



GALA
GLOBAL ADVERTISING LAWYERS ALLIANCE

Social Media: A Global Legal Perspective





ABOUT GALA

The Global Advertising Lawyers Alliance (GALA) is the leading network of advertising lawyers in the world. With firms representing more than 90 countries, each member has the local expertise and experience in advertising, marketing and promotion law that will help your campaign achieve its objectives, and navigate the legal minefield successfully. GALA is a uniquely sensitive global resource whose members maintain frequent contact with each other to maximize the effectiveness of their collaborative efforts for their shared clients. GALA provides the premier worldwide resource to advertisers and agencies seeking solutions to problems involving the complex legal issues affecting today's marketplace.

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FRANCE

1. What are the main social media platforms that advertisers use in your jurisdiction for advertising and marketing to consumers? Are there any important global social media platforms that are not available for use (or are not widely used) in your jurisdiction?

All social media platforms are available for use in France. Advertisers use, in particular, Facebook, Twitter and Instagram.

2. What are the main laws and regulations governing advertising and marketing via social media in your jurisdiction?

There is no specific regulation dedicated to social media, but rather rules applying irrespective of the media used, such as:

- Consumers Code (deceptive, misleading and comparative advertising);
- Intellectual Property Code (trademarks/copyrights infringements);
- Civil Code (the rights of individuals to the protection of their image);
- Law of August 4, 1994 (providing for a mandatory use of the French language in any written, spoken and audiovisual advertising. The use of the foreign language with a translation into French is tolerated).

There is, however, a law dedicated to e-commerce, dated June 21, 2004, ('E-Commerce Law') which addresses some specificities of the activities carried out through Internet (liability of the service providers, the conclusion of online agreements and so on).

This law also sets out general rules which are the same as those applied in the 'real word', such as the requirement to have the ads, whatever their format (pop-ups, ad banners and so on), identified as such and therefore clearly distinguished from non-commercial information (Section 20 of the E-Commerce Law).

The Consumer Code was amended by a law dated March 14, 2016, whereby it now contains the following rule:

'a commercial practice which aims at [...] using editorial content in the media in order to promote a product or a service is deemed misleading if the advertiser has paid for this content without clearly informing the consumer that it is paid-for content, in the content at stake, in writing, with images or sounds clearly understandable by the consumer'

(Section L121-4 11° of the Consumer Code).

3. What are the main self-regulatory rules on advertising and marketing via social media in your jurisdiction?

The French self-regulatory agency, Autorité de Régulation Professionnelle de la Publicité ('ARPP') has issued a Recommendation dedicated to digital ads. This Recommendation also contains Annexes providing for more specific guidelines for specific types of advertising/marketing activity, such as communication carried out by influencers (introduced in April 2017), native advertising and so on.

As a general rule, marketing communications and advertising should be clearly distinguishable as such, whatever their form. That identification can be achieved by any means whereby the consumer can clearly and immediately understand that the message is an ad.

Two instances must be distinguished:

- The case where the commercial nature of the message is obvious, either because it uses a common advertising format or because of the content itself: in this event there is no need for an identification of the commercial nature of the message.
- The case where the commercial nature of the message is not obvious. In this event it is recommended to add a clear notice identifying the commercial nature of the message. When the message is surrounded by news or editorial content, it should be presented in a way that it is instantly recognizable as an advertisement. The notice must be readable or audible, and intelligible.

4. What are the specific laws, regulations, and self-regulatory rules in your jurisdiction related to influencer marketing via social media?

French law is not specifically focused on influencers. But the general obligation to identify a content as an ad is applicable to any content posted by an influencer which can be deemed an ad (Section 20 of the E-Commerce Law, Section L121-4 11° of the Consumer Code).

The ARPP's Recommendation on digital ads provides that, when an influencer has no obligation to promote a brand or a product (ie an advertiser sends products to an influencer who is free to talk about this product, or not, in his/her social network), there is no commercial collaboration between the influencer and the advertiser. It is deemed a 'press relationship', as it is common practice in the 'real world' between an advertiser and journalists/the press.

When there are mutual undertakings between the influencer and the advertiser, the relationship is deemed a commercial collaboration, which must be identified as such in the content posted by the influencer (eg: "#sponsored", "#in collaboration with etc). However, the influencer is not obliged to comply with the ARPP's Recommendation (such as the prohibition on presenting dangerous behavior, the prohibition on presenting someone eating in front of a TV screen etc) because the content is not qualified as an ad.

Commercial collaborations can be qualified as an 'ad' when the following three criteria are met:

- compensation is offered by the advertiser (payment or any other compensation such as gifts),
- there is editorial monitoring of the advertiser, including a prior review of the post/message, and
- there is promotion by the influencer of a product or service of the advertiser (speech, message or image with a promotional purpose).

When the commercial collaboration is qualified as an ad, the obligation to identify the commercial nature of the message applies (eg: '#ad', '#sponsored', '#in collaboration with' and so on), but there are also other obligations imposed on the influencer. The ARPP's Recommendation applies to the content posted by the influencer, insofar as the content is qualified as an ad.

5. What are the specific laws, regulations, and self-regulatory rules in your jurisdiction related to native advertising via social media?

French law is not specifically focused on native advertising, but there is the general obligation to identify the commercial nature of the message when it is integrated into editorial content.

The ARPP's Recommendation on digital ads addresses native advertising in its Annex.

The Recommendation defines native advertising as covering a group of various advertising formats, which use (or look like as much as possible) the design and form of the website on which they are inserted/published, and adapt themselves to the experience of the user. Such communication must be clearly and immediately identified as an ad. The ARPP recommends highlighting the sponsored character of the content through the use of explicit references such as «advertising», «sponsored by», or «in partnership/collaboration with». Such references must be readable, or audible, and be understandable/clear enough, so that the advertising character of the communication may immediately be understood.

As a general rule (applicable to any type of ad), the content of the ad must be honest and true.

6. What are the specific laws, regulations, and self-regulatory rules in your jurisdiction related to the use of user-generated content when advertising and marketing via social media?

French law is not specifically focused on user generated content.

There are, however, general principles governing the assignment of copyrights on a work (the generated content of the user). In particular, the assignment of copyright (or licensing) must be:

- for a limited duration,
- for a defined list of media and
- with a defined territorial scope.

The types of right (reproduction, representation etc) which are assigned/licensed must also be identified.

The moral right of the author is perpetual in France (already deemed a public order rule by French courts).

The ARPP's Recommendation on digital ads provides that, when users are invited to create content for advertising purposes (eg, an ad creation contest set up on a 'User Generated Content' video platform), the principles set out in the Recommendation will have to be complied with, eg, through a moderation of the contributions by the advertiser.

7. What are the specific laws, regulations, and self-regulatory rules in your jurisdiction related to conducting sweepstakes and contests via social media?

The general rules on sweepstakes and contests apply when the promotion is advertised or carried out through social media.

8. What are some other important issues to consider in your jurisdiction when advertising and marketing via social media?

It is important to consider the protection of personal data, particularly in view of the implementation in France of the General Data Protection Regulation ('GDPR') on 25 May 2018.

9. What are the most important, recent cases relating to advertising and marketing via social media in your jurisdiction?

There are a few cases addressing advertising and marketing via social media.

Relevant cases include the following.

- (1) On November 17, 2017, the Court of Appeal of Paris considered that it has jurisdiction over a dispute concerning the infringement of copyrights committed on the Facebook page of the TV show ‘the Voice’ broadcast on the Belgian TV (namely the use, for the credits of the TV show and broadcast on the Facebook page of the show, of a piece of music composed by a French band ‘Anstonvilla’). The Court of Appeal took into account the fact that the Facebook page in question was available in France so that, according to the Court of Appeal, France was the place where the harmful event occurred (in accordance with Section 5-3 of Council Regulation 44/2001/EC of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).
- (2) On 3 July 2013, the Cour de cassation confirmed the decision of the Court of Appeal of Paris which sanctioned the violation, by an alcoholic beverages’ manufacturer (Pernod Ricard), of the rules applicable to the advertising of alcoholic beverages. The ad campaign concerned included the offer of an app, to be downloaded for free (but which required the user to have a Facebook account), allowing the user to see the video of the Ricard ad campaign, but also to download codes leading to cocktails recipes using the alcoholic beverage Ricard, to be published on the user’s Facebook wall.

The Cour de cassation approved the decision of the Court of Appeal of Paris which considered that, despite the fact that the user was sharing the message of the advertiser on his/her Facebook wall with his/her Facebook friends, the message remained an ad, and subject, as such, to the French Health Public Code which, in particular, prohibits online ads for alcoholic beverages where the websites at stake are destined to young people.

The Court of Appeal noted in particular that the use, in the ad campaign, of the Hashtag («#») references was aimed at targeting young consumers who were interested in the new technologies.

10. What are some key ‘best practices’ for advertising and marketing via social media in your jurisdiction?

Some key ‘best practices’ in France are to:

- clearly identify the message as an ad,
- ensure that young people are protected (limitation of access, protection of the image of young people/children etc), and
- ensure that the message is true and accurate.