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INSIGHT (FOCUS & FORUM) • Mar. 17, 2009

Evolving Media Tools Require Companies to Navigate Changing Waters

By Alan L. Friel and Nancy Derwin-Weiss

New media is hardly new. In fact, most companies have had Web sites since the 1990s. Now those sites, and third-party sites employed by companies, enable vibrant consumer interaction with brands and unique methods of conveying sales messages and making sales. Marketers have become the early adopters of new trends and tools, such as blogging, social networking (e.g., Facebook), and user-generated content (e.g., video posts on YouTube). E-mail marketing is widely used and text message campaigns are gaining traction. Legislatures, regulatory agencies, including the Federal Trade Commission and self-regulatory bodies, including the Mobile Marketing Association, have stepped in to regulate digital marketing. To protect the value proposition evolving media can bring to marketing, and to avoid damage to valuable brands and intellectual property, it is essential that knowledgeable counsel be sought to ensure that marketing campaigns are executed legally and do not violate consumer trust.

Spam

Today, most companies use e-mail to communicate with their customers and prospective customers. In 2003, Congress passed the Controlling the Assault of Non-Solicited Pornography and Marketing Act, also known as the CAN-SPAM Act, and the FTC implemented rules, revised last year, further to the act. CAN-SPAM does not prohibit the sending of commercial e-mails, that is e-mails that do not directly concern a transaction the consumer has previously entered into with the sender. Rather, it is designed to prevent fraudulent e-mails and imposes specific labeling, opt-out and do-not-send requirements on the senders of commercial e-mails. Commercial e-mails must clearly disclose the opt-out mechanism and recipients who opt-out must be added to a list used to suppress future commercial e-mails from the sender absent express prior consent.

The FTC has recently modified its rules to address questions of who will be deemed a sender and responsible for compliance, including when multiple companies' products are promoted in a single e-mail or when e-mails are distributed between consumers, at the suggestion of a company, that advertise or promote that company's products. E-mails sent to domain names provided by wireless service providers are subject to greater regulation. Marketers should also exclude domains included on a list maintained by the Federal Communications Commission absent meeting additional compliance requirements. Every e-mail campaign should be reviewed for CAN-SPAM compliance, as marketers and their vendors frequently fail to properly follow the requirements and unwanted e-mails, so-called spam, are a source of frequent consumer complaints to regulators and increasing class action litigation and settlements.

Mobile Mayhem

Advancements in cell phone devices have brought rich media to the mobile device.

Since many users are charged for receiving mobile messages, CAN-SPAM and the Telephone Consumer Protection Act require advance notice and express consent prior to the delivery of a mobile marketing message.

Programs that allow consumers to send marketing messages to their friends via text require careful legal review as advance consent from the recipient is difficult to obtain in practice.

Web site registration pages that collect cell phone numbers must include certain disclosures regarding fees and

applicable devices. Even enabling a Web site for easy viewing on mobile devices (e.g., a "WAP" site) requires specific notices.

The Mobile Marketing Association provides guidelines to assist marketers on the use of mobile media, but it is not a substitute for legal counsel.

Further, the law as it respects mobile media is, like the medium itself, evolving. For instance, text-to-win sweepstakes have spawned a slew of class action lawsuits (now consolidated) that are pending in California federal courts. New mobile media applications, such as mini-games that include a pre-recorded call from a character from a television show, or are otherwise identified with the brand (e.g., the Michelin man), raise issues of compliance with the FTC and FCC's telemarketing rules, even if the recording itself lacks a sales pitch or purchase opportunity.

The Buzz

Marketers consider consumer word-of-mouth one of the most powerful methods of promotion. Digital media enables consumers to communicate more easily and in a more far-reaching manner than ever before. Companies seek to foster a positive consumer buzz about their brands online but their techniques frequently cross ethical and legal lines. For instance, "astroturfing" or "stealth marketing," where a brand is promoted surreptitiously by company employees or contractors pretending to be customers may be considered a deceptive advertising practice.

Buzz activities conducted on a third-party site, like MySpace, in violation of its terms of use, can subject marketers to claims by the sites and potentially even result in liability under certain state and federal laws regulating unauthorized accessing of Web sites. Recommendation marketing is a practice whereby online users are encouraged to promote products in chat rooms, on blogs and otherwise. Where the user has been paid or given other valuable consideration without disclosing that fact at the time the recommendation is made, this can result in charges of deceptive advertising and violation of the FTC's testimonial rules.

A good source of guidance on how to run a cool yet compliant online buzz campaign is the Code of Ethics of the Word of Mouth Marketing Association (www.womma.org), but legal counsel should also be obtained.

Who is Responsible?

Even the most basic corporate image Web site presents content ownership and infringement issues. Too frequently companies do not properly document their engagement with their vendors hired to develop Web sites, banner advertisements and cool viral applications, and execute interactive campaigns, leaving without the necessary contractual protections in place, including insurance requirements, legal compliance, ownership of work product and indemnity obligations.

Also, developers and company employees recurrently use unlicensed software, music, images and other content, creating the risk of infringement claims.

YouTube and other sites that permit users to create and post their own pictures, videos and content (so-called "user-generated content") have become a pop culture phenomenon. Traditional media like Al Gore's cable television network, Current, have integrated viewers into the programming process and enable users to create programming, and even commercials, distributed by the network's Web sites and cable channel.

Consumers, however, have been known to include third-party content without permission in their user-generated content, raising the issue of whether the site operator, or the sponsor of a campaign involving such content, should be secondarily liable for the infringement.

There are potential safe harbors and immunities that may apply to Web site operators and users under the Digital Millennium Copyright Act and the Communications Decency Act, when the user-generated content remains owned by the user and has not been selected, edited or substantially directed by the party seeking the protection.

The conditions and constraints of the protections, which are still being articulated by the courts, require

operators to make many decisions regarding how they design and execute campaigns that have user-generated content elements.

Furthermore, the Communications Decency Act and the Digital Millennium Copyright Act do not protect against all potential claims such those arising under trademark, and potentially the Lanham Act, and courts are split regarding whether a shield to rights of publicity claims exists.

In addition to legal concerns, marketers need to consider how they feel about unflattering use of their content and brand when they make it available to consumers to use in connection with user-generated content.

Different approaches to control over that use results in different outcomes with regarding potential protection under the Communications Decency Act and Digital Millennium Copyright Act.

Further, user-generated content promotions, such as those where consumers create and submit videos promoting a product, and one or more winners are selected, present questions of whether the states' lottery, sweepstakes and contest laws are being followed.

Finally, the distribution of user-created videos to promote companies' products raises issues regarding applicability of deceptive advertising laws.

Interactive marketing presents companies with powerful new tools for cost efficiently interacting with consumers. In times of decreasing advertising budgets, television viewership and print circulation, these are much welcomed.

But a positive return on investment requires marketers to work closely with legal counsel knowledgeable in the area to navigate the treacherous and constantly changing waters of evolving media.

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