

Social Media Platform Agreements and Brand Risk

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This Article summarizes key intellectual property and related provisions in the platform agreements for popular social media platforms and discusses important legal considerations for brand owners launching social media accounts and initiatives.

Social media has transformed the ways people interact with each other and businesses interact with customers. For a brand owner, social media offers an unprecedented avenue to reach current and potential customers and shape how the public interacts with and views its brand. However, underlying every social media initiative is a contract in the form of one or more click-through agreements with the social media platform provider (Platform Agreements). These agreements present unique challenges to brand owners because they:

- Are unilaterally presented.
- Are non-negotiable.
- May be frequently updated and revised.
- Provide the platform provider with broad rights.

This Article highlights some of the key intellectual property (IP) aspects of the current Platform Agreements for four popular social media platforms: Facebook, Twitter, YouTube and Instagram. Brand owners should familiarize themselves with the platform-friendly aspects of these Agreements to better manage the legal implications of conducting business through these channels.

The material terms of Platform Agreements are described below and summarized in the accompanying *Box, Key Platform Agreements Terms*.

COMMON PLATFORM AGREEMENT TERMS

Each social media platform requires the user, whether an individual or company, to agree to specific legal terms. These Platform

Agreements govern the user's actions on the platform, and contain potentially significant IP licensing and related provisions. These agreements may be called Terms of Service (Twitter and YouTube), Terms of Use (Instagram) or Statement of Rights and Responsibilities (Facebook).

The Platform Agreements of the most popular platforms include certain basic features. The agreements generally:

- Define and provide for the license of the user's "content" (see *Content Definition and License to the Provider*).
- Provide for termination of the user's social media account or access to the service and surviving rights of the platform provider and its users to content (see *Use of Content After Termination*).
- Require the user to indemnify the social media provider for third-party IP and other claims arising from the user's posting of content on the platform (see *Indemnification of Third-party Claims*).
- Expressly bind the user to any future updates and agreements issued by the platform provider (see *Updated Versions of Platform Agreements*).
- Restrict what the user may do with the provider's brand and related assets (see *Restrictions on Use of the Platform's Brands*).

The agreements also incorporate by reference or are otherwise supplemented by additional brand-oriented terms and conditions, such as requirements for sweepstakes and other promotions (see *Other Relevant Terms and Policies*).

Familiarity with the published Platform Agreement terms is critical as the agreements are typically non-negotiable. Moreover, these agreements will, as a practical matter, rarely, if ever, stand in the way of a company conducting business on a platform, given the commercial opportunities that a popular social media site can confer on a business.

CONTENT DEFINITION AND LICENSE TO THE PROVIDER

Platform Agreements define "content" broadly. For example, Facebook defines content as anything covered by IP rights, while Twitter defines content as "information, text, graphics, and other materials." In short, content is anything that a user uploads.



In addition, the Platform Agreements define "service" to include plug-ins such as Facebook's "Like" button and Twitter's "Tweet" symbol. Content may therefore include material that users link to from the platform via a plug-in, but do not directly upload, if the material is ultimately displayed on the platform.

Each of the Platform Agreements require that users grant a royalty-free license to the content that the user submits, posts or displays on or through the platform. Brand owners therefore have limited ability under the agreements to control how their content is distributed, transformed and experienced by other users. Once a brand owner publishes content on a platform, social media's interactive, viral nature may amplify the trademark and related risks to the brand owner.

The Platform Agreements generally do not address whether, as part of the content license, the platform also is licensed individual elements within an upload. For example, if Louis Vuitton posts a photo of an LV handbag on Instagram, the Instagram Agreement does not specify whether Instagram obtains a license to the LV logo adorning the bag separate from the content in which it appears. However, the agreements are broadly worded and leave open the possibility that the platform provider or other users may be able to disaggregate the content and trademarks of the brand owner that are contained within an upload.

As a practical, if not legal, matter, a platform provider is unlikely to appropriate and misuse a brand owner's trademarks and other content. Social media platforms benefit financially and otherwise from wide participation in the platform, including business participation. The drawbacks of misusing businesses' brands and content usually likely outweigh any benefits to the platform provider.

Additionally, while the platform provider receives a broad license, the brand owner does not directly license individual platform users and accordingly may have traditional remedies against third-party users. These may include claims for trademark infringement and dilution and copyright infringement. Also, where the user does not comply with the platform's terms of use, the brand owner may be able to seek remedies from the platform provider. For example, Facebook reserves the right to remove or reclaim a user name where a trademark owner has complained that the name does not closely relate to that user's actual name.

A company should therefore consider monitoring the use of its brands and content on the platform. For a related checklist, see *Monitoring and Responding to Third Party Use of Social Media: Best Practices Checklist* (<http://us.practicallaw.com/3-501-1469>).

LACK OF GEOGRAPHICAL LIMITATIONS AND QUALITY CONTROL

The licenses contained in the Platform Agreements raise additional potential concerns for brand owners because they do not contain any of the restrictions typically imposed on a brand or content licensee.

Geographic limitations generally cannot be imposed on a platform. A brand owner therefore cannot precisely target or prevent certain brand uses, products or promotions from being displayed in a particular territory.

There is also no quality control provision in the agreements so the platform provider, or potentially users, theoretically can use the brand

owner's content and brands in new and unapproved contexts. The broad sublicensing rights granted to the platform further complicate this issue.

ADVERTISEMENTS ASSOCIATED WITH BRAND'S CONTENT

Platform Agreements typically allow the platform owner to place advertisements near user content. The nature, manner and extent of these advertisements are generally unrestricted and subject to change without specific notice to the user.

Companies should be aware that they have little control over what ads may be associated with their content on platforms. Advertising strategies that depend on a viewer's profile, such as targeted advertising, frequently will determine the actual ads that are associated with a user's content.

The risk to the brand owner is that consumers may mistakenly draw connections between particular advertisements and the brand owner. These advertisements may be for competitors or for products or services that are inconsistent with the messaging or mores of the brand owner or its brands. This risk is not as great in other new media platforms, such as websites and mobile applications, where the brand owner typically controls whether to permit advertising and the nature or content of this advertising.

THIRD-PARTY USE OF THE BRAND OWNER'S CONTENT

Social media's key attribute, allowing users to interact with one another on a platform, also presents potential risks to brand owners. The license granted by the user under each Platform Agreement is sub-licensable and generally allows users to use and share uploaded content that is publicly accessible.

The extent to which others may manipulate uploaded content depends on the particular platform. For example:

- Facebook permits other users to comment on an uploaded page.
- Twitter allows users to more broadly use, reproduce and create derivative works of uploaded content.
- Youtube allows users to use, reproduce, distribute, display and perform uploaded content as permitted through its service.
- Instagram permits users to use and share publicly available content.

Users may therefore be able comment on or appropriate content for ends that are potentially adverse to the brand owner's interests. For example, users may post critical commentary or initiate negative publicity campaigns.

Each Platform Agreement has different rules against falsely claiming another user's identity, such as posing as a company. However, users may still have an ability to adopt and adapt uploaded content under their own accounts.

USE OF CONTENT AFTER TERMINATION

The Platform Agreements all permit termination of a user's account or the provision of the platform services to a user. For example, the user's legal obligations under the Twitter and Facebook agreements terminate when users delete their accounts. However, the termination of a Platform Agreement or the user's account often does not require the platform to remove the brand owner's content.

Platform providers generally retain licenses to previously uploaded content that other users share or otherwise circulate. The YouTube platform agreement is an exception. It specifies that YouTube may retain a former user's videos post-termination, but will not display or share those videos. However, user comments on deleted videos may still persist.

The retention of previously uploaded content poses several potential problems to brand owners. For example, this feature may:

- Complicate a brand owner's ability to effectively:
 - cease past campaigns or positioning; or
 - withdraw potentially false claims or statements.
- Conflict with a company's obligations to cease all use of third-party content or brands after termination of its applicable agreements with its third-party licensors or settlement of a third-party claim.

As a business matter, deleting a company's account in an effort to remove or diminish the presence of certain material may not be an option. This may require the brand owner to leave the platform or at the least make a frequented page or account no longer accessible or active. Accordingly, when posting social media content, the brand owner should do so with the understanding that its content may be posted for an unlimited term.

INDEMNIFICATION OF THIRD-PARTY CLAIMS

The Platform Agreements generally impose broad indemnification obligations on the user. Specifically, they require users to indemnify the platform provider against IP infringement and any other claims related to uploaded content or use of the platform. The Twitter Platform Agreement is an exception. However, that agreement still requires the user to represent and warrant that it has all rights necessary to grant Twitter the specified rights in any submitted content under the agreement.

It is therefore important for brand owners to confirm that they own or may otherwise license their uploaded content. Associated IP rights should be cleared for social media use, including the worldwide and sub-licensable use required under the agreements.

When combined with the unlimited geographical scope of platforms, the indemnification obligations may also pose potential problems where a brand owner does not own worldwide rights to its trademarks or have worldwide licenses to third-party content.

For example, since trademark rights are territorial in nature, if a company's trademarks are not cleared in a particular territory, the Platform Agreement's worldwide license may result in potential violation of a third party's trademark rights in that territory.

A company should be mindful that any third-party brands and content used on platforms may have been repurposed from other advertising and marketing campaigns. The permissions received for use in these campaigns may have been limited to a one-time use or particular media (for example, magazines, television or website use) and not for worldwide, sub-licensable and potentially perpetual use on a platform.

Companies should also note that additional Platform Agreement terms concerning indemnification are likely to favor the platform

provider. For example, Instagram prohibits users from settling any indemnified claim without its prior written approval, and reserves the right to assume exclusive control and defense of any matter subject to user indemnification.

UPDATED VERSIONS OF PLATFORM AGREEMENTS

Each of the platform providers reserves the right to amend its Platform Agreement at any time. These updates may contain significant changes to the user's rights and obligations.

The platforms take different approaches to notifying users of changes, specifically:

- Facebook's and Instagram's agreements state that they may make changes without notice for legal or administrative reasons, or to correct an inaccurate statement. In other cases:
 - Facebook commits to providing users with seven days notice (for example, by posting the change on the Facebook Site Governance Page) and an opportunity to comment on changes; and
 - Instagram commits to providing reasonable advance notice before any changes become effective.
- Twitter states it may revise these Terms from time to time. If the changes are material in its view, it will notify users through an update at its official Twitter account or an e-mail to the e-mail associated with the user's account.
- YouTube reserves the right to amend its agreement at any time and without notice.

In each case, continued use of the platform signals acceptance of the updated terms. Users are therefore responsible for complying with any new or modified provisions and the responsibility is on a company to stay up to date with the most recent Platform Agreements to ensure compliance.

While a company often designates a particular employee or employees to engage in social media as part of a larger marketing or public relations strategy, those responsibilities may not include checking Platform Agreements or updates. Even where the individual is responsible for checking Platform Agreements and updates, that individual may not understand a change's legal implications. A company should therefore consider having legal counsel work alongside of marketing personnel to review and actively monitor relevant Platform Agreements and their potential impact on the company's social media efforts.

RESTRICTIONS ON USE OF THE PLATFORM'S BRANDS

Each of the Platform Agreements makes the use of the platform's own trademarks and other brand resources subject to its policies. These policies and guidelines cover third-party use of the platform's trademarks, symbols, designs and other brand assets, such as the Facebook Like button or the Twitter bird.

They generally specify the permitted manner of presentation for the assets and that they may not be used in a way that:

- Implies sponsorship or endorsement by the platform.
- Confuses the platform with the user's brand, such as through combined use of trademarks.

The guidelines often include platform-specific content requirements. For example, Twitter's guidelines specify how parties must display Tweets and other Twitter content. Among other conditions, it prohibits showing a Tweet with actions from other social platforms.

OTHER RELEVANT TERMS AND POLICIES

A company reviewing its requirements under a specific Platform Agreement must also consider related terms and conditions and policies incorporated by reference into or otherwise supplementing the agreement.

For example, the Platform Agreements are frequently supplemented by rules and guidelines that apply to advertising or promotions. Facebook has both *Advertising Guidelines* and specific rules and guidelines that apply to contests, giveaways or sweepstakes as part of its *Pages Terms*. Twitter also has specific Guidelines for Contests on *Twitter*. These contractual obligations are in addition to the various state and federal laws rules and regulations that may also govern a company's advertising and marketing efforts. For more information, see *Practice Note, Online Advertising and Marketing* (<http://us.practicallaw.com/4-500-4232>).

The relationship of the Platform Agreement to the platform's Privacy Policy and other data policies must also be considered. In certain cases, the privacy policy and related specifications available to the user may determine in what manner and how broadly content is shared with the public.

BEST PRACTICES FOR BRAND PROTECTION

When initiating a social media campaign, a brand owner can institute certain measures to manage the risks. Brand owners and their counsel should:

- Carefully select and train social media managers and any other employees who are engaged in social media activities on its behalf. The company should also consider putting in a place a policy or guidelines for specific personnel engaged in the company's social media marketing programs or social media practices for all personnel. For examples for private companies, see *Standard Documents, Company Social Media Use Guidelines* (<http://us.practicallaw.com/9-501-1640>) and *Social Media Policy (US)* (<http://us.practicallaw.com/5-501-1524>). For examples for public companies, see *Standard Documents, Social Media Guidelines (Public Company Long Form)* (<http://us.practicallaw.com/9-522-6810>) and *Social Media Guidelines (Public Company Short Form)* (<http://us.practicallaw.com/0-523-4937>).
- Carefully consider and vet all brand and ancillary content prior to posting. For a related checklist, see *Rights Clearance Checklist* (<http://us.practicallaw.com/3-509-4209>).
- Review the Platform Agreements and any other terms and conditions relevant for its specific initiatives and monitor them for any updates.
- Use any findings from the company's review of the relevant Platform Agreements to inform future social media rollouts and strategy.
- Set up internal processes focused on monitoring the use of its brand and content on relevant platforms, and responding to negative or infringing uses.

By understanding the material terms of the Platform Agreements and keeping apprised of any updates, brand owners and their counsel may be better positioned to tailor their social media initiatives and control, or at least understand, the potential risks and costs.

KEY PLATFORM AGREEMENTS TERMS

	Facebook (Statement of Rights and Responsibilities)	Twitter (Terms of Service, The Twitter Rules and Trademark Policy)	YouTube (Terms of Service)	Instagram (Terms of Use and Privacy Policy)
Effective Date	November 15, 2013	June 25, 2012	June 9, 2010	January 19, 2013
"Content" License and Definition	<ul style="list-style-type: none"> ■ "IP Content" is content covered by IP rights (such as photos and videos). ■ The user grants Facebook a license to use any IP Content the user posts on or in connection with Facebook. 	<ul style="list-style-type: none"> ■ "Content" includes information, text, graphics, any other material uploaded, downloaded or appearing on Twitter's services. ■ The user grants Twitter a license to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute Content in any and all media or distribution methods (now known or later developed). 	<ul style="list-style-type: none"> ■ "Content" includes the text, software, scripts, graphics, photos, sounds, music, videos, audiovisual combinations, interactive features and other materials that may be viewed on, accessed through or contributed to YouTube's service. ■ The user grants YouTube a license to use, reproduce, distribute, prepare derivative works of, display and perform the Content in connection with YouTube's business, including for promoting and redistributing part or all of the Service (and derivative works thereof) in any media formats and through any media channels. 	<ul style="list-style-type: none"> ■ "Content" includes data, text, files, information, usernames, images, graphics, photos, profiles, audio and video clips, sounds, musical works, works of authorship, applications, links and other content or materials that a user submits, posts or displays on or via Instagram. ■ The user grants Instagram a license to use the Content that it posts on or through the service.

	Facebook (Statement of Rights and Responsibilities)	Twitter (Terms of Service, The Twitter Rules and Trademark Policy)	YouTube (Terms of Service)	Instagram (Terms of Use and Privacy Policy)
Licenses Granted to Other Users	Users can comment on Pages. No express license.	Users may reproduce, modify, create derivative works, distribute, sell, transfer, publicly display, publicly perform, transmit or otherwise use the Content. The user must generally use Twitter's application programming interface (API) for these purposes.	Each user is granted a non-exclusive license to access and use, reproduce, distribute, display and perform Content as permitted through the functionality of YouTube's service.	Users may search for, see, use or share any Content that a user makes publicly available.
"Service" and Plug-Ins	<ul style="list-style-type: none"> ■ Facebook grants permission to use social plug-ins so others can post links or content from other sites onto Facebook. ■ The user gives Facebook permission to use and allow others to use such links and IP Content on Facebook 	<ul style="list-style-type: none"> ■ Twitter's "Service" includes its various websites, SMS, APIs, e-mail notifications, applications, buttons and widgets. 	<ul style="list-style-type: none"> ■ "Service" includes all aspects of YouTube, including all products, software, data feeds and services provided on, from or through the YouTube website. 	<ul style="list-style-type: none"> ■ "Service" includes the Instagram website, service and any applications made available by Instagram.
License Subject to User-specified Conditions	<ul style="list-style-type: none"> ■ • Subject to user's: <ul style="list-style-type: none"> ■ privacy settings; and ■ application settings. ■ Public setting allows all persons, on and off Facebook, to access and use content. ■ Content posted to a Page is public and viewable by everyone who can see the Page. 	The user can adjust account settings to control who can see its Content.	<ul style="list-style-type: none"> ■ Uploaded video subject to default public setting (visible to all users). ■ The user can adjust privacy settings for a video to: <ul style="list-style-type: none"> ■ private (visible only to the user submitting the content and users it selects); or ■ unlisted (visible only to people who have the link to the video). 	<ul style="list-style-type: none"> ■ Uploaded Content subject to default public setting (visible to all users). ■ The user can adjust privacy setting so only approved followers see posts.
Termination and Surviving Rights	<ul style="list-style-type: none"> ■ Facebook can stop providing all or part of its service to a user if the user violates the letter or spirit of its terms, or otherwise creates risk or possible legal exposure for Facebook. ■ The user may delete account or disable application at any time. ■ IP license ends when the user deletes uploaded IP Content or account. ■ Previously uploaded content may persist if it has been shared with others, and they have not deleted it. ■ Removed content may persist in back-up copies for a reasonable period of time (not available to others). 	<ul style="list-style-type: none"> ■ Twitter reserves right to remove or refuse to distribute any Content on its services or suspend or terminate a user's account. ■ A user may deactivate account and discontinue use of Twitter's services. ■ Twitter's rights to previously uploaded Content cannot be terminated. 	<ul style="list-style-type: none"> ■ YouTube reserves the right to discontinue any aspect its service at any time and to remove Content without notice. It may also terminate a repeat infringer's access to the service. ■ Content license terminates within a commercially reasonable time after a user removes or delete its videos. ■ YouTube may retain, but not display, distribute or perform, server copies of videos that have been removed or deleted. ■ License to user comments is perpetual and irrevocable. 	<ul style="list-style-type: none"> ■ Instagram reserves the right to modify or terminate the service or access to the Service for any reason and to terminate a user's account for violation the terms of use. ■ After account termination or deactivation, Instagram, its affiliates or its service providers may retain information (including your profile information) and Content for a commercially reasonable time for backup, archival or audit purposes. ■ Data is not accessible through deleted accounts. However, data may persist and appear within Instagram (for example, if Content has been reshared by others).

	Facebook (Statement of Rights and Responsibilities)	Twitter (Terms of Service, The Twitter Rules and Trademark Policy)	YouTube (Terms of Service)	Instagram (Terms of Use and Privacy Policy)
Territory	Worldwide	Worldwide	Worldwide	Worldwide
Exclusivity	Non-exclusive	Non-exclusive	Non-exclusive	Non-exclusive
Sub-licensable	Sub-licensable	Sub-licensable	Sub-licensable	Sub-licensable
Royalties	Royalty-free	Royalty-free	Royalty-free	Royalty-free
Derivatives	Silent	Users may create derivative works. The user must generally use Twitter's API for these purposes.	License allows YouTube to prepare derivative works of Content.	Silent
Indemnification	The user indemnifies and holds Facebook harmless from and against all damages, losses, and expenses of any kind (including reasonable legal fees and costs) related to claims related to the user's actions, content or information on Facebook.	Silent regarding indemnification, but the user represents and warrants it has all the rights, power and authority necessary to grant the rights granted to any submitted Content.	The user indemnifies YouTube from and against any and all claims, damages, obligations, losses, liabilities, costs or debt, and expenses arising from: (i) use of and access to the service; (ii) violation of any term of the terms of service; (iii) the user's violation of any third party right, including any copyright, property or privacy right; or (iv) any claim that the Content caused damage to a third party.	<ul style="list-style-type: none"> ■ The user indemnifies Instagram against any claims, liabilities, damages, losses, and expenses (including reasonable attorney's fees and costs) arising out of or in any way connected with (i) its Content or access to or use of the service; (ii) breach or alleged breach of the terms of use; (iii) violation of any third-party right, including, any IP right, publicity, confidentiality, property or privacy right; (iv) violation of any laws; or (v) any misrepresentations. ■ Instagram reserves the right to assume the exclusive defense and control of indemnification matters, and the user may not settle without Instagram's prior written consent.
Third Party Use and Display of Third Party Content	<ul style="list-style-type: none"> ■ Facebook may associate usernames and profile pictures with commercial, sponsored or related content served or enhanced by Facebook. ■ If the user selects a specific audience for content or information, Facebook will respect the user's choice when using IP Content or information. 	<ul style="list-style-type: none"> ■ Twitter may make Content submitted to or through its services available to other companies, organizations or individuals who partner with Twitter for the syndication, broadcast, distribution or publication of the Content on other media and services. ■ Twitter and its third party providers and partners may place advertising on its services or in connection with the display of Content or information from the services submitted by any user. 	Silent.	<ul style="list-style-type: none"> ■ Instagram may share Content and information with affiliates, service providers, third party advertising partners. ■ Instagram may place advertising and promotions on the service or on, about, or in conjunction with uploaded Content.

	Facebook (Statement of Rights and Responsibilities)	Twitter (Terms of Service, The Twitter Rules and Trademark Policy)	YouTube (Terms of Service)	Instagram (Terms of Use and Privacy Policy)
Official Brand Use	<ul style="list-style-type: none"> Authorized reps of a brand, entity or public figure can create official Brand Page. Facebook reserves the right to remove or reclaim username where a trademark owner complains that the name does not closely relate to that user's actual name. Any user can create a Page to express brand support, provided that it is unlikely to cause confusion with official Page or violate another party's rights. Content posted to a Page is public. 	<ul style="list-style-type: none"> Users cannot impersonate with the intent to mislead. Users cannot use business names or logos with intent to mislead. Twitter reserves right to reclaim usernames on behalf of businesses with legal claim or trademark on those usernames. Users are allowed to create news feed, commentary, and fan accounts, but user and profile should not be the trademarked name of the subject or company and biography should include a statement to distinguish it from the real company. 	<ul style="list-style-type: none"> Official channels with business name. Trademark owners with complaints encouraged to contact users directly. YouTube will perform a limited investigation of reasonable complaints and remove content in cases of clear infringement. Targeted Youtube video ads. 	<p>Users can only create an account for themselves, with the exception of people or businesses that are expressly authorized to create accounts on behalf of their employers or clients.</p>
Use of Platform's Trademarks	Use of Facebook's trademarks and other brand resources must conform to Facebook's <i>Brand Usage Guidelines</i> .	Use of Twitter's trademarks must conform to Twitter's <i>Brand assets and guidelines</i> .	Use of YouTube's trademarks must conform to YouTube's <i>Brand Guidelines</i> .	Use of Instagram's trademarks must conform to Instagram's policy on <i>Using Instagram Brand Assets</i> .

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