

### **Brand Protection in the Age of Social Media**

The Internet is transforming the way companies communicate with customers. That transformation is accelerating at an astonishing pace as a result of social networking sites, such as Facebook<sup>®</sup>, Twitter<sup>®</sup> and MySpace<sup>®</sup>. More than ever, consumers are sharing their experiences and opinions, good and bad, with global audiences on blogs, social networks and consumer review sites at the touch of a button. Those opinions have the potential for shaping, controlling and redefining advertising messages, not to mention companies' reputations. Most companies are still unaware of the existence or benefits of social media marketing. However, those that are aware have been caught off guard and unable to adapt to the speed at which social media marketing is revolutionizing the way companies communicate with customers and potential customers and the way consumers are voicing their opinions about companies and their products. Some social media experts believe that the day of the one-way message controlled by brand owners may—at least for now—be dying.

The ever-increasing number of social networking sites, blogs and customer review sites is making it difficult, if not seemingly impossible, for brand owners to manage their advertising messages, reputations and intellectual property assets online. That difficulty will undoubtedly intensify as the number of participants on user-generated content sites explodes to an estimated 1 billion by 2012. It is estimated that there will be 4 billion postings, known as “tweets,” on Twitter in 2009 and 40 billion in 2010. Clearly, the pace at which people are using social media networks to connect with friends and seek out online relationships with business is exploding, which is why some companies see social media as an opportunity to connect with consumers who they could not otherwise reach with traditional marketing efforts.

The question being asked by many social media experts is whether companies that have not already done so will embrace this potentially golden opportunity to reach tens of thousands, if not hundreds of thousands, of traditionally unattainable consumers with the strike of a computer key or be immobilized by fear. Much of the trepidation surrounding social media marketing stems from companies not understanding its intricacies. And although companies are wary of social media itself, they also fear doing nothing and missing opportunities while their competitors strike gold.

### **POTENTIAL CONSEQUENCES**

Other reasons companies fear social media marketing include losing control of their message and brand, the return on time investment and the posting of negative comments or feedback by customers, employees and ex-employees. The truth of the matter is that whether or not companies use social media marketing, their customers may already be talking about them and their products. The problem: companies don't know what customers are saying and therefore are not able to dispel misinformation and inaccurate statements and thwart infringements of their intellectual property.



Negative comments or misinformation left unchallenged becomes perception and that perception becomes reality for potential customers, resulting in lost revenues. For example, a social media expert recently posted a tweet on Twitter for her nearly 6,000 followers that decried her customer service experience earlier that day at one of the largest office supply companies. Is that company listening? If so, kudos to it! If not, it might want to be.

In a more prominent case of a dissatisfied customer taking his frustration over dismal customer service to the social media sphere is that of Halifax singer-songwriter Dave Carroll, whose guitar had been severely damaged by United Airlines. It is reported that in the spring of 2008, Carroll and his band, Sons of Maxwell, were traveling on tour when Carroll says he and his band members noticed United Airlines baggage handlers throwing their instruments on the tarmac in Chicago. He then later discovered that his \$3,500 guitar had been damaged. After months of baggage claims and e-mails went nowhere, Carroll, in protest, wrote and posted a song about his ordeal on YouTube<sup>®</sup>, which went viral overnight and became a public relations nightmare for United Airlines.

In addition to being concerned about negative posts and commentary, companies must also be concerned with the unauthorized use and misuse of their intellectual property, including their trademarks. Unauthorized use and misuse of company trademarks cannot be ignored. Indeed, legal precedent requires trademark owners to police and enforce unauthorized uses of their trademarks or risk losing valuable trademark rights. So rather than putting their heads in the sand and waiting for the social media marketing “fad” to blow over, companies need to put their ears to the ground, listen and join the conversation. At least then they can try to influence the message and conversations about them and their products.

Joining the conversation allows companies to engage consumers directly and turn negative comments into positive ones or refute misinformation. And they just may find that they have brand champions who will defend their products. Joining the conversation also allows companies to monitor for certain infringements to their intellectual property, such as trademark infringement, trademark hijacking, counterfeiting or libelous speech, which can damage their goodwill and reputation. If their brands have been “hijacked,” they need to know what messages the impersonators are spreading and what impact the impersonators are having on their brands.

One recently reported high-profile case involved Tony La Russa, manager of the St. Louis Cardinals baseball team, whose identity was hijacked on Twitter by an imposter. The suit filed in the Superior Court of California in San Francisco, which has since been dismissed, claimed that someone created an account under La Russa’s name and posted tweets, giving the false impression that the comments came from La Russa. The suit also said that the comments were “derogatory and demeaning” and thus damaged La Russa’s trademark rights.

There also have been reports of corporate sabotage. For example, it was reported that a public relations firm allegedly set up a Twitter account in the name of a rival firm. The firm then allegedly disseminated malicious tweets for two months before the competing firm realized that its identity had been hijacked.



## PROTECTIVE MEASURES

What's illustrated by the preceding examples is that one of the most basic steps that brand owners can take to minimize the risk of trademark infringement or hijacking on social media sites is registering their names. Before jumping into social media marketing, however, experts recommend that companies first have a well-designed branding strategy in place for it to be most effective.

Once brand owners have reserved their names, they should next institute a monitoring program to detect negative, inaccurate and misleading comments about them or intellectual property infringements. Although gaining complete control over all negative comments and unauthorized use of company intellectual property is not practical or feasible, a certain amount of control is achievable by monitoring social network sites on a regular and systematic basis.

A monitoring program can be carried out by company employees or by an independent monitoring service company. Before implementing a monitoring program, however, it is advisable to first decide what sort of content poses the greatest risk and what type of content can be ignored. Most companies should at least be concerned with the following types of content: trademark infringement, dilution, counterfeit sale of goods or services, defamatory speech, brand tarnishment, impersonation of company employees and false or misleading advertising. Companies should also consider which of the social network and user-generated content sites are most relevant to their industry and business. The more common sites to monitor include Facebook, Twitter, MySpace, YouTube, Wikipedia<sup>®</sup>, Second Life and other virtual worlds, eBay<sup>®</sup>, industry blogs and product and service review sites.

A self-monitoring program should include a weekly or monthly review of a number of available social media web sites. There are search engines that can help companies find damaging content posted about them. Those sites include icerocket.com (searches blogs, Twitter, MySpace, news and images), Google.com/alerts (alerts for use of company names and brands on blogs, the Web, news, videos and discussion groups) and technorati.com (searches blogs).

Alternatively, companies may decide to hire an outside service to monitor for negative comments and infringements. In addition to monitoring the applicable sites, monitoring service companies can also, if need be, rehabilitate a brand damaged by negative comments by developing new web pages featuring favorable commentary, which will push unflattering comments and web pages to the bottom of search engine result pages. Companies must, however, be aware that creating false and misleading positive reviews about their company, known as "astroturfing," may violate false advertising laws, which may trigger government action against the violating company. The service companies can also generate monthly reports that list negative comments made about companies during the previous month.

Once companies find activities that are damaging to their brands, they will need to consider the level of damage being caused, the nature of the activities and the company or individual(s) involved. If the activities are clearly intended to harm the brand, then swift and strong action is probably warranted. However, if the infringement is innocent or at least not intentional, a soft



approach is likely the best strategy. The last thing any company wants is for the recipient of a strong cease-and-desist letter—who was innocently infringing the property—to post it on his or her blog and post negative commentary. A good approach is to consider each possible infringement with your trademark attorney on a case-by-case basis.

For example, some companies that realize the importance of having a presence on social networking sites are discovering that someone has already registered their company and/or brand names on Facebook and Twitter. What can these companies do? The first step is to review the site operator’s terms of service to find out how trademark infringement and trademark hijacking cases are handled by that service provider and then file a complaint. If the complaining party does not obtain a favorable result from the site owner, what then? Are there current laws, at least in the U.S., that would remedy the ongoing infringement?

Presently, there is uncertainty as to whether current trademark laws are designed to sufficiently address the numerous trademark issues presented by social networking sites. The problem with current U.S. laws is that they tend to cover infringement of second-level domain names. Second-level domain names appear in the Web address immediately preceding the top-level domain, such as “facebook” in “www.facebook.com.” This enables McDonald’s to use the existing U.S. trademark laws against a cybersquatter who registers “www.mcdonalds.com.” On both Facebook and Twitter, however, users have the ability to select personalized “user names,” not “domain names,” which appear as part of the URL or web address, but not part of the domain name (i.e., facebook.com/username). Unless the site owner, i.e., Twitter or Facebook, is agreeable to removing an infringing username from its service after receiving a complaint or a squatter is agreeable to relinquishing control of the infringing username to the rightful trademark owner, the trademark owner may have no choice but to file suit against the infringing party in court based upon traditional trademark infringement principles.

## **CONCLUSION**

To minimize the risks of trademark hijacking, trademark infringement and damage to brand reputation that may occur on social media networking sites, it is advisable to take precautionary and proactive steps. Those steps include reserving company names and key permutations of company names with social networking sites, developing a presence in social networking communities, assigning company employees who are responsible for overseeing the monitoring process, understanding terms of use for each of the major social networks and developing consistent enforcement procedures.

The advent of social networking and user-generated content sites has given companies a myriad of new opportunities to promote their brands that were not previously available with traditional media. However, those opportunities have also created new challenges for managing company brands. Those challenges will likely require companies to institute consistent enforcement programs, which should include taking swift action when misuse of company brands is detected. The development of an enforcement program and a commitment to systematically monitor for



potentially damaging activities can go a long way toward making sure that online social networking sites remain free of content that is damaging to company brands.

**FOR MORE INFORMATION**

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