ADVERTISING AND SOCIAL MEDIA: What You Need To Know

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SOCIAL MEDIA:

MANAGING BUSINESS RISKS & MAXIMIZING OPPORTUNITIES IN A SOCIAL WORLD

KILPATRICK TOWNSEND

ATTORNEYS AT LAW

Agenda

- Overview of Social Media Advertising
- FTC Endorsement Guides
- CDA 230 Safe Harbor protection
- First Amendment – Commercial Speech and corporate blogs
- Hosting a Social Media Platform – DMCA
- Quick Tips re Facebook

Overview

- "Advertising" in Social Media
  - "Advertising" = commercial speech, or anything a company says
  - Social Media = feedback (consumers, bloggers, customers, etc.)
  - "Company" = sells stuff to make money

    - (note: not discussing IP Protection in social media, that's a future KT webinar)

Overview

- "Advertising" used to be "top down"
  - TV, radio - :30 or :60 second spots
  - Advertiser communicates a specific message

- Advertising is now a "conversation"
  - Communications with the public
  - Advertiser does not fully control the message

Overview

- "Social Media" - where the conversation takes place
  - Advertiser's own website, if enabled to allow comments, user feedback, chat rooms, message boards
  - Third Party platforms (FB, Twitter, YouTube, Google+, LinkedIn, etc.)
  - Bloggers

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FTC Endorsement Guides

- What are they and why are we discussing them?
- "**Guides Concerning the Use of Endorsements and Testimonials in Advertising**" – orig'y issued in 1980
- Consumer endorsements, expert endorsements
  - "I use Product X, you should too!"
- Used by companies to tout their products
  - Is a consumer's endorsement (statement about Product X) attributable to the advertiser?

FTC Endorsement Guides

- Consumer endorsement – True? Typical?
  - Appears on company's website in comments section
  - Company re-prints statement in advertising
  - Posted on company's Facebook page by consumer
  - Company re-tweets consumer statement
  - Company re-posts statement on its website to its FB page

FTC Endorsement Guides

- FTC Endorsement Guides revised in 2009
- "The Truth Shall Set You Free" – NOT.
- "Results not typical" discl. = **insufficient**
- Even if true: "**I lost 40 pounds in 40 days using Product X**"

FTC Endorsement Guides

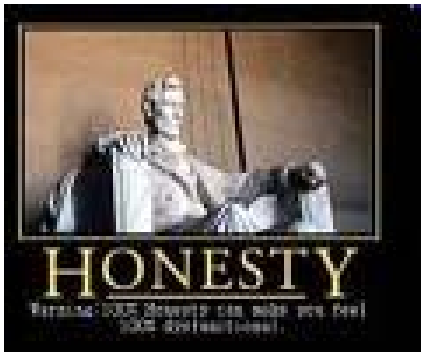
- Claim substantiation
  - Basic tenet of advertising law
  - But is the Advertiser speaking?
- FTC says Yes, if the advertiser uses the consumer endorsement in ads
- Results not typical disclaimer not enough
- Choice: (1) have adequate substantiation or (2) C&C disclose generally expected performance in depicted circumstances
- E.g. “Most people lose 10 lbs. over 6 months using Product X”

FTC Endorsement Guides

- What if “false” or exaggerated consumer endorsement just resides on the advertiser’s website or FB page?
- Is that an advertising “claim” for which substantiation is necessary?
  - Answer: it depends.

FTC Endorsement Guides

- Another aspect to the FTC's Update to the FTC Endorsement Guides:
  - **DISCLOSE MATERIAL CONNECTIONS**
- Endorsements are supposed to be HONEST
  - HONESTY - An endorsement must reflect the honest opinions, findings, beliefs, or experience of the endorser
  - Cannot be statement that if made by advertiser would be deceptive
  - Potential liability for advertisers for falsity through endorsements, or for lack of disclosing material connections with endorsers
  - Endorsers also subject to potential liability



FTC Endorsement Guides

- **<u>MATERIAL CONNECTIONS</u>**
  - Guides require the disclosure of MATERIAL CONNECTION with endorser
    - "material connection" = information that could impact the weight or credibility a consumer gives to the endorsement
      - Incentives e.g. free swag, prizes, special access, privileges
      - Relationship with advertiser - employment
    - Clear and Conspicuous; easily understood; unambiguous

FTC Endorsement Guides

- **LIABILITY**
  - Everyone potentially liable – advertiser, blogger, ad agency, others involved with relationship/advertising
    - Failure to disclose “material connections” and
    - Unsubstantiated claims about goods/services of the advertiser
  - FTC now mandates that advertisers:
    - Implement policy to educate their agents/endorsers about these responsibilities; and
    - Monitor statements and claims by their agents/endorsers

FTC Endorsement Guides

- Oct. 17, 2006: PR Agency Apologizes For Wal-Mart 'Flog' (http://www.mediapost.com/publications/article/49698/)
- Apr. 30, 2010: FTC: We're Not Fining Ann Taylor Because Their Social Media Efforts Were a Failure (Ann Taylor Loft Closing letter: http://www.ftc.gov/os/closings/100420anntaylorclosingletter.pdf)
- Aug. 27, 2010: FTC Settling Case Over "Fake" iTunes reviews (Reverb Settlement – http://www.ftc.gov/opa/2010/08/reverb.shtm)

FTC Endorsement Guides

- Disclose Material Connections:
  - "I received a complementary [PRODUCT] from [COMPANY] to review it"
  - Hash tags – e.g. "#spon" for sponsored, for "#paid" for paid review
  - General Blogger Disclosure statement – "I accept free products from companies to review them, but do not accept any cash payments."

FTC Endorsement Guides

- Advertiser obligations:
  1. Educate “bloggers” about disclosure req’s
  2. Educate employees/agents about disclosure req’s

FTC Endorsement Guides

- Advertiser obligations:
  3. Require disclosure from “bloggers”
     - “If you choose to review or share this product please be sure to disclose that it was provided to you by the company.”
  4. Monitor disclosures
     - Remind and cut off if no compliance

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CDA 230 Safe Harbor protection

- CDA: Section 230 of the Communications Decency Act (47 U.S.C. § 230)
- Think CompuServe, Prodigy, AOL “chat rooms” and “forums”
- Provides immunity from liability for Web site publishers (“interactive computer service”) of communications and messages of others
- Web sites = “publishers”
- “No provider or user of an interactive computer services shall be treated as the publisher or speaker of any information provided by another information content provider.”
- DOES NOT APPLY TO IP CLAIMS

CDA 230 Safe Harbor protection

- 3 prong test for immunity
  1. Defendant must be "**provider**" of "**interactive computer service**"
  2. Claim treats Defendant as "**publisher or speaker**" of the harmful information at issue
  3. Information **provided by "another information content provider**," meaning that Defendant is not the speaker or provider of the harmful content

  Said another way: (1) Did we speak, or (2) did we invite the speech?

CDA 230 Safe Harbor protection

- Cases
  - Global Royalties, Ltd. v. Xcentric Ventures, LLC, 544 F. Supp. 2d 929 (D. Ariz. 2008)
  - Defamation claim against consumer reporting website for postings by visitor referring to Plaintiff's operation as a scam.
  - Facts - Website did encourage negative posting, and did not remove upon complaint
  - HELD: **IMMUNE**, CDA 230 was a complete bar to liability
  - Did the website speak? No
  - Did the website invite the speech? No

CDA 230 Safe Harbor protection

- Cases
  - Fair Housing Counsel v. Rommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008)
  - P alleges Web site violates Fair Housing Act by allowing and encouraging discriminatory postings
  - Website provided drop down boxes to indicate sex, sexual preference, and presence of children
  - Website also provided blank box for "additional comments"
  - HELD: Thru drop down boxes, website became more than a passive publisher of UGC, thus **NOT IMMUNE** under CDA 230.
  - Ct also noted: blank boxes for additional comments WOULD BE IMMUNE from liability through CDA 230.
  - Did the website speak? No
  - Did the website invite the speech? Yes as to drop down boxes, no as to blank additional comment box

CDA 230 Safe Harbor protection

- Cases
  - Doctor's Associates, Inc. v. QIP Holders LLC, 2010 WL 669870 (D. Conn. Feb. 19, 2010)
  - (Subway v. Quiznos)
  - Quiznos ran UGC contest for videos comparing sandwiches; Subway sued for False Ad'g
  - HELD: jury question to determine if Quiznos "actively participated in creating or developing the third-party content submitted to the Contest website."
  - Did the website "channel towards illegality" as in the Roommates.com case (h/t Eric Goldman blog)
  - Did the website speak? No, it was UGC
  - Did the website invite the speech? Maybe

CDA 230 Safe Harbor protection

- Cases discussed cover website's own platform
- What about 3rd Party platforms, e.g. YouTube or Facebook?
  - Same idea. If your company speaks, or you invite the speech, you could be liable for that speech.
  - If you merely provide a platform, CDA 230 provides safe harbor immunity from liability.

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1st Amendment: Comm'l Speech, Corp. blogs

- Corporations – Don't they have free speech rights?
- Yes, but not as great as people
- Traditional test of what is "commercial speech" = "speech that does no more than propose a commercial transaction"
- Calif. Sup. Ct. in Kasky v. Nike – look at 3 elements: the speaker, the intended audience and the content.
- By definition – almost all corporate speech = "commercial speech" – traditional ad, press release, letter to the editor, corporate blog

1st Amendment: Comm'l Speech, Corp. blogs

- Hoffman v. Capital Cities (9th Cir. 2001) ("Tootsie" case)
  - Dustin Hoffman sued magazine that used pic of him as Tootsie to illustrate a special mag feature
    - Magazine had "shopper's guide" at end paid for by advertisers
    - Hoffman won at trial level - $3 million. Reversed on appeal.
    - HELD: NOT Comm'l Speech

1st Amendment: Comm'l Speech, Corp. blogs

- Downing v. Abercrombie & Fitch (9th Cir. 2001)
- A&F prints pics of famous surfers in catalog.
- Catalog filled with (1/4) "content"– news, stories and other editorial features
- HELD: Comm'l Speech - point of catalog was to sell A&F merchandise.

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1st Amendment: Comm'l Speech, Corp. blogs

- Sterling Cooper Draper Pryce Blog: "Draper-Man blog"
  - (note no connection to KT)

1st Amendment: Comm'l Speech, Corp. blogs

- Draper-Man blog: blog, gossip, update, dish dirt etc.
- Real person providing real information and a real "voice" about their agency and the ad industry in general
- SCDP Agency hired a "ghost writer" to blog

1st Amendment: Comm'l Speech, Corp. blogs

- Draper-Man blogger says on corporate blog: "Rival ad agency just lost huge MicroYBM account due to account manager theft"
  - Is that true?
  - Is that opinion?
  - Is that defamation? Vicarious liability
  - Is SCDP agency liable for defamation?

1st Amendment: Comm'l Speech, Corp. blogs

- Draper-Man Blogger comes up with a new song ditty:
  - **"Oh Draper, you're so fine, you're so fine you blow my mind, hey Draper – hey Draper"**
  - SCDP likes it – copyright liability?
    - **What if they publish it on the Draper-Man blog?**
    - **What if they publish a special advertorial in a magazine, and include this ditty?**
    - **What if they publish a catalog of their services, but also with editorial content?**
    - **What if they use it in a television commercial for their services?**

1st Amendment: Comm'l Speech, Corp. blogs

- Agnostura Bitters hears about how great Draper-Man – pays him $5,000 to start talking up how to make Old Fashioned cocktails (of which Agnostura Bitters is an integral part). He does.
  - Does Draper-Man have an obligation to tell readers of the $5,000 payment?
  - Does Draper-Man have an obligation to tell SCDP agency?
  - Does SCDP agency have an obligation to disclose payment to blog readers?

1st Amendment: Comm'l Speech, Corp. blogs

- Draper-Man copies portions of articles from the WSJ (paywall; copyrighted)
  - Ok? What if just a link?
- Draper-Man copies pictures screen grabbed from around the Internet
  - Ok?

1st Amendment: Comm'l Speech, Corp. blogs

- Advice: Don't dam a revenue stream
- Links are fantastic – just don't eliminate incentive to click by copying too much

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Hosting a Social Media Platform - DMCA

- Contrast 3rd party platforms like Facebook and YouTube with your own corporate website
- Hosting refers to your own website – where you give the public the ability to comment, communicate, upload, post, etc.
- You are the website publisher
  - Are you liable for copyright infringements when users upload protected works to your site?

Hosting a Social Media Platform - DMCA

- DMCA addresses copyright issues specific to online usage.
- Provides Immunity for certain select acts by “service provider” in connection with (i) transitory transmission, caching, or storing of information and (ii) providing links to infringing materials.
- Immunity dependent on meeting specific requirements of DMCA

Hosting a Social Media Platform - DMCA

– **Safe Harbor** for Hosts – Section 512(c)

- No liability for service providers (OSP's, ISP's, etc.) if:
  - No financial benefit directly attributable to infringing activity;
  - Not aware of presence of infringing material;
    - » No requirement to monitor
  - Not aware of facts that make infringing material apparent;
    - » Apparent to a reasonable person operating under the same or similar circumstances
  - Upon notice, take down infringing material.

Hosting a Social Media Platform - DMCA

- Website host must:
  - publish instructions for copyright owners to contact host with takedown request (usu'y in Website Terms of Use)
  - file with U.S. copyright office a Designation of Agent to Receive Notification of Claimed Infringement (http://www.copyright.gov/onlinesp/agent.pdf)

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Quick Tips re Facebook

- They have lots and lots of Terms:
  - http://www.facebook.com/terms.php?ref=pf
- The Terms evolve often
  - Statement of Rights and Responsibilities rev'd Apr. 26, 2011
  - Platform Policies revised Oct. 10, 2011
  - Promotions Guidelines revised May 11, 2011
- Hosts of a Facebook Page – FB's terms govern, you cannot establish additional terms, except to govern acceptable content
  - http://www.facebook.com/page_guidelines.php
  - ("9. You may not establish terms beyond those set forth in these terms to govern the posting of content by users on a Page")
- For Sweepstakes and Contests, follow the Facebook Promotions Guidelines
  - http://www.facebook.com/promotions_guidelines.php

THANK YOU

- Future topics will include:
  - **Social Media in Litigation**
  - **IP Protection in Social Media**
  - **Privacy in Social Media**

QUESTIONS?

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