach to a Comprehensive Problem*, LEGAL OP. LETTER, Oct. 2010, available at [http://www.wlf.org/Upload/legalstudies/legalopinionletter/10-29-10CombsLegal\\_Opinion\\_Letter.pdf](http://www.wlf.org/Upload/legalstudies/legalopinionletter/10-29-10CombsLegal_Opinion_Letter.pdf).

7. See, e.g., 21 U.S.C. § 352(n) (2012) (providing rules against false advertisement); 40 C.F.R. § 168.22(a) (2013) (general provisions of advertising); BUREAU OF CONSUMER PROT., FED. TRADE COMM'N, ADVERTISING AND MARKETING ON THE INTERNET: RULES OF THE ROAD 1 (2000), available at <http://www.business.ftc.gov/documents/bus28-advertising-and-marketing-internet-rules-road>.

social media also has several potential non-marketing legal issues such as privacy and employer/employee relations. This Note will solely focus on marketing aspects and the legal issues agrimarketers should be aware of when implementing and using a marketing strategy that includes social media.

## II. AN EMERGING TREND IN AGRICULTURE

From implements to pesticides, agrimarketers are finding social media a beneficial tool to market products and shape their message.<sup>8</sup> Practically, social media offers agribusinesses a potential platform to directly interact with customers quickly and at relatively lower costs than traditional advertising.<sup>9</sup> As a result, agribusinesses both large and small are increasing their marketing and public relations budgets to incorporate social media.<sup>10</sup> The increased focus is likely a good strategy as a recent Farm Bureau study found ninety-eight percent of young farmers have access to the internet and seventy-six percent use social media.<sup>11</sup>

Social media can also prove strategic for other marketing initiatives including data collection, public relations, and customer service.<sup>12</sup> Additionally, unlike most traditional marketing methods, actual impressions can be accurately measured.<sup>13</sup> Across all disciplines, marketers expect to almost triple their social

8. It is also important to note that not all agricultural products fit into a defined category, and certain products face different regulatory agencies with their own views and interpretations of the role of social media marketing. For example, pesticide marketing includes FTC, EPA, and USDA oversight. See Letter from C. Lee Peeler, Assoc. Dir., Div. of Adver. Practices, Fed. Trade Comm'n, to Walter Francis, EPA (July 17, 1998), available at [http://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-comment-environmental-protection-agency-concerning-treated-articles-exemption-under-epas/v980017.pdf](http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-environmental-protection-agency-concerning-treated-articles-exemption-under-epas/v980017.pdf).

9. See, e.g., W. Glynn Mangold & David J. Faulds, *Social Media: The New Hybrid Element of the Promotion Mix*, 52 BUS. HORIZONS 357, 359 (2009) (discussing the high instance of consumer interaction on social media); see also Kimberly E. Stone, *Why Traditional Marketing Trumps Social Media, and What to Do About It*, FORBES, Sept. 18, 2012, <http://www.forbes.com/sites/yec/2012/09/18/why-traditional-marketing-trumps-social-media-and-what-to-do-about-it/> (discussing the high cost of traditional advertising).

10. See Christine Moorman, *Social Media Spend Continues to Soar*, CMO SURV. BLOG (Mar. 6, 2012), <http://www.cmosurvey.org/blog/social-media-spend-continues-to-soar/> (showing all businesses, including those related to agriculture, are increasing their spending on social media marketing).

11. *87 Percent of Young Farmers, Ranchers Express More Optimism*, AM. FARM BUREAU FED'N (Mar. 3, 2011), <http://www.fb.org/index.php?action=newsroom.news&year=2011&file=nr0303.html>.

12. See, e.g., Mangold & Faulds, *supra* note 9, at 359.

13. Determining the number of people who actually read a newspaper, for example, is much more speculative than examining hits for a particular web page.

media budget in the next five years.<sup>14</sup> In 2012, corporate spending for online advertising exceeded spending for print advertising for the first time.<sup>15</sup> The extra investment is likely for good reason considering the staggering participation numbers for social media. Facebook now counts more than one billion active users worldwide, 200 million of which were added in 2011.<sup>16</sup> Twitter had more than 178 million unique visitors in February 2012 alone.<sup>17</sup>

Perhaps more relevant for marketers, twenty-three percent of the time people spend online is spent logged onto social media, by far the largest of any category.<sup>18</sup> The trends suggest this percentage will only continue to rise, making social media a critical element in any agribusiness marketing strategy. So far, more than eleven million businesses have active Facebook pages.<sup>19</sup>

Agrimarketers should be aware that there are potential legal pitfalls when using social media for marketing. Not knowing the law and failing to adopt complete social media policies and guidelines could leave an agribusiness in legal hot water.<sup>20</sup>

## II. GENERAL CONSUMER PROTECTION STANDARDS

Like traditional marketing, an agrimarketer who uses social media as an advertising platform must comply with the consumer protection rules established

14. Moorman, *supra* note 10, at fig.1.

15. John G. Browning, "Like" It or Not: How Social Media Can Lead to Litigation, RISK MGMT. (Oct. 8, 2012), <http://www.rmmagazine.com/2012/10/08/like-it-or-not-how-social-media-can-lead-to-litigation/>.

16. *Company Info*, FACEBOOK, <http://newsroom.fb.com/company-info> (last visited Aug. 23, 2014); *Internet 2011 in Numbers*, PINGDOM (Jan. 17, 2012), <http://royal.pingdom.com/2012/01/17/internet-2011-in-numbers/>.

17. Emily Steel, *Happy Birthday, Twitter! A Look Back at Some Noteworthy Tweets*, WALL ST. J. BLOG (Mar. 21, 2012, 12:04 PM), <http://blogs.wsj.com/speakeasy/2012/03/21/happy-birthday-twitter-a-look-at-noteworthy-tweets/>.

18. NIELSEN, STATE OF THE MEDIA: THE SOCIAL MEDIA REPORT Q3, at 2 (2011), *available at* <http://www.nielsen.com/us/en/reports/2011/social-media-report-q3.html> (the second most popular online activity was gaming).

19. Matt McGee, More Businesses Have Facebook Pages (11M) than Claimed Google+ Local Listings (8M), SMALL BUS. SEARCH MKTG. (July 26, 2012), <http://www.smallbusinesssem.com/more-facebook-pages-than-claimed-google-local-listings/6159/>.

20. *See generally* Toby Merrill et al., *Social Media: The Business Benefits May Be Enormous, But Can the Risks—Reputational, Legal, Operational—Be Mitigated?*, INFO. LAW GRP., Apr. 2011, *available at* <http://www.acegroup.com/us-en/assets/ace-progress-report-social-media.pdf>.

in the Federal Trade Commission Act (FTCA).<sup>21</sup> Thus, any advertising method through social media cannot be “unfair or deceptive” to consumers through the use of untruthful, misleading, or unsubstantiated claims.<sup>22</sup> Marketers who are advertising from social media should “clearly and conspicuously” convey all material information to the consumer.<sup>23</sup>

The FTCA provides the Federal Trade Commission (FTC) with the mechanism to investigate potential breaches of the statute and the authority to take enforcement actions or civil lawsuits.<sup>24</sup> The FTC polices the internet by monitoring online advertising, including advertising done on social media.<sup>25</sup> In addition to Federal laws, social media marketing will likely be examined through the lens of various state laws often modeled on FTC standards.<sup>26</sup> Some of these state statutes even allow a private cause of action to individual plaintiffs, which is not applicable under Section 5.<sup>27</sup> However, because social media is unlike any other, a growing number of guidelines, case law, and best practices are emerging which specifically differentiate social media.<sup>28</sup>

### III. ENDORSEMENTS

Open the November 2012 issue of *Wallaces Farmer* and Iowa farmer Jerry Groth is featured in an advertisement promoting Kinze planters.<sup>29</sup> Endorsements are a common advertising technique, often used as the centerpiece of a campaign in agrimarketing, and will likely be used with frequency in social media.<sup>30</sup> The FTC rules govern endorsements and define such marketing techniques as:

21. See BUREAU OF CONSUMER PROT., *supra* note 7, at 1 (stating that many of the advertising rules for social media are the same for traditional media).

22. See generally 15 U.S.C. § 45(a) (2012).

23. 16 C.F.R. § 255.5 (2013).

24. 15 U.S.C. § 45; see also 16 C.F.R. § 255.0.

25. BUREAU OF CONSUMER PROT., *supra* note 7, at 11.

26. See, e.g., OHIO REV. CODE ANN. § 1345.02 (West, Westlaw through Files 1 to 94 and Statewide Issue 1 of the 130th GA) (all fifty states and the District of Columbia have consumer protection laws).

27. JOSHUA D. WRIGHT, SEARLE CIVIL JUSTICE INST., STATE CONSUMER PROTECTION ACTS: AN EMPIRICAL INVESTIGATION OF PRIVATE LITIGATION I (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1708175](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1708175).

28. E.g., 16 C.F.R. § 255.5 (example seven specifically mentions blogs).

29. *My Planting Solution*, WALLACES FARMER, Nov. 2012, at 13, available at <http://magissues.farmprogress.com/wal/WF11Nov12/wal013.pdf>.

30. E.g., *id.*

[A]ny 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. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group, or institution.<sup>31</sup>

In 2010, the FTC updated its “Guides Concerning Use of Endorsements and Testimonials in Advertising” and addressed new media, such as social media and blogs.<sup>32</sup> The FTC imposes a stronger standard for an endorser who makes statements on behalf of an advertiser.<sup>33</sup> The endorsement must reflect the actual experience of the person and any compensation must be disclosed.<sup>34</sup> An endorsement cannot be presented out of context or “convey any . . . [claim] that would be deceptive if made directly by the advertiser.”<sup>35</sup> Essentially, FTC guidelines attempt to provide consumer protection against endorsements that consumers may not recognize as advertising.

It is also important to note the Guides are not binding law, *per se*, but are meant as administrative interpretations.<sup>36</sup> Advertisers are advised to use the Guides to comply with Section 5.<sup>37</sup> In the event of any enforcement action, the burden of proof would be on the FTC to show that a violation has occurred.<sup>38</sup>

#### A. *Grower-to-Grower Testimonials*

Walk into a small town café or coffee shop and you will likely find a group of farmers involved in a “chat and chew;” that is, sharing information

31. 16 C.F.R. § 255.0(b).

32. *Id.* § 255.0 (addresses application of 15 U.S.C. § 45).

33. *Id.* § 255.1(c); see BUREAU OF CONSUMER PROT., FED. TRADE COMM’N, THE FTC’S REVISED ENDORSEMENT GUIDES: WHAT PEOPLE ARE ASKING 1 (2010), available at <http://business.ftc.gov/documents/bus71-ftcs-revised-endorsement-guideswhat-people-are-asking> [hereinafter FTC ENDORSEMENT GUIDES] (“Endorsements must be truthful and not misleading,” the ad “must clearly and conspicuously disclose the generally expected results in the depicted circumstances,” and “[i]f there’s a connection between the endorser and the marketer . . . it should be disclosed”).

34. 16 C.F.R. § 255.5.

35. *Id.* § 255.1(a).

36. *Id.* § 255.0(a); see also Press Release, Fed. Trade Comm’n, FTC Publishes Final Guides Governing Endorsements, Testimonials (Oct. 5, 2009), available at <http://www.ftc.gov/news-events/press-releases/2009/10/ftc-publishes-final-guides-governing-endorsements-testimonials>.

37. See Press Release, Fed. Trade Comm’n, *supra* note 36.

38. See 16 C.F.R. § 255.0(a).

about the latest news and events.<sup>39</sup> A tight knit community, farmers are more likely to consider the opinion of their fellow farmers when making a purchase decision over other influences, such as advertising literature.<sup>40</sup> As a result, grower-to-grower testimonials are a prevalent strategy in agrimarketing, as can be seen when flipping through any agricultural publication.<sup>41</sup>

The use of testimonials in social media is an attractive option to agrimarketers because a person's credentials and credibility can be easily verified through includable background information.<sup>42</sup> A testimonial may also drive a potential customer to official brand websites or other selected online destinations.<sup>43</sup>

The updated Endorsements and Testimonials Guidelines issued by the FTC specifically reference social media testimonials.<sup>44</sup> One example in the guide addressed a social media testimonial stating, “[g]iven the nature of the medium [social media] in which her endorsement is disseminated, consumers might not realize that she is a paid endorser. Because that information might affect the weight consumers give to her endorsement, her relationship with the [advertiser] should be disclosed.”<sup>45</sup>

Thus, the implications are that agrimarketers may have to use extra diligence when featuring testimonials on social media because of the immediate impact, and should readily disclose that an endorser is being paid. The FTC provides no specific words that must be included for disclosure, but notes it can be simple.<sup>46</sup> In a medium such as Twitter, with its limited space allowances, a dis-

39. See, e.g., *The Chat 'n Chew Café*, PURDUE UNIV., <http://www.agry.purdue.edu/ext/corn/cafe/faqs.html> (last visited Aug. 23, 2014) (explaining the symbolic meaning of a chat 'n chew).

40. See R. D. Grisso et al., *What Information Helps a Farmer Purchase a Tractor?*, 4 AM. SOC'Y OF AGRIC. ENG'RS 197, 198 tbl.1 (Sept. 1988) (more farmers considered the opinion of family, friends, and neighbors than almost any other form).

41. E.g., *My Planting Solution*, *supra* note 29, at 13 (Iowa farmer Jerry Groth is featured in an advertisement for Kinze planters).

42. *BlueGrass – Twitter Testimonials: How Brands Collect and Leverage Social Media Feedback*, AUTOMATED BLOGGER (Aug. 19, 2012), <http://automatedblogger.blogspot.com/2010/08/bluegrass-twitter-testimonials-how.html> (profiles add a level of personalization).

43. *Id.*

44. 16 C.F.R. § 255.0 (2013) (Example 8).

45. *Id.* § 255.5 (Example 3).

46. See FTC ENDORSEMENT GUIDES, *supra* note 33, at 4 (stating that the disclosure can be as simple as “Company X gave me this product to try . . .”).

closure of a testimonial could include the use of a hashtag such as “#paid ad,” “#paid,” or “#ad.”<sup>47</sup>

### B. Blogs

From “AgWired” to “The Dairy Mom,” agricultural blogs are exploding online.<sup>48</sup> More than 6.7 million individuals write blogs on websites, and twelve million more compose blogs on social media.<sup>49</sup> Blogs are considered a form of social media because they provide an opportunity for anyone to publish content, and are an alternative way in which people read and share news and information, some with great influence.<sup>50</sup> As a result, a complete public relations strategy will likely pitch bloggers just as if pitching traditional media. Any “endorsements” that appear in blogs are covered by the Endorsements and Testimonial Guidelines.<sup>51</sup> The FTC makes it clear that if a blogger issues an endorsement and has a material relationship with an advertiser, that fact must be disclosed “clearly and conspicuously” to consumers.<sup>52</sup> The FTC states, “bloggers who make an endorsement must disclose the material connections they share with the seller of the product or service.”<sup>53</sup> Any relationship or “connections that consumers would not expect [] must be disclosed.”<sup>54</sup>

These material connections or relationships include direct payments to a third party blogger and employee bloggers.<sup>55</sup> Further, any relationship not “inherently obvious” must be disclosed, and even providing a blogger with nothing more than a free product for review must be disclosed.<sup>56</sup> The FTC uses a student videogame blogger to detail this:

47. *Id.* at 5.

48. *See AgWired*, ZIMM COMM NEW MEDIA, LLC, <http://agwired.com> (last visited Aug. 23, 2014); *Buzz in the Blogosphere: Millions More Bloggers and Blog Readers*, NIELSEN BLOG (Mar. 8, 2012), <http://www.nielsen.com/us/en/newswire/2012/buzz-in-the-blogosphere-millions-more-bloggers-and-blog-readers.html> (given the expansive rise of blogs in general, agriculture can be included in the growth); *The Dairy Mom*, BLOGSPOT, <http://thedairymom.blogspot.com/> (last visited Aug. 23, 2014).

49. *Buzz in the Blogosphere*, *supra* note 48.

50. *See generally* Brian Clark, *Since When Are Blogs Not Social Media?*, COPYBLOGGER, <http://www.copyblogger.com/blogs-social-media/> (last visited Aug. 23, 2014).

51. 16 C.F.R. § 255.5 (2013) (Example 7).

52. *Id.* § 255.5 (Example 7).

53. Press Release, Fed. Trade Comm’n, *supra* note 36.

54. *Id.*

55. 16 C.F.R. § 255.5.

56. *Id.* § 255.5 (Example 7).



Since his review is disseminated via a form of consumer-generated media in which his relationship to the advertiser is not inherently obvious, readers are unlikely to know that he has received the video game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact likely would materially affect the credibility they attach to his endorsement.<sup>57</sup>

The FTC has taken enforcement steps against advertisers it believes to be in violation of the Guides.<sup>58</sup> In a letter to clothing retailer Ann Taylor, the FTC frowned upon a promotion where bloggers were encouraged to post on the latest clothes collection for a chance to win a \$500 gift card to Ann Taylor.<sup>59</sup> No enforcement action was taken, in part because of the small number of bloggers who participated and because Ann Taylor developed a policy where bloggers must disclose the gift.<sup>60</sup>

In the event of a failure to disclose, the FTC will likely go after the advertiser rather than the endorser.<sup>61</sup> Thus, an agrimarketer could potentially be liable for consumer damages because of a third party blog. As a result, part of an overall marketing strategy should include a diligent policing of internal and external blogs. The FTC may even consider the extent and effectiveness of an advertisers' in-house and outside monitoring when determining compliance with the Guidelines. As stated in the Guides: "[I]t's up to you [the advertiser] to make an effort to know where your people are talking about your product."<sup>62</sup>

In one recent enforcement action of the Guidelines, the FTC ordered, along with a \$250,000 fine, that a company enact a more robust monitoring system.<sup>63</sup> The company advertised its guitar lesson DVD through affiliates; howev-

57. *Id.* § 255.5 (Example 7).

58. *See, e.g.*, Natalie Zmuda, *Ann Taylor Investigation Shows FTC Keeping Close Eye on Blogging*, ADVER. AGE (Apr. 28, 2010), <http://adage.com/article/news/ann-taylor-case-shows-ftc-keeping-close-eye-blogging/143567/>.

59. Letter from Mary K. Engle, Assoc. Dir. for Adver. Practices, Fed. Trade Comm'n, to Kenneth A. Plevan, Attorney, Ann Taylor Stores Corp. (Apr. 20, 2010), *available at* [http://www.ftc.gov/sites/default/files/documents/closing\\_letters/anntaylor-stores-corporation/100420anntaylorclosingletter.pdf](http://www.ftc.gov/sites/default/files/documents/closing_letters/anntaylor-stores-corporation/100420anntaylorclosingletter.pdf); *see* Natalie Zmuda, *supra* note 58.

60. Letter from Mary K. Engle, *supra* note 59.

61. 16 C.F.R. § 255.0; *see also* FTC ENDORSEMENT GUIDES, *supra* note 33, at 3.

62. FTC ENDORSEMENT GUIDES, *supra* note 33, at 6.

63. Consent Order, *In the matter of Legacy Learning Systems, Inc.*, 151 F.T.C. 383, 391–95 (2011) (the company agreed to monitor its top fifty revenue-generating affiliate marketers and another fifty randomly selected affiliate marketers each month to ensure that the appropriate disclosures are being made).

er, because that fact was not disclosed, it appeared to reflect the view of ordinary consumers or “independent” reviewers.<sup>64</sup>

Thus, when agrimarketers work with blogs, either in-house or independent, they need to be aware of FTC guidelines and the potential for liability for failing to disclose any connections between the marketer and the endorser. However, agrimarketers should not be dissuaded from working with bloggers as it can be a great opportunity for publicity.

### C. Message Boards

Message boards are a popular medium of communication and a place where ideas can be shared amongst the agricultural community.<sup>65</sup> The AgChat Foundation, for instance, encourages Twitter users to use the hashtag “#AgChats” to draw participants into online forums.<sup>66</sup> In one recent discussion, more than 2000 people from seven countries recently joined an AgChat.<sup>67</sup> The FTC has addressed the issue of advertisers posting on message boards in its Guides, and makes clear that any paid, planted mole in a message board should be disclosed:

An online message board designated for discussions . . . [of products] . . . Unbeknownst to the message board community, an employee of a leading . . . manufacturer has been posting messages on the discussion board promoting the manufacturer’s product. Knowledge of this poster’s employment likely would affect the weight or credibility of her endorsement. Therefore, the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board.<sup>68</sup>

Another popular agrimarketing strategy is to sponsor message board forums.<sup>69</sup> To raise awareness of herbicide resistant weeds, Dow AgroSciences sponsored a “tough weeds” forum on *Successful Farming*’s website in 2010, which has evolved into the “Enlist Weed Control System.”<sup>70</sup> The likelihood that

64. Complaint, In the matter of Legacy Learning Systems, Inc., FTC Docket No. C-4323, at ¶ 6.

65. See Baumgarten, *supra* note 5; see, e.g., Dow Chem. Co., *Join the Conversation*, ENLIST, [http://www.enlist.com/join\\_the\\_conversation.aspx](http://www.enlist.com/join_the_conversation.aspx) (last visited Aug. 23, 2014).

66. Baumgarten, *supra* note 5.

67. *Id.*

68. 16 C.F.R. § 255.5 (2013) (Example 8).

69. See, e.g., Dow Chem. Co., *supra* note 65; *Community Centre*, AGRIVILLE, <http://www.agrville.com/community/> (last visited Aug. 23, 2014).

70. See Dow Chem. Co., *supra* note 65.

Dow AgroSciences could be liable for any comments by non-affiliated persons to the message board, as a sponsor or even website host, is unlikely.<sup>71</sup> Under the Communications Decency Act, “[n]o provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information provider.”<sup>72</sup>

#### IV. BEYOND THE FTC, MARKETING IN A COMPLEX ENVIRONMENT

##### A. *Animal Health*

Antibiotics, vaccines, and other similar products are an intricate part of the agricultural economy.<sup>73</sup> In addition to FTC oversight, animal health marketing is regulated by the Federal Drug and Food Administration (FDA), which poses additional stipulations on the marketing of such products.<sup>74</sup> Under the Federal Food, Drug, and Cosmetic Act, any advertising, including animal health pharmaceuticals, should include a drug’s “established name [and] . . . formula [showing each ingredient].”<sup>75</sup>

Further, federal regulations mandate that prescription drug advertisements include information related to the drug’s “side effects, contraindications[,] . . . and effectiveness.”<sup>76</sup> The advertisements must contain a “fair balance,” and portray both risks and benefits fairly.<sup>77</sup> As a result of the very nature of social media, including the potential limited space available, it may be difficult to satisfy the fair balance and summary regulations. In online advertising, the FDA has rejected a one-click away approach for this type of marketing.<sup>78</sup> As a result, ma-

71. See 47 U.S.C. § 230(c)(1) (2012).

72. *Id.*

73. See, e.g., *Pfizer Animal Health Unit Files for I.P.O.*, N.Y. TIMES DEALBOOK, Aug. 13, 2012, [http://dealbook.nytimes.com/2012/08/13/pfizer-animal-health-unit-files-for-i-p-o/?\\_php=true&\\_type=blogs&\\_r=0](http://dealbook.nytimes.com/2012/08/13/pfizer-animal-health-unit-files-for-i-p-o/?_php=true&_type=blogs&_r=0) (showing that sales from Pfizer Animal Health totaled about \$4.2 billion in 2011, a substantial part of the agricultural economy).

74. See 21 U.S.C. § 352(n) (2012).

75. *Id.*

76. 21 C.F.R. § 202.1(e)(1) (2013).

77. See *id.* § 202.1(e)(5)(ii).

78. See, e.g., Letter from Sharon Watson, Regulatory Review Officer, Div. of Drug Mktg., FDA, to Nadine D. Cohen, Senior Vice President Regulatory Affairs, Biogen Idec (Mar. 26, 2009), available at <http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/WarningLettersandNoticeofViolationLettersto>

for players in the field such as Pfizer (Animal Health), Bayer (Animal Health) and Lilly (Eli Lilly) have been somewhat reluctant to utilize social media marketing.<sup>79</sup> Of the combined \$4 billion spent in 2008 on pharmaceutical companies' marketing budgets, less than four percent was used for social media.<sup>80</sup> Another issue is that the FDA requires companies to "promptly review all adverse drug experience information obtained or otherwise received by the applicant from any source . . . ."<sup>81</sup> With the vast nature of social media, how that will be accomplished in such a medium is unclear.

To enforce any perceived violations of FDA marketing regulations, the Office of Prescription Drug Promotion (OPDP), an organization within the FDA, may ask a company to discontinue the marketing effort in question by issuing either a notice of violation letter for minor violations, or a warning letter for more serious violations.<sup>82</sup> A company failing to heed the warning letter will likely be sued by the federal government.<sup>83</sup> So far, OPDP letters concerning social media marketing have been few in number, but the FDA has proved willing to send letters addressing the issue.<sup>84</sup> In 2010, the OPDP sent a warning letter to Novartis

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PharmaceuticalCompanies/UCM166071.pdf; Letter from Sangeeta Vaswani, Acting Grp. Leader, Div. of Drug Mktg., FDA, to Christopher Graham, Assoc. Vice President, U.S. Regulatory Affairs, Sanofi-aventis U.S. LLC (Mar. 26, 2009), *available at* <http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/WarningLettersandNoticeofViolationLetterstoPharmaceuticalCompanies/UCM166248.pdf>.

79. See Jeremy A. Greene & Aaron S. Kesselheim, *Pharmaceutical Marketing and the New Social Media*, 363 NEW ENG. J. MED. 2087 (2010) (noting that pharmaceutical companies in the past "have tended to wait for the FDA to establish explicit codes of acceptable marketing practices before devoting substantial resources to a new medium").

80. Catherine Arnst, *Why Drugmakers Don't Twitter*, BUS. WK., Nov. 19, 2009, [http://www.businessweek.com/magazine/content/09\\_48/b4157064827269.htm](http://www.businessweek.com/magazine/content/09_48/b4157064827269.htm).

81. 21 C.F.R. § 314.80(b) (2013).

82. *The Office of Prescription Drug Promotion (OPDP)*, FDA, <http://www.fda.gov/AboutFDA/CentersOffices/OfficeofMedicalProductsandTobacco/CDER/ucm090142.htm> (last updated Mar. 6, 2014); *What is a Warning Letter?*, FDA, <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm194986.htm#> (last updated Apr. 10, 2014); see also *Warning Letters and Notice of Violation Letters to Pharmaceutical Companies*, FDA, <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/WarningLettersandNoticeofViolationLetterstoPharmaceuticalCompanies/default.htm> (last updated Jan. 25, 2012).

83. See Press Release, Dept. of Justice, Justice Department Recovers \$3 Billion in False Claims Act Cases in Fiscal Year 2011 (Dec. 19, 2011), *available at* <http://www.justice.gov/opa/pr/2011/December/11-civ-1665.html>. The federal government collected \$2.2 billion from pharmaceutical companies in civil damages in 2011. *Id.*

84. See, e.g., Letter from Karen R. Rulli, Acting Grp. Leader, Div. of Drug Mktg., Adver., & Comm'ns, FDA, to Lisa Drucker, Dir. Of Regulatory Affairs-Oncology, Novartis Pharm. Corp. (July 29, 2010), *available at* <http://www.fda.gov/downloads/Drugs/GuidanceCompliance>

in regards to a Facebook widget which indicated that an individual's profile newsfeed wanted to share information about a cancer drug.<sup>85</sup> Because risk information about the drug was not included, nor was information on who the drug was actually approved for, the FDA requested that the company stop using the unapproved methods of information dissemination.<sup>86</sup>

Despite the Novartis letter, pharmaceutical companies are in limbo with regard to how they should lawfully proceed with social media marketing as the FDA, to this point, has done little to formally address the issue.<sup>87</sup> A notable exception was the "Responding to Unsolicited Requests for Off-Label Information About Prescription Drugs and Medical Devices" draft guidance issued by the FDA in December 2011.<sup>88</sup> As the title suggests, the guidance looked at how companies should respond to customers using social media.<sup>89</sup> For animal health companies, an example of non-label use could be using an antibiotic specifically for pneumonia to treat foot rot or another bacterial infection not specifically listed on the label.<sup>90</sup> The draft guidance recognizes companies may have to clearly state that their drug has not been approved for any off-label uses, and that individuals should use the provided contact information to get in touch with the company's medical and scientific personnel.<sup>91</sup>

The challenge of marketing animal health pharmaceuticals through social media advertising does not mean the practice would be without merit. Social media marketing could potentially benefit consumers through the education of end-users, ensuring product safety and promoting reliable information. Animal health companies may also gain enhanced brand loyalty and an increased bottom

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RegulatoryInformation/EnforcementActivitiesby%20FDA/WarningLettersandNoticeofViolation  
LetterstoPharmaceuticalCompanies/UCM221325.pdf.

85. *See id.*

86. *Id.*

87. Combs, *supra* note 6 (the question becomes whether or not social media marketing is regulated by same procedures as traditional marketing methods).

88. FDA, GUIDANCE FOR INDUSTRY: RESPONDING TO UNSOLICITED REQUESTS FOR OFF-LABEL INFORMATION ABOUT PRESCRIPTION DRUGS AND MEDICAL DEVICES (2011), *available at* <http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM285145.pdf>.

89. *Id.* at 1.

90. *See, e.g.*, AM. VETERINARY MED. ASS'N, FREQUENTLY ASKED QUESTIONS ABOUT EXTRALABEL DRUG USE AND AMDUCA 3–4, *available at* [https://www.avma.org/KB/Resources/FAQs/Documents/eldu\\_amduca\\_faq.pdf](https://www.avma.org/KB/Resources/FAQs/Documents/eldu_amduca_faq.pdf).

91. FDA, GUIDANCE FOR INDUSTRY, *supra* note 88, at 11.

line.<sup>92</sup> As a result, it seems plausible that animal health companies will increase their social media marketing budgets accordingly.<sup>93</sup> Animal health companies must find ways to market their products and balance regulations posed by the FDA, while still reaching their customers in a platform that expects direct-to-consumer marketing.

Because social media marketing guidelines have been unclear, companies that use this platform face risks and will have to balance these with any rewards. As a result, some pharmaceutical companies and other industry groups have issued their own guidelines on social media.<sup>94</sup> To ensure compliance, animal health marketers should work cautiously and continue working with lawyers, the FDA, and other experts to utilize social media.

### B. *Inputs*

With pesticides, fertilizers, and other inputs there has been little discussion of social media marketing implications. Pesticide marketing efforts face traditional FTC mandates, in that any claims should not be misleading or unsubstantiated.<sup>95</sup> However, under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), pesticides must be registered with the Environmental Protection Agency (EPA) before they can be distributed.<sup>96</sup> It is unlawful to make any claims in marketing efforts that have not been substantiated in the registration process.<sup>97</sup> Interpretations from the EPA have extended the provisions to advertisements in “any advertising medium to which pesticide users or the general public have access.”<sup>98</sup> States may also have independent regulations on marketing pesticides.<sup>99</sup>

92. See Trevor Bell, *Establishing Brand Loyalty Through Social Media*, TEX. TECH UNIV. (Sept. 5, 2013), <http://www.depts.ttu.edu/comc/outpost/blog/brand-loyalty.php#sthash.NAIRYVEK.dpbs>.

93. See Greg Singh, *Is the Return Greater Than the Risk for Pharma Companies' Investing in Social Media?*, VISIBLE TECH. BLOG (Aug. 2, 2011), <http://www.visibletechnologies.com/blog/is-return-greater-than-risk-for-pharma-in-social-media/>.

94. E.g., ASTRAZENECA, WHITE PAPER: SOCIAL MEDIA IN THE PHARMACEUTICAL INDUSTRY 3 (2011), available at [http://www.brandchannel.com/images/papers/522\\_2011\\_02\\_AZ\\_Social\\_Media.pdf](http://www.brandchannel.com/images/papers/522_2011_02_AZ_Social_Media.pdf); see also WEBICINA, <http://www.webicina.com/solutions/pharmaSM/> (last visited Aug. 23, 2014) (a collaborative website discussing social media advertising approaches).

95. See generally 15 U.S.C. § 45 (2012).

96. See 7 U.S.C. § 136a(a).

97. See *id.* § 136a(c)(2)(A).

98. 40 C.F.R. § 168.22(a) (2013) (emphasis added).

As a result, pesticide marketers, like animal health marketers, face difficulties in satisfying provided label requirements in the context of space.<sup>100</sup> To this point, little guidance from the FTC or the EPA in regards to best practices has been provided. Pesticide marketers must balance the pros and cons of social media marketing while considering the unclear regulatory guidance and tread somewhat carefully.

## V. PROMOTIONS

To drive people to their booth during the Farm Progress Show, Pfizer Animal Health used a social media promotion. Individuals who liked a specific Farm Progress Page and brought the receipt to the booth were eligible for a prize.<sup>101</sup> Agriculture is an industry of trade shows, with more than most other industries, and getting the right demographic to attend is key.<sup>102</sup> Although beneficial for driving booth traffic at trade shows, promotions through social media can also prove beneficial for marketing by promoting brand awareness and loyalty, increasing brand engagement, and, ultimately, potentially increasing sales.<sup>103</sup>

Promotions done incorrectly on social media can quickly become legal risks, however. When using social media as a platform for promotions, agrimarketing has generally focused on contests and sweepstakes.<sup>104</sup> Often mistaken for each other, a contest is where individuals are objectively judged on a skill to win a prize, such as guessing the number of kernels of corn in a jar.<sup>105</sup> In a sweepstakes, a winner is chosen at random for a prize.<sup>106</sup>

Generally, traditional promotion requirements will transfer to social media promotions.<sup>107</sup> Each state has statutes governing contests and sweepstakes

99. See, e.g., N.J. ADMIN. CODE § 7:30-2.12 (2014).

100. See EPA, LABEL REVIEW MANUAL, CHAPTER 3: GENERAL LABELING REQUIREMENTS 3-1 to 3-2 (2012), available at <http://www.epa.gov/oppfead1/labeling/lrm/chap-03.pdf>.

101. Personal knowledge of author gained through experience as an Associate Account Executive with Martin Williams Advertising.

102. See *Trade Shows by Industry*, 10 TIMES, <http://10times.com/tradeshows/by-industry> (last visited Aug. 23, 2014).

103. See MICHAEL A. STELZNER, 2012 SOCIAL MEDIA MARKETING REPORT: HOW MARKETERS ARE USING SOCIAL MEDIA TO GROW THEIR BUSINESSES 15 (2012), available at <http://www.socialmediaexaminer.com/SocialMediaMarketingIndustryReport2012.pdf>.

104. 31 U.S.C. § 5362 (2006) (online lotteries are generally illegal).

105. E.g., *Rules For Operation of Contests and Sweepstakes: Legal Guide U-3*, CAL. DEP'T OF AFFS., (Mar. 2010), [http://www.dca.ca.gov/publications/legal\\_guides/u-3.shtml](http://www.dca.ca.gov/publications/legal_guides/u-3.shtml).

106. *Id.*

107. See Mangold & Faulds, *supra* note 9, at 359.

and will monitor to ensure the official rules are “clearly and conspicuously” available to consumers.<sup>108</sup> Also, most social media hosts may have their own rules for promotions. Facebook, for example, states a company does not have to obtain Facebook’s consent to administer a promotion, but the promotion must be administered through a Facebook Platform.<sup>109</sup> Any promotion must contain a waiver releasing Facebook from any potential liability.<sup>110</sup>

Where social media contests and sweepstakes may be more problematic for agrimarketers is if they merge into a third promotion type—lottery. Online lotteries are illegal and much more heavily regulated than contests or sweepstakes.<sup>111</sup> A promotion is considered a lottery if three elements are present: prize, chance, and consideration.<sup>112</sup> Contests and sweepstakes will have two of these elements, but not all three. In lotteries, the payment or consideration must be something of value and can take forms other than cash.<sup>113</sup> Even “[a] cent or a pepper corn, in legal estimation, would constitute a valuable consideration.”<sup>114</sup> While it seems unlikely that by asking someone to “like” a product page, for example, would be deemed “consideration,” it is not impossible.<sup>115</sup> Requiring a contestant to fill out a lengthy survey or referring a friend could also be considered consideration, however.<sup>116</sup>

The National Advertising Division, an industry regulatory group, stated any promotion where a consumer is required to “like” a page or product should provide a clear and conspicuous statement for all material terms and conditions included in its promotion.<sup>117</sup> Not disclosing the cost of shipping and handling of

108. *E.g.*, 15 U.S.C. § 41 (2012) (The Department of Justice, Postal Service, and FCC can all have jurisdiction over promotions at the federal level. Promotions targeting children have additional guidelines); *see also* CAL. BUS. & PROF. CODE § 17539.1(a)(5) (West 2008).

109. *Facebook Pages Terms*, FACEBOOK, [https://www.facebook.com/page\\_guidelines.php](https://www.facebook.com/page_guidelines.php) (last revised Mar. 5, 2014).

110. *Id.*

111. 31 U.S.C. § 5362 (2012).

112. *FCC v. Am. Broad. Co.*, 347 U.S. 284, 290 (1954).

113. *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1404 (E.D. Cal. 1994).

114. *Whitney v. Stearns*, 16 Me. 394, 397 (1839).

115. *See* 31 U.S.C. § 5362 (noting that internet access is not in the definition of consideration).

116. *See, e.g.*, *Seattle Times Co. v. Tielsch*, 495 P.2d 1366, 1370 (Wash. 1972) (finding consideration where participants were required to spend hours following a football forecasting contest and the benefit flowed to the promoter).

117. *NAD Reviews “Like-Gated” Facebook Campaign, Recommends Coastal Contacts Modify “Free-Claim,”* ADVER. SELF-REGULATORY COUNCIL, Nov. 8, 2011, <http://www.ascrereviews.org/2011/11/nad-reviews-like-gated-facebook-campaign-recommends-coastal-contacts-modify-free-claim/>.



a “free” pair of glasses obtained by “liking” a page, for instance, may be misleading or even fraudulent.<sup>118</sup> Promotions where a prize is not really “free” should not be used to generate more “likes” or web traffic.<sup>119</sup>

Further, “[y]ou must not use Facebook features or functionality, such as the Like button, as a voting mechanism for a promotion,” and Facebook guidelines state the act of “liking” a page cannot automatically register or enter a promotion participant.<sup>120</sup>

#### A. *Collecting Data*

Another goal of public relations and marketing promotions has been to collect and measure certain customer data.<sup>121</sup> The collected data helps a marketer better understand customers and their needs, as well as to better craft future messages to the specifically targeted demographic.<sup>122</sup> One way marketers acquire data is through surveys and other questionnaires, which often accompany promotions, tradeshow, and direct mail campaigns.<sup>123</sup>

Generally, to protect itself, a company should follow a series of FTC guidelines when collecting data through social media:

- (1) businesses should provide notice of what information they collect from consumers and how they use it; (2) consumers should be given choice about how information collected from them may be used; (3) consumers should have access to data collected about them; and (4) businesses should take reasonable steps to ensure the security of the information they collect from consumers.<sup>124</sup>

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118. *Id.*

119. *Id.*

120. *Facebook Pages Terms*, *supra* note 109.

121. This section will briefly touch on best practices agrimarketers should consider in regard to FTC direction. Privacy concerns are a huge legal issue and something agrimarketers should be conscious of. Privacy issues, however, will not be discussed at length in this Note.

122. *See, e.g.*, Robert Plant, *The Benefits of Data Talking to Data*, WALL ST. J., Apr. 2, 2012, <http://online.wsj.com/news/articles/SB10001424052970203370604577263722122986512> (providing an example of individualized text message alerts).

123. *See, e.g., id.*

124. *See* FED. TRADE COMM’N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: A PROPOSED FRAMEWORK FOR BUSINESSES AND POLICYMAKERS 7 (2010), *available at* <http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-preliminary-ftc-staff-report-protecting-consumer/101201privacyreport.pdf> (emphasis omitted).

## VI. BRAND PROTECTION

Brand protection is another area where agrimarketers face potential legal risks when using social media. Once a brand has been damaged, digging it out of a hole may take considerable time and effort.<sup>125</sup> Most businesses understand that potential brand damage could negatively encumber the company.<sup>126</sup> The viral nature of social media which can make marketing efforts successful can also be an unpredictable nightmare.<sup>127</sup> Johnson & Johnson learned this when a Motrin ad featuring moms carrying their babies in slings generated more than 300 mostly negative tweets against the company per hour.<sup>128</sup> When using social media, agrimarketers should be aware of potential ways their company's brand could be damaged.

A. *Lanham Act—Business Protection*

The Lanham Act was enacted to protect businesses from other businesses' false or misleading claims.<sup>129</sup> The Lanham Act states any "misleading representation of fact, which—in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of . . . another person's goods, services, or commercial activities, shall be liable in a civil action . . ." <sup>130</sup> Additionally, most states have their own version of the Lanham Act.<sup>131</sup> Some of these statutes, however, differ from the Federal statute in that they provide private causes of action, including a potential action from someone who is not even an actual competing brand.<sup>132</sup>

125. See, e.g., Jack Neff, *Can One Bad Tweet Taint Your Brand Forever?*, ADVER. AGE (Feb. 22, 2010), <http://adage.com/article/digital/bad-tweet-taint-brand-forever/142205/>.

126. Alon Popilskis, *Don't Let Negative Online Reviews Damage Your Company's Reputation*, YAHOO (Aug. 24, 2013), <http://smallbusiness.yahoo.com/advisor/don-t-let-negative-online-reviews-damage-company-005044145.html>; see, e.g., *Our Business Risks*, PEPSICO, <http://www.pepsico.com/annual10/financials/mds/our-business-risks.html> (last visited Aug. 23, 2014).

127. See Neff, *supra* note 125.

128. *Id.* (apparently some Twitter moms took offense to the idea that carrying a baby in a sling was fashionable and gave credence to being a mom).

129. See 15 U.S.C. § 1125 (2012).

130. *Id.* § 1125(a)(1)(B).

131. See, e.g., OHIO REV. CODE ANN. § 4165 (West, Westlaw through Files 1 to 94 and Statewide Issue 1 of the 130th GA).

132. See *id.* § 4165.03(A)(2); see also *Bower v. Int'l Bus. Machines*, 495 F. Supp. 2d 837, 843 (S.D. Ohio 2007) (holding no limit on the type of individuals who could pursue a claim).

So far, a court has not applied the Lanham Act directly to a social media marketing case, but the act has been applied to an email marketing blast.<sup>133</sup> There has, however, been litigation over the issue. In one case, involving consumer-generated videos, Subway and Quiznos battled it out.<sup>134</sup> Quiznos promoted videos hosted on a website and Subway sued for false and misleading advertising in violation of the Lanham Act.<sup>135</sup> Quiznos argued for summary judgment alleging that, under the Communications Decency Act (CDA), it had immunity for user-generated content.<sup>136</sup>

However, the CDA “does not require a court to determine only whether a party creates or develops the information at issue. Being responsible for the creation or development of the information is sufficient.”<sup>137</sup> So, in denying the motion, the court stated Quiznos could have actively participated in the creation or development of the third-party created content.<sup>138</sup>

In looking at whether Quiznos actively participated and CDA immunity was destroyed, the court specifically pointed out that Quiznos expressly invited contestants to submit contestant-created videos proclaiming Quiznos is better than Subway and that the domain name “meatnomeat.com” is arguably a literal falsity because it implies Subway sandwiches contain no meat.<sup>139</sup> The four sample videos created by Quiznos to shape the contestant-created entries may contain false claims implying that Subway sandwiches “hav[e] no meat or less meat than” Quiznos sandwiches.<sup>140</sup>

Taken as a whole, marketers must be careful with any social media that mentions a specific competitor, especially if asking for things such as submissions, “likes,” and re-tweets. Any such practices could create the potential for liability under the Lanham Act.

133. See *Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1275–76 (10th Cir. 2000).

134. See *Doctor’s Assocs., Inc. v. QIP Holder LLC*, No. 3:06-cv-1710 (VLB), 2010 WL 669870, at \*1 (D. Conn. Feb. 19, 2010).

135. *Id.* at \*2.

136. *Id.*

137. *MCW, Inc. v. Badbusinessbureau.com, LLC*, No. 3:02-cv-2727-G, 2004 WL 833595, at n.12 (N.D. Tex. Apr. 19, 2004).

138. *Doctor’s Assocs., Inc.*, 2010 WL 669870, at \*24 (contrasting the distinction of Quiznos went beyond merely publishing and actually participated).

139. *Id.*

140. *Id.* (the case was ultimately settled out of court).

### B. Cross-Licensing

Agriculture as an industry is intertwined, and large agri-businesses and technology products can seem even more intertwined. Monsanto, for instance, licenses its Roundup Ready seed trait to roughly 150 other seed companies.<sup>141</sup> This can make things like marketing extremely complicated in regards to issues such as trademarks and patents.<sup>142</sup> The issue may be even more heightened as a result of the limited space available in some social media outlets. These agreements can create confusion, especially when it comes to social media and what companies can and cannot put on a social media site.<sup>143</sup>

Because the Lanham Act can be applied to social media marketing, an agri-marketer who violates traditional intellectual property (IP) law on social media may face liabilities.<sup>144</sup> Violating IP rights on social media can lead to damages being awarded and owners being entitled to “actual damages and any additional profits of the infringer,” or statutory damages.<sup>145</sup> In one case, to determine whether IP rights had been violated on the internet, the Ninth Circuit evaluated “the strength of the mark; [] the evidence of actual confusion; [and] the type of goods and degree of care likely to be exercised by the purchaser [consumers].”<sup>146</sup> However, because confusion might be difficult to prove and “emerging technologies require a flexible approach,” it seems likely that a copyright suit would be unsuccessful unless the infringement was blatant and confusing to consumers.<sup>147</sup>

Thus, when agrimarketers use social media, the best practice is likely to follow standard existing company procedures with copyright material. Agrimarketers should generally avoid direct mention of competitor-licensed technology

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141. Frank Morris, *Monsanto GMO Ignites Big Seed War*, NAT'L PUB. RADIO (Jan. 12, 2010), <http://www.npr.org/templates/story/story.php?storyId=122498255>.

142. See e.g., *Intellectual Property*, AGRIC. MKTG. RES. CTR., [http://www.agmrc.org/business\\_development/operating\\_a\\_business/legal/intellectual-property](http://www.agmrc.org/business_development/operating_a_business/legal/intellectual-property) (last visited Aug. 23, 2014).

143. ASTRAZENECA, *supra* note 94.

144. See 17 U.S.C. § 502(a) (2012); *Eagle v. Morgan*, No. 11-4303, 2012 WL 4739436 (E.D. Pa. Oct. 4, 2012); see also *Doctor's Assocs., Inc.*, 2010 WL 669870, at \*24.

145. 17 U.S.C. § 504(a).

146. *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1154 (9th Cir. 2011). An additional element considered by the court was the appearance of advertisements and their surrounding context on search engine results. *Id.*

147. *Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1054 (9th Cir. 1999).

in social media marketing efforts, and instead, when possible, use links to other web sites that have the ability to present full disclosure.

### *C. Employer Vicarious Liability*

Social media has given everyone a platform, but it also often glosses over personal and professional life, potentially blurring the source of marketing messages. For instance, with more than 60,000 employees ranging from assemblers found in Waterloo, Iowa, to the marketing professionals at the European headquarters in Germany, there are a many potential “tweeters” on behalf of John Deere.<sup>148</sup> And, with each employee potentially making an inaccurate marketing statement or perhaps a disparaging remark about a competitor, posting that information on social media where it metaphorically “lasts forever” will likely end up in the public sphere for anyone to access.

Under *respondeat superior*, employers can be held liable for their employees’ activities if the discretion was committed within the scope of employment.<sup>149</sup> The ambiguity of the personal/professional dichotomy of social media is at issue.<sup>150</sup> For employers using agrimarketing in social media the risks are twofold: having employees misuse company and competitor IP information and potentially being held vicariously liable for the publication of defamatory statements by its employees through social media.<sup>151</sup>

For IP issues, the Lanham Act specifically says the wrongful act must be in commerce.<sup>152</sup> A mark must be “used or displayed in the sale or advertising of services” in order to be used “in commerce.”<sup>153</sup> Thus, while posting a third party’s copyrighted material on an official company social media account would be a violation of copyright law, an individual posting illegal copyright information on their personal social media account would likely not be considered “in commerce,” even if posted during work hours. Because company and personal often blur together in social media, however, the issue of whether a posting was in

148. *Careers*, JOHN DEERE, [http://www.deere.com/wps/dcom/en\\_US/corporate/our\\_company/careers/careers.page?](http://www.deere.com/wps/dcom/en_US/corporate/our_company/careers/careers.page?) (last visited Aug. 23, 2014).

149. *See, e.g.*, *Burlington Indus., Inc. v. Ellerth* 524 U.S. 742, 745 (1998) (holding employee should be allowed opportunity to assert claim of vicarious liability); *Faragher v. City of Boca Raton*, 524 U.S. 775, 810 (1998) (stating the issue of vicarious liability is one for the factfinder).

150. *See Taubman Co. v. Webfeats*, 319 F.3d 770, 774–75 (6th Cir. 2003).

151. *E.g., id.*

152. 15 U.S.C. §§ 1114(1)(a), 1125(a)(1) (2012).

153. *Id.* § 1127.

commerce, or marketing, could potentially open up.<sup>154</sup> A company may also advise its employees to refrain from posting any company marketing information on their personal social media accounts to protect the company's own IP information.

Defamation is more of a grey area; it may be possible that employers could be liable for employees' social media "marketing" indiscretions, even if "off" the job.<sup>155</sup> Comingling of any personal information and business information on social media could be attributed to an employer.<sup>156</sup> In one case, the president of a banking company used a LinkedIn account for company marketing functions, but also treated it as her own account.<sup>157</sup> After the president was fired, the company took control of the LinkedIn account and changed the password and profile and the former employee sued.<sup>158</sup> The court granted the company's motion for summary judgment, making the profile the company's property; it appears that if the president had said anything defamatory, even if "personal," the company could have been liable.<sup>159</sup> Even information posted on social media such as "suggestions, for example, that a competitor is in financial difficulties, or is unprofessional in the conduct of its business" may lead to legal trouble.<sup>160</sup>

Further, information posted on social media outlets can also be used as evidence in a court of law.<sup>161</sup> This seems to increase the risk that an organization could be held liable for the online posts of its employees because the information is not necessarily considered private. Lawyers now believe that if an employee posts an offending statement against another organization on Facebook or another

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154. *See Eagle v. Morgan*, No. 11-4303, 2012 WL 4739436, at \*8 (E.D. Pa. Oct. 4, 2012).

155. *See id.*; *see also* *Pietrylo v. Hillstone Rest. Grp.*, No. 06-5754, 2008 WL 6085437 (D.N.J. July 25, 2008) (finding that it was reasonable to assume that information from a social media website could be used by the employer, further blurring the lines between personal and employer). Additionally, a court in the United Kingdom found that a personal Facebook account that was updated harassing a coworker during work hours could be used to find the employer vicariously liable. *Otomewo v. Carphone Warehouse Ltd.*, [2012] Eq.L.R. 724.

156. *See Eagle*, 2012 WL 4739436, at \*3-4 (discussing employee's LinkedIn profile being used personally and for business purposes).

157. *See id.* at \*1.

158. *See id.*

159. *See id.* at \*8.

160. Maria E. Recalde, *The Need for a Social Media Policy*, SHEEHAN PHINNEY BASS & GREEN PA 2 (2010), <http://www.sheehan.com/uploads/pdf/New%20folder/Article%20-%20The%20Need%20For%20a%20Social%20Media%20Policy.pdf>.

161. *See Allied Concrete Co. v. Lester*, 736 S.E.2d 699, 703, 711 (Va. 2013) (after an attorney told his client to delete pivotal Facebook photos, the court ordered the attorney to pay \$542,000 and his client to pay \$180,000 for deleting the photos).

er social network, the statement could be attributed to the employer, even if the employee posted on his or her own personal account.<sup>162</sup>

Employers need to be aware of the risks and take steps to mitigate those risks by setting up appropriate policies to guide their employees' online actions.<sup>163</sup> The FTC hints that only designated employees should administer social media marketing, and that a company should make a reasonable effort to monitor social media marketing efforts.<sup>164</sup> The fact is, most employee handbooks and other work rules already address many of the concerns raised by social media.<sup>165</sup> Therefore, employers likely do not have to come up with any fundamentally new rules for social media.

#### D. Responding to Bad Publicity

Agriculture, as an industry, has frequently faced misleading and inaccurate attacks from different ideologically-driven special interest groups.<sup>166</sup> Perhaps one of the more difficult aspects of social media for marketers is how and whether to respond to false and misleading attacks on a product or brand. Because of the ability of the message to go viral, a company risks losing control of its message and potentially losing a battle of public perception.<sup>167</sup>

A company injured by an individual via social media likely has a legal cause of action and the number of lawsuits on the subject are increasing.<sup>168</sup> How-

162. See Recalde, *supra* note 160, at 2 (“[e]mployers can also be held vicariously liable for the publication of defamatory statements by its employees through social media. The defamatory comments need not be insulting”).

163. See *id.* (Examples include disclaimers stating that the views and opinions expressed do not represent those of the employer. Employees should be prohibited from using the organization's logo on personal accounts or making negative comments about a competitor, and an employer should implement controls on employees' use of social media to make favorable statements about the company or its products and/or services).

164. See FTC ENDORSEMENT GUIDES, *supra* note 33, at 6 (stating that “it's up to you [the advertiser] to make an effort to know where your people are talking about your product”).

165. See David Schwartz, *NLRB Memos Offer Cautionary Guidance on Social Media*, 248 N.Y. L.J. 11 (2012) (employers also must work to balance privacy issues with policies about social media use).

166. See, e.g., Terry D. Etherton, *Musings About Attacks on Agricultural Biotechnology*, PENN. ST. UNIV. (Sept. 16, 2008), <http://sites.psu.edu/tetherton/2008/09/16/musings-about-attacks-on-agricultural-biotechnology/>; see also Stephen Budiansky, *Math Lessons for Locavores*, N.Y. TIMES, Aug. 19, 2010, [http://www.nytimes.com/2010/08/20/opinion/20budiansky.html?\\_r=1&](http://www.nytimes.com/2010/08/20/opinion/20budiansky.html?_r=1&).

167. See, e.g., Neff, *supra* note 125.

168. See, e.g., Hayley Peterson, *A Southwest Airlines Worker Sued a Passenger Over Tweets Blasting Customer Service*, BUS. INSIDER, Oct. 16, 2013, <http://www.businessinsider.com/>

ever, someone who “retweets” or “likes” a libelous statement is unlikely to be held liable for the content. The CDA holds, “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>169</sup> If that “retweet” or “like” is modified, however, then there could be a potential for liability.<sup>170</sup> In the same vein, under the CDA, a consumer posting a negative product review will likely not be liable.<sup>171</sup> Generally, parody on the internet has been upheld on the basis of First Amendment rights, particularly if the use is considered non-commercial.<sup>172</sup>

However, litigation can be expensive and with freedom of speech protections and the large number of derogatory posts on social media, suing someone to remedy claims of defamation, business disparagement, trademark infringement, copyright infringement, slander, or libel may not be worth the time.<sup>173</sup> Before responding, agrimarketers should evaluate the credibility of the source, the level of influence generated by the source, whether the complaint is common, how serious the complaint is, and whether responding could make matters worse. For Johnson & Johnson, despite the initial backlash on Twitter, the episode had minimal if any effect on the way people view Johnson & Johnson or Motrin, as in the long run “not that many people ultimately paid attention.”<sup>174</sup>

### E. Brandjacking

Another danger agrimarketers must be aware of is the potential for unauthorized or fake usernames on social media purporting to be the company. After the British Petroleum (BP) oil spill, for instance, a fake BP Twitter account re-

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nashville-singer-is-sued-for-angry-tweets-about-southwest-airlines-2013-10 (noting one case that was ruled to potentially rise to the requisite level of a false light action); see Lauren Streib, *In Lawsuit Over Tweet, Court Sides with Defense: It's Just "Babble,"* BUS. INSIDER, Jan. 26, 2010, <http://www.businessinsider.com/illinois-court-rules-tweet-non-libelous-babble-2010-1> (noting the existence of several such suits, but highlighting one that was dismissed).

169. 47 U.S.C. § 230 (c)(1) (2012).

170. See *id.* (changing the content could potentially make it your own).

171. *Id.*

172. See, e.g., *Lamparello v. Falwell*, 420 F.3d 309, 318–19 (4th Cir. 2005) (noting that for non-commercial uses federal laws are not intended to limit First Amendment rights).

173. See William A. Taylor, *The Economics of a Civil Lawsuit*, BUS. LAW., [http://www.thebusinesslawyers.com/BBL\\_News\\_Articles/Litigation%20Economics%20101.pdf](http://www.thebusinesslawyers.com/BBL_News_Articles/Litigation%20Economics%20101.pdf) (last visited Aug. 23, 2014).

174. Jack Neff, *Crashing Motrin-Gate: A Social-Media Case Study*, ADVER. AGE (Nov. 24, 2008), <http://adage.com/article/news/crashing-motrin-gate-a-social-media-case-study/132787/>.



ceived twice as many followers as the real BP Twitter account.<sup>175</sup> This practice is known as brandjacking and can harm a company's brand or message.<sup>176</sup>

One remedy for businesses may be the Lanham Act. However, a trademark in question must be used in commerce and be likely to cause confusion, which may be difficult given the definitions of commerce in the statute.<sup>177</sup> Another potential remedy may be the Anti-Cybersquatting Consumer Protection Act (ACPA).<sup>178</sup> "[A] bad faith intent to profit" must be shown and the law is specifically limited to website domain names, thus, this option is unlikely to achieve a remedy.<sup>179</sup>

If the potential damage is serious enough, perhaps the best remedy is to ask the social media host, such as Facebook or Twitter, to shut down the offending social media. If the company can prove they are the legitimate trademark or copyright holder, the social media hosts will likely grant the removal request as most have policies against this sort of practice.<sup>180</sup> In the unlikely event the social media site refused to take down the faux account, the threat of a lawsuit would likely lead them to deactivate the account.<sup>181</sup>

## VII. CONCLUSION

With the huge number of existing and potential customers using social media, agrimarketers should utilize the technology to fully market their products. Marketing efforts should not be risk-adverse, but any risks involving social media marketing needs to be understood within the context of the law. Generally, many of the legal considerations surrounding traditional forms of advertising, such as print and broadcast, apply to social media. At the very minimum, agri-

175. Jennifer Valentino-DeVries, *Fake BP Twitter Account Draws Followers With Oil-Spill Satire*, WALL ST. J., May 24, 2010, <http://blogs.wsj.com/digits/2010/05/24/fake-bp-twitter-account-draws-followers-with-oil-spill-satire/>.

176. Steven T. Shelton, *Threats to Brands From Social Media*, 247 N.Y. L.J. S2 (2012). "Fake usernames can be used to distribute false information about a company, redirect the public to other companies or products, obtain confidential information, or simply prevent the brand owner from using them as their logical account names for marketing purposes." *Id.*

177. See 15 U.S.C. §§ 1125(a)(1), 1127 (2012) ("promoting products and services").

178. *Id.* § 1125(d) (explaining how a person would be liable for cybersquatting).

179. *Id.* § 1125(d)(1)(A)(i)-(ii).

180. E.g., *Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/legal/terms> (last revised Nov. 15, 2013).

181. See Complaint, *La Russa v. Twitter, Inc.*, CGC-09-488101 (D. Cal. May 6, 2009) (subsequently, the complaint regarding a fake account for MLB Manager Tony La Russa was voluntarily dismissed after Twitter removed the fake account).

marketers should ensure that their social media marketing efforts are truthful, accurate, and that all relevant information is clearly disclosed to consumers. Social media marketing efforts should disclose necessary information through transparency and vigilance while integrating traditional marketing safeguards. But, because it is unclear how exactly future law will be applied to social media, marketers need a proactive policy that is still geared at staying within the bounds of current law. Any company guidelines should be clear, but flexible to change with the law. Practical efforts include designated social media marketers who are well-versed on the law. Additionally, with lack of oversight guidance, agribusinesses may seek to collaborate together on developing the best practices for the industry.