

# Socially Aware: The Social Media Law Update



If your company has established a presence on Facebook, it has presumably “click-accepted” the terms and conditions set forth in Facebook’s online Terms of Use. But has your company actually reviewed Facebook’s Terms of Use? Is your company aware of its obligations under Facebook’s Terms of Use? In this issue of *Socially Aware*, we take a look at some of the key provisions in Facebook’s Terms of Use. We also discuss a recent FTC settlement against a PR company that had its employees post positive iTunes reviews of its clients’ iPhone apps; Facebook’s launch of its location-based “Facebook Places” functionality; and Facebook’s purchase of a patent portfolio from social networking pioneer Friendster. Further, we summarize the recent *Crispin* decision addressing whether private messaging services provided by Facebook and MySpace are protected under the Stored Communications Act, and we highlight a proposed German bill that, if adopted, would prohibit employers from using social networks for background checks. Finally, we identify the Top Ten Corporate Facebook Pages—is your company’s Facebook Page on the list?

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## PR Firm Settles With FTC for Posting Positive Reviews for Clients' Products on iTunes

The Federal Trade Commission recently announced that a public relations agency has settled charges that it engaged in deceptive advertising by having its employees write positive iTunes reviews of its clients' iPhone apps without disclosing that the reviews were written by the agency's paid employees.

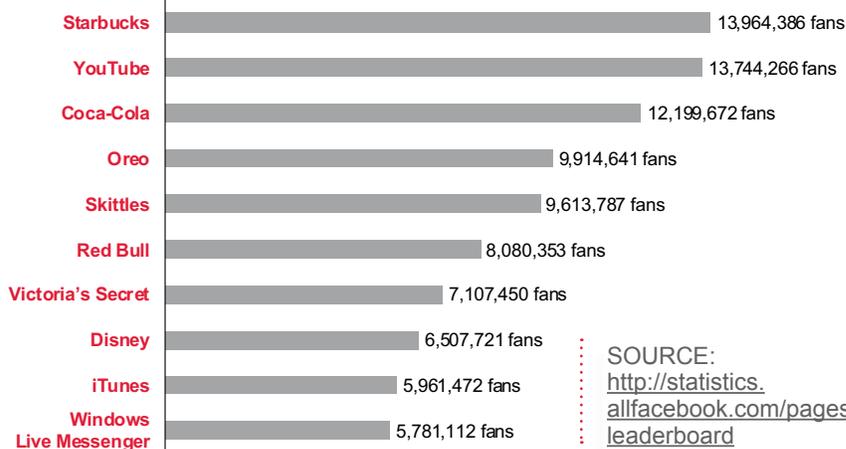
According to the New York Times, Reverb Communications—which provides public relations and marketing services for video game developers—allegedly hired interns to write “influential game reviews” for its clients from November 2008 through May 2009.

The consent order requires Reverb to remove the employee-posted reviews of its clients' products from iTunes and to refrain from misrepresenting “the status of any user or endorser of a product or service, including, but not limited to, misrepresenting that the user or endorser is an independent user or ordinary consumer of the product or service.” Reverb, however, will not be penalized monetarily.

In October 2009, the FTC issued comprehensive “Guides Concerning the Use of Endorsements and Testimonials in Advertising” (16 CFR Part 255) that, among other things, target endorsements by reviewers of products and services who fail to disclose financial compensation or other consideration received directly or indirectly from the seller of the product or service in question. The charges against Reverb are the first to be brought under these Guides. More information about the Guides can be found at the FTC's website.

### SOCIAL MEDIA STATS:

THE MOST POPULAR CORPORATE PAGES ON FACEBOOK (AS OF 09/22/10)



## Facebook Launches Location-Based “Facebook Places” Functionality

On August 18, 2010, Facebook rolled out Facebook Places, a new location-based feature that allows Facebook users to “check in” at their current physical location and “tag” friends who are there with them. The feature also gives Facebook users access to a “Here Now” function that permits users to determine what other Facebook members are at the same location at or around the same time.

Location-based social networking has attracted many start-up companies, such as the immensely popular Foursquare, which is Facebook Places' main competitor, as well as Google Latitude, Gowalla, loopt, and brightkite. Still, concerns have already been raised over Facebook Places' privacy implications.

Facebook has sought to address privacy concerns, setting Facebook Places' default setting for visibility of a user's location to

“Friends Only,” and permitting each user to opt in to being tagged by a particular friend the first time such friend seeks to tag the user. Nevertheless, Facebook Places has drawn criticism for not providing a “single” opt out from all location-based functionality and for its lack of transparency with respect to how advertisers and marketers will be using location information; indeed, the Center for Digital Democracy has stated that it will be raising the latter issue with the FTC.

Interestingly, Foursquare implemented several privacy-related measures prior to Facebook Places' launch, including by providing an intuitive grid of privacy defaults on its site, which measures have been well received in the trade press.

Given the FTC's interest in location information (for example, a panel discussion on mobile “location-based services” was held during the FTC's 2008 Town Hall meeting on mobile marketing), and indications that the FTC may require opt-in consent for the use of precise geo-location (for example, see staff comments on pages 43 and 44 of the FTC Staff Report: Self-Regulatory Principles For Online Behavioral Advertising), we anticipate further developments in privacy measures for location-based social networking in the future.

# Account-Holders May Quash Subpoenas Served on Social Network

The U.S. District Court for the Central District of California [recently held in \*Crispin v. Christian Audigier, Inc.\*](#) that private messaging services provided by Facebook and MySpace are protected under the Stored Communications Act (“SCA”) because the sites constitute both electronic communication service (“ECS”) and remote computer service (“RCS”) providers—which are typically treated differently under the SCA. Interestingly, the ruling also suggested that postings to a social media service’s “wall” would be entitled to SCA protection as well, so long as access to the wall is restricted to invitees only.

Enacted in 1986, the [SCA](#), which is part of the broader [Electronic Communications Privacy Act](#), created a set of Fourth Amendment-like privacy protections that regulate the relationship between, on one hand, service providers that possess private user information, and, on the other hand, government investigators. The SCA governs both voluntary and compelled disclosures of “stored wire and electronic communications...” and applies to services that either “provide[ ]...the ability to send or receive wire or electronic communications” (that is, ECS providers), or provide public “computer storage or processing services by means of an electronic communications system” (that is, RCS providers).

The standard of care that must be applied under the SCA depends on which type of service is involved—but in *Crispin*, the district court ruled that Facebook and similar sites perform the services of both types of providers. In light of this, the court quashed the portions of the

subpoenas that targeted webmail and private messaging specifically, as the court was “satisfied that those forms of communications... are inherently private such that the stored messages are not readily accessible to the general public,” and are therefore protected under the SCA. The court, however, remanded the issues of whether Facebook wall postings and MySpace comments were readily accessible to the public; specifically, the court ordered “the parties to develop a fuller evidentiary record regarding plaintiff’s privacy settings and the extent of access allowed to his Facebook wall and MySpace comments.” More information on the case can be found at [InsideCounsel.com](#). (We will feature further thoughts on the *Crispin* decision in our next issue.)

## Caveat Emptor: Key Provisions in Facebook’s Statement of Rights and Responsibilities

Companies are setting up shop on social media platforms at an astonishing rate; indeed, one struggles to name a major consumer-focused company that has not already established a presence on Facebook and Twitter (this would not have been difficult to do a year ago). However, in their rush to capitalize on the social media boom, corporations are “click accepting” the extremely one-sided, overly burdensome online contracts that typically govern their access to social media platforms—contracts that these same corporations would be loathe to accept in the offline world, at least not without extensive negotiation. Moreover, many companies enter into these online agreements without any prior review, and often remain unaware of their binding obligations and potential liability exposure under these agreements.

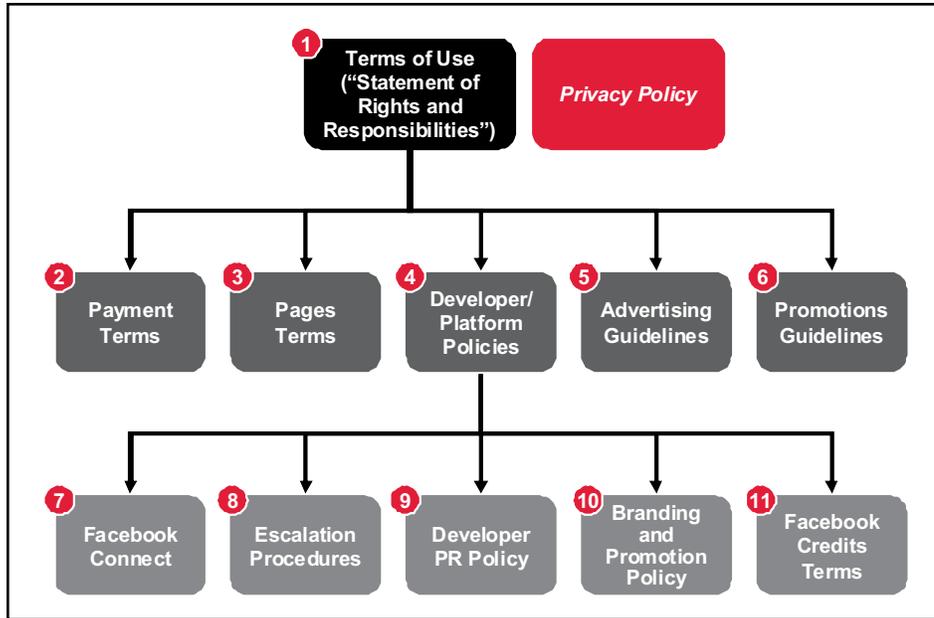
As social media platform providers become more powerful, however, their so-called “Terms of Use” agreements are attracting greater scrutiny. For example, an effort by Facebook last year to modify its main governing agreement, its “[Statement of Rights and Responsibilities](#)” or “SRR,” sparked an [end-user revolt](#) that resulted in Facebook abandoning the modification effort. Further, corporate users are beginning to focus on how best to assess and manage the risks posed by these online contracts. To facilitate this effort, we are presenting the first in what will be a series of pieces examining the Terms of Use agreements of some of the high-profile social media sites; we start this series with a look at Facebook’s SRR.

One challenge in analyzing social media websites’ Terms of Use agreements is untangling the complex web of policies and rules that often comprise such agreements. Indeed, the Facebook SRR is merely one of twelve documents constituting Facebook’s online contractual

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regime (which, if printed out, spans more than 33 pages). The graphic below attempts to show how Facebook’s twelve governing documents interrelate.

in which case the license appears to continue in perpetuity.



We cannot here summarize all of the important terms and conditions to be found in these twelve documents that govern one’s use of the Facebook platform; however, we do wish to highlight terms that may come as a surprise to many corporate users of Facebook:

**Facebook Receives a Broad License to User-Posted Content [Facebook SRR, § 2.1]:** Is your company posting text, images, sound recordings or videos to its Facebook Page? If so, then your company may be granting Facebook a broad license to such content. In particular, § 2.1 of the Facebook SRR provides that, by posting content that is “covered by intellectual property rights,” such as photos and videos on or “in connection with” Facebook, users (which, again, includes companies as well as individual end-users) grant to Facebook a non-exclusive, transferable, sub-licensable, royalty-free worldwide license to use any such content. This license terminates when the posted content is deleted from Facebook—unless the content has been “shared” with others,

**Promotions Are Subject to Restrictive “Promotions Guidelines” [Facebook SRR, § 3]:** Is your company thinking about operating a contest, giveaway, sweepstakes or similar promotion on Facebook, or merely advertising such promotion on your company’s Facebook Page? The Facebook SRR may require that your company obtain Facebook’s prior written permission to run the contemplated promotion. Also, keep in mind that all such activities are governed by a set of supplemental terms and conditions contained in Facebook’s separate Promotions Guidelines, introduced in November 2009, which govern not only the content of the promotion but how the promotion may and may not be operated and promoted.

**Consent and Notice Requirements for Collection of User Information [Facebook SRR, § 5.7]:** Does your company collect information on the Facebook platform from other Facebook users? If so, Facebook’s SRR appears to require your company to (a) obtain such users’ consent, (b) make it clear that your company is the one collecting

user information, and (c) post a privacy policy explaining what information is being collected and how it will be used.

**Facebook May Unilaterally Modify the SSR’s Terms at Any Time [Facebook SRR, § 13.1]:** Facebook reserves the right to change the Facebook SRR by providing notice to users on the Facebook Site Governance Page, where it gives users an opportunity to comment on such changes. To keep abreast of changes to the Facebook SRR, companies that regularly use Facebook should check Facebook’s Governance Page from time to time (or consider “Liking” the Page to ensure receipt of notices of any changes).

**Facebook May Terminate User Accounts for Violation of SRR or Where There Is a “Legal Risk” to Facebook [Facebook SRR, § 14]:** Unsurprisingly, Facebook reserves the right to stop providing all or part of its services to any user who violates “the letter or spirit” of the SRR. More interestingly, Facebook also reserves the right to stop providing Facebook to any user who “creates risk or possible legal exposure for Facebook.” Read broadly, the foregoing language could allow Facebook to withhold its service from companies making novel commercial uses of Facebook, at least to the extent that such use create any “risk” for Facebook.

**All Disputes to Be Resolved in Facebook’s Home Forum [Facebook SRR, § 15.1]:** Facebook’s SRR requires all Facebook users—including companies that operate Facebook “Pages”—to resolve any disputes regarding the Facebook service in the state or federal courts of Santa Clara County, California (the location of Facebook’s headquarters).

**Facebook Disclaims Security, Implied Warranties and Liability for Third-Party Acts [Facebook SRR, § 15.3]:** Facebook’s SRR includes a number of broad disclaimers, including (a) disclaimers concerning the safety or security of the Facebook platform; (b) disclaimers of express and implied

warranties; and (c) a disclaimer of Facebook's liability for the actions, content, information or data of third parties.

Although these broad disclaimers are commonly found in consumer-focused online Terms of Use agreements, they are the types of provisions that corporations have typically sought to negotiate out of their contracts with their service providers.

### Facebook's Liability Capped at \$100

**[Facebook SRR, § 15.3]:** The Facebook SRR caps Facebook's aggregate liability arising out of the SRR or the Facebook service at the greater of \$100 or the amount that the user has paid Facebook in the past twelve months. Presumably, most Facebook users—including corporate users—pay little or no money to Facebook, in which case \$100 would be the cap on Facebook's liability under the SRR.

The cap presumably will increase if, for example, a company were to purchase ad space or other services from Facebook.

In future editions of this newsletter, we will continue our exploration of the online terms of use of social media providers.

## Proposed German Bill Would Prohibit Employers From Using Social Networks for Background Checks

The German government has approved a bill that would substantially amend the country's framework data protection law, the Bundesdatenschutzgesetz (BDSG), expressly with regard to human resources data. Chancellor Angela Merkel's coalition government had promised to revise the BDSG following a wave of alleged corporate breaches of employee privacy, including

by a supermarket chain, an automobile manufacturer, and the government-owned railway company Deutsche Bahn AG, which was assessed to be the largest-ever fine for non-compliance with the BDSG. The bill, as approved by the government, now goes to the German Parliament, where it is expected to undergo substantial changes; although it could still become law in 2010.

Among other things, the bill would prohibit employers from using social networking sites such as Facebook when conducting background checks and screening current and potential employees. According to the relevant provisions, employers should limit their searches to "publicly available" information only. However, searching on "professional" online networks such as LinkedIn or Xing would still be permitted. In practice, the distinction between professional social networks (which are "primarily used for the presentation of professional qualifications"), which may be accessed, and other social networks, which employers may not use, will sometimes be difficult to make. Moreover, the bill raises several interesting questions: How will information on non-"professional" social networks that has been made "publicly available"—for example, a photograph or status update that a user has designated as viewable by all users—be treated? And what if an item of content that was formerly "publicly available" on a social network is cached by Google or another popular search engine, and is later designated "private" by such user on the social network on which it originally appeared?

Thomas de Mazière, the German Secretary of the Interior who is responsible for the initial draft, stated, "If it turns out that an employer rejected a candidate because of a private picture on Facebook, a fine can be imposed." However, when questioned how a candidate would evidence that the employer used such information, he had no answer. The draft bill is available (in German) by following this link.

## Facebook Quietly Buys Up Social Networking Patents

With little fanfare, Facebook recently purchased a portfolio of patents and patent applications covering a wide range of social networking activities. Based on documents filed with the U.S. Patent and Trademark Office, VentureBeat reported recently that, earlier this summer, Facebook purchased 18 patents and patent applications from MOL Global, the parent of social networking pioneer Friendster. According to VentureBeat, Friendster never actively enforced these patents, but there is a possibility Facebook could take a more aggressive position. Of the 18 purchased items, eleven are pending patent applications, several of which appear to be quite broad, covering subject matter such as a "system and method for managing an online network" (U.S. Pat. App. No. 10854054) and a "system, method and apparatus for connecting users in an online computer system based on their relationships within social networks" (U.S. Pat. No. 7069308). According to TheSocial, Facebook likely wants control of the patents to prevent imitation, and to give Facebook significant leverage in light of Google's efforts to enter the social networking space. The patents were transferred on May 13 and, as GigaOm reports, at a purchase price of \$40 million, the acquisition of Friendster's patent portfolio is one of Facebook's largest such acquisitions to date.

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If you wish to review the earlier issues of *Socially Aware*, please click here and here.

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