



# Seven Lessons Learned from the Early Years of Social Media

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Presented by:  
Corby Anderson  
Partner, McGuireWoods LLP

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# SEVEN LESSONS LEARNED

## FROM THE EARLY YEARS OF SOCIAL MEDIA

Corby Cochran Anderson  
McGuireWoods, LLP  
704.343.2225  
canderson@mcguirewoods.com

### 1. Social Media Is Here to Stay.

#### **Social Media Is Living Up to Its Hype**

- “Social media is, at its most basic sense, a shift in how people discover, read, and share news and information and content.”
- Old Spice’s Smell Like a Man Campaign

#### **Uses for Social Media**

- Providing brand exposure
- Engaging consumers in conversation
  - GAP rebranding experience
- Informing consumers
- Driving consumers to other marketing channels
- Gaining knowledge of markets, ideas
- Crowdsourcing
- Building loyalty, attracting new customers
- Generating a “buzz”

#### **Social Media Should Be Integrated**

- Most effective social media campaigns involve traditional media as well
- Most effective social media campaigns involve more than marketers
  - Others need to learn how to spot risks and minimize them

## **2. It's Important to Have a Social Media Policy.**

### **Why Have a Social Media Policy?**

- Ensures brand consistency
- Ensures effective use of social media
- Minimizes risk of liability
- Protects confidential information
- Allows for quick action if a brand crisis arises
- Keeps in step with changes in laws and rules, technology, consumer behavior

### **What Issues Should a Social Media Policy Cover?**

- Use of name and marks on Internet
- Transparency in endorsements, testimonials
- Unfair, deceptive advertising
- Protection of privacy
- Infringement of trademarks, copyrights
- Defamation, disparagement
- Protection of confidential information
- Concept of adding value

### **Employees' Use of Social Media**

- No disparagement of customers
- No casting business in negative light
- No disclosure of confidential information
  - Theflyonthewall.com
  - Wikileaks.org
- Company's business interests versus employee's right to privacy
- Different policies for official versus off-duty posts

- State “off duty laws” may prohibit termination, disciplinary action
  - In North Carolina, lawful use of lawful products law, N.C. Gen. Stat. § 95-28.2
- For work-related use, require
  - Disclosure of employee status
  - Disclaimer that views are employee’s, not company’s
- Cisco’s Patent Troll Tracker Blog litigation
- What happens when employment relationship ends?

### **3. Social Media Requires Time and Vigilance.**

#### **It’s a Conversation, Not a Monologue**

- It’s a relationship, and relationships take time and commitment
- Get comfortable with user-generated content (UGC)
  - More credibility with other consumers
  - More risk
- Know where your audience connects
  - Burger King’s “Shower Babe”
- Know what’s being said about you
- Know who is using your name, and how

#### **Review Sites**

- Sites have generated claims for
  - Defamation, commercial disparagement
  - Unfair trade practices
  - Extortion
    - Yelp class actions: reviews manipulated to reward businesses that agree to advertise, punish those that do not agree

- Monitor reviews
- Be proactive in dealing with customer complaints

### **Facebook Community Pages**

- General topics with background information, user posts
- Not sponsored or moderated by brand owner
- Adopted in June 2010
  - Little experience in how Facebook will respond to objections

### **Namesquatting**

- Twitter Policy
  - Brand owner may assert rights
  - Must have registered trademark
  - Request removal or transfer to brand owner
  - Account must be misleading
  - News/commentary isn't enough to support use of brand name
  - "Unofficial Account" or "Not Affiliated With" disclaimers

## **4. In Advertising, Be Transparent.**

### **False Advertising**

- FTC Act
  - Prohibits "deceptive and unfair" advertising
- FTC Rules of the Road for Advertising and Marketing on the Internet
  - Deceptive = likely to mislead, affect decisions
  - Unfair = substantial unavoidable injury, not outweighed by other benefits

### **Astroturfing**

- Artificial creation of a grassroots "buzz" for a product or service

- Don't make postings disguised as a consumer!
- Liability under state and federal law for false and deceptive advertising
- Lifestyle Lift
  - Employees fabricated positive reviews, attacked negative posts
  - NY Attorney General found consumer law violations, deceptive practices, false advertising
  - \$300,000 settlement, July 2009
- Reverb Communications
  - Marketer's employees posted positive reviews of clients' games
  - Did not disclose that fees included percentage of game sales
  - FTC found failure to disclose = deceptive practice
  - Charges settled, August 2010

## **Endorsements, Testimonials**

### **FTC Guides on Endorsements and Testimonials in Advertising**

- October 2009 revision incorporates social media
- Transparency is key
- Disclose material connections between endorser, seller
  - Money
  - Free or loaner products or services
  - In-kind gifts
  - Special access privileges
  - Employment relationships
- Requirements stricter for social media than for traditional media
  - More celebrity disclosure
- Seller liable even if lacks control
  - Must advise, monitor

- Tweets not excluded because of length
  - #spon, #paid, #smp

### **FTC Enforcement Actions**

- FTC's Division of Advertising Practices' first investigation of bloggers
- AnnTaylor LOFT offered gifts to bloggers at fashion event
- No enforcement action taken, citing:
  - Notice to bloggers at event
  - Written policy on disclosure to bloggers
  - Steps to monitor compliance required

### **Industry Guidelines on Social Media**

- Word of Mouth Marketing Association (WOMMA)
  - Social Media Marketing Disclosure Guide (February 2010)
- Direct Marketing Association
  - Guidelines for Ethical Business Practice (January 2010)

## **5. Protect Privacy, But Don't Make Promises You Can't Keep.**

### **Privacy Policies**

- Tell site users what types of personal information are collected
- Tell site users how personal information will be used
- Disclosing practices, complying with site's own policy are key
- Note that policy is subject to change
- Don't over promise ("We will never share your information ...")
- Disclose use by service providers
- Allow for sharing with affiliates, successors, assigns
- Disclaim for links to sites of others
- Note state-specific requirements

- California requires policy, disclosures on sharing with third parties
- Massachusetts requires written security policy

## **CAN-SPAM**

- Social media: Conversation versus advertising resource
  - How do you use collected personal information?
- Commercial e-mails are not just bulk “spam”
- Monitor third-party marketing services
- Check policies of social media sites
- Transactional messages
- One-bite Rule
  - For unsolicited commercial email messages:
    - Identify as advertisement
    - Routing information
    - Physical address of sender
    - Clear and conspicuous means for recipient to opt out of receiving future messages.
    - No further emails to those who opt out
    - 10 days to remove from lists

## **Children’s Online Privacy Protection Act (COPPA)**

- Protects children’s personal information
- Applies to children under 13
- Online marketers must make reasonable effort to
  - Obtain parental permission or
  - Give notice about collecting personal information from children
- Privacy policy must describe practices
- For direct notice/permission, communicate with parent via:



- Postal mail
  - Fax
  - Toll-free number
  - Digital signature
- Respond to parent inquiries about information collected

## **6. Guard Against Defamation and Infringement Risks in UGC.**

### **Defamation**

- Elements:
- False and defamatory statement
  - Concerning an identifiable person
  - Unprivileged publication to a third party
  - Fault
  - Injury to reputation or business
- Lay groundwork in Terms of Use to reduce risk
- Prohibit posting of defamatory or deceptive content, as a condition of using site
  - Allow company maximum discretion to take down content
  - Disclaim responsibility, liability for UGC
  - Require creator/poster to indemnify company (recognizing limits)

### **Communications Decency Act (CDA) Safe Harbor**

- Interactive computer service providers shall not be treated as publishers or speakers of information posted by content providers
- Content providers not protected
- Immunity lost if employee makes false, defamatory statement acting within scope of employment
- Courts construe this immunity broadly

- Nemet Chevrolet shows breadth of immunity

### **Digital Millennium Copyright Act (DMCA)**

- Protects online service providers from infringement liability based on user postings
- Service providers must notify U.S. Copyright Office of designated agent
- Terms of Use should provide DMCA disclosure, agent for notice-of-infringement claims
- Terms of Use should prohibit posting of infringing materials
- Process for DMCA Notice of Claimed Infringement
  - Notice to online service provider
  - Service provider must take down
  - User gets chance to provide counter-notice of non-infringement within 10 days
  - Service provider may restore 10 days after notice to copyright owner unless litigation filed

### **Lights! Camera! Action! Video Contests!**

- Video contests generate excitement!
- Highly credible with consumers
- Sponsor can be liable, even though it does not create content
  - Subway v. Quiznos: Show “why you think Quiznos is better”
- Make sure contests comply with applicable regulations, host site’s terms of use

### **Minimizing Risks of UGC**

- Contest rules, Terms of Use can help reduce risk of liability
  - As condition of participation, prohibit postings that are defamatory, deceptive, infringing
  - Allow company maximum discretion to take down content that violates this prohibition
  - Disclaim liability, responsibility for UGC

- Require creator of UGC to indemnify company (recognizing limits)
- CDA's safe harbor can protect against liability for defamation
- DMCA can protect against liability for copyright infringement
- Neither CDA nor DMCA affords any protection against liability for
  - Trademark infringement
  - Misappropriation of right of publicity

## **7. Be Prepared for a Brand Crisis.**

### **Two Ways to Respond to a Crisis**

- Chevy Tahoe Video Contest
- Domino's Pizza Rogue Employees' Video

### **Managing a Brand Crisis Spawned by Social Media**

- Have a crisis management plan in place
- Monitor social media for complaints, problems
- Act quickly
- Take responsibility from the start
- Don't get defensive – tell your good story, if there is one
- "Put out the fire" with same media that started it

## SOCIAL MEDIA PLATFORMS

The primary forms of social media include:

- **Blogs**, which feature comments in the form of journal-type entries posted on a website, sponsored by a company or by an individual.
- **Microblogs**, which permit users to send brief updates, primarily by text messaging, instant messaging, and emailing. On Twitter, the most popular microblog, with more than 100 million registered users, these updates are limited to 140 characters and are called “Tweets.”
- **Social networking sites**, such as Facebook, LinkedIn, and MySpace, which allow individuals and companies to share information about themselves and connect with others. Facebook, one of the primary social media platforms and arguably one of the internet’s biggest successes ever, announced in July 2010 that it has reached the milestone of having 500 million users.<sup>1</sup> These users spend more than 500 billion minutes a month on the site.<sup>2</sup>
- **Video-sharing and photo-sharing sites**, such as YouTube and Flickr, which provide a distribution platform that allows people to watch and share their own videos and photographs with others.
- **Review sites**, such as Angie’s list and Yelp, which allow people to share their experiences and opinions about local products and services.
- **Marketplace sites**, such as eBay and Craigslist, which connect buyers and sellers of products and services, and matching sites, such as Roommates.com and Match.com, which help people find roommates or other companionship.
- **Wikis**, which are collaborative websites that let users read, write, and edit the articles they contain. Wikipedia, the most popular wiki, bills itself as “the free encyclopedia that anyone can edit.”<sup>3</sup>
- **Chat rooms**, which are websites or server spaces on the internet where live “keyboard conversations” occur, usually organized on the basis of a specific topic. Chatroulette, for example, features live conversations audio and video.
- **Virtual worlds**, such as Second Life, on the internet, where users can customize an avatar and socialize using voice and text chat.
- **Crowdsourcing sites**, such as InnoCentive and Helium.com, which outsource tasks to a community. Essentially, a “seeker” organization posts a challenge on

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<sup>1</sup> Facebook Blog, <http://blog.facebook.com/blog.php?post=409753352130> (last visited July 26, 2010).

<sup>2</sup> Jeffrey Rosen, The Web Means the End of Forgetting, N.Y. TIMES, July 19, 2010, available at <http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=1&how>.

<sup>3</sup> Wikipedia Home Page, [http://en.wikipedia.org/wiki/Main\\_Page](http://en.wikipedia.org/wiki/Main_Page) (last visited July 30, 2010).

the site, “solvers” submit solutions to the challenge, and the seeker pays an award to the solver who best meets the solution requirements.

- **Group activity sites**, such as Foursquare, a site that offers users rewards for visiting certain participating locations and lets users connect with friends while there, and Groupon, a “collective buying power” site that features a different deal each day on products or services and can only offer the deal if a certain number of users sign up for it.



**Corby Cochran Anderson**  
**Partner**

Bank of America Corporate Center  
100 North Tryon Street, Suite 2900  
Charlotte, North Carolina 28202-4011  
T: 704.343.2225  
F: 704.373.8935  
canderson@mcguirewoods.com

Ms. Anderson's practice focuses on commercial litigation, intellectual property, franchising and media law. She has represented business clients in trials and appeals involving trademark and copyright claims, trade secret claims, and contract and business tort disputes. She has defended clients in class action litigation over the administration of franchise advertising funds, the calculation of insurance benefits, and the syndication of limited partnerships in the cable television industry. She regularly counsels clients on intellectual property, advertising, social media and franchising matters. Her work for media clients includes the defense of libel actions in North Carolina, Mississippi and Ohio courts, as well as cases involving subpoenas and access to public records.

**Practice Areas**

- Intellectual Property
- Franchise & Distribution
- Complex Commercial Litigation
- Technology & Software
- Appellate

**Representative Matters**

- Advise clients including retailers, franchisors and publishers on trademark, copyright, advertising and social media issues.
- Represent nation's leading online lending exchange in intellectual property and litigation matters, including patent litigation involving methods and computer networks for coordinating loans over the internet.
- Represented a major financial institution seeking to halt a competitor's trademark infringement in nationally televised bankcard commercials.

- Defended a franchisor in a nationwide class action over the administration of franchise advertising funds.
- Represented a national software company in litigation against a prospective business partner involving copyright and trade secret disputes related to software for performance measurement in health care industry.
- Represented international power plant manufacturers in a fraud and breach of contract dispute in federal court in Florida over the construction of a power plant in Pakistan.
- Defended a Southeastern grocery chain in a lawsuit in federal court in Texas filed by a company that provided "mystery shopper" services, alleging copyright infringement and theft of trade secrets.
- Represented the 25th largest school system in the nation in copyright and trademark matters, including protecting trademark rights, negotiating license agreements and publishing contracts, and advising on IP issues related to Internet use and curriculum materials.
- Defended an Indiana-based insurer in class action litigation in federal court in South Carolina over the calculation of insurance benefits.
- Represent various national franchisors in federal courts in North Carolina seeking injunctive relief against franchisees for trademark infringement and related claims.
- Represented a Jordan-based manufacturer and distributor of food products and its North Carolina affiliate in a trademark, trade dress, and false advertising lawsuit filed in federal court in North Carolina against an Illinois distributor of Middle Eastern foods.
- Defended a major motion picture distributor in a copyright infringement lawsuit filed by an author who claimed his manuscript was the basis for the movie "He Got Game."
- Represented a niche-market maker of canine treats in a federal lawsuit to enforce its trademark rights against a major manufacturer of pet products.
- Defended a South Carolina-based video distributor in lawsuits in Massachusetts and Indiana over licensing issues, copyright infringement, and trademark infringement and dilution.
- Represented a Kansas-based cooling tower manufacturer in a federal lawsuit in Florida involving trademark infringement and business defamation disputes with a competitor based in Calcutta, India.
- Defended a general partner in a class action over the syndication of limited partnerships in the cable television industry.
- Represented a national investment bank in consolidated securities fraud litigation in Oklahoma.

#### **Education**

- University of Virginia School of Law, Charlottesville, Virginia, J.D., 1994
- College of William & Mary, Williamsburg, Virginia, B.A., *magna cum laude*, 1976

#### **Honors**

- Named One of the "Best Lawyers in America," Woodward/White, Inc., 2010-2011
- Named One of North Carolina's "Legal Elite," *Business North Carolina*, 2010

#### **Previous Experience**

- Member, Helms Mulliss & Wicker, PLLC, Charlotte, North Carolina
- Appointed Special Master to resolve discovery disputes in *Boeing Co. v. United States*, a major government contract case.
- Law Clerk, U.S. Court of Federal Claims
- Reporter, Editor, Publisher, The Bureau of National Affairs, Inc. and Buraff Publications

## **Publications**

- "The Initial Interest Confusion Doctrine: A Powerful Protection Against Infringement," *ABA Franchise Law Journal*
- "Franchising & Distribution Currents," *ABA Franchise Law Journal*
- "The Antitrust Risks of Information Sharing," *ABA Franchise Law Journal*
- "Confidential Sources and Public Figure Libel Plaintiffs: The Jewell Case Offers Good Guidance for the Media," Southern Newspaper Publishers Association
- "Wiretapping: What Happens When Private Conversations Take a Public Turn," Southern Newspaper Publishers Association
- "*Rosa Parks v. Outkast*: Right of Publicity Versus the First Amendment," ABA First Amendment and Media Litigation Newsletter
- "When the Police Knock at Your Door: Newsroom Search Warrants," Southern Newspaper Publishers Association
- "Media Law Resource Center's 50-State Survey of Libel Law," Chapters on 4th Circuit and North Carolina Law
- "North Carolina Considers Right of Publicity Statute," *North Carolina Bar Association's Sports & Entertainment Law Newsletter*
- "Racing Was Built Here, Racing Lawyers Belong Here," *North Carolina State Bar Journal*
- "The Mecklenburg Bar Revue: Give Them an Audience and They Milk It So Hard It Moos," *North Carolina State Bar Journal*

## **Speaking Engagements**

- "Protecting the Franchise Brand in the Age of Social Media," ABA Franchise Forum Presentation and Paper
- "Protecting Your Famous Marks Against Trademark Dilution," ABA Franchise Forum Presentation and Paper
- "Anatomy of a Franchise Lawsuit," North Carolina Bar Association Presentation and Paper
- "Legal Issues for Writers," The North Carolina Writers' Network

## **Certifications**

- Certified North Carolina Superior Court Mediator

## **Professional Affiliations**

- Mecklenburg County Bar
  - Board of Directors, 2003-2006
  - Bar Leadership Institute, 2003
  - Publications Committee, CLE Committee (former member)
- American Bar Association
  - *Franchise Law Journal*, Editorial Board
  - First Amendment and Media Litigation Committee (former member)
- North Carolina Bar Association
  - Committee on Trademarks, Copyrights, and Trade Secrets, IP Section
  - Committee on Franchising, Business Law Section
  - Appellate Rules Study Committee (former member)
- North Carolina Association of Women Attorneys



**Civic Affiliations**

- College of Arts & Sciences Advisory Council, University of North Carolina at Charlotte
- Board of Directors, Kids Voting North Carolina
- Board of Directors, Executive Committee, Kids Voting Mecklenburg County (former member)

**Admitted**

- North Carolina 1994