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Social media in action in advertising and marketing

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Introduction

As emerging technologies with nearly limitless boundaries and possibilities, social media give consumers unprecedented engagement with a brand. Consumers are empowered. However, this brings with it risks as well as gains. Consumers are not just buying a product or service online; they are discussing, reviewing, endorsing, lampooning, comparing and parodying companies and their brands. They are not simply being targeted for advertising; in many cases, they are participants in the creation and distribution of advertising. Companies can better enable, influence, monitor, react to and hopefully monetize the consumer conversations taking place in social media, and can better engage and interact with the consumer directly with their brands - but it is critical to understand and navigate the attendant legal minefields, which are both dynamic and evolving.

Why are advertisers and marketing professionals drawn to social media? Because more than 1.8 billion people use the Internet every day(1) and, according to Nielsen, consumer activity on social networking and blogging sites accounted for 17% of all time spent on the Internet in August 2009 (up from 6% the previous year).(2) The internet audience is larger than any media audience in history and is growing every day.

In the United States, Nielsen estimates that advertising spending on social networking and blogging sites grew by 119% from an estimated $49 million in August 2008 to $108 million in August 2009.(3) Expressed as a percentage of total US online advertising spend, advertising expenditures on social networking sites climbed from 7% in August 2008 to 15% in September 2009.(4) In February 2010 the chief operating officer of Kellogg's confirmed that the company had tripled its social media spending since 2007.(5) Where are companies spending these dollars? The possibilities are endless.

This update first looks at branded channels, gadgets, widgets and promotions such as sweepstakes and contests within and even across social media platforms, which are just a few of the ways in which companies are using social media to increase brand awareness. Even companies that are not actively using social media platforms to engage consumers must monitor social media outlets for comments made about the company or its brands. Social media cannot be ignored; this section explores the legal implications of marketing in this manner.

Next, the update looks at the use of social media to foster brand engagement and interaction. Many companies are moving beyond simply having a page on Facebook, MySpace or YouTube, and are encouraging consumers to interact with their brand. Companies are using social media to provide customer service and get product reviews. Marketers seek to engage the consumer in developing user-generated content around their brands for advertising, and solicit their social networks actively to create buzz, viral and word-of-mouth advertising campaigns. Some even employ 'street teams' of teenagers who plug and promote a brand, film or music artist in return for relatively small rewards. Who controls and retains liability for the statements made and content provided in the social media universe? Who owns the content? Will brand owners lose control of their brands?

Finally, the update explores the impact of social media on talent rights and compensation. As discussed above, advertising spend is increasingly moving online. Along with this shift, the line between content and advertising has become blurred. Celluloid is being replaced by digital files and projectors by flat screens and monitors. What once aired only on television is now being moved over to the Internet by content owners and advertisers, or is going viral thanks almost entirely to consumers, with a little encouragement from advertisers. This update examines how this shift impacts on talent compensation and discusses its application to the Screen Actors Guild (SAG) and the American Federation of Television and Radio Artists (AFTRA) commercials contracts.

Brand awareness

The official Starbucks Facebook page has more than 6.8 million fans and counting. The Starbucks YouTube channel has more than 6,000 subscribers and more than 4.5 million uploaded video views. There are two Starbucks groups on Flickr, each with more than 3,500 members, and a combined total of more than 21,000 photos. More than 840,000 people follow Starbucks on Twitter. And Starbucks' own social network, Starbucks V2V, has nearly 24,000 members.

This section explores the legal issues involved in the use of branded pages and promotions and contests.

Branded pages

Branded social media pages which are created and hosted using a third-party service allow companies to establish a social media presence quickly and easily. In order to do so, individuals companies must register and agree to abide by the terms of use and policies that apply to these services and host companies. As discussed below, this may not only restrict a company's ability to use the brand page for promotional and advertising purposes, but may also grant or restrict media rights with which a brand owner might not otherwise have had to contend. The third party bears much of the responsibility for regulating the actions of users who access, use and interact with the service. For example, the third party is responsible for responding to takedown notices received pursuant to the Digital Millennium Copyright Act 1998 and for establishing age limits for users. The terms of service applicable to Facebook and YouTube specifically prohibit use by children under the age of 13, while Twitter allows access only by individuals who can enter into a binding contract with Twitter.(6) Facebook, YouTube and Twitter prohibit the uploading or posting of content that infringes a third party's rights, including IP, privacy and publicity rights, and provide instructions for submitting a Digital Millennium Copyright Act takedown notice.(7) However, even where the third party's terms of service provide a framework for both a company's and an individual user's activities, can a company afford not to monitor its branded page for offensive or inappropriate content, trademark or copyright infringement, or submissions obviously made by or containing images of children?

Creating a presence and beginning the conversation is easy - but controlling the conversation is nearly impossible. Looking again at Starbucks as an example, a search for 'Starbucks' on Flickr currently yields nearly 300,000 results, and on MySpace more than 91,000 results; and there are more than 3,400 unofficial Starbucks pages on Facebook. This is the current state of affairs, despite the fact that as a part of the registration process for a page, Facebook asks that individuals "certify that you are an official representative of this brand, organization, or person and that you are permitted to create a Facebook page for that subject", coupled with an electronic signature. As an additional deterrent, Facebook includes the following note:

"*Fake pages and unofficial 'fan pages' are a violation of our pages guidelines. If you create an unauthorised page or violate our pages guidelines in any way, your Facebook account may be disabled.*"

Similarly, Twitter has an impersonation policy that prohibits "non-parody impersonation".(8)

Despite these efforts by social media platforms, can these legal conditions and requirements realistically act as a deterrent or a meaningful enforcement mechanism? More significantly, will a company be forced to rely on these third parties to provide remedies or enforce these terms before acting - or instead of acting?

So, what are a company's options in managing its brand image? While a company could have a claim for copyright or trademark infringement and could attempt to shut down impersonator and unofficial sites by contacting the social media platform to demand that the infringer and infringing material be removed, these measures could become (and may already be) virtually impossible to implement because of sheer volume. Further, depending on the message being conveyed on an unofficial page, a company might not want to shut it down. For example, there are three unofficial 'I love Starbucks' pages and more than 500 'I love Starbucks' groups. If consumers likes frappuccinos, they can join one of more than a dozen groups dedicated to various flavours. But for every 'I love Starbucks' page or group, there is an 'I hate Starbucks'

group (more than 500) or 'Starbucks sucks' page (211). How does a company respond to these so-called 'suck sites'? As mentioned above, a company could try to litigate on the basis of IP infringement, but that could prove to be an endless battle.

Promotions and contests

Many companies are using their social media presence as a platform for promotions, offering sweepstakes and contests within or founded on social media and user networks. There are giveaways for the first 10 people to re-Tweet a Tweet. Companies can partner with YouTube to sponsor contests that are featured on YouTube's Contest Channel, or sponsor contests available on a company-branded channel. While YouTube's terms of service are generally silent on the issue of sweepstakes and promotions, Facebook's terms of service specifically prohibit offering contests, giveaways or sweepstakes on Facebook without its prior written consent. Even those who merely use Facebook to publicize a promotion that is otherwise administered and conducted entirely off Facebook must comply with the promotions guidelines. In December 2009 Facebook revised its promotions guidelines to require specifically, among other things, that:

- the sponsor take full responsibility for the promotion and follow Facebook's promotion guidelines and applicable laws;
- the promotion be open only to individuals who are at least 18 years of age;
- the official rules contain an acknowledgement that the promotion is not sponsored, endorsed or administered by, or associated with, Facebook, as well as a complete release for Facebook from each participant; and
- the sponsor submit all promotion materials to his or her Facebook account representative for review and approval at least seven days prior to the start of the promotion.(9)

In addition, Facebook's promotion guidelines prohibit, among other things:

- using Facebook's name in the rules except as otherwise required by the promotion guidelines;
- conditioning entry in the promotion on providing content on Facebook (eg, making a post on a profile or page, status comment or photo upload);
- administering a promotion that users automatically enter by becoming a fan of a page; or
- administering the promotion on Facebook other than through an application on the Facebook platform.(10)

However, many companies appear to be ignoring Facebook's terms.

Other companies have taken their contests off a particular social media platform and instead operate a contest-specific website. As a result, several companies have sprung up to assist advertisers in their social media endeavours, including Votigo, Wildfire and Strutta. One such company is Folgers, which recently launched a social media contest to celebrate the 25th anniversary of its famous Folgers jingle "The Best Part of Wakin' Up". The contest, located on a dedicated website, encourages people to submit their take on the iconic jingle. Entrants have a chance to win $25,000 and potentially have their jingle featured in a future Folgers Coffee commercial. In addition to the grand prize awarded for the jingle itself, daily prizes and a grand prize will be awarded via random drawings to individuals who submit votes in the jingle contest. It does not take much imagination to see the legal issues and challenges (eg, consumer, talent union and regulatory) that might be raised. What if the winner is a member of a union? Who owns the video submissions? Will the semi-finalists, finalists or winners be required to enter into a separate agreement relating to ownership of the master recording?

Despite the undeniable reach of social media, participation is not always easy to come by. In Autumn 2009 FunJet Vacations sponsored a giveaway whereby individuals who uploaded a photo or video of themselves making a snow angel were entered into a draw for a four-night vacation in Mexico or the Caribbean. However, according to Mike Kornacki, who assisted Funjet Vacations in the giveaway, "on the 1st level market reach Funjet was at 384,000 individuals for Facebook and 1.05 million for Twitter" and Funjet received only "313 total submissions over 5 days".(11) So what happened? Those who did participate were unwilling to share the giveaway with their networks because "they didn't want the competition".(12) Surveyed individuals who did not participate said "it was too hard to enter the draw".

Regardless of the platform or website on which a contest is featured, the same laws apply online as to offline contests, but they may apply in unique or novel ways and their applicability may be subject to challenge. Because social media are often borderless and global, companies must also consider the possibility that individuals from across the globe may find out about the contest and wish to enter. Unless a company plans to research the promotion and sweepstakes laws in every country around the globe (and translate the official rules into every language), eligibility should be limited to those countries where the company does business and/or has legal counsel. This represents both an opportunity and a challenge - both fraught with legal and regulatory possibilities.

In the United States,(13) a sponsor cannot require entrants to pay consideration in order to enter a sweepstake. Unlike skill-based contests, the golden rule of 'no purchase necessary to enter or to win' applies. In addition, depending on how the promotion is conducted and the aggregate value of prizes awarded in the promotion, New York, Florida and Rhode Island have registration requirements (New York and Florida also require bonding).(14) In New York and Florida, if the aggregate prize value exceeds $5,000, a sponsor must register the promotion with the state authorities and obtain and file with the state a bond for the total prize amount.(15) In Rhode Island, if the aggregate prize value exceeds $500 and the promotion involves a retail sales establishment, a sponsor must register the promotion with the Rhode Island secretary of state.(16)

Brand interaction

Bloggers

"People are either going to talk with you or about you."(17) So how do you influence the conversation? Many companies are turning to amplified word-of-mouth marketing by actively engaging in activities designed to accelerate the conversations that consumers are having with brands, including the creation of Facebook applications based on a company or its product. In July 2009, for example, Starbucks created a Facebook application where users could share a virtual pint of ice cream with friends. Other examples include using third-party bloggers to create product reviews, offering giveaways on third-party blogs or creating a company-sponsored blog.

Companies often provide products to bloggers so that the blogger can write a review of the product. While this practice is generally acceptable, companies and bloggers who fail to disclose the connection between blogger and company face regulatory scrutiny and consumer backlash. In Spring 2009 Royal Caribbean was criticized for posting positive reviews on travel review sites through the Royal Champions, a viral marketing team comprised of fans. In return for positive postings, the Royal Champions were rewarded with free cruises and other perks. Royal Caribbean has acknowledged that the Royal Champions programme exists, but denies that it was ever meant to be secretive or that members were instructed to write positive reviews.

In addition to backlash from consumers who might feel as if they have been duped or that a blog is a glorified advertisement and the blogger an instrument of a particular company, companies and bloggers who fail to disclose material connections (eg, the provision of free products or other perks to the blogger) may come under regulatory scrutiny. In 2009 the Federal Trade Commission (FTC) revised its Guides Concerning the Use of Endorsements and Testimonials in Advertising.(18) The FTC guides provide a general principle of liability for communications made through endorsements and testimonials:

"*Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers. Endorsers also may be liable for statements made in the course of their endorsements.*"(19)

In general, a company that provides products to a blogger for purposes of a product review should never instruct the blogger on what to say in the review or ask to review or edit the review before posting. While companies should provide bloggers with up-to-date, company-approved product information sheets, these should not reflect the company's opinion or include prices. In the event of a negative review, the company has the option of not providing products to the blogger for future reviews. The company should also warn its personnel about engaging in inflammatory disputes with bloggers on any blogs. In addition, since under the FTC guides a company could be liable for claims made by a blogger, the company should monitor product reviews made by bloggers to ensure that the claims made are truthful and can be substantiated.

Customer service and customer feedback

Blogs also foster customer feedback and engagement with a brand. For example, General Motors has at least two blogs: the Fast Lane(20) and the Lab.(21) According to General Motors, the Fast Lane is:

"*a forum for GM executives to talk about GM's current and future produand services, although non-executives sometimes...discuss the development and design of important products. On occasion, Fast Lane is utilized to discuother important issues facing the company.*"(22)

The Lab is "a pilot program for GM, an interactive design research community in the making".(23) The Lab lets consumers "get to know the designers, check out some of their projects, and help [the designers] get to know [the consumers]. Like a consumer feedback event without the one-way glass".(24) Both General Motors blogs, of course, link to General Motors' Facebook page, where consumers can become a fan. Similarly, Starbucks has its Ideas In Action blog, where consumers share ideas with the company. The customer feedback received via the blog and social networks led to the creation of a store-finding and information application for the iPhone, and a second application that will let customers use the iPhone as their Starbucks card. According to

Stephen Gillett, Starbucks' chief information officer, "We think it's really talking to our customers in new ways."(25)

Once the conversation has begun, companies can use social media to provide nearly instantaneous customer service and receive customer feedback. Major credit card companies and international banks are providing customer services via Twitter.

A major retailer launched its Facebook page in July 2009. In September 2009 the company posted a seemingly innocent question: "What do you think about offering [our site] in Spanish?" The company didn't get the constructive dialogue that it was looking for. According to the company's senior director of interactive marketing and emerging media, "It was a landmine. There were hundreds of negative responses flowing in, people posting racist, rude comments." Do the tenets of free speech demand that a company leave such comments posted on its branded social media page? Or can the company selectively remove such comments? In this case, it removed the post.

In September 2009 a major washing machine company interacted with a so-called 'mommy-blogger' through Twitter, turning what started out as a negative into a positive. After what she described as a frustrating experience with the company's customer service representative and her new washing machine, Heather Armstrong, Tweeter and author of Dooce.com, aired her grievances with the company and its product on Twitter. Armstrong sent a Tweet to her more than 1 million followers urging them not to buy from the company. Three minutes later, another Tweet with more criticism, and then more equally barbed Tweets followed. Within hours several appliance stores had contacted Armstrong via Twitter offering their services. Then came a Tweet from the manufacturer asking for her number, and the next morning a company spokesperson called to say they were sending over a new repairman. By the following day, the washing machine was working fine. This is an example of tackling a social media problem creatively rather than deciding to let it slide and turning it into a positive customer experience.

So what should a company do if it finds itself or its products to be the subject of a negative or false post? First, it depends on where the post was made. Was it a company-operated blog or page, or a third-party site? Second, it depends on who posted the negative comment. Was it a company employee? Was it the author of the blog? Was it a third-party commenter on a blog? Was it a professional reviewer (journalist) or a consumer? More perniciously, was it a competitor? Finally, the content of the post should be considered. Is a right of free speech involved? Was anything in the post false or defamatory? Companies should seek to correct any false or misleading information posted concerning the company or its products. This can be done either by seeking removal of the false post or by responding to the post to provide the public with accurate information. Where a post is defamatory, litigation may be an option. In the case of a negative (but truthful) product review or other negative opinion posted about the company, if the comments are made on a company-operated blog or page, the company has the right to remove any posting, subject to its policies and the terms on which the blog is made available. Where comments are made on a third party's blog, a company could attempt to contact the author of the blog and seek removal of the post. However, depending on the content of the post, it may not be in the company's best interests to take it down.

One of the central tenets of social media is open dialogue. Where a company avails itself of the benefits of social media, but then inhibits the conversation by selectively removing posts, it may face a public relations fiasco. One approach to responding to negative posts may be to have an authorized company representative respond to the post on behalf of the company in order to engage the consumer in further dialogue. If a company prefers not to have such a conversation in an open forum, the company could seek to contact the poster offline to discuss the poster's negative opinion of the company or its products. This is the approach that the washing machine manufacturer took when faced with negative Tweets from Armstrong.

User-generated content

User-generated content covers a broad spectrum of content, from forum postings to photos and audiovisual content such as video, and may provide the greatest potential for brand engagement. Companies frequently and increasingly create promotions around user-generated content (eg, urging consumers to submit content-rich descriptions of why they love a certain product or service). However, "the consumer wrote it" is not an iron-clad defence against claims of IP infringement or false advertising. Particularly in contests that are set up as a comparison of one brand to another, things can be difficult.

Following the court's denial of its motion for summary judgment, on February 23 2010 Quiznos settled its nearly three-year-long dispute with Subway stemming from the 'Quiznos v Subway' ad challenge. The challenge solicited videos from users depicting that Quiznos' sandwiches have more meat than Subway's sandwiches. In 2007 Subway filed a lawsuit against Quiznos(26) claiming that by airing the winning video from the Quiznos contest, Quiznos had engaged in false and misleading advertising under the Lanham Act. In denying Quiznos' motion for summary judgment, the court found that

Quiznos was a provider of an interactive computer service, but declined to decide whether the user-generated content videos at issue were "provided" by Quiznos or by a third party (a requirement for Communications Decency Act immunity). The court determined that it was a question of fact as to whether Quiznos was actively responsible for the creation of the user-generated content.(27)

Following the decision in *Quiznos/Subway*, the question remains of how much control is too much - at what point is a sponsor of a user-generated content promotion "actively responsible" for that content?

As discussed above, if a company is accepting user-generated content submissions through use of a third-party platform (eg, Facebook or YouTube), it is likely that the third party's terms of service already prohibit content that is infringing, defamatory, libellous, obscene, pornographic or otherwise offensive. Nonetheless, whenever possible, a company should establish community requirements for user-generated content submissions prohibiting, for example, infringing or offensive content. Similarly, although the third party's terms of service most likely provide for notice and takedown provisions under the Digital Millennium Copyright Act, companies should have procedures in place in the event they receive a notice of copyright infringement. Another reason to implement your own policy is that services such as Facebook and Twitter may have a safe harbour defence as internet service providers under the Digital Millennium Copyright Act, whereas a company using an infringing work in a commercial context, whether or not through a third-party service, is unlikely have such a defence available to it should an infringement claim arise. Although the third party's terms of service provide a framework for both a company's and an individual user's activities, it is still recommended that a company monitor its branded page for offensive content, blatant copyright infringement or submissions obviously made by, or containing, images of children. In advance of the user-generated content promotion, companies should establish policies concerning the amount of monitoring, if any, that they plan to perform concerning content posted via their branded pages.

In addition to issues relating to content and intellectual property, companies should take steps to ensure that user-generated content displayed on their social media pages does not violate the rights of publicity of the individuals appearing in the displayed content. In January 2009 a Texas teenager and her mother sued Virgin Mobile for using one of her personal photos uploaded on Flickr for an Australian advertisement. The lawsuit insisted that Allison Chang's right of publicity had been exploited and that the use of her photo violated the open-source licence under which her photo was submitted. Although the case was dismissed over a discrepancy in jurisdiction, the message is clear that if you seek to use user-generated content in a commercial context, whether or not on a social media page, best practice would be to obtain releases from any individuals depicted in your work.

Companies should make clear that by submitting user-generated content to the company, the submitter is granting the company a worldwide, royalty-free right and non-exclusive licence to use, distribute, reproduce, modify, adapt, translate, perform publicly and display publicly the user-generated content. However, this does not give a company a licence to transform the user-generated content into a commercial or print advertisement. In fact, in the event that a company seeks to transform a user-generated content video into a television commercial or made-for-Internet commercial, the company must obtain a release from any individuals to be featured in the advertisement and take into consideration the SAG and AFTRA requirements set forth in the commercials contract.

A company must have specific terms and conditions in place regarding content uploaded by users. Those terms and conditions should specify that such content does not violate any third-party rights, including moral rights and copyrights, and does not contain any defamatory, libellous, racial or pornographic content. It should indicate user-generated content as such. It should not use user-generated content for its own offering; otherwise it might assume liability for its content. It must observe the notice and takedown principle. In case specific illegal content will be repeatedly uploaded, it must take measures to prevent such continuous infringement (ie, terminate user access or install certain filter software). It must not automatically assume that it will be protected by safe harbour defences.

Talent compensation

Commercial or content?
In traditional television and radio media, the 30-second spot has reigned supreme as the primary advertising format for decades. Within that format, in order to help create compelling television and radio spots, advertisers have frequently engaged professional on-camera and voiceover actors pursuant to the terms contained in industry-wide union contracts with SAG and AFTRA, as well as musicians under a contract with the American Federation of Musicians (AFM).(28) Those contracts dictate specific minimum compensation amounts for all performers who appear in commercials, depending on the exhibition pattern of those spots.

Now, with companies rapidly shifting advertising dollars online, the cookie-cutter paradigms of traditional media have given way to the limitless possibilities of the Internet, mobile and wireless platforms and other new media - including social media. While 30-second spots remain one part of the new media landscape, creative teams have been unleashed to produce myriad forms of branded content that straddle traditional lines separating commercials and entertainment. This has understandably created confusion and uncertainty among advertisers, agencies, talent and studios, to name only a few of the major players, with respect to the applicability of the SAG, AFTRA and AFM contracts in these unique online and wireless venues.

As a threshold matter, it is important to note that the SAG, AFTRA and AFM contracts apply only to internet/new media content that falls with the definition of a 'commercial'. 'Commercials' are defined as:

"*short advertising messages intended for showing on the Internet (or New Media) which would be treated as commercials if broadcast on television and which are capable of being used on television in the same form as on the Internet.*"

Put simply, if the content in question cannot be transported intact from the Internet to television or radio for use as a commercial, then it is not covered by the union contracts; the advertiser is not obligated to compensate performers in accordance with those contracts and can negotiate freely for appropriate terms. Thus, branded entertainment content and other forms of promotion that are not like a commercial will not fall within the coverage of the union contracts.

Made-fors and move-overs

If the content in question falls within the definition of a 'commercial', the advertiser must determine whether the content constitutes an original commercial designed for internet/new media exhibition (a 'made-for') or an existing television or radio commercial transported to the Internet/new media (a 'move-over').

If the commercial is a made-for, under current provisions in the union contracts advertisers may negotiate freely with the performers for appropriate terms, with no minimums required, except that pension and health contributions must be paid on any amounts paid. However, this period of free bargaining will expire on April 1 2011, at which time contractual minimums will apply unless new understandings are mutually agreed.

In the case of move-overs, the union contracts do provide for minimum levels of compensation, depending on the length of use for the spot. For eight weeks or less, performers must be paid 133% of the applicable session fee. For a one-year cycle, payment equals 350% of such fee.

User-placed or generated content

As noted above, the union contracts that govern the payment of performers are generally based on the exhibition patterns for commercials. But what happens where advertisers no longer control where and when commercials appear (eg, YouTube)? Or further, what happens when the advertiser does not even produce the commercials? Is the advertiser obligated to pay the actors under the union agreements? The answer is no, but the person who posted the materials without permission is liable for invasion of privacy and publicity. Unfortunately, the pockets of those posters are generally too shallow to warrant an action by the actor.

These are fertile areas for disagreement between the advertising industry and the unions. However, the industry position is clear: an advertiser cannot be held liable for compensating performers for an unauthorized exhibition of a commercial; nor is that advertiser responsible for policing such unauthorized use. Similarly, an advertiser cannot be held responsible for paying performers who appear in user-generated content, so long as the advertiser has not actively solicited and exhibited that content.

Current legal and regulatory framework

Depending on the advertising activity, various federal and/or state laws may apply, such as Section 5 of the FTC Act, the Lanham Act, the Digital Millennium Copyright Act, the Communications Decency Act, CAN-SPAM and state unfair trade practice acts.

Comment

Social media implications and applications to advertising and marketing cannot be ignored. While active or passive participation can enhance and promote brand presence, a danger of brand damage also exists, and risks should be minimized by prudent planning. All companies, regardless of whether they elect to actively participate in the social media arena, should have policies in place to determine how to respond to negative comments made about the company and/or its brands. Companies that seek to play a more active role should have policies in place that govern marketing agency and/or employee interaction with social media, as well as the screening of user-generated content. It is critical, however, that companies not simply adopt someone else's form. Each social media policy should be considered carefully and should

address the goals and strategic initiatives of the company, as well as taking into account industry and business-specific considerations.

For further information on this topic please contact Douglas J Wood, Stacy K Marcus or Anthony S Traymore at Reed Smith LLP by telephone (+1 212 521 5400), fax (+1 212 521 5450) or email (dwood@reedsmith.com, smarcys@reedsmith.com or atraymore@reedsmith.com).

Endnotes

(1) World Internet Usage Statistics, www.internetworldstats.com/stats.htm, as of June 30 2009.

(2) Lisa Lacy, "Nielsen: Social Media Ad Spending Up Sharply", ClickZ.com, September 25 2009.

(3) *Id*.

(4) *Id*.

(5) David Goetzl, "Kellogg Increases 2010 Ad Spend, Triples Social Media", *MediaDailyNews*, February 18 2010 (www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=122709).

(6) www.facebook.com/terms.php?ref=pf, www.youtube.com/t/terms and https://twitter.com/tos.

(7) *Id*.

(8) http://twitter.zendesk.com/forums/26257/entries/18366#.

(9) www.facebook.com/promotions_guidelines.php

(10) *Id*.

(11) Mike Kornacki, "Social Media Contests – Participation is Not Always Easy to Come By", SocialMediaToday.com, January 21 2010 (www.socialmediatoday.com/SMC/168344).

(12) *Id*.

(13) With regard to eligibility, in order to avoid Children's Online Privacy Protection Act issues, a sponsor should limit eligibility to individuals who are at least the age of majority in the jurisdiction in which they reside (18 in most states). If individuals under the age of 18 are permitted to enter, they should do so only with parental permission. If individuals under the age of 13 are permitted to enter, a company must comply with both the Children's Online Privacy Protection Act requirements concerning collection of personal information from children, and Children's Advertising Review Unit requirements for advertising directed toward children. Remember, however, that if a promotion is being offered via a third-party's website or platform (eg, Facebook, YouTube or Twitter), a company must comply with such third party's terms of use, which typically prohibit use by children under 13.

(14) NY GBL § 369-e and FL Stat § 849.094.

(15) *Id*.

(16) RI Stat Ch 11-50 *et seq*.

(17) Mark Adams, director of communications for the International Olympic Committee, quoted in "Social media bringing down the walled garden of the Olympic Games", TMC.net, September 24 2009.

(18) 16 CFR Part 255.

(19) 16 CFR § 255.l(d).

(20) http://fastlane.gmblogs.com.

(21) http://thelab.gmblogs.com.

(22) http://fastlane.gmblogs.com/about.html.

(23) http://thelab.gmblogs.com/about/.

(24) *Id*.

(25) Andrew LaVallee, "Starbucks Unveils Its First iPhone Apps", http://blogs.wsj.com/digits/2009/09/23/starbucks-unveils-its-first-iphone-apps/, September 23 2009.

(26) *Doctor's Associates Inc v QIP Holders LLC*, 82 USPQ 2d (BNA) 1603 (D Conn April 18 2007).

(27) Joseph Lewczak, "Quiznos/Subway Settlement Poses Threat to Future UGC Promos", *PROMO Magazine*, March 23 2010.

(28) This discussion presumes that either the advertiser or advertising agency is a signatory to the union contracts. Of course, if there is no signatory relationship, no contractual obligations will exist, although professional talent may insist on such contractual coverage.

This update has been adapted from Chapter 1 - "Advertising and marketing" of *Network Interference: A legal guide to the commercial risks and rewards of the social media phenomenon*, published by Reed Smith LLP.