

**USER GENERATED CONTENT:
A DREAM OR A NIGHTMARE**

By

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The room was silent, everyone looking up or down to avoid meeting eyes with Ava Driscoll. “People,” Ava said. “You can’t have exhausted all ideas for our next campaign—it’s only 10:15 AM! We’re looking for something fresh. Something new. Something that really reaches our audience. THINK!” she said, desperately. Fritz Marshall let out a huge sigh. “Just seems like we’re fresh out of ideas. We can’t do the same thing again.” “That’s quite obvious, Marshall,” Ava snapped. “I may as well call my daughter and ask her!” Gerard Beil shot out of his chair almost immediately. “That’s not a bad idea,” he yelled. “I mean, you want to reach our base and potentially expand upon it by reaching a younger crowd...why not have consumers create the campaign?” The room started buzzing. “We could do a promotion – get the product out there and have the people tell us why it’s better than all of the rest!” “Maybe we could have the public vote on the best video overall and use it as a platform for all of our marketing next quarter, even TV commercials.” “Why didn’t we think of this before?? This is going to be a breeze! Think of the time and money we’re going to save by having consumers create our client’s next campaign!!”

The only person in the room who hadn’t contributed yet was Carly Reitman. A skeptic by nature, Carly wondered why everyone wasn’t doing this if it was so easy. “What if there’s a problem with a video, what then?” Carly asked. “Even if there was a problem and we needed to redo something, why would that be our issue?” said Phil Geller. “We won’t have created the video, so we won’t be responsible.” This response satisfied everyone and they went on with their

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planning. “Anyone who wants to make a submission can, agreed? Teens make a video for teens, twenty-somethings make a video for twenty-somethings, the thirty-set make a video for the thirty-set and so forth – this way we’ve got every demographic covered. Your daughter could even take part.” Marshall took it one step further. “Let’s not place limitations on the creative process – it could hinder an individual’s creativity. I say let people run with it.” At this point, Vanessa chimed in. “Think of the different ways we could use the content – print, TV ads, Internet ads, on the website – with no limitations, we can just decide as we go!” As the discussion continued, it was decided that the videos, once uploaded, would be posted immediately on the company website, allowing viewers to comment and vote in real time. The group would decide how long the promotion would last and whether to end it early if things were going well.

Carly tried to encourage the rest of her colleagues to focus. “Okay, wait. Some guidelines might be helpful – what if, for example, someone decides to make a video that makes fun of our products or that says the company sucks? What then? If the videos are posted immediately, we won’t have the control we need. Forgetting the potential embarrassment, shouldn’t that be cause for disqualification?” No one heard Carly and her concerns went unanswered. All anyone could think about were the benefits – the numerous e-mails and other contact information that would be collected to beef up the database; the huge amounts of traffic the promotion would drive to the company’s website; all of the creative content that would be submitted which could be used in the future; the new customers; the media exposure; the buzz! They might even have an opportunity to comment on their competitors through the consumer – it wouldn’t be their words, so what’s the harm?

OKAY. OKAY. You get the idea. Inviting consumers to create content, while exciting for the creative opportunities it presents, poses numerous potential risks which require careful consideration. The challenge, of course, lies in identifying the issues and the pitfalls in order to make the campaign legal and successful.

The content described above, commonly referred to as “user generated content,” or “UGC,” is created by ordinary consumers and can take many forms, including videos, music, photos, essays and blogs. Acknowledging that consumers are more likely to educate themselves about a particular product and/or service when they are more than passive purchasers, advertisers are integrating UGC into their advertising campaigns. By allowing individuals to “interact” with a brand, an advertiser hopes to generate excitement about its product or service – “notoriety” and prizes provide numerous incentives for consumers and potentially great benefits for the advertiser and/or sponsor (which are often one and the same). Promotions, irrespective of whether they involve UGC, can drive traffic to a website, generate buzz for an advertiser and/or its products/services and help build, or reinvigorate, a brand. Furthermore, submissions will often provide valuable content for the advertiser and enthusiastic consumer(s) as spokesperson(s) for the brand.

That said, with “pros,” come “cons,” as there are concerns that should be addressed before launching a promotion involving UGC. Without delving too deeply into the various protections available (e.g., Digital Millennium Copyright Act (“DMCA”)*, Communications Decency Act

* Digital Millennium Copyright Act, 17 U.S.C. §§512(c), (d). Attached as Exhibit A.

(CDA)[†] or the UGC Principles[‡]), below is an outline of certain issues that should be kept in mind when developing a promotion similar to the one in the scenario set forth above:

1. Make sure that eligibility requirements are clear. For example, while the greatest number of submissions is often desirable, if certain categories of individuals are to be excluded (e.g., employees and their family members, a company's competitors, professionals, individuals under 13/18 years of age), those exclusions should be prominently set out in the rules governing the promotion. In addition, certain promotions may be targeted at, or reach, a young audience, which requires careful consideration of numerous issues. Because compliance with COPPA[§] is critical where the target audience is under 13, an analysis should be made of the relative importance of children's participation to the purpose of the promotion. How likely is it that children are going to make and submit a video? For brands that include 13 to 17 year olds in their demographic, because agreements with minors may be voidable, consider what impact, if any, the inability to use UGC submitted by a minor will have on the brand.

2. Acquire all necessary rights in submissions. Concerns regarding ownership of intellectual property rights are not unique to minors and are present whenever UGC is involved. Rights must be cleared – especially when third party materials may be incorporated into submissions without permission. While there are some defenses and safe harbors available, violators of the Lanham Act^{**}, for example, cannot rely on the provisions of the CDA or DMCA. For this reason and others, it is important to consider how the UGC may be used in connection with the promotion and in the future and to acquire the necessary rights in advance, as it is

[†] Communications Decency Act of 1996, 47 U.S.C. §230(c). Attached at Exhibit B.

[‡] User Generated Content Principles available at www.ugcprinciples.com (last visited September 15, 2009) .

[§] Children's Online Privacy Protection Act, 15 U.S. C. §§6501-6508.

^{**} Lanham Act, 15 U.S.C. §1125.

generally more difficult (and sometimes costly) to secure such rights after declaring the winners—affidavits of eligibility and releases help in this regard, but the rules should address all these issues from the beginning.

3. Vet UGC prior to posting. Technological innovations in recent years have made screening more feasible and less onerous on a company or sponsor. Although there are, of course, additional considerations that go hand in hand with using such screening technologies, overall, they can save time and avoid possible headaches in the future, including those associated with copyright and trademark infringement (contributory infringement or vicarious liability), right of publicity and privacy violations, false advertising concerns, and product claims and/or defamation. A company or sponsor may find itself on the hook for problems arising in connection with UGC it receives and disseminates, despite the fact that the submission was created by someone else. The Terms of Use of a company's website should be reviewed prior to the launch of a Internet promotion consisting of UGC – along with the rules, a well-drafted Terms of Use can provide certain protections and guidelines letting entrants know what is and is not acceptable.

4. Take care in drafting the rules. Rules, including guidelines and disclaimers, are absolutely necessary when considering any type of promotion but particularly those involving UGC. Entrants need to know what they can and cannot do, as well as those things they must do in order to be eligible. The rules should also specify what type of content is prohibited, the basis for disqualification, any judging criteria, voting criteria, prize details and so forth. In addition, the rules should specify any parameters applicable to the UGC (e.g., no music; no identifiable persons other than entrant and/or individuals from whom entrant obtains a release; safety

precautions; no filming of minors). Ideally, only original content should be permitted to avoid submissions containing infringing material. Alternatively, if pre-existing materials are allowed, consider providing a toolbox of cleared content (e.g., music, clips, photos, trademarks) for entrants to use in their submissions to minimize the risk of exposure to liability for violation of a third party's rights. In order to help ensure the rules are enforceable, use check boxes or the like and require all entrants to accept the rules (and the Terms of Use) prior to entering the promotion and submitting any content.

5. Obtain the necessary rights. Without a comprehensive set of rules granting a company the rights it needs, it may not be able to utilize the content as planned (the right to exhibit a video online is not the same as the right to create a television commercial based on the video). Therefore, the rules should be drafted to encompass the broadest set of rights a company may reasonably expect to exercise. Eligibility should be conditioned upon the entrant securing whatever rights are needed by the company/sponsor, as the absence of such rights could render the UGC useless or require the company/sponsor to spend money acquiring those rights it still needs. Also, while screening content is advisable, editing content may blur the line between sponsor and creator, leading to liability for problematic content.

A final point to keep in mind. While Carly's colleagues automatically assumed that they would not be held responsible for content created by ordinary consumers, tread lightly. Advertising and promotional campaigns may not be false or misleading and must comply with state and federal laws, including those that require substantiation of certain types of claims. If a claim is one that must be substantiated, the fact that it was made by an entrant in a promotion rather than the advertiser or the advertising agency will not be dispositive. The Quiznos v. Subway Ad

Challenge is an example of the type of problem that can arise with a promotion of this kind. In that case^{††}, Quiznos and iFilm invited customers to submit videos comparing its product to that of Subway's, without discouraging negative portrayals. Subway promptly sued Quiznos and iFilm claiming, among other things, that the UGC made false and misleading claims. The case is currently pending.

CONCLUSION

While promotions can be a creative and cost-effective way for advertisers to engage consumer with their brands, building brand loyalty that can last for generations, care should be taken to ensure that the advertisers' interests are protected without sacrificing creativity or imagination.

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^{††} *Doctor's Assocs., Inc. v. QIP Holders, LLC*, 2007 U.S. Dist. LEXIS 28811 (D. Conn. Apr. 19, 2007).

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