

Social Media in Marketing and the Workplace: Legal and Regulatory Considerations (LAW 303)

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Agenda

- Overview of Social Media - defining the medium
- Advertising and Marketing
- Data Privacy in Social Media
- Gaming
- Copyright and Trademark
- Employer-Employee issues (liability and enforcement)
- Jurisdictional questions in the border-less internet
- Drafting an effective Social Media policy for your company and Monitoring channels/compliance



Advertising & New Media: Social Media



- Social Media:

- “[O]nline forms of communicating that any individual can employ, ... Contrast with “industrial media,” which refer to professionally produced radio, TV and film” (Answers.com)



- “[A] blending of technology and social interaction for the co-creation of value” (Wikipedia.com)



- Social media platforms include blogs, social networking, social bookmarking, news sharing, and photo/video sharing



WIKIPEDIA
The Free Encyclopedia



- Americans spend nearly a quarter of their time online on social networking sites and blogs (Nielsen 2010)



Advertising & New Media

- Communications Decency Act of 1996
 - Core of act invalidated, but key provisions remained
 - Immunity for content or for removing “objectionable” content
 - “No provider or user of an *interactive computer service* shall be treated as the *publisher or speaker* of any information *provided by* another information content provider.”
 - Changes traditional rules applicable to (offline) media publishers



Advertising & New Media: CDA

- “Interactive Computer Service” includes social networking sites such as MySpace, ISPs such as America Online, and commercial websites with third-party content, bulletin boards, blogs, etc.
- Example: A YouTube post inaccurately criticizes a company or product
 - YouTube bears no liability
 - Must identify and sue poster
 - May be able to persuade YouTube voluntarily to remove post, but, absent trade secret, copyright or similar exigency, no obligation to do so
 - May have to subpoena to obtain poster information



Advertising & New Media: CDA

■ Limitations?

- Only defamation/obscenity, or broader than that?
 - Any liability that stems from status as publisher, speaker, distributor
 - Does not expand or limit intellectual property laws
- Content must be “provided by” another content provider
- Not applicable if “responsible, in whole or in part, for the creation or development” of the content
 - Cannot solicit or encourage what is specifically objectionable about the content
 - Addition of titles, headers, pull-outs, logos?



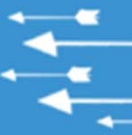
Advertising & New Media: Endorsements

- Three Basic Principles from FTC Endorsement Guide:
 - Endorsements must be truthful and not misleading;
 - Material connections must be disclosed; and
 - Ad must clearly and conspicuously disclose the generally expected results in the depicted circumstances.
- Advertisers subject to liability for statements made by endorsers
- Enforcement Actions
 - Legacy Learning Systems (March 2011)
 - Reverb Communications (August 2010)



Advertising & New Media: Endorsements

- Social Media
 - Fundamental question is whether, viewed objectively, the relationship between the advertiser and the speaker is such that the speaker's statement can be considered "sponsored" by the advertiser and therefore an "advertising message."
 - **Lack of control** over a specific statement made via new forms of consumer-generated media **does not necessarily mean** that the advertiser is not responsible for the content.
- Must monitor social media sites **and need action plan**
- Avoid appearance that company implicitly adopts statements it knows are not supported



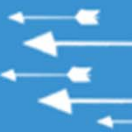
Advertising & New Media: Endorsements

- Tensions with CDA: when is the company responsible?
- Stacey Ferguson, FTC Div of Adv Practices, Dec. 2009
 - *Q: What about sites that allow you to review the product on the advertiser's site? Consumer buys product and writes: this is the greatest ever, it cured my skin disorder. Is the advertiser who puts up the site responsible for the content?*
 - *Ferguson: **Not entirely resolved.** If it's a statement on behalf of the company, the company would be responsible. But if the consumer is making her statement on her own, but it's on the company's site, that's a gray area. The CDA would exempt the person who owns the website from responsibility for content on the site. But if the advertiser knows the representation isn't substantiated, the advertiser should be wary of keeping the statement on the site.*



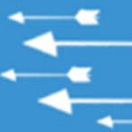
Advertising & New Media: Texts and E-mail

- Telephone Consumer Protection Act (“TCPA”)
 - Governs “Do Not Call” List/requirements
 - Numerous courts, including 9th Circuit, have held covers unsolicited texts
 - TCPA provides a private cause of action
 - \$500 per violation or \$1,500 per willful violation
 - “Cash cow” for plaintiff’s lawyers
- CAN-SPAM
 - FTC filed complaint against Philip Flora in 2/2011
 - Allegations include over 5MM unsolicited, repeated texts and misuse of personal information
 - Violations of FTC Act and CAN-SPAM



Advertising & New Media: Affiliate Marketing

- Third parties – e.g., website operators or individuals – who drive traffic to a seller’s website in exchange for a commission
- FTC concerned that affiliates are using improper means - false and deceptive claims about the product, fake blogs, other content that fails to disclose material connection to seller
- Central Coast Nutraceuticals (2010)
 - Used affiliates to direct consumers via internet ads, spam e-mails, pop-up ads, blogs and other websites
 - **FTC filed complaint against Central Coast; holding Central Coast responsible for claims made by affiliate**



Advertising & New Media: Mobile Marketing

- Increased focus; team at FTC devoted to monitoring mobile advertising
- We've seen 2 enforcement actions for mobile apps so far:
 - W3 Innovations' "Emily's World" Apps
 - W3 agreed to pay \$50k
 - Notable as first "App case" and for recent uptick in COPPA actions
 - "AcneApp" and "Acne Power" Apps
 - Marketer cited to a bogus journal article and provided endorsements
 - Companies involved agreed to pay \$14k and \$1700 respectively



Data Privacy

- Google Settlement with FTC
 - Google Buzz. Allows users to share updates, comments, pictures, videos and the like through “buzzes” made either publicly or privately to individuals or groups of users.
 - Google used information gathered from Gmail
 - Failed to ask consent
 - Practice contradicted Google’s privacy policy and rendered policy false and misleading



Data Privacy

- Two important Firsts in Google settlement
 - First time FTC settlement required a business implement a comprehensive program to protect consumers' privacy
 - First action charting violations in terms of US-European Union Safe Harbor Framework



Data Privacy

- Facebook settlement, Nov. 2011
- FTC alleged that changes to information sharing in user profiles by default was unfair and deceptive
- From now on, affirmative consent is required
- Requires a comprehensive privacy and security program (see Google settlement), including information destruction on user deletion
- Independent privacy audits every 2 years for 20 years



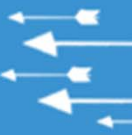
Data Privacy

- Cookies, Web Beacons and Web Tracking
 - Growing source of concern
 - Various proposals and FTC activity
 - Do Not Track
 - Raises questions regarding the type of information, type of consent (opt in/opt out), global/entity or browser specific, etc.
 - European Union's "Cookie Directive"
 - Effective May 27, 2011, permits cookies and similar technology only when user has given positive consent or "opted in"
 - Concern focuses on "tracker cookies" that relay browsing history



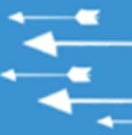
Data Privacy

- March 2011, FTC brought action against Chitika, Inc., a behavioral advertiser that permitted people to “opt out” of accepting “tracker cookies,” but option expired after 10 days
- Per settlement agreement, Chitika:
 - (1) cannot misrepresent privacy policy;
 - (2) must take measures to improve transparency;
 - (3) must honor opt out request for at least 5 years; and
 - (4) must create a simple opt-out mechanism and include in close proximity a disclosure informing consumers:
 - Company collects browsing info to deliver ads
 - By opting out, Chitika will not collect that info
 - Current status of consumer’s choice (e.g., “opted-in” and “opted-out”)
 - Choice is browser specific



Data Privacy: Issues Presented by New Media

- Social Media
 - Popular applications transmit identifying information
 - Last year, Facebook revised privacy settings
- Mobile Privacy
 - Location information?
 - E.g., Apple/iPhone.
 - Newly formed Senate Judiciary subcommittee on privacy, technology and the law held hearings May 10, 2011
 - Medical/Financial?
 - E.g., Insurers reportedly considering basing underwriting on where insured routinely visits (e.g., donuts v. the gym!).
 - Emphasis on transaction-based notice and choice



Advertising & New Media: Gaming

- Games, sweepstakes and contests online are increasing in popularity
 - Both to promote products and as free-standing games
 - Second most popular internet activity, accounting for 10% of all internet time (Nielsen 2010).
- Elements to consider:
 - Consideration
 - Does chance influence the outcome?
 - What are you playing for?
- Facebook revised sweepstakes guidelines May 2011
 - Cannot enter sweepstakes through Facebook (e.g., by “liking” a page);
 - Cannot notify winners through Facebook (e.g., by Facebook message);
 - Cannot use Facebook to cast vote in sweepstakes



Legal Risks: Copyright

- Copyright protects “original works of creative authorship fixed in a tangible medium of expression”
- What this means:
 - any content whether (a) created by you, (b) by some one else at your request, or (c) by an independent third party IS PROTECTED BY COPYRIGHT
 - GET PERMISSION FIRST if the content is **not** created by you or under a written work-for-hire agreement Note limited exceptions (e.g. government works, public domain)



Legal Risks: Copyright

- Practical Applications
 - Can placing a hyperlink to a photo on a publicly-accessible Web constitute misappropriation of the photo?
 - South Carolina case involving user's experience with BidZerk; placed link on his blog
 - Can an advertiser's use of photo from photo-sharing web site constitute misappropriation?
 - U.S. suit against Australian advertiser for using photo without permission
 - Are "Tweets" protected by Copyright?
 - Twitter's terms of service say you own your own posts; copyright law applies. Fair Use?
 - Is Tweeting a Conference Lecture a Copyright violation?
 - In 2007, Computer and Communications Industry Association filed FTC complaint against Major league sports;
 - NFL DMCA debacle with Wendy Seltzer, Brooklyn Law School professor and EFF staff attorney



Legal Risks: Trademarks

- What is a Trademark/Service mark?
 - Any word, name, symbol or device that signifies the source of goods or services
- How Are Trademarks Used in Social Media?
- How Are Trademark Rights Acquired?
 - Use
 - Registration (state and federal)
- Practical Applications
 - Is Creating a Facebook Page about your favorite brand infringement?
 - Is Tweeting about a brand infringement?
 - Is using a trademark as a social media handle infringement?



Legal Risks: Employment & Workplace

- Companies seek to control how sites are used to communicate with potential clients and colleagues; BUT control is more complex because communications occurring outside IT systems and continuously in flux.
- Greater risks to regulated industries like Financial services industry because of compliance worries.
- NLRB: August 8, 2011, “Report of the Acting General Counsel Concerning Social Media Cases.”
 - The take away for Employers: most, if not all, job related social media discussions are protected.



Legal Risks: Employment & Workplace

- Practical Applications
 - Litigation: “Facebooking the Jury”
 - Prospective Employees: Is it OK to use social media profiles in the hiring process?²
 - Disclosure of Private Information³
 - Can an employee criticize a supervisor when posting on a social media platform?
 - What is protected and unprotected on social media, and do the same rules that apply to verbal communications in the workplace apply to social media?
 - Does it make a difference if the post is done during non-work time?



Jurisdictional Issues

- The French Yahoo! Cases (2000)
 - Two cases; one in France and one in US
 - French court ordered Yahoo! to block all French users from auction sites that advertised or sold Nazi memorabilia, which is illegal in France
 - Yahoo! sought judgment in the U.S. that order was unenforceable
 - Result: Yahoo! ended up self-censoring the sale of Nazi memorabilia.
 - Illustrates the problems that arise when sovereign laws conflict, and the intersection of law and the technology required to comply
 - Yahoo! exec was found criminally liability for violations of European anti-Nazi laws in related case



Other Jurisdictional Issues

- Language laws
- Labeling/disclosures
- Differing standards for health claims
- Privacy



What Should You Do?

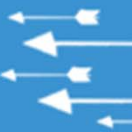
- There are steps you can take
- Focus on relevant markets
- Adopt internal rules/policies and monitoring
- Contractual provisions
- Awareness – education



Practical Guidelines

Navigating Jurisdictional Issues

- No solution is foolproof
- If not selling online or offering “red flag” content, can limit risk by expressly targeting specific countries
 - Product discussion
 - Terms of use
- “Red flag” content includes “sin” products, children-directed content, infant formula (WHO and other issues) and health/pharma claims



Practical Guidelines

Types of Rules and Monitoring to Consider

- Ensure that all employees know the ins and outs of social media and the risks and legal consequences associated
- Make yourself known! Proper disclosures of affiliations & compensation are key
- Understand the Company's privacy policy and the type of data collected from consumers
 - Dynamics are changing quickly
 - Discuss collection and retention policies with in-house or outside counsel
- Make sure you have received consent where necessary (e.g., text messages)



Practical Guidelines

Types of Rules and Monitoring to Consider

- Endorsement monitoring
 - Reasonable program; scope depends on risk of deception and harm
 - Train members of “network” what they can and cannot say about the product (e.g., proven benefits of product, financial relationship!);
 - Set up a reasonable monitoring program to check on what your “network” is saying;
 - Follow up if you find questionable practices.
- While applicability of the CDA to comments posted on a Company website is unclear, Company should be “wary” of an unsubstantiated claim posted on a Company website



Practical Guidelines

- Action Items
 - Proper Contractual Provisions
 - Code of Ethics/Code of Conduct
 - Social Media Policy
 - Monitoring
 - Google Alerts
 - Brand names/Trademarks
 - Social Media Handles
 - Executives Names
 - Facebook/Myspace/LinkedIn Pages
 - Updated Privacy Policy



Practical Guidelines

- Here's what to include in your Social Media Policy:
 - **Philosophy:** how does social media fit into an employees job expectations and performance
 - **Behavioral Expectations:** areas of expertise; respectful conduct; timeliness; perspective; transparency & judiciousness
 - **Channel expectations:** Which sites (communication channels) are appropriate for which types of communications.
 - **Contextual Expectations:** conversational style; perception; value
 - **Content Expectations:** use of company proprietary information, including current projects, trademarks, names, logos

