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Keep User-Generated Content Legal

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A solid Terms of Use policy can sometimes save an advertiser from getting into dangerous legal territory with user-generated content.

Social networking websites like YouTube and MySpace are popular because they allow computer users to participate in an online community by sharing videos they've created (or found) and by commenting on what has been posted to the site.

Advertisers have started incorporating these same features into their own advertising and promotional campaigns. Some advertisers have created websites or web pages where users are encouraged to submit original content, often as part of a contest. And some advertisers have used user-created content in their own advertising campaigns.

This article addresses some of the legal and business issues that arise when advertisers (and their agencies) solicit and use user-created content on their own websites or third-party sites. Other issues in this space relate to advertiser liability when ads are placed on social networking sites that may contain infringing or defamatory content.

Protect the Brand's Image

Any time an advertiser allows someone to participate in an advertising campaign, they risk losing control of the brand image. Although there are many customers who genuinely love the product being advertised, there are also customers who relish the chance to disparage a product or company.



An advertiser with a participatory website may well want to screen all postings to the site and state this policy in the website's Terms of Use.

False Advertising Concerns

User-created content can blur the distinction between commercial content (i.e., ads) and noncommercial content (i.e., entertainment and commentary). Noncommercial content is afforded more protection from the First Amendment than commercial content, while commercial content is subject to federal and state advertising laws. These laws require, among other things, that claims be substantiated, that the ad not be false or misleading, that certain disclosures be made and that testimonials and endorsements comply with federal rules.

It's not clear whether user-created content would be considered advertising, but it is certainly possible, particularly if the content contains product claims and appears on the advertiser's own website. So an advertiser who intends to post user-created content on its site should review the content as carefully as it reviews its own ads to make sure it complies with advertising laws. This might mean that some user-created content may have to be edited, so the advertiser's right to do such editing should also be spelled out in the Terms of Use.

This publication may constitute "attorney advertising" under the New York Code of Professional Responsibility.

Liability For Infringement of Third-Party Rights

If an advertiser posts a user-created video, essay or other content on its site, it should try to limit liability for copyright and trademark infringement, defamation and violation of the right to privacy and publicity. The site's Terms of Use should instruct users to only submit material for which they own all the rights (including the music rights) and provide guidelines for use of trademarks, the names and likenesses of other people and copyrighted materials owned by third parties.

The Terms of Use should also include language indemnifying the advertiser if it is sued for content provided by a user. The advertiser should carefully review all submissions and reserve the right to take down any infringing materials or materials that violate the Terms of Use, particularly since an indemnity from an individual content creator may not provide much protection in the event of a claim.

An open question is whether the Digital Millennium Copyright Act and the Communications Decency Act, two federal laws that provide some protection from liability for copyright infringement and defamation, would apply to an advertiser who solicits user-created content to be posted on its own site or on a third-party site. There is no case law on this subject yet and, as a result, advertisers should be particularly careful about the content they allow to be posted, particularly on their own sites.

License and Terms of Use

An advertiser will want to obtain broad rights to use any user-created content that is submitted. One way to do this is to include in the Terms of Use (that the user must affirmatively accept) language indicating that the user grants to the advertiser the rights to use, copy, edit, publish and distribute the material, in any media, forever, as well as the right to use the user's name, likeness and performance.

Note: Since the law is somewhat unsettled as to whether a complete transfer of the copyright (i.e., a buy-out or exclusive license) can be affected with a click-wrap acceptance, without a physical signature, it is more prudent to get a non-exclusive license to use the materials if obtaining consent online.

Note: Even if the advertiser obtains broad rights to the user-created materials, without any payment obligations, the use of the materials in some media, such as broadcast television commercials, may require payments under talent and other guild collective bargaining agreements.

Finally, advertisers should also bear in mind that since contracts with minors are not enforceable, if they need to obtain significant rights to the materials (for example, to run a user-created video in a commercial) and the creator is a minor, it is important to obtain a parent's consent as well.

Insurance

Most advertisers or their ad agencies have insurance for advertising-related injuries, which would include a lawsuit brought against the advertiser for infringing material contained in an ad. An important question for advertisers and agencies is whether this insurance would cover any claims stemming from the display or use of user-created content. If not, an advertiser or its agency would have to pay the costs of defending such a case, and, in the event of a settlement or a judgment against the advertiser, would also have to pay the settlement costs, damages and fines.

Conclusion

Encouraging users to submit original content can be a very effective way of attracting customers and promoting a product. In addition, an advertiser might end up with material that can be used for a commercial, which in itself could generate media attention. But advertisers need to think about the potential risks associated with such use and take steps to limit liability and develop Terms of Use that clearly convey to users the parameters of the invitation to submit original content.

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