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Marketing 101: How to Counsel Your Marketing Department

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Agenda

- Introductions
- Scaling a Global Brand Efficiently and on a Budget
- Navigating the New FTC Regulation Banning Fake Reviews and Testimonials
- Using Influencers and Endorsements in Social Media Marketing
- Launching Sweepstakes and Contests
- Q&A

Today's Presenters



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Scaling a Global Brand on a Budget

Scaling a Global Brand on Any Budget: Broad Considerations

■ Is the brand in use yet?

- If not, consider ITU application in US and national applications in critical markets
- If yes, where? Consider common law protection to date.
- If US mark is registered, consider leveraging both nationals and Madrid for gap-filling

■ What are your key geographies now and in the next few years?

- If the company is a consumer product, consider import/export issues and counterfeiting
- If the company has already received a lot of PR (or it's expected to) consider defensive filings even if no market plans

■ What are your key brands?

- Focus on core word mark
- Stylized filings can help if word mark presents challenges
- Slogans can be unprotectable in certain geos (EU) or fleeting in marketing departments

Scaling a Global Brand on a Budget: Make The Money Count

- Costly to implement strategy for every single product name, feature name, brand variation, tagline, logo, etc.
- What is the business’ “house mark”?
 - Company name
 - House logo
- How will the business *primarily* use its mark?
 - Consumer products?
 - Life sciences or medical device?
 - Software as a service?
- How important is the brand to the company and its offering?
- Consider whether the logo or stylization will evolve overtime—with new funding comes more marketing budget.
- When to consider not filing
 - Descriptive marks can help educate

Scaling a Global Brand on a Budget: Clearance

- Arguably one of the most important steps in brand protection process
- Determine protectability and risk of brand
 - Is the mark “descriptive”
 - Is the mark a common or trendy word?
 - Do you see other marketplace use for similar (if not the same) offerings?
- Perform high-level cursory searches on:
 - Google
 - Social media handles
 - USPTO database
- Engage outside counsel for more detailed searches, but only after some internal research to save \$\$
- Domain availability or availability on corporate register are not dispositive

Scaling a Global Brand on a Budget: Key Geographies

- Trademark rights are territorial
- If budget is tight, lock in US registration and go from there when you can
- Expensive to implement full-blown strategy in every country around the world, even for larger companies
- Focus on your most important business territories over the next 3-5 years + defensive considerations
- Usual suspects:
 - US, EU, UK, Canada
 - New Zealand, Australia, Japan, Korea and HK
 - China, Turkey, Russia, India, Brazil

Scaling a Global Brand on a Budget: Trademark Filings

- File strategically in geographies that matter
- Cost-effective considerations:
 - Paris Convention filing window
 - Pro: Allows companies to stagger / push costs over six months; broad protection
 - Con: Can be expensive with national applications
 - Madrid Protocol / WIPO
 - Pro: Allows companies to file a single International Registration (IR) at the World IP Office (WIPO) and extend to multiple territories
 - Con: Limited protection; all filings/extensions are tied together
 - EUTM Filing
 - Single application covers 27 member countries

Scaling a Global Brand on a Budget: Enforcement

- Enforcement is key to maintaining brand value
- Responsible for taking *reasonable* effort to police third-party brands
 - Not necessary or efficient to take action against every single minor issue out there
- Geographies of interest and flagrant infringement are most important
- Watch notices
 - Allow companies to be notified early re: third-party issues, which can save money in the long run



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FTC Regulation Update

FTC Regulation Update: Reviews and Testimonials

- FTC issued final rule in August 2024:
 - Prohibits fake or misleading consumer reviews or testimonials
 - Commission authorized to seek civil penalties against violators
 - Monetary fines of up to nearly ***\$52K per violation!***
 - Liability expanded to include companies that knew ***or should have known*** about prohibited conduct
- Raises stake for companies that solicit consumer reviews

FTC Regulation Update: Reviews and Testimonials (cont'd)

■ Prohibited conduct includes:

- Creating, selling, or buying fake/false reviews or testimonials, including AI-generated fake reviews
- Compensating/incentivizing consumers to write reviews that express particular sentiment (either positive or negative)
- Using insider reviews and testimonials without clear and conspicuous disclosure of relationship
- Misrepresenting that a company-controlled website/entity provides independent reviews or opinions, other than consumer reviews, about products/services that include the business' own products/services
- Suppressing negative reviews
- Buying/selling fake indicators of social media influence, e.g., followers or views generated by bots or hijacked accounts

FTC Regulation Update: Reviews and Testimonials (cont'd)

■ Key Takeaways

- Solicit reviews from actual consumers
- Make neutral requests for reviews
- Approach and rank all reviews neutrally
- Provide clear and conspicuous disclosures
- Conduct active monitoring



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*Social Media Marketing:
Influencers and Endorsements*

Social Media Marketing: Influencers and Endorsements

■ Endorsement

- Advertising message that consumers are likely to believe reflects an opinion of a party other than sponsoring advertiser
- May be the same as advertiser's opinion
- Must reflect endorser's honest opinion and cannot express something that would be deceptive if made directly by advertiser
- Ad law substantiation requirements apply to objective statements made by endorsers
- Endorsers must be bona fide users if their statements suggest so, and endorsers must have the expertise that they are represented as possessing

■ Influencers

- Macro, micro, and nano influencers can all be very persuasive in marketing
- Create sense of community that celebrities and companies cannot replicate

Social Media Marketing: Influencers and Endorsements (cont'd)

■ Endorsement and Influencer Issues

- Emotionally compelling but not always deeply knowledgeable about the product (or research/back-up for claims about product)
- Obligation to include risk factors?
- Are “likes” or “retweets” equivalent to endorsement, or just merely opinions?
- Is consumer “endorsing” product when they comment in social media post in exchange for free trial?
- Can employee post about their company on their personal accounts?
- Can companies pay their customers as courtesy for using their social media posts in marketing?
- Must company track all social media endorsements?
- How can a company monitor and track compliance for micro and nano influencers?

Social Media Marketing: Influencers and Endorsements (cont'd)

■ *Is social media message “sponsored”?*

- Is speaker acting independently or acting on behalf of advertiser or its agent?
- Facts and circumstances dependent:
 - Is speaker compensated by advertiser/agent?
 - Was product/service provided to the speaker for free by advertiser?
 - What are the terms of the agreement (if any)?
 - What's the length of relationship?
 - Has speaker previously received products/services? Is future receipt likely?
 - What is the value of the items or services received?

■ IF THERE IS A SPONSORSHIP RELATIONSHIP, THEN IT MUST BE DISCLOSED!

Social Media Marketing: Influencers and Endorsements (cont'd)

■ Disclose Material Connection

- Disclosure of material connection required when sponsorship relationship exists
- Material connection can be cash or in-kind services or other consideration
- Endorser is the primary party responsible for disclosing the material connection
- Advertiser not off the hook for failure of endorser to disclose—in fact, companies could be sued if sponsoring a post that omits material facts
- Employees will always have material connection
- As always, disclosure needs to be clear and conspicuous
- Risks of non-compliance include FTC investigations, lawsuits and poor PR

Social Media Marketing: Influencers and Endorsements (cont'd)

■ BEST PRACTICES FOR ENDORSERS AND INFLUENCERS

- In-line, prominent disclosures in text are best
- Character and space limitations are no excuse
- Single disclosure may not be enough
- Be mindful of formats
- Will a viewer of video always see disclosure?
- Will disclosure travel when picked up on mobile device?
- No magic words. But consider indicators such as:
 - #sponsored, #paid, #ad
 - #spon, #partner, #ambassador are considered too vague
- Use above the break in text

Social Media Marketing: Influencers and Endorsements (cont'd)

■ BEST PRACTICES FOR ADVERTISERS AND BRAND OWNERS

- **Clear External Guidelines.** Establish written guidelines and train endorsers and influencers.
- **Contractually Bind Social Media Endorsers.** Require endorsers and influencers to disclose material connections and include any required information about medical devices.
- **Monitor.** Be diligent in monitoring endorsers and influencers and in taking prompt action.
- **Careful @ What You Are Incentivizing.** Context may determine whether a “like” is incentivized action requiring disclosure.
- **Use Technology.** Use technical monitoring tools (e.g., marketing intelligence or monitoring services such as TweetDeck or Hootsuite).
- **Retain Records.** Keep written record of your monitoring and enforcement.
- **Clear Internal Policies and Control.** Limit who speaks for company. Assign central responsibility for managing endorsements and influencers.
- **Standardize Disclosure Practices.** Require that all disclosures be consistent and complete.
- **Audit Use and Benefit.** Evaluate benefit of use of free products and payment practices.



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Sweepstakes and Contests

Sweepstakes and Contests: Regulatory Risks and Lawsuits

■ Federal Regulations

- 18 U.S.C.§1302: Prohibits the mailing of gambling material (e.g., lottery tickets)
- 18 U.S.C.§1304: Prohibits the broadcasting of lottery information
- 18 U.S.C.§1306: Prohibits financial institutions from offering lotteries
- Deceptive Mail Prevention and Enforcement Act: regulates sweepstakes offered through the mail

■ State Regulations

- California: specific guidance on official rules
- New York, Florida: registration and bonding requirements

■ Additional Restrictions

- Disclosure requirements (prize values)
- Posting/publication of winners
- Requirement to award all prizes
- Record retention requirements

■ FTC Enforcement

■ State Attorneys General

■ Private Actions and Class Actions

Sweepstakes and Contests: Avoid Lottery!

In general, a lottery is a promotion that has ALL of the following three elements:

- 1** **A prize:** anything of value awarded to the winners, even if nominal, e.g., download coupons
- 2** **An element of chance:** chance is present any time winners are selected by a random process
- 3** **Consideration:** consideration is generally either –
 - Monetary: Purchase of a sponsor’s product, pay to enter, etc.
 - Non-Monetary: Consumer spends time or effort which directly benefits the sponsor



Goal: Eliminate one of the three elements



Sweepstakes AMOE must have “**Equal Dignity**”

Sweepstakes and Contests: What's "Consideration"?

- Refer 10 friends to enter
- Free membership or usage (e.g., download app)
- Requiring a winner to pay money to claim a prize already won
- “Re-tweet” or re-post content
- Giveaway for your existing customers only
- Requiring a publicity release as a condition of entry/prize

Sweepstakes and Contests: What's a "Contest"?

- Determination of clear judging or skill determinations
- Whether judging expertise or independence is needed
- Maximum number of games/rounds in contest
- Maximum amount of \$ entrant must pay
- That subsequent rounds are more difficult (if true)
- Method of breaking ties

Sweepstakes and Contests: Do's

- Be detailed and specific as to what entrants must do and what they may win
- Be thoughtful and specific about eligibility
- Disclose odds and ARVs
- Be thoughtful about judging criteria and any public voting
- Confirm and disclose any third-party platform requirements
- Prepare short-form disclosures for marketing
- Consider registrations, bonding, and localization requirements
- Consider how you'll use or promote winners/content (e.g., publicity release; background checks?)
- Find a way to award all prizes
- Ensure you keep records of winner selection

Sweepstakes and Contests: Don'ts

- Launch promotion without fully vetted terms
- Launch promotion into a geography without considering permissibility
- Extend giveaway or expand eligibility during promotion
- Change prizes mid-promotion
- Assume you can use any entrant's social media posts
- Include AMOE entrants into general marketing database
- Forget to issue tax documents or make winners list filings

Q&A

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