

SOCIAL MEDIA PANEL

January 25, 2012

Anaheim, California

Sponsored by: Sheppard Mullin

Moderator:

Cameron Westcott, Legal Counsel, Kia Motors America

Panelists:

Ira Lam, Former Assoc. GC, Williams Sonoma

Brian Anderson, Attorney, Sheppard Mullin

Michelle Sherman, Special Counsel, Sheppard Mullin



Panelists

■ Cameron Westcott (Moderator)

- Kia Motors America/Legal Counsel
CWestcott@Kiausa.com

■ Ira Lam

- Williams Sonoma/Formal Assoc. General Counsel
iralam@gmail.com

■ Brian Anderson

- Sheppard Mullin/Attorney
banderson@sheppardmullin.com

■ Michelle Sherman

- Sheppard Mullin/Special Counsel
msherman@sheppardmullin.com

- **FTC endorsement guidelines applied to the internet and social networks**
 - **Transparency in endorsements**
 - **No undisclosed relationships**
 - **The biased, positive review**
 - **The fake, negative review**
 - ◆ Actions a company can take

FTC Staff Closing Letter To Hyundai Motor

- **FTC drafted as guidance to other companies**
- **Take away from November 2011 letter**
 - **Advertiser gift to blogger is material connection requiring disclosure**
 - **Hyundai spared because it was ignorant of promotion, and it was contrary to Hyundai's social media policy**
 - **Social media policy "safe harbor" came into play**
 - **Make sure you share your social media policy with PR agencies and advertisers, not just employees**
 - **Monitor their activities**

FTC Rule 5(a) And Online Activity

- **FTC's settlements with Twitter, Facebook, Google, and online advertiser ScanScout is part of a larger enforcement effort**
- **FTC Rule 5(a) prohibits unfair or deceptive acts or practices**
- **FTC equates violating an online privacy policy with making a false or misleading misrepresentation**

- **Actions considered to be a misrepresentation to consumers**
 - **Not preventing cyberhacking with reasonable security measures**
 - **Sharing data beyond the audience disclosed to consumers, including third party advertisers and applications**
 - **Allowing access to deleted and deactivated accounts when users were told it would be inaccessible**
 - **Using information beyond the scope of what you told consumers it would be**

Lessons Learned From Facebook Settlement

- **Review and update your online privacy policy and terms of use**
- **Coordinate changes in website with IT, marketing and legal so social media use does not outpace notice to consumers**
- **Use clear and simple language to make disclosures**
- **Take reasonable measures to safeguard consumer information**



8th Annual In-House Counsel Conference
January 11, 2012 (Beverly Hills, CA)
January 25, 2012 (Anaheim, CA)

www.acc.com/chapters/socal/



#IHCC12



Brian D. Anderson

Associate

San Francisco
Four Embarcadero Center
Seventeenth Floor
San Francisco, CA 94111

Palo Alto
379 Lytton Avenue
Palo Alto, CA 94301

Tel: 415.774.3287
Fax: 415.434.3947
banderson@sheppardmullin.com

PRACTICE AREAS

- Intellectual Property
- Entertainment, Media and Technology

INDUSTRIES

- Advertising
- Entertainment, Media and Technology
- Food and Beverage
- Outsourcing
- Sports

OVERVIEW

Brian D. Anderson is an associate in the Intellectual Property Practice Group in Sheppard Mullin's San Francisco and Palo Alto offices. He is a member of the Entertainment, Media, and Technology Industry Team.

Areas of Practice

Brian advises clients on intellectual property law, corporate law, and all forms of commercial transactions, with a focus on representing enterprise software, Internet, digital media and technology companies in their strategic technology transactions.

This includes:

- software licensing
- software as a service (SaaS) and other cloud computing services agreements
- media and content licensing
- mobile application and other mobile technology agreements
- agreements around social media and search technologies
- ad network and other ad-serving technology agreements
- privacy policies, terms of service, and end user licenses for web and mobile

Brian also represents leading food, beverage, grocery, retail, fashion, consumer product, and luxury goods/lifestyle businesses and brands in all forms of commercial transactions, advertising, social media, sweepstakes, contests, promotions, intellectual property, and corporate matters.

He also counsels clients on compliance with federal DMCA safe harbor and CDA 230 immunity regarding use of user generated content and third party content online and state and federal legislation that affects e-mail and mobile marketing and online data collection and use, such as CAN-SPAM, TCPA and COPPA.

Brian has a core strength in helping clients with federal, state, international, and industry specific privacy and data security concerns such as COPPA, GLB, FCRA, FACTA, EU

Privacy Directive, PCI standards, and responding to data security breach incidents.

He assists clients in complying with state and federal regulations governing high-profile sweepstakes, contests, and other promotions; clearing advertising in all media and complying with advertising and consumer laws; structuring gift card, rebate, loyalty, and rewards programs; and representing clients in NAD advertising challenges.

EDUCATION

- J.D. University of California, Davis, 2002, *Law Review*
- B.A. University of California, Davis, 1999, *with honors*

CLERKSHIPS

- Law clerk in the Summer Honors Program at the U.S. Securities and Exchange Commission, 2000

ADMISSIONS

- California

EXPERIENCE**Representative Matters**

Represented Yahoo! in negotiating and documenting a three-year strategic alliance with technology media company that included content licensing, Internet advertising, software distribution, and search marketing components.

Represent GitHub, Inc. in connection with SaaS, PaaS, and other "cloud" computing matters and transactions, as well as enterprise private network software licensing transactions.

Represented Adconion Media Group in its acquisition of certain intellectual property and technology assets from Joost.

Negotiated and documented numerous ad serving technology platform, ad network, and ad sales agreements between Auditide and leading media, sports, and social networking companies.

Represent AutoFuss and Bot & Dolly in connection with technology and advertising transactions.

Represented fashion designer Donna Karan in a deal that launched her new iPhone application. The application allows users to scroll through fall runway looks and create a wish list that can be sent to a personal shopper at the click of an icon.

Outside counsel to leading newspaper and media company in connection with all forms of media and technology deals, including large scale IT and business process outsourcing transactions.

Outside counsel to national and international retailers and consumer product companies, such as Williams-Sonoma, Safeway, TaylorMade-adidas Golf, Gymboree, See's Candies, and Procter & Gamble/Wella, in connection with general business transactions, privacy and data security issues, advertising, sweepstakes, contests, and other promotions.

Represent TaylorMade-adidas Golf Company in connection with various commercial contracts, license agreements, privacy and data security issues, advertising, social media, and other matters, including negotiating and drafting software development agreement for interactive in-store kiosks that help match consumers with golf products.

Outside counsel to SPIN Magazine in connection with general business transactions, copyright and publicity rights counseling, music licensing, and Internet and new media deals.

Negotiated and drafted complex joint development agreement between DHL and leading technology company regarding hybrid engine technology for use in DHL delivery trucks.

Represented producer of professional ski and snowboard jump event "ICER AIR" in San Francisco, where 200-tons of man-made snow transform one of San Francisco's steepest streets into the site for the first of its kind urban big-air competition.

MEMBERSHIPS

- Member, International Association of Privacy Professionals (IAPP)

ARTICLES

- *The Law of Online Contracts*, Media Law Resource Center Bulletin "The Ins and Outs of Online Business" (March 2011)
- *FTC Behavioral Advertising Privacy Principles Extend Far Beyond Current Requirements*, Media Law Resource Center Bulletin "Digital Media & Comments on Frontiers in Internet Law" (May 2008)
- adbriefs, Fall 2005 - present

SPEECHES

- Legal and Business Considerations of Mobile Social Media and Mobile Marketing, Social Media Legal Risks and Strategies Summit (2011)
- Legal Issues with Advertising/Marketing Using Social Media, ACCA-SoCal In-House Counsel Conference (2011)
- The Business and Legal Considerations of Cloud Computing, Law.com Panel (2010)



Michelle Sherman

Special Counsel

Los Angeles
333 South Hope Street
Forty-Third Floor
Los Angeles, CA 90071

Tel: 213.617.5405
Fax: 213.620.1398
msherman@sheppardmullin.com

PRACTICE AREAS

- Litigation
- Government Contracts, Investigations & International Trade

INDUSTRIES

- Aerospace and Defense
- Digital Business
- Social Media

OVERVIEW

Michelle Sherman is a former partner at Sheppard Mullin who took one year away to be a Los Angeles County Assistant Public Defender where she further sharpened her trial skills and won all her jury trials. Ms. Sherman returned as special counsel in the Business Trial and Government Contracts Practice Groups in the firm's Los Angeles office where she specializes in complex litigation matters, and advising companies on social media and Internet legal issues. She is the head of the Social Media Industry Team, and is editor and contributing author to the Firm's Social Media Law Update blog, www.socialmedialawupdate.com.

Ms. Sherman has a monthly Social Media Law column in the *Cyberspace Lawyer* (Thomson/West), and is a contributing author to the *Journal of Internet Law*. She has had articles printed in various publications including the *e-Commerce Law Report*, *The Recorder*, and *California Lawyer* magazine.

Ms. Sherman also speaks regularly on social media and Internet legal issues. Ms. Sherman is a regular presenter of webinars for the Federal Publications Seminars, a division of Thomson Reuters. Ms. Sherman also speaks to legal departments and business groups concerning social media and Internet legal issues, ranging from labor and employment issues, trade secrets protection, compliance with the Sarbanes-Oxley Act, FINRA requirements, and privacy issues.

Ms. Sherman is an adjunct professor for USC Annenberg School for Communication & Journalism, and will be teaching communications law in the Spring 2012. Ms. Sherman also serves as a faculty member for the National Institute for Trial Advocacy.

Ms. Sherman graduated Order of the Coif from UCLA Law School, and Phi Beta Kappa from Smith College with a degree in psychology.

Areas of Practice

Michelle Sherman works closely with clients to try and strategize a business dispute so costly litigation can be avoided, and her clients' goals can be achieved in the most cost efficient way. This legal counseling also extends to advising her clients on compliance matters, and includes the drafting of compliance programs for business clients, including social media policies, and updating ethics and compliance policies to address the social media activity of her business clients and their employees.

When litigation is unavoidable, Ms. Sherman has handled a wide range of cases from

alleged unfair competition, price fixing, tortious interference with contract, breach of contract, Cal. Business & Professions Code Section 17200 (unfair trade practices), trademark disputes, misappropriation of trade secrets, fraudulent conveyance, partnership disputes, Clean Water Act, and other business and white collar matters, before state and federal courts, arbitrators and FTC administrative judges. Ms. Sherman has tried a number of cases, with her client being the prevailing party in most instances.

EDUCATION

- J.D., University of California at Los Angeles, 1988, *Order of the Coif*, American Jurisprudence Award in Antitrust
- B.A., Smith College, 1983, *Phi Beta Kappa*, Chair of the Academic Honor Board

ARTICLES

- Anonymous Bloggers and the First Amendment, *FindLaw*, October 17, 2011
- Background Check: Social Media And Job Candidates, *Employment Law360: Litigation, Policy & People News*, October 17, 2011
- Is Your Company's Social Media Launch Ahead of Its Compliance Program, *FindLaw*, October 7, 2011
- Why Every Business Should Have a Social Media Policy, *e-Commerce Law Report*, August 2010
- Antitrust Compliance Programs Under The Federal Sentencing Guidelines, Fall 1998
- Vertical Maximum Price Fixing Is No Longer A Four Letter Word Under Federal Antitrust Law, Spring 1997

Government Contracts Law Blog Articles

- "Loose Tweets Sink Fleets" - What Government Contractors Should Include In Their Social Media Policy," November 11, 2010
- "The Fourth Amendment Trumps Unbridled Government Searches Of Electronic Data (And What Companies Should Know To Protect Their Interests)," March 19, 2010
- "New FCA Rules Put Lenders and Brokers Directly in Their Gun Sights", August 12, 2009

Social Media Law Update Blog Articles

- "Your Social Media Policy May Need Revamping," October 3, 2011
- "Legal Issues Surrounding Social Media Background Checks," October 3, 2011
- "Anonymous Bloggers And The First Amendment: When And How Your Company Can Identify Its John Doe Defendants," July 25, 2011
- "10 Social Media Must Haves For Your Corporate Compliance And Ethics Program," July 18, 2011
- "Does Your Sarbanes-Oxley Act Compliance Program Reflect Your Social Media Presence?," June 21, 2011
- "Is Your Company's Social Media Launch Ahead Of Its Compliance Program," May 17, 2011
- "Social Media Activity In The Workplace And The Computer Fraud And Abuse Act," May 17, 2011
- "Protecting Trade Secrets In A Post-WikiLeaks World," April 6, 2011
- "Before You Hire That Online Reputation Manager, Consider Your Legal Alternatives," April 6, 2011

- "Why Companies Want Arbitrators Who Have A Public Profile On LinkedIn And The Internet," March 9, 2011
- "Why Social Media Activity May Mean Updating Your Insurance Coverage," March 9, 2011
- "Social Media Research + Employment Decisions: May Be a Recipe for Litigation," January 18, 2011
- "E-Discovery Rules Applied to Social Media: What This Means in Practical Terms for Businesses," January 18, 2011
- "What You Wish Your Lawyer Had Told You About Social Media," December 14, 2010
- "The Anatomy of a Trial With Social Media - The Jury," December 14, 2010
- "The Federal Trade Commission's Proposed Framework For Consumer Privacy Protection - The Basics," December 14, 2010
- "Businesses May Have Some Legal Recourse For Anonymous Smear Campaigns On The Internet," November 16, 2010
- "Chapter Two: Blog Hyperlinks To News Stories - Copyright Infringement Or Not," November 16, 2010
- "Blog Hyperlinks to News Stories = Copyright Infringement or Not?" October 18, 2010
- "Information Sharing On The Internet May Mean Fewer Confidential Trade Secrets," October 18, 2010
- "Cyber-Bullying Does Not Happen In a Vacuum," October 18, 2010
- "Bloggers and Web Media Beware: You Can Be Sued For Defamation If You Change A Video Clip And Distort The Speaker's Original Message," September 10, 2010
- "'Astroturfing' With Fake Reviews Exposes A Company to Legal Risk," September 10, 2010
- "Why Every Business Should Have A Social Media Policy," September 10, 2010

SPEECHES

- Panelist, "Use of Social Media in IP Litigation", AIPLA (American Intellectual Property Law Association) Midwinter Meeting, Orlando, FL, February 3, 2011
- Panelist, "Everything - and We Mean Everything - You Need to Know About Social Networking ... But Were Afraid to Ask!", UCLA Law School, February 16, 2011
- Webinar, "Loose Tweets Sink Fleets - Social Media Policies and Guidance for Government Contractors", Federal Publications Seminars (West Thomson), February 23, 2011
- Panelist, "Everything - and We Mean Everything - You Need to Know About Social Networking ... But Were Afraid to Ask!", UCLA Law School, March 9, 2011
- Speaker on Social Media Use, The Straus Council of Distinguished Advisors Annual Meeting, Pepperdine University Law School, April 6, 2011
- Panelist for program on Social Media, Advertising and Branding, Women Lawyers Association For Los Angeles, Business Section, April 7, 2011
- Webinar, "Social Media Issues For Corporate Counsel", Federal Publications Seminars (West Thomson), April 27, 2011
- Webinar, "Safeguarding The Company Jewels: Trade Secrets In The Post-WikiLeaks World", Federal Publications Seminars (West Thomson), May 11, 2011
- Webinar, "How To Address Defamatory Material On The Internet About Your Business", Federal Publications Seminars (West Thomson), June 14, 2011

- Webinar, "Social Media Law and Corporate Compliance for Government Contractors ", Federal Publications Seminars (West Thomson), September 21, 2011
- Webinar, "Social Media Law and Corporate Compliance: Key Policy Elements", Federal Publications Seminars (West Thomson), September 22, 2011
- Moderator, "Social Media - What Business Owners Need To Know", Vistage International's All-City 2011, Los Angeles, September 27, 2011
- Speaker, "The Use Of Social Media In The Workplace: OMG/TMI", Sheppard Mullin Richter & Hampton LLP breakfast program, September 29, 2011
- Panelist, "Does Tweeting Beat Meeting? – The Ethics of Social Networking", California Minority Counsel Program, October 5, 2011

EVENTS

- Social Media: How to Minimize Legal Risks and Maximize Commercial Success
- Social Media: How to Minimize Legal Risks and Maximize Commercial Success
- The Use of Social Media in the Workplace: OMG/TMI
- Everything – And We Mean Everything – You Need To Know About Social Networking (Facebook, Twitter, LinkedIn, etc.) ... But Were Afraid To Ask

Cameron Westcott serves as Legal Counsel for Kia Motors America. His practice consists primarily of advertising and marketing matters, including social media. Mr. Westcott received his J.D. from Boston University School of Law and his B.A. from the University of California at Berkeley.

Social Media Law Blog

Highlighting Legal Issues Regarding Social Media

Presented By **SheppardMullin**

Social Media Law Update

Posted at 11:41 AM on December 27, 2011 by Sheppard Mullin

Facebook's Settlement With The FTC Is A Wake Up Call For Businesses To Review And Update Their Website Privacy Policy And Agreements

By [Michelle Sherman](#)

The Federal Trade Commission ("FTC") is working hard to make sure consumers are not being misled about how websites and social networking sites are using their personal information. Companies that do not follow their own privacy policies are finding themselves the subject of FTC complaints. It is therefore even more important for businesses to review and update their "privacy policy," "terms of use," and other legal agreements on their websites. This review should also include any company apps.

1. When Businesses Do Not Comply With The Terms Of Their Website Privacy Policy, Then They May Be In Violation Of Section 5(a) Of The FTC Act

The recent consent decrees that the FTC entered into with [Facebook](#), [Google](#) and online advertiser [ScanScout](#) highlight the need for businesses to make sure they are acting in accordance with their privacy policies. Businesses are well advised to take the following actions:

- (1) Ensure that the published policies on their websites for terms of use and privacy reflect what information the businesses are collecting from consumers, and that the disclosures are clearly stated without unnecessary and lengthy legalese;
- (2) Examine how the businesses are using personal information or anticipate using it, and that these uses are being fully disclosed to consumers; and
- (3) Take reasonable measures to safeguard consumer information. Because of the risks of cyberhacking, it is also worthwhile to conduct an audit on how consumer information is being safeguarded, and what information is being stored and for how long a period. The FTC settled a complaint against [Twitter](#) for its alleged failure to take reasonable safeguards to protect users' accounts against hackers.

In all of these complaints, the FTC alleged that the respondents made false or misleading representations about their privacy policies in violation of Section 5(a) of the FTC Act. The FTC Act prohibits unfair or deceptive acts or practices. 15 U.S.C. § 45(a).

The consent decrees entered into by Facebook, Google and ScanScout in order to avoid more costly litigation and possibly stiffer penalties are similar in some key respects, and include some terms that will increase their costs of doing business. As is sometimes the case with the FTC, the FTC conditioned the settlements on these businesses

agreeing to change their business practices in ways that may place them at a competitive disadvantage to their competitors because some of the additional privacy measures they must now take are not required under current law.

2. Lessons To Be Learned From The FTC Settlements With Facebook And Others

It is instructive to know how these businesses allegedly violated the terms of their privacy policies with users because the same may be true for many companies.

(a) Facebook Complaint

In its complaint against Facebook, the FTC alleged:

- (1) Facebook told its users that third-party apps that users installed – such as Farmville by Zynga– would have access only to user information that they needed to operate. In fact, the apps could access nearly all of the users' personal data.
- (2) Facebook told users that they could restrict sharing of data to limited audiences – for example, with "Friends Only." In fact, selecting "Friends Only" did not prevent their information from being shared with the third-party applications their friends used.
- (3) Facebook promised users it would not share their personal information with advertisers. Facebook did according to the FTC.
- (4) Facebook claimed that when users deactivated or deleted their accounts, their photos and videos would be inaccessible, when in fact Facebook allowed access to the content according to the FTC.
- (5) Facebook also claimed that it complied with the U.S. – EU Safe Harbor Framework that governs data transfer between the U.S. and the European Union, but it did not.

(b) Google Complaint

Google is also faulted for making use of its users' data in ways that was contrary to what Google was telling users about the launching of Google's Buzz social network through its Gmail web-based email product. The FTC alleged that "Google led Gmail users to believe that they could choose whether or not they wanted to join the [Buzz] network, [but] the options for declining or leaving the social network were ineffective." Google was apparently trying to immediately ramp up its social network in order to compete with Facebook. The Buzz launch ended up being a public relations nightmare for Google with thousands of consumers reportedly complaining that they were concerned about public disclosures of their email contacts from which Google tried to create immediate Buzz connections for users. In some cases, use of the emails disclosed ex-spouses, therapists, employers or competitors.

According to the FTC, Google breached its privacy policy when it launched Buzz, its social networking site, because Google's policy told Gmail users that "[w]hen you sign up for a particular service that requires registration, we ask you to provide personal information. If we use this information in a manner different than the purpose for which it was collected, then we will ask for your consent prior to such use." According to the FTC, Google used Gmail users' information for a different purpose without telling them by starting a social networking site with the information.

(c) Online Advertiser ScanScout Complaint

The FTC is not just pursuing these actions against social media behemoths such as Facebook and Google. In November 2011, the FTC reached a settlement with an online advertiser ScanScout. ScanScout is an advertising network that places video ads on websites for advertisers. ScanScout collects information about consumers' online

activities (aka behavioral advertising) in order to post video ads targeted to the people visiting the website. In ScanScout, the FTC alleged that there was a discrepancy between the online service and their website privacy policy:

"[F]rom at least April 2007 to September 2009, ScanScout's website privacy policy discussed how it used cookies to track users' behavior. The privacy policy stated, 'You can opt out of receiving a cookie by changing your browser settings to prevent the receipt of cookies.' However, changing browser settings did not remove or block the Flash cookies used by ScanScout.... The claims by ScanScout were deceptive and violated Section 5(a) of the FTC Act."

In the ScanScout action, the company Tremor Video, Inc. is also subject to the settlement order because ScanScout merged with Tremor Video. This settlement also highlights the importance of doing an audit of a target company's social media activity before acquiring or merging with it so your company will have more information concerning the legal risks of the deal.

3. Business Costs Of Not Updating Your Privacy Policy And Following It

In each of these cases, the FTC is making the settling party do some things that are more than they would have been required to do in the normal course of business, thereby, making it more challenging and expensive for them to do business.

These consent decrees require the settling party to do the following:

- (1) Tell users what information is being collected and for what purpose, with the right to "opt out" of the targeted advertising (ScanScout);
- (2) Obtain consumers' affirmative express consent before enacting changes that override their privacy preferences (Facebook; Google);
- (3) Establish and maintain a comprehensive privacy program to address privacy risks associated with new and existing products and service, and protect the privacy and confidentiality of consumers' information (Facebook; Google); and
- (4) Every two years, for the next 20 years, obtain independent, third party audits certifying that the privacy program meets or exceeds the requirements of the FTC order (Facebook; Google).

4. Conclusion

Considering that the vast majority of consumers simply click through the legal agreements to get to the applications on a website, there is no real downside to companies spending a little time and money to ensure that their privacy policy, terms of use and other legal agreements reflect their current practices. Similarly, updating these agreements should be a routine part of changing how the company is collecting and using information from its users. It should be coordinated between marketing, IT and legal with each checking off on the updates being accurate. And, finally, the website should clearly indicate that the privacy policy and/or agreements have been updated so users have the option to review any changes. If experience is any indicator, virtually all users will continue to visit the website notwithstanding the updated policy or agreements.

For further information, please contact [Michelle Sherman](#) at (213) 617-5405. ([Follow me on Twitter!](#))

Comments (0)

Attorney Advertising