

Web 2.0: Legal Issues You Need To Know Before Marketing With User Generated Content

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What do Doritos, Taco Bell, Sephora, Coors, Nesquik, Paramount, Fox and General Motors have in common? Each brand has featured user generated content (“UGC”) in recent advertising campaigns.

Statistics reflect the growing power of UGC marketing. Social networking and video-posting sites like YouTube, Digg.com, Facebook and MySpace collectively attract some 100 million monthly unique visitors. In fact, 55% of online teens have profiles on a social network, as do 50% of those in the 18-29 demographic. Consumer reaction to digital video marketing is nearly instantaneous with 40% of UGC video viewers visiting the advertisers’ websites afterward. Moreover, the ability to track the immediacy of consumer reaction and the return on investment is available online in ways unmatched by other platforms. Perhaps most importantly, ad spending on social networking websites is expected to increase from \$1.2 billion in 2007 to \$2.2 billion in 2008.

Despite its allure, the use of UGC in advertising can legally trap the unwary if not handled properly. Several companies now face class action lawsuits based upon hapless UGC or digital advertising and marketing campaigns. Below are some key considerations for limiting legal liability when structuring or defending UGC campaigns. Review by legal counsel is of course also advised.

1. Content Ownership - Maximize Defenses

If UGC submissions are posted on your website, be aware of two federal statutes that help website operators avoid liability for UGC postings - the Digital Millennium Copyright Act (“DMCA”) and the Communications Decency Act (“CDA”).

The DMCA was designed to protect online service providers (“OSPs”) from claims of copyright infringement based upon third party content. Now nearly 10 years old, the DMCA is at the core of recent copyright infringement lawsuits involving website operators such as YouTube and Veoh. The CDA provides immunities for website operators for content that is defamatory, obscene or violates state intellectual property laws. The CDA does not provide immunity for federal intellectual property claims.

When receiving online submissions of UGC, maximize your defenses by not taking ownership of UGC in your website’s terms of use. Work with an attorney to craft language permitting use of the content on all media but avoid taking ownership of UGC.

Also, use best practices by adhering to industry standards such as the UGC Principles available at <http://www.ugcprinciples.com>.

2. Content Management - Do Not Manipulate UGC

UGC can be transformed from third party content (subject to DMCA and CDA protections) to your company’s content if it is either (a) intertwined with your company’s content; or (b) your staff edits, modifies or manipulates the UGC.

For that reason, a company should disqualify UGC submissions containing illegal content rather than attempting to edit that material. Failure to properly separate the company’s role as a neutral OSP versus the creator/owner/publisher of the UGC could expose your brand to liability.

3. Content - Encourage Lawful Submissions

Some UGC ad campaigns have been alleged to encourage false advertising, trademark or copyright

infringement. Recently, Quiznos sponsored a UGC contest encouraging users to compare Quiznos sandwiches with Subway sandwiches using the theme “meat - no meat”. Subway, believing that Quiznos encouraged users to insinuate that its sandwiches lacked meat, promptly sued for disparagement and false advertising.

You can avoid these pitfalls by (a) disqualifying UGC that disparages a competitor’s product; (b) encouraging originality; (c) disqualifying infringing content; and (d) providing pre-cleared content (e.g., movie clips, music or logos) to users for UGC creation.

4. Viral Campaigns - Comply With CAN SPAM

The Federal Trade Commission (“FTC”) provides guidance to companies involved with “viral campaigns.” If you are hosting a UGC campaign and you would like to encourage users to forward the videos to friends, consult with an attorney to ensure compliance with the Federal CAN SPAM Act. Do not actively encourage an emailing campaign unless (a) the emails sent by consumers will be scrubbed against your opt-out list; and/or (b) you are not actively encouraging the proliferation of the content, but rather are providing a neutral tool for users to forward content to friends. Follow industry guidelines such as those published by the Word of Mouth Marketing Association at <http://www.womma.org/ethics/code/>. You might also explore options available from third party companies who host viral campaigns on their servers giving you more control over content distribution and subjecting you to less liability as you can negotiate for these companies to assume some or much of the risk.

5. Awards - Maintain Discretion

Brands often promise prizes for UGC submissions with the highest votes. In recent Doritos campaigns, winning submissions were promised air time during Super Bowls 2007 and 2008. Similarly, last year, Nesquik ran a UGC campaign promising to display the winning submission on a billboard in Times Square. Although this did not occur in these examples, what if users had voted for an ad disparaging the brand? To avoid such consequences, structure campaigns to give the brand maximum flexibility in awarding prizes.

6. Sweepstakes and Contests - No Private Lotteries

Due to heightened class action activity based upon state unfair competition laws, care must be taken to avoid allegations that UGC contests/sweepstakes constitute private lotteries. Recently, in *Couch v. Interscope*, a California Federal District Court held that text message submissions for reality show trivia questions could constitute an illegal private lottery because the text message premium charge (\$.99) could constitute payment of consideration for a chance to win a prize. Companies can minimize exposure by structuring their marketing campaigns as either (1) sweepstakes (in which case consideration cannot be paid for the potential to win a prize); or (2) contests (where chance must be eliminated although consideration may exist).

Most importantly, to ensure your UGC campaigns’ success with the public and the courts, make sure your advertising and legal teams work collaboratively. If despite precautions, you are sued because of your UGC marketing, invoke your defenses under the DMCA, CDA and the contractual defenses of your website’s terms of use. Also, showing compliance with industry standards can help your defense. Finally, select counsel that is well-versed in the nuances of internet law and experienced in defending digital media cases.



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