

# Advanced Advertising in the Sports Industry

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# 2010 World Cup:

## A Good Example of Sports Marketing Using Advanced Advertising

- FIFA, teams, broadcasters, current and former players – everyone was using advanced advertising to promote the matches and connect with fans.
- There were mobile apps for live streaming of the matches, news, updates, photos, scores and schedules.
- Fans could see game highlights on YouTube, get running updates on Twitter, and share comments on Facebook.
  - Twitter launched a special website for World Cup fans (<http://twitter.com/worldcup>) that provided schedules of matches, flag icons of countries playing in the World Cup and live tweets about the matches.
  - The Facebook Guide to the World Cup ran a contest to see which team had the most fans, teamed with broadcasters so that fans could comment live with Facebook friends while watching the matches, and provided platforms for playing virtual games with friends.





### Support Your Team


Powered by **involver**

We're running a global competition to see which country has the most passionate football fans. Here's how it works:

1. Check out the leader board below
2. Support your favorite team
3. Encourage your friends to support your team
4. Watch your team move up

Sort by: **Passion Rank** Popularity Intensity Region Group

Rank?	Countries (32)	Likes	Intensity?	Take Action
1	 <b>Chile</b> Internet Population : 8.3M	419,355 	+12,351 	Support 
2	 <b>Honduras</b> Internet Population : 958K	46,167 	+2,581 	Support 

 Chat (3)

# 2010 World Cup:

## A Good Example of Sports Marketing Using Advanced Advertising



- CNN teamed up with FourSquare to create a contest for those in South Africa and those in other countries who watched the games.
- After checking in with FourSquare from at least three locations where fans were watching games, fans could earn a special CNN FourSquare World Cup badge.



# Advanced Advertising in the Sports Industry

## Today's Agenda

- Conducting Promotions Through Social Media
- User Generated Content and IP Issues
- Behavioral Advertising



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# Conducting Promotions Through Social Media

Jim Taylor





# Social Media – What Is It?

- Sports marketers can use social media in the following ways:
  - Create a presence on an existing social networking site such as YouTube, Facebook or Hi5
  - Buy ad space on a social networking site
  - Participate in a particular campaign or program on a social networking site
    - ESPN entered into a deal with gaming company Playdom to develop ESPN-branded sports games that can be played on social networking sites such as Facebook and MySpace
  - Launch a blog or create your own social networking functionality on your team, league, or athlete's website
  - Use a Twitter account to promote athletes and sporting events, or use it to conduct promotions such as sweepstakes and contests
  - Entice fans to spread your message to their friends using viral marketing



# Why Use Social Media?

- A recent study found that consumers who engage with brands on social media sites like Twitter, Facebook and YouTube are 2.5 times more likely to search for those brands and click on those brands' search ads
- It's where the customers are – on Facebook and YouTube and using Twitter
  - The\_Real\_Shaq has almost 3 million followers on Twitter
- It provides a two-way conversation with customers
- It can provide more data about customers



# What Are the Risks?

- When you invite customer input, you risk losing control of your brand.
- Some uses of social media could be considered advertising, and claims made in advertisements should comply with state and federal laws governing advertising, including laws that require adequate substantiation for such claims and certain disclosures.
- The FTC's recently revised guidelines for endorsements and testimonials apply to some bloggers, word-of-mouth marketing, and social networking sites.
- Statements made in new media are subject to the same laws as statements made in traditional media – including defamation, privacy and violation of the right of publicity.
- Marketers that create a presence on an existing social networking site (as opposed to creating their own site or micro-site) need to be familiar with the site, its Terms of Use and its privacy policy.
  - You might need to get written permission to conduct a contest or sweepstakes on the site, and you will need to comply with the site's privacy policy which may contain restrictions on the collection and use of members' information.



# What Are the Risks?

- Advertisers that distribute or post content that has been provided by third-parties – such as videos, music, pictures, and essays - may be liable for copyright or trademark infringement.
- Marketers that operate their own social media site should have Terms of Use, a privacy policy, and, in some cases, may need licenses to use content provided by third-parties.
- Sweepstakes and promotions using social media still need to comply with state and federal laws governing sweepstakes and promotions.
- Materials produced for social media sites could be subject to Guild agreements.



# Blogs

- Two general categories:
  - A league, team or event promoter creates a blog on its own site; may invite a celebrity/athlete, employees, and/or fans to post comments
  - A league, team or event promoter promotes events and merchandise on a third-party site; may provide tickets or merchandise to a third-party site in exchange for coverage or reviews, or the league, team or promoter itself may write blog comments
- Blogs that could be considered an endorsement or testimonial should comply with FTC guides.
- Blogs also raise the same legal issues as third-party content, such as liability for copyright and trademark infringement, defamation, brand tarnishment, and false advertising concerns.



# FTC Guides for Endorsements and Testimonials

- Revised Guides include specific references to social media, blogging and word-of-mouth marketing
- Are “advisory” in nature – not binding law – but FTC uses them to evaluate whether an endorsement or testimonial violates Section 5 of the FTC Act which prohibits unfair and deceptive practices
- Guides:  
<http://www.ftc.gov/os/2009/10/091005revisedendorsementguides.pdf>
- FTC Facts for Business:  
<http://www.ftc.gov/bcp/edu/pubs/business/adv/bus71.pdf>



# FTC Guides for Endorsements and Testimonials

- Advertisers can be liable for false or misleading statements made by bloggers.
- Bloggers can be liable for false or misleading statements.
- Bloggers should disclose any material connection with an advertiser.
- Advertisers should provide guidance to bloggers and should monitor blogs to see that bloggers are not making false or misleading statements.
- Celebrities, such as athletes, can be liable for false or misleading statements.
- Celebrities should disclose when they are promoting something outside traditional advertising such as on talk shows or social media sites.



# FTC Enforcement of the New Guides

- In April, the FTC sent a letter to retailer Ann Taylor regarding gifts given to bloggers who attended a fashion show featuring new products. This appears to be the first publicly announced enforcement action by the FTC relating to the new endorsement guides.
- The FTC stated that after conducting an investigation, it decided not to initiate any enforcement proceeding based on a number of factors:
  - Only a small number of bloggers posted content about the fashion show and several of those bloggers disclosed that Ann Taylor had given free gifts.
  - Ann Taylor adopted a written policy in February 2010 stating that it will not issue any gift to any blogger without first telling the blogger that he or she must disclose the gift in his or her blog.





# Social Media: The Big Picture

- Raises some legal concerns unique to social media and some legal concerns that relate to traditional advertising
- Inviting consumer participation can lead to increased liability for infringement and defamation claims
- Privacy continues to be hot button issue
  - Senator Charles Schumer (D-NY) sent a letter to the FTC asking the agency to develop guidelines that would regulate how social networking sites use and share personal information about users.
- New FTC guidelines on endorsements will have a major impact on promotional blogs



# User Generated Content and IP Issues

Brian Socolow



# User-Generated Content (UGC) Liability Concerns

- User generated content (UGC) includes words, videos, images, music, games, logos, trademarks and any other audio or visual content that is submitted by a website user and made available to other users.
- Typically, UGC is in the form of blogs or the comments written in response to blogs, as well as content submitted as part of a contest.
- Website operators including advertisers and marketers that post, use in commercials or otherwise make available UGC may be liable for:
  - Copyright and trademark infringement
  - Defamation and violation of the rights of publicity and privacy
  - Claims of false advertising



# Copyright Infringement



- How do you minimize liability for copyright infringement?
  - Statutory “safe harbor” (DMCA)
  - Terms of use
  - Screening content



# DMCA (Digital Millennium Copyright Act)

## Safe Harbor

- The DMCA is a federal law that provides a “safe harbor” for online service providers from liability for secondary copyright infringement if they distribute copyrighted material – if certain conditions are met.
- There are many requirements for complying with the DMCA including:
  - You must adopt a policy for terminating users who repeatedly post infringing material on your web site.
  - You must file a form with the U.S. Copyright Office naming someone who will receive complaints of infringement.
  - If you become aware of infringing material, you must quickly remove it.
  - You should not interfere with digital rights management / copyright protection measures.
- The DMCA safe harbor is available only for secondary copyright infringement (i.e., contributory or vicarious copyright infringement); the DMCA does not provide a safe harbor for direct infringers.



# DMCA Safe Harbor

## *Viacom International v. YouTube, SDNY, June 23, 2010*

- In a closely watched case, the district court held that YouTube, which complied with all of the DMCA requirements and removed infringing content quickly when notified by DMCA takedown notices, is entitled to the DMCA safe harbor.
- The plaintiffs (Viacom International, Comedy Partners, Country Music Television, Paramount Pictures and Black Entertainment Television) claimed that YouTube knew that there were large amounts of copyrighted material on its website and it should be liable for contributory copyright infringement because it only removed infringing material in response to specific DMCA takedown notices.
- However, the court said that the DMCA requires more than a generalized knowledge of infringement, and the court, following other DMCA decisions, held that copyright holders have the burden of monitoring websites for infringing content, not the website operator.



# DMCA Safe Harbor

- There is no duty to monitor – but advertisers should screen/review content before posting it.
- However, editing content might jeopardize your ability to qualify for the DMCA safe harbor.
- The DMCA safe harbor does NOT apply to trademark infringement.



# Limiting Liability with Terms of Use

- Terms of Use and/or contest rules should prohibit submissions that contain trademarks or material that is copyrighted by someone other than the entrant, or should instruct entrants to make sure they have obtained the rights to use third-party material.
- The advertiser should reserve the right, stated in the Terms of Use and/or contest rules, to reject, edit, and remove any content for any reason.
- The Terms of Use should include language indemnifying the advertiser if it is sued for content provided by a user.





# Defamation and the Right of Publicity and Right to Privacy

- Defamation is making untrue statements about another person that damage that person's reputation.
  - Courtney Love was sued for defamation for statements she made using Twitter.
  - The plaintiff, a clothing designer, claimed that Love made defamatory statements using Twitter after the two disputed the plaintiff's bill.
- The right of publicity and the right to privacy are related but different:
  - Infringement of right of publicity: the commercial use of a person's identity without that person's consent.
  - Infringement of right to privacy: reference to a person in a manner that causes injury; typically this is disclosure of information or images that a person would reasonably believe were private.



# Defamation and the Right of Publicity

- Section 230 of the Communications Decency Act (CDA) provides immunity from claims of defamation when a web site operator is acting like a publisher.
  - To maintain status as a publisher, a web site operator should not make significant changes to UGC or blog entries which could transform a non-defamatory statement into a defamatory statement.
  - Maintaining publisher status needs to be weighed against the need to screen for inappropriate content.
  - The CDA does not require registration or any of the other actions required by the DMCA.
  - The CDA may also protect a web site operator from right of publicity claims.
- Web site terms of use and/or contest rules should tell users to refrain from (1) making derogatory statements about other people, (2) using a celebrity's name or likeness, or (3) providing personal information or pictures about celebrities and non-celebrities.



# Right of Publicity

- Several athletes have reportedly seen false Twitter accounts set up using their names. Dallas Cowboys linebacker DeMarcus Ware learned that a Twitter account in his name was giving false updates on his contract negotiations and false information was disseminated via tweets from a fake account using the name of Ben Roethlisberger of the Pittsburgh Steelers.
- St. Louis Cardinals Manager Tony La Russa sued Twitter when he learned that a fake account was set up using his name and was sending offensive tweets. La Russa sued for violation of his right of publicity and false endorsement. Twitter reportedly settled the suit by making a donation to La Russa's animal rescue organization and paying La Russa's legal fees.



# False Advertising and Claim Substantiation

- If content provided by third-parties includes claims about a product – such as “This company’s service is faster/slower/cheaper than that company’s service” – the advertiser could be deemed to be making that claim, and if the claim is false, it raises the potential for a false advertising claim.



# False Advertising



- Subway Restaurants v. Quiznos Restaurants
  - In 2006, Subway Restaurants filed a false advertising action against Quiznos Restaurants relating to two television commercials and a contest that invited consumers to submit videos comparing Quiznos and Subway sandwiches. One of the issues was whether Quiznos would be able to qualify for immunity from liability for the false advertising claim relating to the videos submitted by contestants under Section 230 of the Communications Decency Act.
  - In Feb. 2009, the court denied summary judgment for Quiznos, saying that a jury will need to decide if Quiznos served as a traditional publisher or if it went "further and actively participated in creating or developing the third-party content submitted to the contest website."
  - The court did identify certain features of the contest that could sway a jury towards finding that Quiznos was not merely a publisher. "A reasonable jury may well conclude that the Defendants did not merely post the arguably disparaging content contained in the contestant videos, but instead actively solicited disparaging representations about Subway and thus were responsible for the creation or development of the offending contestant videos."
    - The court pointed to the domain name of the contest – [www.meatnomeat.com](http://www.meatnomeat.com) – and contest language that asked for entries that "compare Quiznos to Subway and illustrate why Quiznos is better than Subway"
  - The parties later reached a settlement.



# False Advertising

- As shown in the *Subway v. Quiznos* case, advertiser-sponsored third-party content can be alleged to be the advertising of the sponsor.
- Accordingly, best practices to prevent a false advertising claim are:
  - Don't encourage submissions about competitors
  - Claims should be substantiated
  - Submissions should not make false or misleading claims (see FTC Act, 15 U.S.C. § § 41 et seq., which prohibits unfair or deceptive acts or practices)



# Behavioral Advertising

Ken Florin



# Behavioral Advertising

- What is it?

- Collecting and customizing consumer data in order to deliver ads tailored to an individual's interests
- Can include online behavioral advertising (tracking a consumer's activities online) and location-based marketing (delivering an ad to a mobile device based on a consumer's location)
- Also called targeted advertising, behavioral targeting, and interest-based advertising



- Why are we talking about it?

- It can be effective in reaching existing customers to promote a new product or service, or reaching new customers.
- It raises privacy concerns.





# What is the Controversy?

- It takes place largely out of sight.
  - Consumers may not know who is collecting the data, what it is used for, and who it is shared with.
- The information collected through behavioral advertising is usually anonymous, but it can be merged with personally identifiable data (often provided by a consumer when registering or making a purchase).
- Privacy advocates complain that too much data is being collected about individuals without their knowledge or consent.
  - In a recent complaint filed with the FTC relating to behavioral advertising, privacy groups want the FTC to “address the moral and ethical consequences to consumers and citizens when they are subjected to an invisible system that sells access to them—wherever they go online—to third parties.”



# What is the Controversy?

- It sometimes involves DPI (deep packet inspection) which has been the subject of at least one lawsuit.
  - Deep packet inspection refers to the automated inspection of unencrypted data that is transferred between an ISP and the ISP's subscribers.
  - Charter Communications partnered with NebuAd and allowed NebuAd to use DPI to intercept data sent between consumers' computers and the cable provider and use this data to deliver targeted ads. Subscribers could opt-out from receiving the ads, but could not opt-out of having their data collected. Congress held hearings on DPI, the program was suspended, NebuAd's CEO resigned, and a class action lawsuit was filed against NebuAd.



# Behavioral Advertising: Hot Topic

- Congress held hearings on online behavioral advertising in 2009.
- Ten consumer and privacy groups (Center for Digital Democracy, Consumer Federation of America, Consumers Union, Consumer Watchdog, Electronic Frontier Foundation, Privacy Lives, Privacy Rights Clearinghouse, Privacy Times, U.S. Public Interest Research Group, and the World Privacy Forum) sent letters to Congress pressing for behavioral advertising legislation that requires opt-in, no collection of data from children under 18, a private right of action, FTC creation of a do-no-track registry, and no pre-emption of stricter state laws.
- Last week, Congress held hearings on two new federal privacy bills/proposals.



# The Boucher Proposal

On May 4th, Representatives Rick Boucher (D-Va.) and Cliff Stearns (R-Fla.) introduced a draft of a comprehensive federal privacy bill. If enacted, the bill would:

- Apply to the online and offline collection, use and disclosure of personal information (which the bill calls “covered information”)
- Require companies to provide a notice describing their privacy practices before collecting covered information
  - If notice is provided on a website, it must be accessible from a direct link on the homepage
  - The notice must include a detailed description of, among other things, how information is collected, used, disclosed, and stored; how an individual can limit or prohibit such collection and disclosure; and how changes to the privacy notice are communicated to individuals
- In general, the bill would allow companies to collect covered information unless an individual opts-out (as long as the required notice has been provided)



# The Boucher Proposal

- Opt-in for sensitive information: the bill would require express affirmative consent before collecting, using or disclosing sensitive information, which includes medical records, financial records, race or ethnicity, religion, sexual orientation, and precise geographical location.
- The bill provides an opt-out framework for behavioral targeting if certain requirements are met including: (1) there is a clear, easy-to-find link to a webpage where an individual can opt-out of having a profile and (2) the ad network does not share the information with anyone else.
- The bill would be enforced by the FTC, state attorneys general and state consumer protection agencies, but would not provide a private right of action.
- Would preempt state laws regulating the collection, use and disclosure of personal information but would have no effect on federal privacy laws.
- The bill contains several exemptions from the notice and/or opt-in requirements such as information collected for “transactional” or “operational” purposes and information disclosed to affiliates.
- Rep. Boucher has said that he may revise the draft bill after he reads comments from privacy and advertising groups and will formally introduce a bill in the House in a few months.



# The Rush Bill

- Congressman Bobby Rush (D-Illinois) introduced a bill, H.R. 5777, that is similar to the Boucher proposal by providing a comprehensive framework for the online and offline collection of data, but it differs by:
  - Providing a private right of action with penalties up to \$5 million
  - Giving the FTC additional rule making authority to develop detailed requirements for privacy notices
  - Providing a safe harbor from enforcement for companies that participated in FTC-approved self-regulatory programs



# What are the Risks?

- Violation of the FTC Act
- Violation of state, federal or international privacy laws
- Private or class action law suit
- Congressional hearings
- Public relations disaster



# Legal Landscape

- Right now, behavioral advertising is governed by existing privacy laws and self-regulation.
- Existing privacy laws that may apply include:
  - Federal laws limiting the collection of personal information such as Children's Online Privacy Protection Act (COPPA), Gramm-Leach-Bliley Act ( relating to financial information), CAN-SPAM Act (limits sharing email addresses), federal telemarketing laws (limits sharing telephone numbers), the FTC Act (which requires, among other things, that companies comply with their own privacy policy), and HIPAA (governing medical information)
  - State laws such as California's Online Privacy Protection Act and laws restricting the disclosure of financial and medial information
  - European Union privacy directive and other international laws
- Self-regulatory guidelines include:
  - Self-Regulatory Principles for Online Behavioral Advertising issued by AAAA, ANA, BBB, DMA, and IAB ("Advertising Industry Guidelines")
  - Network Advertising Initiative (NAI) Self-Regulatory Code of Conduct (for Third Party Ad Networks)
  - FTC Staff Report: Self-Regulatory Principles for Online Behavioral Advertising ("FTC Guidelines")
  - Wireless Association Best Practices and Guidelines for Location Based Services





# Advertising Industry Program

- As part of the advertising industry's self-regulatory program, the industry is launching the "i" program that uses an industry-standard icon that advertisers can place on web pages where data is collected. The icon would link users to a page with more details about what information is collected, how it is used, and how consumers can opt-out of certain uses.



# FTC Guidelines

- Websites should disclose their data collection practices tied to online behavioral advertising.
- Websites should disclose that consumers can opt-out of these practices and provide a mechanism for opting-out.
- Websites should provide security for consumer data and retain it only as long as necessary.
- For companies that revise their privacy policy, they should obtain affirmative express consent before using consumer data in ways that are materially different from the privacy policy that was in effect when the data was collected.
- Websites should obtain affirmative express consent before using sensitive consumer data (sensitive data includes financial data, data about children, health information, precise geographic location information, and Social Security numbers).
  - The FTC said defining sensitive and financial data may depend on the context, and companies should consider whether there are certain categories of data that are so sensitive that they should never be used for behavioral advertising.



# FTC Guidelines

- Not limited to just PII – principles apply to “any data collected for online behavioral advertising that reasonably could be associated with a particular consumer or with a particular computer or device.”
- Type of data protection (for example, encryption) should be based on the sensitivity of the data, the nature of the company’s business operations, the types of risk a company faces, and the reasonable protections available to a company.



# Behavioral Advertising: What's Next?

- The advertising industry hopes that its self-regulatory program will work.
- The FTC held a series of roundtable discussions on privacy issues including behavioral advertising and may propose new laws
- Rep. Boucher asked for comments on his draft federal privacy bill and said he will introduce an official bill in a few months
- Consumer groups continue to press for laws regulating behavioral advertising and class action lawyers continue to file law suits against companies that make privacy mistakes
- The European Union adopted a regulation that seems to require an opt-in for behavioral advertising, but it depends on how member countries implement the regulation.



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