

Social Media – Where is Your Comfort Zone?

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Agenda

- Introduction
- Customer Endorsements
- Protecting Company Intellectual Property Rights
- Protecting Company Information
- Data Protection
- Compliance
- Technical Solutions

Introduction

Use of social media/web 2.0 by corporate executives

- 94% use Web 2.0 to boost internal communications
 - 83% knowledge management
 - 78% fostering collaboration across the company
 - 74% enhancing company culture
 - 71% training
- 87% use Web 2.0 to interface with customers
 - 73% improve customer service
 - 71% acquire new customers in existing markets
 - 53% generate customer participation in product development
 - 53% let customers interact
 - 23% for other customer interactions

Source: McKinsey (McKinsey's "Building the Web 2.0 Enterprise" survey 2008) cited per <http://socialmediastatistics.wikidot.com/corporate-uptake>

ROI of social media

Companies engaging with Web 2.0 technologies and using social media to communicate with customers and to share information internally are enjoying greater market shares and higher margins than those that are not:

- 27% reported both market share gains and higher profit margins against their competitors
- 40% perform better against competitors

Source: McKinsey (McKinsey's "Web 2.0 finds its pay day" report 2011) cited per <http://www.marketingmagazine.co.uk/bulletin/dailynews/article/1049830/?DCMP=EMC-BreakingnewsfromMarketing>

1,000 ways to get it wrong?



Grilled Chicken a Kentucky Fried Fiasco

Off-Brand Bet Sunk by Poor Planning and Oprah-Driven Crowds

By: Emily Bryson York

Published: May 11, 2009

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CHICAGO (AdAge.com) -- KFC's grilled-chicken launch was to be the biggest in the chain's history. Now it might also go down as a marketing case study in what not to do.

The story starts with a marketer testing the elasticity of its brand. After all, we all know what the 'F' stands for in KFC, so suddenly insisting the consumer associate the fast feeder with grilled chicken, rather than the Colonel's fried version, was always going to be a stretch.



KFC thought the way to meet the challenge was to spend millions on a TV ad campaign from DraftFCB, Chicago. TV is a marketing channel that's worked well for other fast-food introductions, but the creative was simultaneously underwhelming and yet, by telling consumers to "Unthink KFC," seemed to undermine the chain's main game, fried chicken.

Whether it was working or not we may never know, because this was the point at which the marketer brought in the big gun, Oprah Winfrey, and the trouble really started. The company's offer on the daytime diva's talk show May 4 of two free pieces of grilled chicken, two sides and a biscuit to anyone who downloaded a coupon within a two-day period should have been a huge promotional coup. Instead, it turned into an unmitigated disaster when the company was unable to execute and actually had to rescind the offer.

KFC's offer sent the chain skyrocketing to the No. 1 topic on Twitter. By Wednesday, blogs began reporting riots at New York City KFCs. On Thursday, local news crews interviewed fuming customers getting turned away in other markets, including Chicago. Consumers complained about rude service, and media complained about a PR team that seemed asleep at the wheel. By Friday, the day after KFC pulled the promotion, NPR was calling KFC "the James Frey of fast food," referring to the author of a memoir praised by Ms. Winfrey that was later exposed as fiction.

In the end, KFC managed to strain relationships with three core constituents: consumers, the media and franchisees that swallowed the cost of the free food themselves. "This is going to damage their brand," said Gene Grabowski, senior VP, Levick Strategic Communications.

Just how did things go so far awry?



AD AGE INSIGHTS Q2 TREND REPORT Mobile Marketing: Couponing

Ad Age Insights

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FDA Cites Novartis Tassigna Facebook Promo

Date Published: Monday, August 9th, 2010

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Drug maker *Novartis* was just issued a warning by the U.S. Food and Drug Administration (FDA) for how it marketed a specific drug on social media giant, Facebook, wrote Bloomberg Business Week.

The FDA warned Novartis that how it is using Facebook's Share button to market information about the cancer-fighting drug, Tassigna, violates FDA requirements for how to disclose drug information, said Bloomberg Business Week. The letter, sent to Novartis Pharmaceuticals on July 29, advised that use of Facebook Share, in this case, is both incomplete and misleading. According to Jeffrey Chester, a privacy advocate and executive director of the Center for Digital Democracy, this might be the first time the agency has had to issue a warning to a drug maker for its use of Facebook for marketing, according to Bloomberg Business Week.

The letter asks Novartis to cease using Facebook's Share option to market the leukemia drug, reported Bloomberg Business Week. The letter appears on the FDA's website.

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Formal policies on employees' use of social media

- Formal policies regarding employee use of social media (2009)
 - EMEA 11%
 - Americas 29%
 - Asia-Pacific 25%
 - Worldwide 20%
- Considering increased usage and dangers of social media, low levels of formal policies are very surprising

Source: Manpower report "Social Networks vs. Management? Harness the Power of Social Media", January 26, 2010 cited per <http://www.emarketer.com/Article.aspx?R=1007493>

What does this mean for us?

It's time to get ready!

- Social media/Web 2.0 are here to stay
- Correctly applied, they are powerful tools
- Mistakes are costly and global
- One size does not fit all
- Cross-functional teams can best assess where social media/Web 2.0 is your friend/foe

Customer endorsements

How many potential customers/social marketers are on social media?

- **LinkedIn:** over 100 million users in over 200 countries
Source: <http://press.linkedin.com/about/>
- **Twitter:** around 200 million users
Source: <http://www.bbc.co.uk/news/business-12889048>
- **Facebook:** 640 million active users, 155 million in U.S.
Source: <http://www.browsermedia.co.uk/2011/03/30/2011-social-media-statistics-show-huge-growth/>

All with different audiences

Regulations

- U.S.: Federal trade Commission Guides Concerning the Use of Endorsements and Testimonials in Advertising (FTC Guides 2009)
- EU: Unfair Commercial Practices Directive 2005, but no specific regulation on social media endorsements yet
- National level:
 - Different levels of maturity
 - UK CAP Code (aka Code of Non-Broadcast Advertising) extended to online advertising as of 1st March 2011

Basic rules

- Endorsement to reflect honest opinion of endorser
- No messages that would be deceptive if made by the company itself
- No false or unsubstantiated statements
- Clear disclosure of all material connections or “sponsoring” (e.g. receipt of products or advantages in order to endorse product)
- Respects others’ IP Rights

Basic requirements

- ⇒ Need to have control over endorsers!
- ⇒ Written codex for all persons endorsing on your behalf, written in plain language
- ⇒ In line with your company's strategy
- ⇒ Review with help of legal and IT teams
- ⇒ Continuously monitored

Protecting Company IP rights

Key points to consider:

- Enforceable IP rights v. individuals' constitutional rights
- Value of protecting v. damage of protecting
 - E.g., Nestlé/KitKat and Kim v. Coach, Inc, et al
- Finding the right approach, balancing the preventive and the reactive

Approach will depend on type of IP right and unauthorized use

Trademark:

- Gripe pages
 - Commercial intent or a true gripe page?
Diageo plc v. John Zuccarini, Individually and t/a Cupcake Patrol - Case No. D2000 – 0996 (WIPO Arbitration and Mediation Center)
 - False statements (libel), impairment of trademark reputation and/or unfair commercial practices?
 - Justification by constitutional rights (e.g., freedom of speech)?
Smart & Co SAS v. Alain Turby - Case No. D2009-1402 (WIPO Arbitration and Mediation Center)

Approach will depend on type of IP right and unauthorized use

Trademark (cont.):

- Fan pages
 - Commercial intent / use for goods or services?
 - Justification by constitutional rights?
- Commercial use and indications of affiliation
 - Likelihood of confusion? Suggestion of commercial ties with right holder?
(ECJ, C-120/04 – Thomson Life)
 - Exploitation of reputation (“free ride”) or dilution of distinctive character?
(ECJ, C-206/01 – Arsenal Football Club, ECJ, C-442/07 – Radetzky-Orden/BKFR, ECJ, C-487/07 – L’Oréal/Bellure)

Approach will depend on type of IP right and unauthorized use

Copyright:

- All uses
 - Fair use?
 - E.g., right of citation, reproduction for private use
 - Justification by constitutional rights?

Possible preventive measures

- Internal policy and training directed to employees
 - IP usage
- Restrictions in agreements with third parties
 - What is authorized and what is not
- Monitoring programs covering main websites
 - Source for information to take action
- Working with social networking sites, fan pages and related businesses
 - To create collaboration, rather than confrontation

Possible reactive measures

- Do nothing
- Cease and desist letter if the posting person can be identified
 - EU Enforcement Directive v. EU Data Protection Directive
- Takedown request to portal provider
 - By letter and/or channel made available by provider
- Licensing arrangement with business partners
- Legal action
 - Preliminary injunction proceedings can be effective
 - E.g., in Germany, where frequently granted on an *ex parte* basis

Protecting Company information

- Because it makes business sense
- Because public companies are subject to disclosure rules

Disclosure rules

- Typically, publicly traded companies must disclose material information to the public in a manner that is broad and non-exclusionary
- For US listed companies subject to SEC Regulation FD, this means that the information must be disseminated in a manner calculated to reach the securities market place in general through recognized channels of distribution.
(Faberge, Inc., 45 S.E.C. 249, 255 (1973), Securities and Exchange Commission 17 CFR Parts 241 and 271 [Release Nos. 34-58288, IC-28351; File No. S7-23-08], “Commission Guidance on the use of Company Web Sites”)
- Not yet clear if social media meets these requirements

Possible preventive measures

- Internal policy and training directed to employees
 - The handling of Company information and, specifically, the sharing (online and offline) of Company information
- Far-reaching confidentiality and audit clauses in third party agreements
- Use only existing channels for disclosure until social media channels have been validated by the regulators
- Requiring in-house counsel review of non-public Company information before its publication on social media
 - Material or not?

Possible reactive measures

- If non-public Company information of material nature was disclosed
 - Immediately file an 8-K (or corresponding non-US filing)
 - Consider issuing a press release or other website statement
- If any other Company information was disclosed, appropriate measures need to be determined on a case-by-case basis

Data protection

- Resolving the paradox of corporate transparency and protection of individual freedoms
- The national and the European Commission views
- New corporate business expansion demands
- Challenges of surveillance and information governance
- Recommendations for practical implementation

Compliance policies

- Recognition of policy requirement – by regulators, investors, clients and staff
- Meeting the needs of preventing and identifying breaches and criminality
- Policies need to be converted to workflow
- Audit and enforcement

Source: McKinsey (McKinsey's "Web 2.0 finds its pay day" report 2011) cited per <http://www.marketingmagazine.co.uk/bulletin/dailynews/article/1049830/?DCMP=EMC-BreakingnewsfromMarketing>

Related technology

- New capability for total digital format data to be monitored, where permitted
- Language, volume and format agnostic issues can be accommodated
- Essential need for connectivity to data sources without negative impact
- Applying rules with a “meaning-based” approach, for sensitivity and granularity
- Technology power needs itself to be compliant to be effective

Thank you

We now open up to your
questions or comments