

# Legal Risks in Social Media Marketing

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**Abstract**—Social media is an important communication channel for marketers. The research conducted earlier shows that more than 81% of the businesses are using social media or planning to use social media for marketing purposes. The social media is used for engagement marketing, buzz marketing, building customer relationships and to revitalise brand image. As social media marketing facilitates two way communications between the marketers and the users, the content generated in social media is considered trustworthy and reliable by the customers. The marketers while using the social media should be aware of the legal risks involved in social media marketing. This research paper by using content analysis looks at social media marketing and legal risks involved in social media marketing.

**Index Terms**—Social media, marketing, legal risks, regulations.

## I. INTRODUCTION

Social media marketing is a phenomenon where businesses are seeking new ways to create value. The introduction of social media considerably changes the marketing activities and consumers' behaviours. With the introduction of various technologies associated with social media the businesses and consumers participate in marketing activities easily without cost. Though social media is relatively a new media, its popularity is increasing rapidly across the world. Social media is used to engage with consumers, promote the business products and build business brands. Social media is also used as online word-of-mouth marketing to create buzz marketing effect of trust and reliability on products and brand. In the process, the businesses are building customer relationship management of their brand where the consumers' suggestions and inputs about a product or service are given enough consideration in improving business processes, innovation and product development [1], [2]. The social media marketing as an interesting marketing tool creates unprecedented opportunities along with risks. Privacy violations and breaches on promotion laws are common legal errors the businesses commit when they involve in social media marketing. One of the main reasons for business going for social media marketing is that they can collect a lot of real, current but actionable data of all types of consumers so that they can target the customers' needs and satisfy them in their offering. The collection, usage and storage of personal data must be consented by the user otherwise they can be considered as violation of privacy in many countries. With

the availability of data the businesses want to use various promotional activities to attract the customers. When they promote their products, they need to be aware that any promotional activities that can be considered as false, misleading or deceptive must be avoided. Even the use of influencers and endorsers who have material connection must be disclosed. This paper analyses the use of social media for marketing activities and various legal risks involved in social media marketing.

## II. METHODOLOGY

The paper studies the social media marketing and the legal risks by comparing the legislative and regulatory frame work of USA, European Union, Australia and United Arab Emirates. This study helps to find out the different types of marketing activities in social media and associated legal risks. The study uses the appropriate literature, laws and regulation for content analysis. Followings are the laws and regulation that have been analysed in this research.

European Union Directives	US Laws	Australian Laws	UAE Laws
The European Union Directive on Data Protection,	Children's Online Privacy Protection Act (COPPA, 2000)	Commonwealth Privacy Act 1988,	Federal Constitution of UAE
Privacy and Electronic Communications Directive 2002	Deleting Online Predators Act in 2006	Privacy Amendment Act 2000,	Penal Code,
	Self-Regulatory Program for Online Behavioural Advertising	Australia Competition and Consumer Act 2010	Dubai Electronic Transactions and Commerce Law (No.2 of 2002)
	Trade Commission Act		Data Protection Law 2007
	CAN-SPAM Act (Non-Solicited Pornography and marketing Act)	Australian Anti-Spam Act 2003	Consumer Protection Law (No.3), 2003
	Telephone Consumer Protection Act (US)	Do-Not-Call Register Legislation 2007	
	FTC's Guidelines Concerning the Use of Endorsements and Testimonials in Advertising		

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In addition to the laws and regulations relevant decided cases are also analysed to find out the legal risks involved in social media marketing.

### III. SOCIAL MEDIA MARKETING

Social media marketing is the use of the social media for marketing activities. Boyd and Ellison [3] defined social media by including three features of social media “web-based services that allow individuals to 1) construct a public or semi-public profile within a bounded system, 2) articulate a list of other users within whom they share a connection, and 3) view and traverse their list of connections and those made by others within the system.” The definition shows that social media is an umbrella concepts that included social software and social networking. It comprises of various applications that connect people and track their web based discussions or activities. This media enable the users to interact, communicate, and share ideas, content, thoughts, experiences, perspectives, information, and relationships [4]-[7]. The social media includes among other social networks, online communities, blogs, bulletin boards and audio video and photo sharing services.

The social media is growing exponentially and being adopted by various quarters including the business. The very nature of social media being viral makes more than 81% of the business to use social media for marketing purposes. It is expected to generate revenue of \$8.3 billion in 2015 [1]. The social media marketing is defined as using social media to promote products and services. The use of social media makes the customers as marketers or advertisers [8]. It allows the marketer to create and share contents with participants [9]. The social media as a unavoidable marketing tool should be utilised in all marketing related activities including marketing intelligence, promotions, public relations, product and customer management and marketing communications [10], [11]. Since there is a reliance and trust on user generated contents by the other users in social media, user generated contents creates positive image about the business brands. [12], [13]. The reviews by the users on certain products and services in social media could be considered as important since they are serving the company as free sales assistants [14]. Thus as Godin [15] has suggested the businesses should sponsor social media to promote the brand, products or services or engage with the customers so that they could to some extent control negative image of corporate brand and promote positive marketing.

Social media marketing plays a vital role in establishing effective engagement marketing. Engagement marketing in social media era requires two way interactions between the businesses and consumers. Although the engagement marketing is costly for the business as they have to manage customer interaction, co-creation and blogging, it is imperative to have a good strategy for managing engagement marketing. The closer the engagement with the customers, the stronger the business could create user acceptable products and service. This will be able to create trust among online communities. Reviews and comments in social media channels become first reference points for consumers when they search information of products and upon which they

make their buying decisions [16]. In the modern age of engagement marketing, consumers are in control and brands cannot be built through traditional marketing tools alone.

Viral, buzz or word-of-mouth marketing (WOMM) is another focal feature of social media marketing. In WOMM, the marketers sway the consumer-to-consumer communications in their favour [17]. The emergence of social media helps the marketers to strengthen their existing marketing communication mix. The businesses could promote their product in social media but many businesses use the influencers in promoting and creating positive image about their products along with traditional marketing communication tools so that online WOM could be acceptable and considered as reliable. The influencers could be community representative or academics or artists. Along with the use of influencers, the business also gives the privilege to use the products for free or as gifts to the influencers so that they will rate the products favorably to other users [18]. The review by the users and influencers are very important product related user generated contents that may be used by the businesses for their marketing campaigns. However, the risk is that the buyer created facilities may be misused which could create unfavorable image about the business. Or there may be likelihood that user created content cannot be controlled [14].

The social media also facilitates the businesses to improve on their customer relationship using social media. It allows the customers and businesses to have open conversation and this helps to promote healthy relationship. It is used as an important medium to respond accurately to negative comments or discussions about the products or brands in a timely manner [10]. By establishing strong customer relationship management, the business tries to retain profitable customers and also try to reach out to the largest young customers. The customer relation management tries to move the customers from awareness to customer advocates [19]. When customers become companies' advocates, the company builds strong campaigners who are determined to build good brand equity for the company [10]. In order to keep the die-hard loyal customers, the businesses take proper strategies like providing some tangible value for their time and effort [20].

### IV. LEGAL RISKS IN SOCIAL MEDIA MARKETING

Businesses are excited of getting vast international consumer based for promotion, live interaction, enhancement of loyalty, sale and expand market share via social media. In the race to capture the promising social media marketing, many business tend to ignore the potential legal risk and subsequent legal liability. The business may be sued for collection, use and misuse of personal data. It also could face intellectual property violation issues when they use user generated contents. There is also a potential liability on various forms of advertising.

#### A. Privacy Violation

Privacy is considered as necessary for the development of varied and meaningful interpersonal relationships [21] or the value that control others access on personal data [22] or a set

of norms that enhances personal expression and choice [23] or some combination of these [24]. Privacy is considered very important because the individual will retain the right to determine when, how, and to what extent information is communicated to others. Privacy is about the human personality. By providing protection of privacy, individual's independence, dignity and integrity can be protected and reserved [25]. The very nature of privacy can be violated by businesses when they collect personal information, preferences and buying behaviours of users and use them in targeting users with promotional activities. The social media activities generates huge amount of private information and these information are used to build consumer databases. Building a consumer database could be the best strategy to serve the customers best. Nonetheless the business should take note of privacy concerns in building databases and using the private information. Privacy is a paradox where the consumers want to keep private information under their control whereas the businesses want to maximize the use of it [26], [27].

The European Union Directive on Data Protection which was incorporated in all the member countries and adopted by many trading partner countries has important implication for the protection of personal data of EU consumers. Personal data under the Directive includes any information or opinion of a living person who is identified or identifiable as personal data that includes opinion about others. As per the Directive the businesses who intend to collect, store or use consumer information need for principles set out by the Directive. The personal data must be processed fairly and lawfully. It implicates that the data must be collected directly with consent. The collection of data via social media without the express consent will go against this principle. The collection must be for specified, explicit and legitimate purposes. As such, the consumer data is only allowed to be processed in accordance with the purpose for which they were obtained. This provision also prohibits excessive collection of data for future purposes. In the UK's Data Protection Tribunal in *Runnymede Community Charge Registration Officer v. Data Protection Registrar* held that where information is required in relation to certain individuals it is not reasonable to hold excessive information about all individuals. Sensitive data are provided more privacy by requiring the consent to be "explicit consent". The EU Directive states that sensitive data would include racial or ethnic origin, political opinion, religious believe, (and) philosophical or ethnical persuasion, and sexual life. It may even include racial or ethnic origins, political opinion, membership of political association, religious beliefs or affiliation, philosophical belief, membership of professional or trade organisation, membership of trade union, sexual preference or practices, criminal record, and individual health information [28]. When personalisation of products or target marketing activities mean, more specific information is required that may include sensitive information. In the event if these information are to be used the compliance as to "explicit consent" is to be considered seriously.

The Directive is also requires the data collector to collect adequate, relevant and not excessive data in relation to the purpose, for which the data was collected. This principle

makes it important for the collector or businesses to destroy once the purpose of collecting the information ceases. In *Community Charge Registration Officers of Runnymede Borough Council, South Northamptonshire District Council and Harrow Borough Council v Data Protection Registrar*(DA/90 24/49/3), the tribunal found that the holding a database of property information obtained from voluntary answers was not necessary for the purpose for which the data was collected and they are excessive information. Personal data shall also be accurate and kept up to date. Thus keeping and using any outdated, misleading, and incorrect information should be avoided. It requires reasonable steps to make the data accurate and updated. Personal data shall be processed in accordance with the rights of data subjects and data collection storage and usage must respect rights of data subjects.

It requires also appropriate technical and organizational measures to be taken against unauthorized or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data (article 17), and Personal data as per Article 25(1) shall not be transferred to a country or territory outside the European Union unless the country or territory ensures adequate level of protection for the rights and freedoms of data subjects in relation to processing of personal data. This provision mad many countries to come formally acceptable laws or rules that are compatible with the EU Data Protection Law. Many companies when they go on social media marketing it may be very difficult to access to certain country thus appropriate measures in term of policy or operation of their marketing activities must be clearly devised to avoid being exposed to legal risk in term of violation of privacy. Google Earth was not allowed in EU as it collect lots of personal identifiable that was considered as violating personal data.

Article 13(1) of the Privacy and Electronic Communications Directive 2002 permits direct marketing provided prior consent was given. It is very important for the companies to make sure that their marketing communication is solicited. This law makes it mandatory to businesses to allow the subscribers to opt-out at any time. When a new or an existing consumer signifies his intention to receive marketing communication in relation to a particular product or service, any marketing materials sent must be in association of the product he bought from the company. Tapping of the consumer sensibility and lifestyle to advertise products that may be preferred by consumers will not be allowed as the customer may not give the consent to receive any information or the consent given is only for receiving information about a particular product.

Australia regulates privacy of social network users through two different laws. One law regulate public sector and the other regulate the private sector. The Commonwealth Privacy Act 1988 applies11 Information Privacy Principles (IPPs) to all Commonwealth Government departments. The Act is compatible with EU Personal Data Protection Directive in providing basic assurance of privacy and security of data of social media users. The Private sector is regulated through the Privacy Amendment Act 2000. It covers personal information or opinion that can identify a person. As the law intended to facilitate co-regulatory

approach, it gives the choice to industry either adopt the existing privacy principles followed by the public sector or develop a industry- relevant codes that should be approved by Federal Privacy Commissioner. It is expected from the businesses that they should take all 'reasonable steps' to honour the privacy principles. The privacy principles intend to cover collection, storage, maintenance, use and disclosure. The marketers who are using social media for marketing purpose can only collect information if the customers or users gave their consents. The customers' consents can be reasonably considered as implied as long as the reason for the collection is clear to them. It may be necessary to the businesses to notify of the consumers of the handling of their data.

In United Arab Emirates the Federal Constitution, the Penal Code, Dubai Electronic Transactions and Commerce Law (No.2 of 2002) and the new Data Protection Law could be invoked in protecting the social media users' privacy. Article 31 of the Federal Constitution sets to protect secrecy of communication and the information of individual. Thus any collection, use and storage of personal information of social media users against their knowledge and approval could be considered as criminal actions. The Penal Code in section 378 states that disclosure or use of any information or picture or view of a person's private life is a crime. Similarly section 379 states that any information received in confidence cannot be disclosed without the consent of the person who imparted in confidence. The Federal Constitution and the Penal Code clearly guarantee protection of personal data. Thus collection, use, selling and distribution of any personal or private data could be easily classified as crimes. Dubai, the commercial state of UAE, through Dubai Electronic Transactions and Commerce Law (No.2 of 2002) and Data Protection Law (DIFC Law No.1 of 2007) two regulate data privacy. Dubai Electronic Transactions and Commerce Law (No.2 of 2002) penalizes a person who intentionally discloses any information included in records or files. The provisions are similar to the 1995 EU directive which introduced "opt-in" system where getting consent of the users is an important prerequisite to collect, store and use the personal data of data subject. The law allows the data subject the right to access, right to deny collection of data and right to correct the data collected. The law also establishes a Data Commissioner to oversee the administration of data privacy. The legal paradigm in UAE in protection of personal data against the use and misuse by business is comprehensive where it provides criminal and civil sanctions against the violators.

#### *B. Privacy of Children's Data and Social Media Marketing*

Social media marketers also use the private information of children for target marketing purposes. The children are the heavy users of social media without consideration or fear of privacy violation. Children rarely read the privacy policies of websites and generally unaware of their legal rights. The social networks facilitate capturing of personal data and information of the users while providing with tools to interact with other users [29]. The in-discriminatory nature of collection and use personal data of children is a grave

concern to parents and regulators. Though the general privacy law can be applied to protect children's privacy, many organisations and national governments passed new laws to control privacy violation. United Nations General Assembly in 1989 adopted the International Convention on the Rights of the Child which requires the governments to respect and ensure the rights of children, including the right to the protection of their privacy. The EU is also trying to strengthen the children's privacy by passing additional resolution and educating the children. The Data Privacy Commissioner recommends the business to adopt measures relating to information control, security, profile eliminations, promote the use of pseudonyms, prevent mass data profile downloads and guarantee that user data can only be explored by external search engines with consent .

The US stands on privacy is "opt-out" in general. However, on protection of privacy, the Federal Trade Commission of USA developed the Children's Online Privacy Protection Act (COPPA, 2000) which requires the Commission to enact rules governing the online collection of personal information of children under 13 (Barnes, 2006). It is required on businesses to take reasonable effort to ensure that before personal information is collected from a child, one of the child's parents must be informed and consents to those practices must be obtained. Through this practice the children will be informed whether the content they wish to access is suitable for their age group. Pennsylvania drafted a law called Deleting Online Predators Act in 2006. This Act requires federally funded schools to filter all the commercial sites that may possibly collect children information. Children Advertising Review Unit was set up by industry as a regulatory body to review nationally disseminated children-directed advertising. It also issued guidance similar to FTC rules as to collection, use and storage of personal data of children. Industry wide regulation is also came up with "Self—Regulatory Program for Online Behavioural Advertising". The main objective of this regulation is to regulate on tracking of online activities. Facebook and selected marketers were suit in 2008 under class action for allowing external websites to Facebook for target advertising to Facebook users (Lane v. Facebook. Inc., Case No. 5:08-CV-0385-RS, ND Cal. Aug. 12 2008).

#### *C. Violation in Social Media Promotion*

The social media created greater opportunity for promotion to all the users of social media without boundaries. The traditional laws on marketing will be applied to marketing in social media too. In US the Trade Commission Act states that unfair or deceptive practices are illegal. The federal law was extended to all the states where the state laws are also against the deceptive and unfair promotional and trade practices. When the marketers use certain promotional tools like price comparison, rebates and others, the promotions must be true and must be able to substantiate the claims or actions. When companies outsourced its promotional activities to third party, they also make sure that no violation of promotional laws as the deceptive practices of third party could make the main company liable. In Swift v. Zynga Game Network Inc. No. CV-09-5443, N.D. Cal. Nov. 17, 2009), facebook and Zynga Game company was sued for

deceptive practices of a third party affiliate. Thus it is important to regulate the third party affiliates activities to mitigate risks. In Australia, the Australia Competition and Consumer Act 2010 regulates all types of deceptive practices including false guarantees.

The other issue in promotion is the use of unsolicited emails and telephone calls. The social media allow the marketers access to personal contact details. When they use that information for marketing purposes, they are not only violating laws related to privacy but also laws on promotion. USA regulates unsolicited mails through CAN-SPAM Act (Non-Solicited Pornography and Marketing Act). The unsolicited telephone calls or message "calls" are also prohibited under Telephone Consumer Protection Act (US). In Australia, the Australian Anti-Spam Act 2003 imposes restriction on marketers. The Australian Communications and Media Commission came up with the code to control of spamming. All the businesses adopting e-marketing practices are obliged to follow the code. Australia also came up with Do-Not-Call Register Act 2007. This legislation prohibits companies to use the telephone numbers registered under this Act for marketing purposes.

When the marketers use endorsement or testimonial, the law generally requires the relationship or "material connection" between the parties to be disclosed. The FTC's Guidelines Concerning the Use of Endorsements and Testimonials in Advertising requires that "material connections" between the consumer endorser and the company must be disclosed. So that the general consumers will be made aware that the endorser is not acting independently but has connection with the company and they can decide whether they want to rely on the endorsement fully. If material connection is not disclosed, the advertiser can be held liable for deceptive social media endorsement. In the event, if an advertiser gave free sample or gift to a blogger or influencer with the hope that he will talk favourable about the product, the advertiser is obliged to disclose. The provisions of Australian Competition and Consumer Act 2010 are also regulating the use of influencers.

In UAE, the Consumer Protection Law (No.3), 2003 in section 4 prohibits deceptive and unfair practices in general regardless of medium that the marketers use. Thus any deceptive practices via social media come within the prohibition of the Consumer Protection Law. If the marketers happen to use the email or message system for unsolicited marketing, the Unsolicited Electronic Communications Regulatory Policy issued by Telecommunication Regulatory Authority, will be in use. The policy controls all the unsolicited mails and messages. It requires the businesses to get consent from the customers for receiving unsolicited mails or messages. It also urges the businesses to talk reasonable measures to control spam.

## V. CONCLUSION

Social media is being utilised well for marketing purposes. They have been used for brand building, conveyance of product knowledge, establishing and maintaining customer relationship, creating awareness, engagement, conversation, influencing and tracking consumer believes and attitudes

[30].The use of social media have created not only opportunities but also risks. One of such risks is legal risk. The article discussed two major legal risks associated with social media marketing. The marketers could easily breach privacy or data protection laws if they use personal information of social media users. Any use of private information collected and used without mentioning the terms and condition or without indicating that the information could go to the company's databases could violate privacy law in many countries. The law also requires the marketers to provide opt-out option. The promotion activities using social media platform are also regulated by many countries. The deceptive or false claims or advertisements will lead many social media marketers into liabilities. The use of influencers or endorsers who have material connection with the company must be declared to avoid unfair influence on the users' buying decision. The laws in many countries provide legal framework to regulate the unsolicited mails, messages or message "calls". It will be better for marketers to devise appropriate strategy to avoid or mitigate the legal risks. The marketer should have clear terms and conditions that specify the terms upon which they operate. It is also necessary to practice opt-in system when they collect, store and use personal data. Special attention need to be drawn in cases where the company is collecting behavioural or other personal data of children. In case the marketers are sending solicited mails to the existing customer, they should allow the customers to "opt-out" if they wish to.

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