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# SENDING MARKETING MESSAGES WITHIN SOCIAL MEDIA NETWORKS

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**By Liisa M. Thomas**

When we think of messages that are subject to the requirements of the federal CAN-SPAM Act, we normally think of traditional email messages that are sent from one person's email server to another. An often overlooked—and more recently used—manner in which this law has been applied is to messages that are sent within a social networking forum. In particular, two of the more popular social networking Web sites, MySpace and Facebook, have both successfully used this law against entities that they viewed as violating CAN-SPAM. What can companies who use these forums do to avoid potential liability under CAN-SPAM?

As most companies are aware, CAN-SPAM requires that, before marketing e-messages are sent, the sender scrub its mailing list against its own internally maintained opt-out list. Additionally, when the message is sent, it must (1) include a mechanism that allows consumers to opt out of receiving future such e-mails, (2) include the sender's physical address, and, (3) if the message is unsolicited, indicate that the message is advertising.<sup>1</sup> Compliance with these requirements is relatively straightforward to contemplate if the message is going to be sent from the company's own servers. But how does one comply if the message will be sent wholly within a social networking forum like Facebook or MySpace?

Based on the few cases in this area that have come down thus far, courts generally accept that messages sent within a social networking forum are messages sent to an "electronic mail address," namely a "unique electronic mail address,"<sup>2</sup> and as such, the requirements of CAN-SPAM apply. Many of the cases that have analyzed this issue have involved "serial spammers," that is, those who use technological means to hijack the social networking accounts of legitimate users and send messages that violate the law. MySpace and Facebook have both successfully used CAN-SPAM to halt the activities of these types of individuals and have received judgments in the millions of dollars.<sup>3</sup>

These cases do not provide much direction or counsel for a company that is trying to set up a social media account and send messages to its "fans" or "friends." According to CAN-SPAM, if the messages that will be sent are intended to promote a commercial product or service, then the sender must, *inter alia*, (1) scrub its mailing list against its existing opt-out list (those individuals who have asked not to get messages from the sender), (2) include its name and address in the body of the message, (3) label the message as "advertising," and (4) include an opt-out mechanism in the body of the message. Implementing these steps for traditional email messages can be straightforward. Implementing them for messages sent in social media: not quite as straightforward.

First, there is the tricky issue of scrubbing a send list from a company's social networking account against its current opt-out list. Presumably, the opt-outs that the company has obtained have been from consumers who have received more traditional electronic messages from the company. To the extent that a company could tell that a person who opted out of receiving an email message was the same as one of its current friends in a social networking forum, a company might wonder whether it has an obligation not to send a message within a social networking forum to that individual. This could cause a potential headache for cross-referencing opt-outs from traditional email into the social media. Fortunately under CAN-SPAM, an opt-out request is specific to the electronic mail address rather than to the individual. In particular, CAN-SPAM indicates that, if a recipient has "one or more electronic mail addresses in addition to the address to which the message was sent or delivered, the recipient shall be

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treated as a separate recipient with respect to each such address.”<sup>4</sup>

Therefore, although a company need worry only about opt-outs that it has received from users within the social media network, it still needs to think about how it will process such requests. In doing so, it is helpful to keep in mind the requirements and restrictions of the social networking site itself. For example, Facebook allows commercial accounts to be opened as “Pages.” These are “special profiles that may only be used to promote a business or other commercial, political, or charitable organization or endeavor.”<sup>5</sup> And, according to the Facebook rules, Pages may post content only under the “everyone” setting, meaning that Pages cannot post one-to-one messages directly into another user’s account.<sup>6</sup> Presumably, a general posting would not be viewed as a message sent to a unique electronic mail message. As such, this type of “message” would not fall under CAN-SPAM, and thus there is no need to worry about how to send a direct commercial message on Facebook, since the Facebook terms prohibit sending these types of messages.

For those social media networks where sending direct messages are permitted, companies will still need to worry about scrubbing against opt-out lists. Most sites, however, like Facebook, make it possible to publish public posts that go to everyone who is following your account. These messages are unlikely to be deemed to fall under CAN-SPAM inasmuch as they are not being sent to a specific electronic mail address. Companies that wish to avoid addressing the requirements of CAN-SPAM could therefore use the public posting features of these sites and avoid sending direct messages to a user’s in-network inbox. If a company sends out any commercial content by public postings, it will then avoid CAN-SPAM obligations such as including its name and address in the content

of the message and including an opt-out in the body of the message.

If a company decides that it does want to send a direct-to-consumer message (and such a message is permitted by the rules of the social networking Web site), another option for avoiding some of the more strenuous requirements of CAN-SPAM is to have that message fall within the definition of “transactional” content. Transactional content is narrowly defined and includes messages that deliver a specific product or service. Examples of transactional email messages have been deemed to include electronic newsletters. Similar messages might be considered included in the social network message context.

As social networking forums become an increasingly popular platform on which to advertise and the operators of those forums raise their vigilance on how third-party advertisers interact with users, companies will need to think about the applicability of CAN-SPAM to messages they send within those forums. As of now, there appear to be easy-to-implement strategies for avoiding potential liability. Companies are encouraged to think about and use these strategies.

## NOTES

1. 15 U.S.C. § 7704(a)(3).
2. 15 U.S.C. § 7702(6).
3. See *Facebook Inc. v. Guerbuez*, Case No. C 08 03889 JF HRL (N.D. Cal., default judgment granted Nov. 21, 2008) (\$873 million award); *MySpace v. Richter*, Am. Arb. Assoc., No. 72 117 Y 00904 (final award granted June 12, 2008) (\$6 million award); *MySpace, Inc. v. Globe.com, Inc.*, 2007 U.S. Dist. LEXIS 44143 (C.D. Cal. Feb. 27, 2007); *MySpace, Inc. v. Wallace*, 498 F. Supp. 2d 1293 (C.D. Cal. 2007).
4. 15 U.S.C. § 7702(14).
5. Facebook Statement of Rights and Responsibilities, § 12(1). Available at <http://www.facebook.com/profile.php?id=100000908393177#!/terms.php?ref=pf>, last accessed April 2, 2010.
6. *Id.* § 12(3).