



SOCIAL NETWORKING EMPLOYEES CAN RAISE IP ISSUES

Companies need policies that limit copyright, trademark infringement risks

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Facebook, Twitter, MySpace, LinkedIn, YouTube, blogs, Wikis and a host of web sites targeted to particular interests: these days the social media phenomenon is everywhere.

Companies from the world's largest brands to small local businesses are social networking, creating Facebook pages by the hundreds of thousands in order to capitalize on the vast marketing potential that social media can offer. Moreover, employees are engaging in social networking both at home and at work.

The rapidly changing nature of social media platforms can present organizations with a host of legal challenges. While existing laws apply equally to conduct online as well as offline, potential risks of online conduct can be difficult to anticipate. One effective solution is to have a clear social media policy in place.

Consequences For Brands

Recent events have made it abundantly clear that even a single post, tweet or blog entry can have consequences for a company's brand. For example, during the height of the recent unrest in Egypt, Kenneth Cole, the CEO of fashion house Kenneth Cole Productions, posted the following tweet to the company's Twitter account:

"Millions are in uproar in Cairo. Rumor is they heard our new spring collection is now available online..." The backlash was almost instantaneous, with calls for a boycott of Kenneth Cole Productions.

Even more recently, Gilbert Gottfried was fired as the voice of the AFLAC duck after he tweeted a series of jokes about the earthquake and tsunami in Japan. AFLAC derives approximately three quarters of its revenue from that country.

But the social networking activities of *all* employees, not just highly visible ones or spokespersons, have the potential to cause damage. And it's not only the public's perception of the company at stake when employees engage in social networking; an employee's post, blog or tweet could potentially give rise to liability for the company on a whole host of grounds.

For example, an employee touting the virtues of his or her employer's product could inadvertently provide a basis for a false advertising claim against the company. Other potential claims that could arise from an employee's social networking include defamation, copyright infringement and trademark infringement.



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In addition, in the face of the proliferation of marketing on social networking sites, the Federal Trade Commission issued guidelines in 2009 for advertisements or endorsements appearing on social media sites. Among other things, the FTC has indicated that when there is a material connection between a person endorsing a product and the seller of that product, the connection must be fully disclosed. 16 C.F.R. Part 255.5.

The FTC has made it clear that an employee is considered to have a "material connection" with his or her employer. Furthermore, the FTC's guidelines contemplate that a company police social media sites and correct any "deceptive representations" that are discovered. 16 C.F.R. Part 255.1. So, an innocent remark regarding a company's product made by an employee on his or her Facebook page or in an online forum could subject the company to an FTC enforcement action and fines.

Given these landmines, companies

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should adopt and implement clear social media policies to avoid potential damage to their brand and to hopefully limit liability arising from employees' social networking activities.

First and foremost, the policy should be clear in who it covers. As is evident from the examples above, companies should consider extending their social media policies to all employees of the company and to anyone else involved in the company's marketing, including public relations firms and spokespersons.

Second, the policy should be clear in the obligations that it imposes. Companies should clearly indicate that their policy extends to employees' social networking both during company time and on their personal time, whether or not the employees

are using company computers. Companies should limit access to postings on their behalf (*e.g.*, on a company Facebook page or Twitter account) to approved employees. If a company chooses to monitor employee social networking activities, it should be clearly communicated in the company's social media policy together with the consequences for violating the policy.

Third, companies should consider prohibiting employees from posting any claims about company products or services without prior approval of the company. In any event, the policy should require company employees to disclose their affiliation with the company in any discussion of company products or services.

Moreover, to the extent that an employee is acting as a company representative on a

social networking web site, companies may also consider: (1) prohibiting employees from discussing competitors, customers or other employees; (2) disclosing confidential company information; (3) using the intellectual property of others, including copyrighted works or trademarks; or (4) posting defamatory or otherwise offensive material.

Risk Vs. Reward

Social media provide companies with a powerful tool to promote their brands and reach consumers. This far reach is a double-edged sword, however, when the stray remarks of a company's employee have the potential to reach those same consumers and subject the company to liability. A strong and clear social media policy is a company's best defense. ■