



LEGAL ASPECTS OF SOCIAL MEDIA

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PREFACE

Social media is being increasingly used and ever-increasing in marketing concepts. New opportunities offered by networks such as Facebook and Twitter, however, also carry new legal risks. This paper provides an overview of the legal issues arising from the use of social media in Germany and Switzerland and highlights how these challenges can be met.

As with all other online activities, a country's borders are effectively invalidated by the use of social media. Tweets or Facebook profiles are accessible worldwide. It may therefore be possible that a Swiss company using social media has to comply with German law. The same applies for companies from other EU member states or overseas targeting Swiss or German customers via social media platforms – they may be subject to Swiss or German legislation.

The mere accessibility of a Facebook profile in Switzerland or Germany does not yet make it necessary to comply with country-specific legal requirements. For such legislation to apply, a concrete connection to the relevant country or instruction to users from that country is required. As a rule, a Facebook profile page of a company that offers products in these markets, also addresses users from these countries. Here, a specific connection for the company in question must exist. This connection arises when a profile page has shown a large number of users from Germany and/or Switzerland. In contrast, profile pages of companies which do not offer products in Central Europe or are not well-known, normally only address users from their home country. In this case, the necessary connection will not exist and compliance with the laws of Germany and/or Switzerland will not be required.

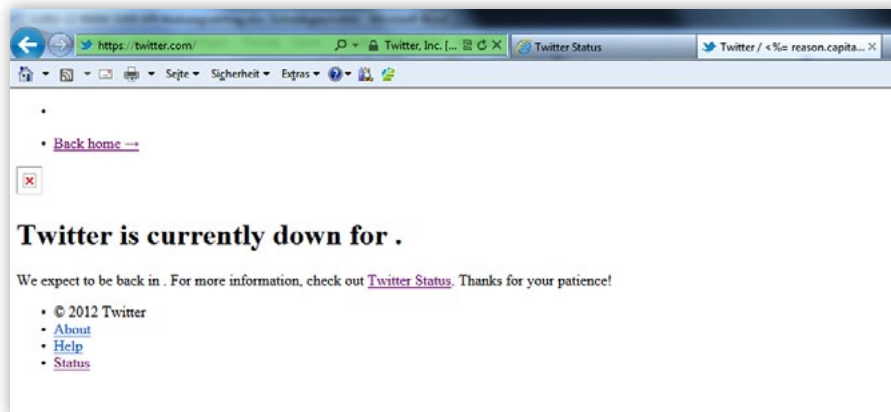
This paper addresses the requirements of both Swiss and German law. It should be noted that in certain cases, the question of the applicable law cannot be answered with certainty. In doubt the requirements of both legal systems should be observed.

I. INVESTMENT PROTECTION

The introduction of Facebook's timeline at the beginning of last year has shown that companies are forced to accept any change of policy introduced by the social media networks. Anyone who desires permanent representation by means of a contemporary presence on a certain social network, needs to be aware that this will require them to take the latest technical developments into account and may cause additional costs.

Furthermore, there is no legal protection and no remedy against the adverse effects of any changes in the network's policies or loss of investment due to such changes. The services are offered to companies free of charge, and there is therefore no obligation to provide the service at all, or in a certain way. And in fact, provision is made for this eventuality within the network's terms and conditions.

Of course, it is not expected that large networks will adjust or reduce their services from one day to the next and that, as a result, it would no longer be attractive for companies to use them. However, it is a fact that social networks can give guidelines regarding design and content which can have an impact on companies and this should not be ignored.



There is no effective legal action against failures of the network. In practice, there is no realistic chance of obtaining compensation from the network provider. For example, if a Twitter interview is announced and then fails to take place, material losses or reputational damage cannot be claimed successfully. The same applies in the event of the deletion of profiles or temporary or permanent lockouts. For example, Facebook has decided early last year (and recently revoked this decision) that profiles cannot use city names, and as a result, the profile of the city of Munich, with 400 000 fans had to be deleted. Another difficulty is that claims must be lodged at the networks' head office and are then governed by American or, more specifically, by Californian law.

The above-mentioned legal restrictions make it clear that concentrating solely on social media platforms for corporate communication is fraught with risks. Companies that rely solely on social platforms should have a plan B for different scenarios.

II. BASIC RULES REGARDING SOCIAL MEDIA PROFILES

As is the case for the internet in general, social media are subject to the law. Users tend to forget this fact, as the design of social media profiles and the content of sites can be created, edited, and deleted quickly and easily. Nevertheless, the law and the legal system of a state also apply to social media. In particular, copyright and trademark rights must be borne in mind as well as the fact that posts and tweets could offend or libel competitors.

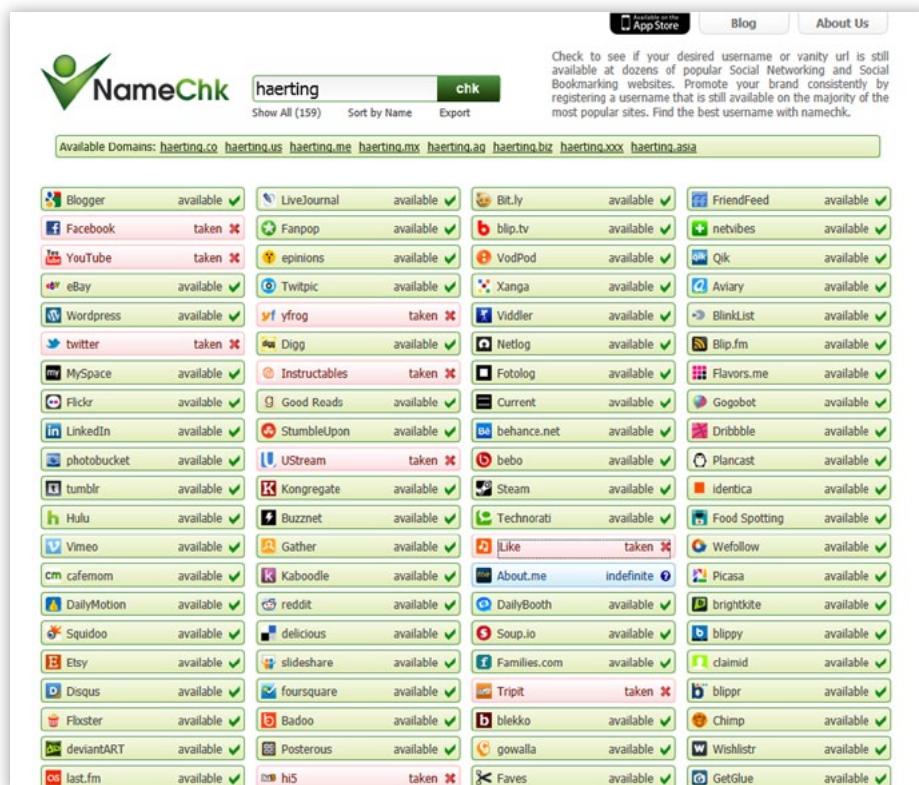
Unlike in Switzerland, where – with a few exceptions – the rules in the online context are based on the general rules, numerous special regulations apply in Germany to the online activities of companies.

1. ID-GRABBING

Many companies reserve their company's name well in advance of any decision to make use of a specific social media platform. Companies neglecting this may experience the phenomenon of ID grabbing that started causing problems in the 90s: Back then, companies found out when registering their domains that the domain had already been assigned to someone else. Similar problems are now occurring with social media platforms.



There are various services, which enable the availability of particular IDs on various networks to be checked. www.namechk.com, for example, provides a good overview. In order to avoid disputes and costs, it is also recommended that IDs on the various social networks are reserved.



Generally, the first come, first serve principle applies under both German and Swiss law. However, if a company's brand or name is being used by someone else, that company may take legal action. Legally, there are parallels to the cases of domain grabbing. In these cases, the legal situation is fairly clear: whoever reserves an internet domain name merely to sell it on to the brand owners later, is acting unlawfully under both German and Swiss law. Such activities must cease and the domain must be released. It is often hard to prove that such an infringement was committed with intent and legal action can therefore only be successful in certain cases or if the domain actually was sold on (see German Federal Court of Justice, 02/12/2004, I ZR 207/01; OGer TG 02/19/2002, Z1.2001.3). It is also difficult to prove ID grabbing if the opponent can give plausible reasons why he is using the domain or the ID. This may often be the case if the brand or the company name is also a generic term.

Another legal remedy is to claim trademark infringement. A prerequisite for the success of such a claim is that business has been conducted using the name in such a way that trademark rights are affected. If the name is used solely in a private context, there is no trademark infringement.

The misuse of a company's name may also be a violation of the rights of one's own name. Nobody (including companies) has to accept misuse of their name. In most of these cases an injunction will be successful. Problems may arise if the defendant has the same name; his use of the name will, by definition, be lawful. In such cases ID can only occasionally be re-claimed successfully.

One practical problem is that it is not possible to identify the creators of social media profiles, as most social media sites do not provide any general information about the persons responsible for content. Action can only be taken against the provider if a violation of statutory rights has occurred. Where such actions are successful, the provider is obliged to remove the offending profile. Experience has shown that Facebook and Twitter respond quickly to obvious trademark infringements, although a deletion of the respective accounts sometimes requires some time.

2. CHOOSING THE RIGHT FORM OF PROFILE

There are limited options available for setting up and designing a specific and individual presence on social media platforms. As a result it may be difficult to fulfil all legal requirements whilst remaining within those limits.

Facebook offers the possibility of creating different categories of sites. As private user accounts cannot be used for commercial activities, it makes sense for companies to either create a „group“ or to transform a private account into a company profile. A group is a page that is distinct from the profile page and which provides information about a particular topic. The creation of a group does not, by itself, necessarily imply or state that it is an official corporate website.

When choosing a profile name, similar considerations have to be made as when choosing a domain name. Problems can occur where an existing brand name or profile name to which the company in question has no connection. Use of a brand name that belongs to a third party must be avoided, as confusion could arise among users that the profile is the official account of that

brand (see above with respect to ID grabbing).

Pictures should only be uploaded and used on the profile if all online rights have been obtained. This applies regardless of whether the image appears in the Twitter background, is included in messages or is used as a profile picture. It should be noted that the same rules apply as if the image were on the company's website: The photographer must give consent to the use of the picture in question.

As some platforms require obtaining an extensive license with respect to the content uploaded, the company and profile owner must check whether the rights obtained actually include the right to sub-licence the content. This is very often not the case with pictures from stock image companies. Getty Images, for instance, explicitly prohibits sub-licensing of its pictures to third parties.

Where individuals appear in such pictures, their permission must also be obtained prior to publication.

Companies are always on the safe side regarding the content of their internet presence, if they only post information on their profiles which they would also be happy to post on the corporate website.

3. IMPRINT

As is the case with EU law, German legislation requires the identification of the company offering and being responsible for a particular web service. Under German law professional profiles on Facebook, Twitter and other social networks are deemed telemedia services and thus governed by the TMG (Telemedia Act). This Act states that certain information must to be provided to the user of telemedia services.

This is generally done by way of an imprint of the particular site. Mandatory details according to the TMG include the name, address, authorized representatives, e-mail address and other contact details (usually a phone number), any registration information, professional legal information (only for certain professions), and VAT number.

Generally, Swiss law requires information on the (company) name, postal address, e-mail address of the registered office as well as the VAT number. However, in Switzerland, the legal situation regarding imprints for social media sites is not yet clear and the question has not been clarified by the courts as there have not been any precedents on this topic. We assume that an imprint is only mandatory (Article 3 para 1 lit.'s Point. 1 UWG) if the profile provides a binding offer or if customers can submit binding orders for specific products via the profile.

If the profile is linked to a company the imprint can be copied from the company's website. Difficulties may arise in integrating the imprint into the social media profile. Here it must be examined from network to network, how the respective requirements can be met. While the Swiss provision does not establish explicit guidelines about the way of integration, German law requires that the imprint must be easily recognizable, immediately accessible and readily available.

Both legal systems permit providing a link to the imprint on the company's website to meet the

obligation. If the imprint is linked to the profile, it should be noted that under German law the imprint may not be more than „two clicks away“ (German Federal Court of Justice, 07/20/2006, I ZR 228/03). In this case it is recommended that a statement is incorporated into the imprint on the website making clear that the information provided also applies to the social media profiles of the company.

III. RESPONSIBILITY FOR CONTENT AND MANAGEMENT OF CONTENT

It is crucial for companies to think about who will be responsible for communicating on behalf of the company through the respective social media channel with fans, followers, members etc. The means of communication may include the PR department, a social media team, individual employees or external agencies. This may have implications in the design of the imprint. In any case it should be clear that it is a corporate account and that there is no doubt about the ownership of the account.

Adequate account and password management must be set up in order to avoid departing employees retaining access to the profile and being able to set, change or delete content.

It is important, not only for communication purposes but also from a legal point of view to ensure a common understanding of those involved in the management of accounts. Such an understanding can be reached via guidelines which state which platforms are to be used and how content should appear.

Employees should also be trained on the basic relevant legal issues of which they must be aware when using social media, in particular on the law on unfair competition and personal rights. It is also important that the handling of critical or even insulting remarks in comments is discussed and pre-determined.

It must be noted that if the social media department or more importantly, an external agency makes any agreements or statements to third parties or users via the profile that this can lead to the profile owner being liable for such statements, even though they were not authorized by the company management.

If a third party, e.g. a PR agency is mandated with managing the social media communication it should be made clear that postings and tweets written by the PR agency are quite naturally assumed by users to the account owner. Consequently the agency should be carefully selected (and monitored) and it is recommended that social media guidelines are set out in the contract.

Secondly, rules should be put in place to deal with and define the extent of the account owner's final liability for claims which are brought against him but caused by the agency violating the social media guidelines.

Moreover, the assignment of a third party always requires disclosure of personal data, it is therefore essential that guidelines on privacy and data security are included.

IV. CONTENT OF POSTS

The established (offline) regulations apply to the content of social media posts. For instance, insulting tweets are, unlawful in both Switzerland and Germany both from a criminal and civil legal perspective. Misleading advertising is also a violation of competition law. However, there are some typical situations that can be avoided.

1. COPYRIGHT PROTECTION

Even small postings on social media sites can be copyright protected. However, posts or tweets are normally only protected if they include a certain degree of creative content.

Only in exceptional cases can very short texts enjoy copyright protection. Longer wall posts are more likely to be protected than short tweets. However, even tweets can contain the level of creativity required for copyright protection. Caution should therefore always be used when copying posts or tweets because once creativity status has been reached the owner's permission is required before the content may be copied.

Re-tweets are not problematic as re-tweeting is common and accepted on twitter as long as a tweet is not changed or altered.

Whilst the photographer's rights on pictures taken by him are always protected in Germany, a picture in Switzerland must fulfil certain definitions of individuality and must therefore be distinct from everyday pictures in order to be covered by copyright law (BGE 130 III 714 E. 2.3). If an image falls under copyright protection - which should be assumed even in Switzerland if there is any doubt - posting is only allowed with the consent of its owner.

Of course copyright does not only exist with regard to posting, but also to external content. If any images, text or other content are used or included in a profile, the author's consent is required.

2. HIDDEN ADVERTISING

Special care is needed when the account is used for private and business purposes at the same time. In such cases, it is possible that the advertising nature of individual messages or tweets is not clear. Advertising disguised as information is always unlawful and to be avoided under both Swiss and German law (cf. the principle of separation).

If the profile is used for mixed purposes (i.e. advertising and information) it is recommended that each type of message is kept strictly separate and that the prefix "ad" is placed in front of advertising or business tweets.



The same applies to the hiring of celebrities or athletes to make positive tweets or comments about a particular brand. There are no reported court cases in Germany or Switzerland yet, however a good example is the #makeitcount-campaign from Nike, where athletes including Wayne Rooney, tweeted their New Year's resolutions at the beginning of last year and linked this to the Nike campaign. In the dispute that followed, the British fair trading authority requested that the particular tweet be deleted as it was not marked as an advertisement.



Entrepreneurs who have designed their site in a way that makes it clear that it is a corporate site that advertises their own products have however no difficulties with the principle of separation.

3. UNSOLICITED MESSAGES

As with other media, e.g. email or text messages, sending direct messages for advertising purposes is only allowed if the recipient of the message has given his permission in advance.

Unsolicited commercial communications by email is both an infringement of the rights of the recipient and illegal under Swiss and German law (prohibited spam). In social media networks electronic mail can be considered to be any message that ends up in a mailbox to be picked up by the recipient.

Consent cannot be assumed by the fact that the recipient is a Facebook fan of the advertising company or a follower on Twitter. If messages are being sent to fans or followers regardless of the permission, especially under German law, even a single message can lead to warning letters, lawsuits or even criminal charges.

V. SOCIAL MEDIA AND PRIVACY

Privacy law issues must be taken into consideration whenever personal data is collected whilst a person is using a website. Information is considered to be personally identifiable, if it can be assigned to a specific person. Therefore, if a user likes a post, or if he re-tweets a tweet, his personal profile names or pictures would constitute personal data as long as a connection to a specific person can be made. This distinction is important because under current data protection law, personal data may only be collected and processed, if allowed by law or the data subject has given his or her express consent. For example it is legally permitted to process contract data. In contrast, the use of personal data for advertising purposes almost always requires a person's consent.

1. CORPORATE FACEBOOK PROFILES

Privacy advocates argue that Facebook collects a lot of personal data without the necessary consent or even knowledge of the users. Although Facebook's privacy policy provides details on exactly how Facebook uses the data, the information has been called non-transparent and therefore insufficient. Data Protection Commissioners in Germany demand that default settings must be based on the principle of consent – in return the default setting must be that data is not collected.

What does this mean for companies with a Facebook presence? Although companies are service providers under the definition of the German Telemedia Act (TMG) the data is not collected by them, but by Facebook. As companies receive access to anonymised personal data only by using the tracking tools provided by Facebook, the company itself does not process any data, (unlike, for example, when using Google Analytics) such that the question of whether IP-addresses can be connected to a certain person does not arise here. However, privacy advocates and DPAs argue in particular that the company in question is participating in unlawful data collection by the social network if it uses the statistical function provided by the network while being aware said data collection may be unlawful.

2. SOCIAL PLUG-INS

Facebook has introduced the Like Button in order to offer users the possibility of showing their network friends what kind of things they like on the web. The Like button can be included on sites that do not belong to Facebook – especially on company websites.

The Like Button is integrated as a graphic file that is downloaded from the Facebook servers each time the page is visited. This procedure enables Facebook to gain access to the current IP-address of the user and the URL of the website visited is forwarded to Facebook. In addition, a cookie is set, which should be valid for two years. Facebook is accused of creating personal profiles with the collected data that are used for advertising purposes and thereby tracks which of its members has visited a certain site, even if they did not click the Like Button. Facebook also

collects the IP-addresses of users who have never logged into Facebook.

From a data protection perspective, the Like Button is controversial both in Switzerland and Germany. It could be argued that the tracking of Facebook members is covered by consent. However, this view is not shared by DPAs due to the said lack of transparency of Facebook's Data Policy. Many lawyers believe that including a Like Button without adequate information about the data forwarded to Facebook is not covered by data protection law and therefore unlawful without the consent of the users. If no information is provided to the websites visitors this could cause a violation of competition or data protection law. The result of this could be warning letters or fines.

In order to be on the safe side, a two-click solution should be considered: here a Like-Button is used but the graphic is saved on the company's server and not directly downloaded from the social network (and usually first appears in grey indicated that it is inactive). The image is not downloaded from the Facebook server until the user clicks on the button and only then transmits data to Facebook. Before the visitor clicks on the grey button information will appear explaining to the user what data will be transmitted to Facebook.

VI. PROMOTIONS AND COMPETITION ON SOCIAL MEDIA

Since Facebook opened its platform to third-party applications, the number of available games and competitions has increased significantly. The same trend can be observed on other social media networks. If a competition is offered to customers via a social network rules from the networks as well as the general law must be followed.

First of all, there is a distinction between gambling and lotteries or competitions. By definition, gambling is defined as a game requiring a monetary stake and winning must depend only on chance. Gambling usually requires a license. Gambling on the internet is currently prohibited in Switzerland.

It must be noted that a monetary stake may be presumed if the participation in a game is directly or indirectly connected to a purchase, for example if it the purchase of a certain product is required in order to take part in the raffle. In general, a strict distinction between gambling and promotion will not be needed on social media as most of the time only a "like" or a re-tweet is required to take part in a competition. This cannot be considered a monetary stake.

Organizers of competitions should provide terms and conditions for participation in the competition. If terms are used these must be precise and clear, easily identifiable as such and easily accessible. The terms must include information on the persons entitled to participate in the competition, the organizers, the campaign period, what the user must do in order to participate, how the winner will be identified, how the prize will be paid out to the winner and the possible costs of using the prize.

Furthermore, in Switzerland some competitions fall under lottery legislation. In practice, all games and competitions must be considered in the light of lottery-like events (Art. 43 para. 2 LV-CH). Under this Act competitions are prohibited in which participation requires a stake with a certain monetary value or a legal transaction, for example the purchase of a product.

In addition to statutory regulations, the network operator provides guidelines that must be adhered to. (eg: http://www.facebook.com/page_guidelines.php promotion guidelines; <https://dev.twitter.com/terms/api-terms>). Most networks do not require prior approval to start a competition. On Facebook it must be noted in particular that competitions are only allowed if they run on canvas pages (the homepage of an independent application) or via a separate tab within the profile. Liking a particular Facebook post (where this is available) as a condition of participation, or using Facebook messages to notify the winner is not permitted. It is, however, permitted to require users to become a fan of a certain page in order to participate. Networks retain the right to delete profiles if their guidelines are violated.

Zurich & Berlin, March 2013

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