

Contact Attorney Regarding
This Matter:

Anuj Desai
404.873.8658 - direct
anuj.desai@agg.com

Arnall Golden Gregory LLP
Attorneys at Law

171 17th Street NW
Suite 2100
Atlanta, GA 30363-1031

Two South Biscayne Boulevard
One Biscayne Tower 2690
Miami, FL 33131

1775 Pennsylvania Avenue NW
Suite 1000
Washington DC 20006

www.agg.com

Q&A WITH INTELLECTUAL PROPERTY ATTORNEY ANUJ DESAI ON THE RISKS OF SOCIAL MEDIA USE

How does social media make brand protection more difficult?

When you add social media into your marketing efforts you have several more channels to monitor to make sure that your brand is protected. Extra effort and extra manpower are going to be required. You don't always need a lawyer to do that. A lot of social media services like Facebook, Twitter, Instagram, etc. have terms of service and policies that address intellectual property concerns. But sometimes it can get to a point where you need help to move things along, to perhaps go directly after the infringer rather than continue addressing the issue with the social media service.

What are the risks associated with taking brand enforcement action?

One thing that comes up often is viral backlash. A well-publicized example is McDonald's sending a notice to a teenager who came up with a charity called McFest. McDonald's was taken to task by the public for being heavy handed. Another example is when Monster, the energy drink, sent a cease and desist notice to Vermonster, a craft beer brewer from Vermont. That actually generated positive publicity for Vermonster and negative publicity for Monster. Monster ended up withdrawing its claims and settling with the brewer. Oftentimes the public views brand enforcement as Goliath trying to squash David and it doesn't like that. You have to be careful in picking your brand enforcement battles and taking the right approach, using softer demand letters when the parties are of disproportionate sizes so that the demand is not misconstrued as bullying, triggering a PR firestorm.

Give an example of a brand enforcement approach that impressed you.

Coca-Cola has done a great job in this respect. It collaborated with a fan site to align it with the company's brand strategy and at the same time nurtured the organic fan movement. Part of having a great brand is you're going to have fans, but there's a fine line between being a fan of the brand and infringing on the brand. That's especially true in social media, which is all about user generated content (UGC), consumers coming together to talk about something in common, such as companies they admire. Some companies have difficulty with that because they want to protect their brand and control what the brand message is, and here you have a Facebook page by someone

who loves the brand and wants to post comments and articles about it, and you may not agree with how they're doing it or what they are saying. Again, monitoring social media is a lot of work for somebody in the company's marketing or legal department. There are new social media services coming out every year, and you want to make sure you register your trademarks and your names with these services so that other folks do not try to pass themselves off as you.

Interacting with consumers on social media poses risks. Explain that.

A few years ago Netflix decided to raise their rates and split off their streaming and DVD services. A core group that had been with Netflix since its infancy was taken aback by the changes and for several months posted profanity and derogatory comments on Netflix's Facebook wall. Netflix was likely hoping that the wall would promote only positive views of the company. So you have to be careful about how much interaction you allow and whether you can control the content that comes from the users, otherwise your social media presence can become a mouthpiece for complaints. Encouraging or allowing infringing content also is dangerous. If you have a Facebook wall or Instagram account where copyrighted images are being posted and you've been notified of that and you don't take action to remove them, then you could be held liable for the infringement. And if defamatory comments are posted, a company could be sued for knowingly allowing the offending content to remain on its site. Courtney Love filed a defamation lawsuit because of comments on Twitter, and it settled in her favor.

What are other areas of vulnerability?

A lot of companies like to use social media for contests and sweepstakes, which are governed by federal rules that must be followed even on social media. Also, renegade employees have been known to make parting remarks or have said something inadvertently that was insensitive or cruel and tarnished the company's brand. A person or a team with sole access to a company's social media accounts should make sure comments go through the correct channels of approval just as any other marketing collateral would.

What are some of the interesting copyright issues that social media has created?

An older, but useful example is the website The Cool Hunter, which posts interesting images and services and earns advertising revenue for doing so. It launched a Facebook page to generate more traffic. The Cool Hunter attracted nearly 800,000 Facebook fans at one point, so social media was huge for them. But The Cool Hunter was repeatedly cited for using other people's copyrighted images without their permission, so Facebook eventually shut down the account, which was devastating to the business. The takeaway is making sure that the authorship of what you're posting is not in dispute. The Cool Hunter has renewed its presence on Facebook, but with not nearly as large a following as before.

What about the lawsuit against Instagram?

Instagram faced a huge backlash when it changed its terms of service, and users understood that to mean that Instagram was giving itself permission to do whatever it wanted with the user images, including selling them for a profit. That led to a class-action lawsuit against Instagram. Similarly, Facebook allows third-party application providers, such as Snapfish, to let users or friends order photo albums without the subjects of the photos even knowing. Such practices bring up a huge question: Who has rights to images posted on social media accounts when anybody can order them and reproduce them? As a company, when you have a social media account and your users are generating content, maybe pictures of themselves with your product, what are your rules as to what can be done with that content and have you clearly explained that to the users? Consumers don't expect their content will be taken without credit.

Doesn't advertising on social media also pose risks?

Advertising can be tricky. On one occasion, Spirit Airlines had its famous \$9 airfare sale and tweeted "from just \$9." The tweet didn't comply with the Department of Transportation's full disclosure airfare rules and Spirit Airlines was fined. Ordinarily, when you advertise a sale you have fine print that says here's the surcharge, here's what the full fare would be, etc. You can't do that in a tweet. Inadvertently, Spirit Airlines was on the wrong side of the law on that one. The FTC, meanwhile, has its own guidance on endorsements and testimonials. If a celebrity vouches for your product or service on your social media page, and you've paid for that endorsement, you've got to disclose that even if the praise was just a Facebook comment or a tweet. All the rules and regulations that apply to traditional advertising also apply in the social media world.

When should a company refrain from participating in social media?

If you can't monitor your social media pages and quickly respond to customer inquiries, and your Facebook wall is a long list of unanswered questions, that's going to be detrimental to your brand. There are companies that start out gung-ho and then can't do it, and that tarnishes their image. If you want your brand to prosper using social media, then you need the infrastructure to create social media content. Updating content requires considerable resources and manpower, something many companies don't realize until they've already dipped their foot in the water. Social media is a way for companies to remain relevant, but you have to stay on top of its demands and manage it well and not be half-hearted about it. A business that looks lackluster online will suffer.

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