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Legal Issues in Launching a Social Media Presence

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At the end of January, Coca-Cola announced that its Super Bowl campaign would include a social media component, in which the number of visitors to its Facebook site would influence its charitable contributions. Not to be outdone, Pepsi announced its Pepsi Refresh Project in which consumers vote via social media like Facebook and Twitter on what philanthropic cause Pepsi should support financially. With this cause-related marketing effort, the cola kings have harnessed the power of social media to influence how the public views each brand and to engage in a conversation with their customers.

Have your clients joined in the social media revolution? Social media describes a series of social networking websites, each of which is a community of people interacting not only with brands and commercial applications but also with each other. Social media has emerged as a viable and necessary business tool for finding a consumer base and developing brand awareness. Historically, businesses spoke to consumers through one-way messages delivered through print or broadcast media such as direct mail, advertising, commercials, or press releases. With social media, consumers do not just receive messages passively; they interact with the messages, and through their conversations, consumers are shaping brand images.

Because of the viral nature of social media communications on the Internet, both positive and negative attributes of a brand spread almost instantaneously. It is impossible for a brand owner to monitor every social networking site or blog to police online chatter about the brand. Instead, the prudent business will try to initiate and influence the conversation by launching its own social media applications. Inevitably, clients will approach attorneys for advice on how to enter the brave new world of social media prudently. While the legal issues in marketing a brand via social media are still emerging and are too complex for full examination in this article, several issues deserve immediate attention when a client seeks legal advice in this area.

Format Choice for Social Media

At the outset, the brand owner must determine what type of social media site to launch. On the most conservative end, the business can develop websites and blogs to publish carefully vetted information about the brand. These techniques alone, however, miss the power of social media marketing since they do not allow the consumer to interact with the brand. If the brand owner can get people talking in a positive light about the brand, the brand becomes more powerful and respected. Many businesses, therefore, are setting up Facebook pages or Twitter accounts. In all cases, an attorney advising such clients should be familiar with the legal terms and rules governing these existing social media pages before advising a client as to how to develop a presence in social media.

Protecting Intellectual Property in Social Media

Attorneys must be sensitive to protecting intellectual property on the social media platforms. Trademark highjacking is a priority concern. The social media sites do little to prevent users from adopting usernames that incorporate third party trademarks, thus misdirecting traffic and creating confusion in the marketplace. While Twitter threatens suspension of accounts that manifest a clear intent to mislead others and

Facebook has a registration process for trademarks and a reporting option for infringement, there is little consistency in enforcement. Will the social media sites police similar trademark usages or trademarks that are not registered with the USPTO? What about foreign registrations? At this point, the trademark owner bears the responsibility of monitoring the marketplace and cannot rely on the social media website to do so, particularly because of the safe harbor defense that is available in most instances for the social media website. Audits should be done in foreign languages as well since the marketplace is international.

What about unsolicited ideas? In the offline environment, companies typically do not accept such ideas without a signed release and copyright transfer. With postings to social media sites, however, it is impossible to prevent the submission of unsolicited ideas. A policy stating that the company will not accept unsolicited ideas does not provide adequate protection against third party infringement claims. Companies need to monitor what consumers are posting and be sure not to violate their own stated policies by making use of an unsolicited idea accidentally. Part of developing a policy in this area is determining marketing goals. Perhaps a company wants to develop a viral marketing plan that invites submissions of unsolicited ideas or user generated content (UGC). Attorneys need to develop customized policies based on each client's needs.

Other intellectual property questions remain unanswered. With the increasing use of avatars in virtual worlds, rights of publicity and privacy are at stake and potentially clash with First Amendment rights. Then there is the question of whether a tweet is subject to copyright protection. The short answer is most likely not, making it crucial for tweeters and other social media users to contemplate how to protect their copyrights. Since the law is so undeveloped at this stage and has not caught up with the technology, intellectual property owners need to be vigilant about policing their properties, while being cognizant of the limitations of their ability to catch every violation.

Promotions

Companies are using social media to launch sweepstakes and contests to spread brand awareness. Again, the first step is to check the guidelines and legal terms of the social media website that the client wishes to use. The social media websites rules are constantly changing, and indeed could have changed in the time this article went to press. Therefore, before running a promotion, it is essential to do a current check on social media sites' terms and conditions governing promotions.

At the end of 2009, Facebook revised its guidelines concerning running "any sweepstakes, contest, competition or other similar offering" on Facebook. Chief among the new guidelines is the requirement for prior written consent by Facebook for any promotion being run and administered on Facebook In addition, the promotions cannot use Facebook's "native" functionality to run a promotion. The promotion cannot allow entry by becoming a fan of a company on Facebook or by posting an entry on a Facebook wall. (See the full guidelines at http://www.facebook.com/promotions_guidelines.php.) You Tube and Twitter, on the other hand, are silent on these issues.

In addition, even in the social media context, sponsors must accomplish full compliance with offline promotions laws and limit eligibility to those countries in which they have completed legal due diligence. It is essential to confer with co-counsel who specializes in this complex area of law to insure that a promotion is not an illegal lottery.

User Generated Content

Many promotions attempt to facilitate consumer interaction with the brand through UGC. Many brands are launching UGC promotions in which consumers are invited to post content which they have created, perhaps videos or songs, to sponsor sites for judging. Judging may be done by the brand or by a combination of brand and public vote. Typically, this content is posted directly to the sponsor website without internal vetting.

The legal issues abound. Is the promotion an illegal lottery? Attorneys need to seek out specialized co-counsel if they are not fully familiar with the laws of promotions. How will the sponsor handle issues of violations of third party intellectual property rights or rights of publicity? Should a consumer post something libelous, obscene, or infringing on third party rights, even the most diligent monitoring service will not be able to remove it instantaneously. The result can be damage to the public image of the brand and legal vulnerability for the brand owner. To limit such dire consequences, brands that use UGC contests need to police activity practically 24 hours a day. Such contests, and their submissions, will also be subject to the terms and condition of the third party posting site. Some companies are now insisting on submission to them directly for posting on the sponsor sites to help gain control of the monitoring process.

In addition, contest rules must be carefully drafted as to submission requirements, creating guidelines prohibiting infringing or offensive content. The rules should also strongly protect the sponsor's right to reject or delete ineligible submissions. Then, in advance of launching the promotion, an attorney reviewing this kind of contest must discuss with the client how it will use submissions, who will own them, and what releases may be necessary

to obtain. Public judging is a legal quagmire. It is difficult to monitor voting to be sure the promotions is judged accurately and is not an illegal lottery.

Attorneys also need to counsel clients on how they can use UGC. What releases need to be obtained? Who will own the copyright? What derivative works can be created? Properly drafted rules should address these issues at the promotion's inception.

Endorsements and Testimonials in Social Media

Attorneys advising in this area should also caution regarding the new FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising (16 C.F.R. 255). These guides provide that advertisers must disclose "material connections" between themselves and endorsers, and those endorsers, themselves, may bear legal liability for their statements. In two examples provided by the FTC at Part 255.5 (examples 7 and 8), the FTC suggests that if a blogger receives behind the scenes compensation to try a product or receives a free sample of a product and then promotes the product online, the blogger should disclose the "material connection." Similarly, if an employee posts reviews of his employer's product on an online discussion board, the employee should conspicuously disclose his employment connection or the employer and employee could run afoul of the guidelines. Best practices, then, require a company to develop policies regarding how it promotes its products or services, how it discloses its relationships with product promoters and employees, and how it monitors online activity of such people.

Employment Law Issues

Multiple employment issues arise in connection with a company's use of social media. First, a company must decide how to use social media. Company-sponsored pages on social media can be used to promote the company and even to recruit job applicants. If a company executive has his own social media page or blog, sometimes his/her persona may be indistinguishable from the company, and anything he/she posts may reflect on the company. It is important to establish guidelines as to its use and content to distinguish personal use from professional use. The blog that turns into a rant may be perceived as the position of the employer company, not only creating public relations issues, but also raising legal issues of defamation, privacy violations, etc. These issues may conflict radically with free speech concerns, and the courts are considering the boundaries for such speech.

In addition, a company should consider whether its employees can access social media pages at work. It is advisable to restrict use of personal social media pages while on duty or with company equipment through a stated policy and even to block access to such pages. What if the employee divulges trade secrets or posts defamatory or harassing statements? Does the employer bear liability? Can the employer monitor personal social media pages that an employee accesses on company-owned equipment without violating privacy rights? Will a social media site cooperate if the company asks them to remove defamatory information? While the social media site's usages statements typically prohibit posting content that may be or actually is threatening, defamatory, infringing, or unlawful, they may be less likely to address confidential information. In addition, the standard regarding removal varies from possibly unlawful material to actually unlawful material.

Companies need to develop stated policies on use of social media by employees. Such a policy should cover personal use of social media, inappropriate posts on professional and personal pages, and policing of social media. Care should be taken to respect laws that protect employees in their off-duty conduct. Then, considerable thought is necessary on how to monitor compliance with the policy and what to do about violations. If a company cannot enforce its policy, then it should probably be redesigned.

Conclusion

Social media is a powerful tool for advertising and marketing one's brand. Because fact patterns and case law are still developing, companies who join the conversation are traveling in a new frontier of legal issues. In creating social media programs for clients, attorneys need to draft flexible policies that a client can enforce. Then, they need to train risk management departments to monitor social media activity. Beware the use of forms. Each client's issues are unique and need to be addressed in the context of its individual goals and industry needs. All laws that apply offline still apply in the social media world, but risk and remedies could be different online. If a trade secret is leaked via social media in hours or minutes, there is no injunction that can really correct the damage. Attorneys need to help their clients influence the online conversation so that engagement in social media helps brands rather than hurts them. ■

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