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The explosion of social media brings new legal issues and pitfalls that await marketers, both experienced and uninitiated. Many of these issues involve regulatory and legal matters. Of greater concern are the public relations implications of a social media campaign gone awry, the authors write. They address four areas as hot issues to follow in the coming year.

This article is part of a Bloomberg BNA *Social Media Law & Policy Report* series on social media developments in 2014 in selected industries and practice areas.

Protecting Brand Reputation in an Increasingly Mobile World

BY MARC S. ROTH AND STACEY M. MAYER

Consumer social media activity, once limited to a consumer's desktop or laptop, has exploded in recent years with the increased availability and use of smartphones, enabling 24/7 liking, pinning and blogging. In fact, 83 percent of young people reportedly sleep within reach of their smartphones.[1] And social media is no longer used solely for personal activities such as posting pictures. In fact, 80 percent of Americans who use social networks reportedly prefer to connect with corporate brands through Facebook.[2] And a branded Vine video is four times more likely to be seen than a regular branded video.[3] Therefore, it is not surprising that social media continues to play an increasingly important role in any company's marketing strategy.

Along with the explosion in social media come new legal issues and pitfalls that await marketers, both experienced and uninitiated. Although many of these issues involve regulatory and legal matters, of greater concern are the public relations implications of a social media campaign gone awry. This article is intended to provide counsel who advise clients on social media issues with a cursory understanding of these issues and

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[1] Alan Pearcy, *Infographic: 83 Percent of Young People Sleep Next to Their Cell Phones* , Ragan's PR Daily, Sept. 2, 2011, http://www.prdaily.com/Main/Articles/Infographic_83_percent_of_young_people_sleep_next_9391.aspx.

[2] Tom Pick, *101 Vital Social Media and Digital Marketing Statistics*, Social Media Today, Aug. 6, 2013, http://socialmediatoday.com/tompick/1647801/101-vital-social-media-and-digital-marketing-statistics-rest-2013.

[3] Saya Weissman, *15 Stats You Need to Know About Vine and Instagram Video*, Digiday, Sept. 9, 2013, http://digiday.com/brands/15-stats-vine-and-instagram-video.

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suggestions on avoiding mistakes made by others. However, as technology and social media platforms continue to grow at exponential rates, the issues that they present will similarly introduce concerns that are nonexistent today.

A few years ago, the term ''social media'' meant just a few major websites, such as Facebook, Twitter and LinkedIn. But new platforms are emerging daily, pulling users away from the incumbents to more aggressive players. In fact, on a recent earnings call, Facebook's chief financial officer admitted that Facebook has noticed a decrease in daily users, specifically among younger teens.[4] As new platforms emerge, companies face the challenge of applying traditional advertising and marketing rules to new mediums, as well as complying with the rules and best practices of each platform. Although it may be impossible to predict the next hot platform, counsel can apply learnings from past social media disasters, litigation and enforcement activity to help predict what will be the major social media issues to avoid. In other words, ''those who cannot remember the past are condemned to repeat it.''[5]

We view the following areas as hot issues to watch and follow in 2014:

- User-Generated Content
- Consumer Reviews/Endorsements
- Native Advertising
- Brand Interactions With Consumers in Real Time

I. User-Generated Content

Simply defined, user-generated content (UGC) is information, in whatever form, posted, blogged, submitted, uploaded or offered by consumers online and in other media.[6] Some UGC is solicited, such as in connection with a sweepstakes or contest entry, and other UGC is freely offered, such as a blog post, tweet or Facebook status. In either case, UGC ultimately belongs to the creator, and if a third party wishes to use such content for its own purpose, it must either take ownership of or obtain a license to the content, lest it face a copyright infringement claim.

Typically, website operators, app developers and others do not take ownership of UGC, as they do not need to own the content and assume any liability that may attach to such ownership. Instead, operators typically inform consumers that any posting or submitting of their content on or through the operator's platform will confer a license to the operator to use, display or perform such content without compensation and the creator's further consent. This language, which is commonly found in a website or app terms of use or terms of service, typically tracks language in the Copyright Act and developed case law that is sufficient to grant the license.[7]

As consumers become less trustful and more cynical of corporate advertising, they are placing greater value and trust on the opinions of other consumers. Thus, UGC continues to be highly attractive to advertisers. Companies are continuing to look for innovative ways to use UGC, in any form, including opinions, photos, videos or songs about the company or its competitors. This trend will likely increase in popularity in 2014, with photos and videos likely replacing traditional text. Companies may want to reuse such material in their advertising, link to this material, or retweet or repin this material. However, the reuse of such content can give rise to claims of copyright or trademark infringement, defamation, violation of privacy or publicity, false association, false advertising and more.[8]

Some of these risks were highlighted recently when a $1.2 million verdict was awarded to a photographer in a copyright infringement action, where Getty Images and Agence France-Presse reused the photographer's pictures posted on Twitter without permission.[9]

Companies that seek to reuse UGC must also be mindful of the terms of the platform on which the content was originally posted and the laws of the country from which the content is sourced, as some countries may have more restrictive intellectual property laws, limiting the ability to reuse UGC.

As the law in this area continues to develop, there are various steps companies can take to mitigate the risk of using UGC. As an initial matter, companies should be aware and take advantage of all available safe harbors that may be implicated by UGC, including the Digital Millennium Copyright Act (DMCA) and the Communications Decency Act (CDA).[10] To take advantage of the DMCA safe harbor and avoid claims of copyright infringement for storing or linking to allegedly infringing materials, an operator must have no actual knowledge that the material at issue is infringing; infringement must not be readily apparent; the material must be immediately removed upon notice; there can be no financial benefit from the infringing activity; and the company must provide takedown procedures.[11]

To take advantage of the CDA safe harbor, which provides immunity for Internet service providers, including website operators, from claims of defamation, libel and other torts, the operator cannot be deemed a ''content provider'' (i.e., it cannot participate in the ''creation'' or ''development'' of content, but minor editing is permissible).[12]

Second, a company should disclose any material connections between itself and the person whose content it is retweeting or reposting. The National Advertising Division (NAD), the investigative unit of the advertising industry's self-regulation program administered by the Council of Better Business Bureaus, has specifically

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[4] Jenna Wortham, *Still on Facebook, but Finding Less to Like*, NEW YORK TIMES (Nov. 16, 2013), available at http://bits.blogs.nytimes.com/2013/11/16/still-on-facebook-but-finding-less-to-like.

[5] *See* George Santayana, The Life of Reason, Reason in Common Sense (1905).

[6] SearchCIO, *What Is User-Generated Content (UGC)?*, http://searchcio.techtarget.com/definition/user-generated-content-UGC.

[7] *See* 17 U.S.C. § 106.

[8] *See* Marc S. Roth & Stacey M. Mayer, *Social Media Marketing in 2013: Best Practices for Safeguarding Brand Reputation in an Uncertain World*, Soc. Media L. & Pol'y Rep. (Bloomberg BNA), Jan. 15, 2013.

[9] *Agence France-Presse v. Morel*, No. 1:10-cv-02730-AJN-MHD (S.D.N.Y. Nov. 22, 2013) (*see related article*).

[10] *See* 17 U.S.C. § 512; 17 U.S.C. § 230.

[11] 17 U.S.C. § 512.

[12] 17 U.S.C. § 230; *see also Fraley v. Facebook*, 830 F. Supp. 2d 785 (N.D. Cal. 2011); *Swift v. Zynga Game Network, Inc.*, No. C 09-05443 (N.D. Cal. Nov. 2, 2010); *Fair Housing Council of San Fernando Valley v. Roomates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008).

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weighed in on the practice of a company retweeting third-party posts or sharing the posts on Facebook, Twitter or other social media, determining that the advertiser is responsible for disclosing a material connection between itself and the endorser of its products when it uses such endorsements in its advertising, including reposting on social media.[13] Specifically, the NAD noted that material connections include the receipt of a product for free, any compensation paid for a review or any incentives provided to the blogger or Twitter user for ''clicks'' through to a company's website.

Third, linking to, as opposed to retweeting or repinning, a statement may reduce the risk of infringement or liability.

Fourth, companies should provide detailed content submission guidelines when conducting a UGC promotion and/or soliciting such content. Importantly, it is imperative to avoid conducting campaigns that induce, reward or incite infringement. Specifically, when soliciting UGC, companies should prohibit the use of (i) third-party (nonentrant) works; (ii) third-party marks; (iii) photos or likenesses of any other person appearing or referenced in such content (unless they execute a release from such parties); (iv) submissions that have been previously published; and (v) offensive or defamatory works. Companies should also be prepared to screen and filter submissions that violate particular platform guidelines, reserving the right to disqualify and remove content for noncompliance with submission guidelines or platform policies.

As mentioned above, there are certain advantages to licensing, rather than assuming ownership of UGC. For example, in addition to reducing the risk of an infringement claim, a limited license to display UGC would help avoid triggering actor royalty claims under the Screen Actors Guild Commercials Contract (SAG Contract), as the contract exempts commercials ''made for'' new media, provided that certain conditions are met. Specifically, producers may solicit, accept and display UGC or crowdsourced commercials via the Internet as entries to a contest, and such entries can be exhibited via the Internet during the contest period without triggering application of the SAG Contract. However, if a contest-winning commercial or nonwinning entry is displayed after the contest period ends, they will also be subject to the rates and terms of the SAG Contract.

II. Reviews and Endorsements

Consumer reviews and endorsements are also likely to continue to be hot-button social media issues in 2014. As noted above, consumers are placing more stock in other consumers' experiences with brands than in traditional advertising from the brands themselves. In fact, a recent study found that 90 percent of consumers say that online reviews influence their buying decisions. Google—undoubtedly aware of the importance of such reviews—recently announced that it will be selling user endorsements across the Web. Companies that utilize consumer online reviews must ensure they comply with all applicable laws and guidelines, including state laws, the Federal Trade Commission's Guides Concerning the Use of Endorsements and Testimonials in Advertising (Endorsement Guides),[14] policies of the apps or websites where the reviews appear, and industry rules for promoting certain products.

A. Astroturfing

As noted in our previous article,[15] in 2009 the FTC amended the Endorsement Guides by requiring, among other things, that an endorser disclose any material connection to the advertiser when the relationship is not otherwise apparent from the context of the endorsement and that the endorsement reflect the honest opinions and beliefs of the endorser.[16] Since this time, the FTC has brought numerous actions concerning the disclosure of material connections between an endorser and the advertiser, including employees posing as consumers.[17]

In September 2013, the New York Attorney General's office announced settlements with 19 companies that the state claimed wrote fake online reviews for the companies and others, requiring them to pay more than $350,000 in penalties. The AG's office made clear that ''astrotrufing''—the practice of preparing or disseminating a false or deceptive review that a reasonable consumer would believe to be a neutral, third-party review—is a form of false advertising that violates New York law and the FTC's Endorsement Guides.[18]

The New York investigation utilized undercover tactics, as representatives from the AG's office called search engine optimization companies posing as the owner of a yogurt shop in Brooklyn requesting assistance in combating negative reviews on consumer sites. During these calls, representatives from some of the companies offered to write fake reviews of the yogurt shop and post them on various sites. The AG's office also discovered solicitations on sites such as Craigslist.com and Freelancer.com to hire people to write fake reviews.

Given the widespread use of astroturfing as evidenced by the New York AG action, we expect to see similar actions by the FTC and other state attorneys general in the coming year. Additionally, paying for fake reviews violates the acceptable use policies of popular review websites such as Yelp and Amazon,[19] and Yelp has already demonstrated its displeasure with such practice by suing a business for allegedly posting deceptive reviews on its site.[20] It will be interesting to see how those platforms handle these situations in 2014.

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[13] *eSalon.com LLC*, No. 5645 (NAD Oct. 17, 2013), *available at* http://op.bna.com/sml.nsf/r?Open=mlon-9cwjs9 (*see related article*).

[14] 16 C.F.R. pt. 255, *available at* http://ftc.gov/os/2009/10/091005revisedendorsementguides.pdf.

[15] *See* Roth & Mayer, *supra* at 8.

[16] *See* Endorsement Guides, *supra* at 14.

[17] *See, e.g.* , *In re Legacy Learning Systems Inc.*, FTC File No. 102-3055 (Mar. 15, 2011); *In re Reverb Communications Inc.*, FTC File No. 092-3199 (Aug. 26, 2010).

[18] Press Release, A.G. Schneiderman Announces Agreement With 19 Companies to Stop Writing Fake Online Reviews and Pay More Than $350,000 in Fines (Sept. 23, 2013), *available at* http://www.ag.ny.gov/press-release/ag-schneiderman-announces-agreement-19-companies-stop-writing-fake-online-reviews-and.

[19] Yelp, Terms of Service, http://www.yelp.com/static?country_=US&p=tos; Amazon.com Help: Conditions of Use, http://www.amazon.com/gp/help/customer/display.html/?nodeId=508088.

[20] *Yelp, Inc. v. McMillan Law Group, Inc.*, No. CGC13-533654 (Cal. Super. Ct. *complaint filed* Aug. 20, 2013) (*see related article*).

B. What Constitutes an Endorsement

For years, the government and advertisers have grappled with the issue of what activities constitute an endorsement, and as technology and new social media platforms emerge, a hard-and-true definition will continue to remain elusive. For example, is liking a Facebook page an endorsement? Arguably, people can like things for various reasons and a like may not necessarily constitute an actual endorsement of a company or product. Although the FTC has not officially weighed in on this (Commission staff has indicated that it is ''considering'' the issue),[21] other regulators and industry self-regulatory bodies have.

On one hand, there is support for the notion that a like is substantive speech and can thus qualify as an endorsement. The Fourth Circuit recently ruled that a like on Facebook is protected as free speech. The case stemmed from employees in a Virginia sheriff's office claiming they were fired after liking their boss's opponent on Facebook during an election. The court held that liking something on Facebook was the equivalent of ''displaying a political sign in one's front yard'' and therefore, protected speech.[22] Applying this opinion to a consumer liking a company's Facebook page, such action may be considered an expression of support or opinion for the company, and thus, an endorsement, which may warrant some disclosure under the FTC Endorsement Guides if the like is the result of some inducement by the company. That said, given the limited, if not impossible, ability to add any commentary to a like on Facebook, such compliance may not be feasible.

In 2011, the NAD held that the display of likes on Facebook and other social platforms may reasonably be understood by consumers as conveying a message of general social endorsement.[23] And more recently, the Food and Drug Administration (FDA) sent a warning letter to a company in connection with its marketing practices in this area. In addition to including testimonials on its website, the FDA noted that the company liked a consumer's post on its Facebook page, which made an unapproved claim regarding its product.[24] This warning suggests that a company that takes some action that endorses or agrees with a third-party claim regarding the company's products, such as a like, retweet or repin, may be responsible for making a false or unsubstantiated claim.

We anticipate that this area of law will continue to develop in the coming year.

III. Native Advertising

Native advertising became a major marketing tool in 2013 and will no doubt continue to expand in 2014. The term ''native'' refers to content designed to match the look and feel of a site or service in which the content is presented, so as to appear organic and ''fitting in,'' but is in fact sponsored or paid for by an advertiser. Although popular, this form of advertising is not without issues, as regulators claim that this format may be deceptive if consumers are not informed that the content is paid for or sponsored by an advertiser.

One of the earliest examples of native advertising in social media is Facebook's Sponsored Stories. Sponsored Stories typically include a display of a Facebook user's Facebook name and profile picture along with a statement describing the user's interaction with the Facebook service, such as ''John Smith likes UNICEF'' or ''John Smith played Farmville.''[25] Following the introduction of Sponsored Stories, Facebook was sued for using the names, photographs, likenesses or identities of the plaintiffs to advertise or sell third-party products or services through Sponsored Stories without plaintiffs' permission. The matter settled with no judicial guidance provided, but the settlement terms, as well as some language from the court order approving the settlement, are instructive.

Notably, the settlement required Facebook to revise its terms of use to more clearly disclose to users how their comments about products and other personal information would show up in ads.[26] The settlement also requires Facebook to give users more control over how their information is used in Sponsored Stories and to limit such use. However, as of the date of publication of this paper, these additional terms had not yet been implemented.

In the order granting the motion for final approval of the Sponsored Stories settlement, the court noted that plaintiffs' allegations and theories remain ''largely untested, having only survived a motion to dismiss.''[27] Further, the court noted that regardless of the degree of benefit to Facebook, plaintiffs faced a substantial burden in showing they were injured by Sponsored Stories.[28]

Although there are no court cases setting precedent for native advertising, the NAD has twice weighed in on this issue, and the FTC recently conducted a workshop to explore the topic in further detail.[29]

In one case, the NAD expressed concern with certain online content that appeared to be editorial or user-generated but was in fact created by an advertiser. Specifically, the NAD questioned whether consumers could clearly discern whether such content was advertising or editorial content. The advertiser in this case, eSalon, a maker and seller of at-home hair color products, exclusively advertised its products through social media, maintaining an active presence on Facebook, Twitter

[21] Mary K. Engle, Assoc. Dir. for Adver. Practices, Bureau of Consumer Prot., FTC, Remarks at the BAA 35th Annual Law Conference: The Next Wave of Marketing Law (Nov. 20, 2013).

[22] *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013).

[23] *Coastal Contacts Inc.*, No. 5387 (NAD Oct. 25, 2011).

[24] Warning Letter from FDA to Amarc Enterprises (Dec. 11, 2012), *available at* http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2012/ucm340266.htm.

[25] *Fraley v. Facebook Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011).

[26] Facebook recently revised its Statement of Rights as follows: ''You give us permission to use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. This means, for example, that you permit a business or other entity to pay us to display your name and/or profile picture with your content or information, without any compensation to you. If you have selected a specific audience for your content or information, we will respect your choice when we use it.'' *See* Facebook Statement of Rights and Responsibilities, https://www.facebook.com/legal/terms.

[27] *Fraley v. Facebook Inc.*, No. 3:11-CV-01726-RS, (N.D. Cal. Aug. 26, 2013).

[28] *Id.*.

[29] *See Qualcom, Inc.* , No. 5633 (NAD Sept. 20, 2013) (finding advertiser had appropriately disclosed itself as the sponsor of a tech-related article series appearing on Mashable.com); *eSalon.com, LLC*, No. 5645 (NAD Oct. 17, 2013).

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and Pinterest, as well as a blog. With respect to the blog, although it carried a disclosure at the bottom of the webpage stating that it was ''sponsored by eSalon-.com,'' the NAD found that the disclosure was not sufficient to advise consumers of the connection between eSalon and the blog. Therefore, the NAD recommended that eSalon disclose (1) clearly and conspicuously at the top of its blog and on each page or post that it maintains the blog, and (2) its connection to the blog when it posts content from the blog on other social media, such as Pinterest.

As noted above, the FTC has expressed significant interest in this area, and on Dec. 4, 2013, hosted a workshop to gain a better understanding of how advertisers are using sponsored content and whether consumers know (or care) that such content is paid for by an advertiser. Importantly, one of the main questions facing the FTC is whether such activity results in any actual or potential consumer harm if the sponsored content does not speak to, reference or advance the advertiser's name, products or services.

In the meantime, companies should consider whether their sponsoring of or creating native content warrants disclosure so as to avoid any misimpression as to the source of such content. If an advertiser has any hand in developing or paying for the content, a best practice would be to include some notice informing readers of such connection.

IV. Interacting With Consumers in Real Time

With consumers' increased use of mobile technology, ''on the go'' connectivity with social media platforms now allows for real-time and immediate interactions. Brands now have the ability to track how consumers are ''talking'' about them (and their competitors) in real time through the use of trend-tracking software and outsourced solutions. Very often when brands see consumers posting negative comments about them or their products, their initial reaction is to immediately address the negative statement and stem its further distribution. However, doing so may be tricky. One issue to consider is the platform on which the statement is made. For example, Facebook's terms provide that brands cannot direct message a Facebook user unless that user has sent a direct message to the brand's page. Further, Facebook requests that companies not contact its members for commercial purposes without the consumer's consent.[30]

The reputational risks of engaging consumers through social media present even greater concerns from a public relations perspective. In what is widely considered one of the biggest public relations nightmares of the year, JPMorgan Chase canceled a Twitter-based Q&A with one of its key executives just hours after it was launched. The event was intended to have a senior executive answering consumer banking questions via Twitter, using the hashtag #AskJPM. Only six hours after the event started, the bank had collected thousands of posts, very few positive.[31]

As brands continue to engage consumers in real-time ''conversations''—a trend we expect to continue into 2014—they will need to navigate these waters carefully, lest they run afoul of potential legal mines, or worse, public relations nightmares, as some name brands have recently experienced.

V. Conclusion

As social media platforms continue to develop and brands seek new ways to communicate with consumers, companies need to be aware of how regulators and industry self-regulatory bodies are applying their laws and rules (most of which are outdated and ill-equipped to address current activities) in order to avoid legal liability. Even more important, however, are the public relations land mines that exist in a communications medium where consumers are in the driver's seat. Although 2013 was a landmark year in social media developments, there is no doubt that 2014 (and years thereafter) will present new platforms, laws and challenges for consumers, regulators and marketers.

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[30] Facebook Community Standards, https://www.facebook.com/communitystandards.

[31] Brian O'Connell, *Snark-Nado: What Happened with JP Morgan's Epic Twitter Fail*, The Street, Nov. 18, 2013, *available at* http://www.thestreet.com/story/12112324/1/snark-nado-what-happened-with-jp-morgans-epic-twitter-fail.html.