

Legal Issues of Social Media - Case Studies from the World of Cinema

**Background Materials for the 2013
Association of National Advertisers Law and
Public Policy Conference
March 19-20, 2013
Washington DC**



Association of National Advertisers | Est. 1910

Agenda

Structuring & Activating Your Social Media Campaign

- **Structural** - Promotions Law
- Legal Implications of Various **Activation** Strategies
 - Privacy
 - TCPA & CAN SPAM
 - User Generated Content (UGC)
 - CDA & DMCA
 - CCV
 - COPPA
 - FTC Endorsement & Testimonial Guidelines/Social Media Policies

The Typical Campaign

- Used to be -- build a website, leverage the assets with promotional partners, hold a couple sweepstakes.
- The emphasis over the past few years has been on trying to go viral and multi-platform.
- To rely heavily on social media means more than just putting up a Facebook page or launching a Twitter feed.
- The ideal is to have others do your marketing for you – forwarding promotions and engaging their friends & family, sharing positive experiences, posting brand-related videos or otherwise interacting with the brand/company.

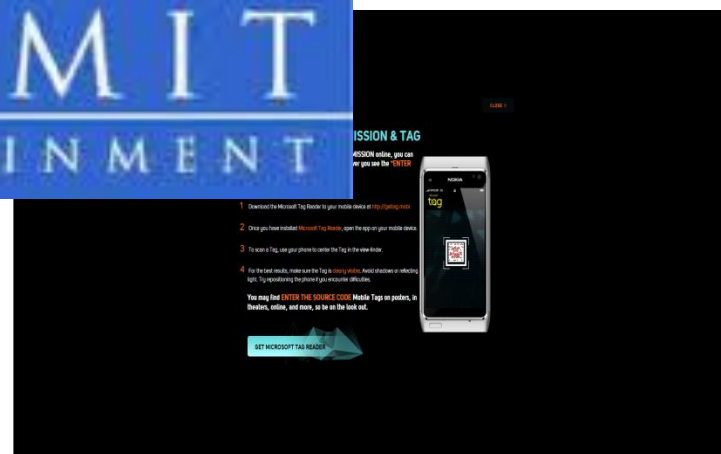
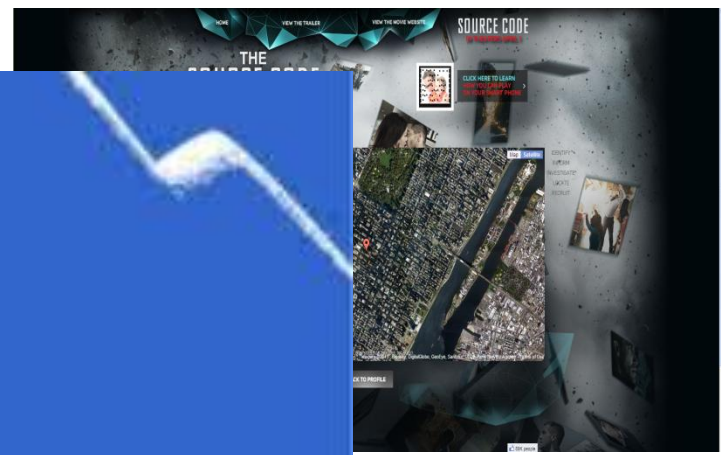
Examples

- **Identify** - Use Facebook Connect to identify yourself
- **Inform** – share information on Twitter or post something on your Facebook wall
- **Locate** – use programs such as FourSquare to “check in” to a location
- **Recruit** – send information to your friends about the Promotion
- **Interact** - Use a QR Code or Microsoft “tag” application to interact with entrants



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Why Relevant?



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Why Relevant?

n Sweepstakes Entry
 this simple entry form and you could b
 next w
 Con
 o regist
 ready
 First
 Last

The screenshot displays a multi-browser window setup. The top browser window is Internet Explorer showing the campaign page: **GO FOR IT! - HOLLER BACK! DOLLAR BACK! FUNDRAISER**. The page features a large graphic with the text: **GO FOR IT! IN THEATERS MAY 13** and **BACK! DOLLAR BACK! FUNDRAISER**. Below this, it lists steps: **1. YOUR CREW** and **2. REP YOUR SCHOOL**. A table lists participating schools:

1	Clemente Community Academy HS Chicago, IL
2	Los Altos High Hacienda Heights, CA
3	Wilson (Glen A.) High Hacienda Heights, CA

The bottom browser window shows a Facebook page for 'GO FOR IT!' with a post that says: **SHARE THE TRAILER AND YOU COULD WIN THE BEATFREAKS' 'GO FOR IT!' CUSTOM HIGHTOPS!** and **WIN A \$1,000 OR MORE FOR YOUR DANCE STUDIO, SCHOOL, TEAM, OR CLUB!**. The Windows taskbar at the bottom shows the time as 10:27 AM and the date as 01-20-04.

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What If You Get It Wrong?

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

CHARLES E. HUMPHREY, JR.,
Plaintiff

v.

VIACOM INC.,
CBS CORPORATION,
CBS TELEVISION NETWORK,
SPORTSLINE COM, INC.,
THE WALT DISNEY COMPANY,
ESPN, INC.,
THE HEARST CORPORATION,
VULCAN, INC.,
VULCAN SPORTS MEDIA and
THE SPORTING NEWS,

Defendants.

No.

COMPLAINT

JURY TRIAL DEMANDED

Plaintiff, by his undersigned counsel, alleges the following upon personal knowledge as to himself and upon information and belief as to all other matters. The allegations based upon information and belief were formed after an inquiry reasonable under the circumstances.

NATURE OF THE ACTION

2. Plaintiff brings this action against the major operators of Internet fantasy sports leagues for violations of the anti-gambling and gambling loss recovery laws of New Jersey and other states with similar prohibitions.

3. Each of the defendants operated and promoted Internet fantasy sports leagues in which the participants agree to pay a specified amount of money to participate; the determination of winners is based predominantly on chance rather than skill; and the winners receive a monetary or other valuable prize. Defendants receive the wagers made by participants to play in the fantasy sports leagues. These wagers represent gambling losses. The wagers are the source of revenues and profits to defendants from operating these Internet fantasy sports leagues.

4. Despite the illegal nature of such gambling in New Jersey and the United States in general, defendants actively and knowingly facilitate illegal Internet gambling by operating fantasy sports leagues through their Internet websites throughout the United States. The revenues that defendants earn from the operation of these Internet fantasy sports leagues are derived directly from the wagers made by players, denominated by defendants as membership or participation fees charged to the participants in the league. Such wagers range from \$9.95 to \$499.95 per team.

5. During the past year, revenues from the operation of fantasy sports leagues are estimated to have been over \$1.5 billion, resulting in defendants having received and retained substantial gambling losses incurred by players who are members of the general public throughout the United States.

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What If You Get It Wrong?



Department of Justice

FOR IMMEDIATE RELEASE
 MONDAY, JULY 17, 2006
WWW.USDOJ.GOV

CRM
 (202) 514-2007
 TDD (202) 514-1888

Eleven Individuals and Four Corporations Indicted on Racketeering, Conspiracy and Fraud Charges

WASHINGTON – A federal grand jury in the Eastern District of Missouri has returned a 22-count indictment charging 11 individuals and four corporations on various charges of racketeering, conspiracy and fraud, the Department of Justice announced today. The indictment was returned on June 1, 2006, and unsealed today.

BetonSports PLC, a publicly-traded holding company that owns a number of Internet sportsbooks and casinos, was among the companies charged in the indictment. The founder of BetonSports.com, Gary Stephen Kaplan, 47, was charged with 20 felony violations of federal laws including: the Wire Act, Racketeer Influenced and Corrupt Organizations (RICO) Conspiracy, interstate transportation of gambling paraphernalia, interference with the administration of Internal Revenue laws and tax evasion.

Other defendants in the racketeering conspiracy include: Kaplan's siblings, Neil Scott Kaplan and Lori Kaplan Multz; Norman Steinberg; David Carruthers, chief executive officer of BetonSports.com; Peter Wilson, media director for BetonSports.com; and Tim Brown, Steinberg's son-in-law. The three other charged companies, all Florida-based, were Direct Mail Expertise, Inc., DME Global Marketing and Fulfillment Inc. and Mobile Promotions Inc. Also charged are William Hernan Lenis; Monica Lenis and Manny Gustavo Lenis, owners and operators of the Florida companies; and William Hernan Lenis' son, William Luis Lenis.

"Illegal commercial gambling across state and international borders is a crime," said U.S. Attorney Catherine L. Hanaway of the Eastern District of Missouri. "Misuse of the Internet to violate the law can ultimately only serve to harm legitimate businesses. This indictment is but one step in a series of actions designed to punish and seize the profits of individuals who disregard federal and state laws."

The indictment alleges that Gary Kaplan started his gambling enterprise via operation of a sportsbook in New York City in the early 1990s. After Kaplan was arrested on New York state gambling charges in May 1993, Kaplan moved his betting operation to Florida and eventually offshore to Costa Rica. According to the indictment, BetonSports.com, the most visible outgrowth of Kaplan's sports bookmaking enterprise, misleadingly advertised itself as the

UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF MISSOURI
 EASTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,	)	4:06 CR 337 CEJ (MLM)
)	
v.	)	No.
)	
BETONSPORTS PLC, its predecessors,	)	18 U.S.C. § 1962(f) - Racketeering
holding companies, subsidiaries and associated	)	Conspiracy [Count 1, pp. 1-17]
entities; GARY STEPHEN KAPLAN, also	)	18 U.S.C. § 1341 - Mail Fraud
known as Greg Champion; NEIL SCOTT	)	[Count 2, p. 18]
KAPLAN, also known as Scott Kaye; LORI	)	18 U.S.C. § 1084 - Transmission of
BETH KAPLAN MULTZ, also known as Beth;	)	Wagers/Wagering Information
DAVID CARRUTHERS; PETER WILSON;	)	[Counts 3-12, pp. 18-19]
NORMAN STEINBERG, also known as Tom	)	18 U.S.C. § 1953 - Interstate
Miller and David Noeman; TIM BROWN, also	)	Transportation of Gambling Para-
known as Matt Brown; DIRECT MAIL	)	[Count 13, p. 20]
EXPERTISE, INC.; DME GLOBAL	)	18 U.S.C. § 2 - Aiding and Abetting
MARKETING & FULFILLMENT, INC.;	)	26 U.S.C. § 7201 - Tax Evasion
MOBILE PROMOTIONS, INC.; WILLIAM	)	[Counts 14-16, p. 20-22]
HERNAN LENIS; WILLIAM LUIS LENIS;	)	26 U.S.C. § 7212(a) - Interference
MANNY GUSTAVO LENIS, and MONICA	)	with Administration of Internal
LENIS,	)	Revenue Laws [Counts 17-21, pp. 22-
	)	23]
Defendants.)	Forfeiture pursuant to: 18 U.S.C. §
)	1963 [Forfeiture Count, p. 23]

INDICTMENT
 FILED UNDER SEAL
efed 7/2006

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So Get The Structure Right - Key Legal Premise

- No private lotteries



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Lottery

- PRIZE
- CHANCE
- MANDATORY CONSIDERATION



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Activation Objectives

- Identify Self
- Recruit Others
- Interact with Brand



Facebook Promotion Policy

- Use a Third Party Application to Administer Promotion
- Include Disclosures in the Official Rules



Third Party Applications

- Implicates Privacy Issues.
- If possible, negotiate the contractual terms regarding use of info collected.
- Add disclosures to Official Rules to Distance Sponsor from conduct of Third Party.



TCPA and CAN-SPAM

- Depends on the Underlying Technology:
 - CAN-SPAM prevents marketers from sending commercial emails without express consent from the recipient (one “free bite”).
 - TCPA prevents marketers from using automatic devices or prerecorded voices to make calls to wireless devices (including cell phones) without express consent (no “free bite”) and consent is not effective unless accompanied by specific disclosures.



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User Generated Content (“UGC”) Promotions



the WANDERLUST:

an overwhelming urge to travel for fun.

Are you experiencing symptoms of the Wanderlust? Do you feel:

- Trapped in your own home or office?
- Like you haven't taken a vacation in years?
- Consumed by thoughts of exotic lands?
- All of the above?



Thousands have the obsession.
Four will be cured.

Register for The Miles Millionaire Contest.

UGC Promotions

- Defined: those contests where users are invited to post content they create to a website that is controlled by Herbalife or associated with Herbalife.
- This content has not been cleared legally.
- Risks – exposure includes defamation type claims and intellectual property claims (e.g., copyright, trademark, publicity, trade secrets).



UGC Promotions

- Talk about two aspects of this:
 - (1) Reducing risk by relying on the CDA and DMCA in the United States; and
 - (2) Strategies for reducing International exposure.



User Generated Content – Defenses to Infringement (CDA)

- Section 230 of the CDA – 47 U.S.C. 230(c)
 - Robust Protection Afforded: No provider of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
 - The touchstone of Section 230(c) is that interactive computer services are immune from liability for content created by third parties.

User Generated Content – Defenses to Infringement (CDA)

- Neither Notice Nor Delay in Removing Content Are Bars to CDA Web Site Third-Party Content Immunity Defense.
- The statements at issue were personal attacks on an individual's moral character, which were posted to an Internet message board entitled "Joe's Christian Debate." In granting a defendant's Motion to Dismiss, the Eastern District of Michigan held that the mere fact that a web site operator had received notice that defamatory statements were on its servers was not enough to strip a defendant of its Communications Decency Act (CDA) Section 230 immunity defense. The court also held that the defendant was entitled to an immunity defense under the CDA despite a delay in removing the offensive material. The Court recommended that the plaintiff pursue its claims against the actual speakers of such allegedly defamatory statements—the individuals who posted to the message board.
- **Take Away:** Although complaints regarding content that may violate third-party rights should be handled judiciously, this ruling indicates that the federal law will likely provide protection for a web site provider against claims that the web site contains defamatory content provided by a third party, even if the injured party gives the web site provider notice of defamatory content, and even if the web site provider does not quickly remove the offending material.

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User Generated Content – Defenses to Infringement (CDA)

- CDA Provides Immunity for Actions Stemming from Illegal Third-Party Content.
- In February 2007, the Western District of Texas found that MySpace Inc. was immune under the Communication Decency Act (“CDA”) from injuries stemming from content posted to its site. The case was brought by a mother whose daughter was victimized by an online predator she "met" on MySpace (the child obtained the account by lying to MySpace about her age). The court found that the CDA protects interactive computer services from liability, not only for content posted to the site, but also for personal injuries stemming from such content.
- **Take Away:** A web site provider is immune under the CDA not only for the claims regarding content posted on its web site by third parties, but also for personal injuries that stem from content posted on its web site by third parties.

User Generated Content – Defenses to Infringement (CDA)

- *But the CDA is not without limits.*
- First Limit - interactive computer services are not immune for publishing materials that they are responsible, in whole or in part, for creating or developing.

User Generated Content – Defenses to Infringement (CDA)

- *Fair Housing Council v. Roommates.com*, 2007 WL 1412650 (9th Cir. May 15, 2007).
- Case description:
 - Service helps individuals find roommates based on their descriptions of themselves and their roommate preferences.
 - Users respond to questionnaires by choosing answers in a drop down menu (gender, children, age, ethnicity), the service sends email newsletters listing compatible roommates and channels what users can access, and users can provide “Additional Comments” through an open-ended essay prompt.
- Issue:
 - Does the service involve itself to such an extent that it affects the scope of immunity under CDA?
- Holding:
 - No immunity for claims based on publication of the Questionnaires.
 - No immunity for claims based on publication and distribution of Profiles.
 - Operator was immune for claims based on publication of content provided by members in “Additional Comments”.

User Generated Content – Defenses to Infringement (CDA)

- *Doctor's Associates v. QIP Holder LLC*, 2010 U.S. Dist. LEXIS 14687 (D. Conn. Feb. 19, 2010) (aka “the Quiznos case”).
- Case Description:
 - Quiznos sought to compare the meat content of certain of its sandwich products to comparable Subway offerings by posting user generated videos on meannomeat.com.
 - Subway brought an action against Quiznos alleging that, the tv ads, the sample videos and the user-submitted videos unfairly compared its products with Quiznos products.
- Issue:
 - Was Quiznos immune from liability under the CDA because the contestants were the exclusive creators of the videos?
- Holding:
 - Subway argued that Quiznos went beyond the role of a traditional publisher in that it solicited disparaging material and shaped the ultimate content of the videos such that it was “responsible” for the creation or development of the content.
 - Court concluded that it was unclear and dismissed Quiznos’ motion for summary judgment. The Parties later settled.

User Generated Content – Defenses to Infringement (CDA)

- *The CDA is not without limits.*
- Second Limit - courts are directed to construe the immunity created by the CDA in a manner that would neither “limit or expand any law pertaining to intellectual property”.
- The courts that have addressed the issue thus far have viewed this language as substantive, as opposed to merely clarifying.
- As a result, the CDA does not clothe service providers in immunity from “law[s] pertaining to intellectual property.”

User Generated Content – Defenses to Infringement (CDA)

- *Perfect 10 v. CCBill*, 2007 WL 1157475 (9th Cir. May 31, 2007).
- Case Description.
 - Publisher against web hosting and payment service provider.
 - Claim defendants violated copyright, trademark, and state right of publicity laws.
- Issue: Scope of IP exception to CDA immunity?
- Holding:
 - Immunity only for state law “intellectual property” claims (which includes publicity claims), not federal IP.
- Takeaway – copyright & trademark infringement claims, both federal, survive.

User Generated Content – Defenses to Infringement (DMCA)

- Digital Millennium Copyright Act (“**DMCA**”) – 17 U.S.C. 512
 - Protection Ordinarily Afforded: provides statutory safe-harbors against a copyright infringement claim for content that third parties post on your website.
 - To qualify, the online service must adopt and reasonably implement notice and takedown procedures that allow copyright owners to send a notice of infringing content and get it taken down.
 - In addition, the protection only extends to third party content, **not** to content that the online service is responsible in whole or in part for creating or developing. In that instance, the online service is a content provider unable to invoke the safe harbor.

User Generated Content – Defenses to Infringement (DMCA & CDA)

- Weakness in relying on CDA and DMCA in UGC Context: Sponsor Picks & Posts the Finalists.
 - At first blush, the sponsor isn't using the infringing IP. The entrants are.
 - And the sponsor hasn't granted the entrants permission to use the infringing IP; that's something the entrants decided to do on their own, often against the sponsor's wishes.
 - The sponsor is simply arranging for an online forum through its own site or an online social networking site like Facebook.
 - Under ordinary circumstances, the CDA would protect the online forum against almost all claims except copyright and trademark infringement, and the DMCA would protect against copyright claims.
 - Unfortunately, it has been held that those protections likely do not apply where the sponsor takes an active role in selecting the finalists and posting them for viewing. In addition, it could be reasonably argued that the active role the sponsor plays in that context means that the sponsor itself is using the infringing content and exposing the sponsor to a direct or contributory infringement claim.

Commercial Co-Venture (CCV) Laws

- Saying that the purchase of a product benefits a charity in some way will trigger the CCV laws in various states (about half the states have these laws). AA would be the "commercial co-venturer" in this instance, abbreviated as CCV.
- While the state CCV laws vary, the common requirements outside of registration include:
 - (i) a written contract between the charity and the CCV that contains certain mandatory provisions;
 - (ii) periodic reporting requirements that the CCV must provide to the charity and that either the charity or the CCV must, in turn, provide to the state; and
 - (iii) mandatory disclosure statements to consumers at the point of sale, which commonly require disclosure of the precise percentage or dollar amount of product/service sales that will benefit the charity.

japan RELIEF T-SHIRT
 \$29.00

DESCRIPTION	DETAILS & FIT	FABRIC & CARE
<p>We ♥ Japan. 100% of the net proceeds of every Japan Relief T-shirt sold through September 13, 2011, will go to the American Red Cross to benefit the Japan earthquake and Pacific tsunami relief efforts.</p> <p>The American Red Cross name and emblem are used with its permission, which in no way constitutes an endorsement, express or implied, of any product, service, company, opinion or political position. For more information about the American Red Cross, please visit www.redcross.org</p> <p>This item is available for pre-order and will ship as soon as possible.</p> <p>Receive free Standard Shipping on any purchase of the Japan Relief T-shirt. No promotion code necessary.</p> <p>Style Number: 13112196</p>		
<p>COLOR: WHITE <input type="checkbox"/></p>	<p>SIZE: <input type="checkbox"/> S <input type="checkbox"/> M <input type="checkbox"/> L <input type="checkbox"/> XL</p>	<p>QUANTITY: <input type="text" value="1"/></p> <p>Availability: Please select a size</p>
<p><input type="button" value="Add to BAG"/> <input type="button" value="WISH LIST"/> <input type="button" value="SHARE"/></p>		

COPPA

- Governs the online collection of personally identifiable information from children under the age of 13.

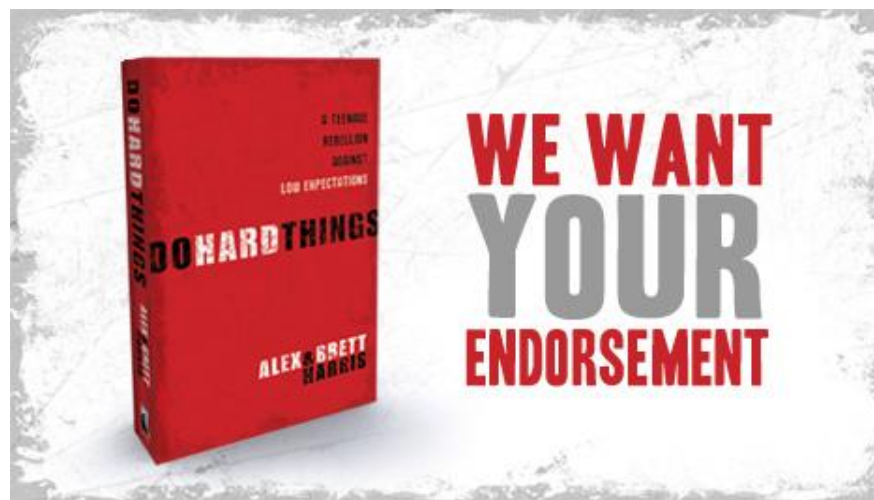


[adbriefs]

FTC Endorsement & Testimonial Guidelines/Social Media Policies

Revised endorsement guidelines

- Disclose material connections
- Why adopt a social medial policy?



[adbriefs]

Thank you!

- **Rachel Kimbrough**

Vice President, Business & Legal Affairs

Lionsgate

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Summit Entertainment, A Lionsgate Company