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Reddit and Weep? Protecting Your Brand and Reputation in Social Media – A Continuum of Approaches from Engagement to Litigation

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INTRODUCTION

With their customers active on Facebook, Twitter, Instagram, Snapchat, YouTube, Pinterest, Reddit, and a plethora of other social media, franchisors understand the importance of building and protecting their brands online. Yet, it is easy to be overwhelmed by the changing online environments, particularly given the unique concerns faced by franchisors in developing a social media presence: How can the system convey a consistent brand image across all social media platforms? How will it manage responses to complaints from unsatisfied customers? How will it respond on social media if a crisis develops? The ubiquity of social media creates infinite opportunities for franchise brands to come under fire online, whether at the hand of irate customers posting negative reviews, of employees posting videos or photos of themselves engaged in unauthorized acts at the workplace, of competitors, or even their own franchisees.

The potentially frenzied pace of social media communications, coupled with various platforms that invite spontaneous and casual communication, make it easy to forget that all the same rules of contemporary advertising apply equally to all social media advertising and communications. Franchisors also have unique issues when dealing with social media issues, as the involvement of the franchisees must be carefully planned and communicated. The public may not distinguish between the online activities or comments of a franchisee, and may assume that they represent the brand owner.

This paper examines the legal standards for social media marketing, how to develop a social media strategy, and the fundamentals of brand protection in the social media world.

I. Legal Standards for Social Media Marketing¹

Social media as a marketing channel allows for provocative and impactful messages that can become effortlessly viral in seconds. The urge and ability to react and respond quickly sends energy through marketing departments and puts “legal” on edge. How can a business use social media to promote a brand while managing the risk of landing in a slurry with an irked competitor, a gullible consumer, or a regulator who thinks the promotion has crossed the line of truth in advertising? An effective social media advertising strategy must start with understanding the rules of engagement. We have boiled them down to three core concepts.

Core Concept 1: General Consumer Protection Laws Apply to Social Media.

The U.S. Federal Trade Commission (FTC) enforces a broad mandate that prohibits unfair or deceptive acts or practices in the marketplace. States also have similar, general laws that prohibit unfair or deceptive conduct. Beyond this general premise, there are no black and white laws for engaging in social media. However, there are plenty of places to look for legal guidance to ensure that a social promotion stays within the boundaries of consumer protection laws.

Social media posts are personalized in such a way that the message is typically associated with an individual voice. When the voice reflects an opinion, belief, finding, or experience about a sponsoring advertiser, the post becomes an endorsement. An endorsement is a form of advertising message that falls under the FTC’s purview. Thus, the FTC’s Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255 (“FTC Endorsements Guide”), is an important roadmap for social media ads. As advertisements, social media messages are likely to make claims about the product or service that the message promotes. Another FTC guide, *.com Disclosures – How to Make Effective Disclosures in Digital Advertising* (“Dot Com Disclosures”), provides a tool for making claims in social media ads in compliance with consumer protection standards.

Online and social media marketers may also find guidance in case reports resulting from FTC and state attorney general law enforcement actions and investigations, the results of competitor challenges brought through forums like the Council of Better Business Bureau’s National Advertising Division (NAD), and private litigation. Together, all of these components create an evolving body of law and principles that form the basis of social media marketing policies and company guidelines to help ensure compliance with consumer protection laws.

¹This paper provides only general information about legal topics, does not constitute legal advice and should not be used as a basis for providing legal advice. It is provided for educational and informational purposes only.

In Canada, the Competition Bureau has long held the position that the misleading advertising provisions of the *Competition Act* apply equally to representations made online.² Those provisions prohibit advertisers from making a representation, by any means whatsoever, that is false or misleading in a material respect, and the general impression conveyed by the representation must be taken into consideration. The Competition Bureau has used this provision to pursue false and misleading representations made online.

One footnote about consumer reviews in the U.S.: while brand marketers are looking for positive voices to promote their products and services, a new law – the Consumer Review Fairness Act of 2016 (CRFA) – has made it illegal for companies to use form terms and conditions to prohibit or punish negative reviews by customers. The CRFA was a response to practices that some businesses used to prevent customers from giving honest, albeit negative, reviews, including by threatening to sue such customers. The law protects consumer reviews and evaluations posted online through social media. If standardized contractual provisions with consumers, such as form terms and conditions or website terms of use, prohibit consumers from sharing their honest opinions, then the FTC can treat the terms as unfair or deceptive and impose financial penalties and injunctive relief.

Core Concept 2: Payments and Other Benefits Given to Social Influencers Must Be Disclosed.

One core principle that frames the basis of the FTC Endorsements Guide is that compensation or other benefits, such as free products or services, provided to an endorser in exchange for the endorsement, must be disclosed within the ad. This mandate is particularly important when the connection between the endorser and the seller of the product or service would not be reasonably known to or expected by the consumer. In the FTC's view, this type of connection might materially affect the weight or credibility of the endorser's statement, and thus must be disclosed.

The FTC Endorsement Guide contains an example of a college student who has earned a reputation as a video game expert and posts entries about his gaming experience on a blog.³ In the FTC example, a video game company sends the blogger a free game to play and review, and the blogger writes a favorable review. Because the gamer's relationship to the game company would not likely be known to consumers, the blogger should clearly and conspicuously disclose that he received the game system free of charge. The FTC example also explains that the video game company should advise the blogger to make such a disclosure and monitor the blogger's posts for compliance.⁴

² "Application of the Competition Act to Representations on the Internet," <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03134.html#eGuideline4.2>

³ 16 C.F.R. Sec. 255.5 Example 7.

⁴ The FTC emphasized the importance of educating bloggers about their obligations to disclose receipt of payment or other gift in a 2010 public letter to AnnTaylor Stores Corporation. See

The FTC's examples cover similar situations, including material connection disclosures that should be made when endorsements are provided by employees of a company and that relationship would not be apparent to consumers.⁵ Separately, the FTC has also specified that "entry into a contest to receive a significant prize in exchange for endorsing a product through social media constitutes a material connection that would not reasonably be expected by viewers of the endorsements."⁶

As reported by *Advertising Age* in August 2016, brands are spending more than \$255 million each month on influencer marketing campaigns. At the same time, the FTC has become increasingly aggressive in requiring companies to disclose when they have paid social influencers to post on YouTube, Twitter, Snapchat, and other platforms.⁷ In March 2016, the FTC approved a consent order with online entertainment network Machinima, Inc. after the FTC alleged that influencers paid by Machinima failed to adequately disclose that they were being paid for their opinions on YouTube videos endorsing Microsoft's Xbox One and various games.⁸ The FTC's order prohibits misrepresentations in any influencer campaign about whether the influencer is an independent user of the promoted product and requires Machinima to monitor the posts of its influencers for compliance.

In May 2016, the FTC settled with Lord & Taylor, LLC after the FTC charged that the retailer paid for a seemingly objective article in an online magazine (a tactic known as native advertising) without disclosing that the online article was a paid advertisement for a new clothing line.⁹ In July 2016, the FTC announced a settlement with Warner Bros. Home Entertainment.¹⁰ The FTC alleged that Warner Bros. engaged in deceptive conduct by failing to adequately disclose that it paid influencers to promote gameplay videos on social media. The settlement prohibits Warner Bros. from failing to make such disclosures and misrepresenting that sponsored content reflects an objective, independent opinion of a social influencer or video game enthusiast. The settlement also requires Warner Bros. to adequately monitor its social marketing channels for compliance.

https://www.ftc.gov/sites/default/files/documents/closing_letters/anntaylor-stores-corporation/100420anntaylorclosingletter.pdf.

⁵ 16 C.F.R. Sec. 255 Example 8.

⁶ See FTC letter to Cole Haan, Inc. (March 20, 2014) https://www.ftc.gov/system/files/documents/closing_letters/cole-haan-inc./140320colehaanclosingletter.pdf.

⁷ See <http://adage.com/article/digital/ftc-cracking-social-influencers-labeling-promotions/305345/>.

⁸ See <https://www.ftc.gov/enforcement/cases-proceedings/142-3090/machinima-inc-matter>.

⁹ See <https://www.ftc.gov/enforcement/cases-proceedings/152-3181/lord-taylor-llc-matter>.

¹⁰ See <https://www.ftc.gov/news-events/press-releases/2016/07/warner-bros-settles-ftc-charges-it-failed-adequately-disclose-it>.

While the FTC did not assess monetary penalties against Machinima, Lord & Taylor, or Warner Bros., each of the companies is subject to 20 years of the FTC looking over their shoulders on social media marketing issues. Meanwhile, state attorneys general have shown equal interest in similar marketing issues in cases that have resulted in fines. For example, the Florida Attorney General settled with Lifestyle Lift after the state alleged that the company used consumer testimonials in its advertising without disclosing that the company had paid those consumers.¹¹ The company had to refund consumers for prior sales. Prior to the Florida case, Lifestyle Lift paid \$300,000 to the State of New York after settling charges that it induced employees to pose as consumers and post positive reviews about the company without disclosing the employment relationship.¹²

In Canada, the *Competition Act* does not specifically address disclosure of paid endorsements. However, the Competition Bureau has successfully used the general misleading advertising provisions in the legislation to levy fines and penalties for fake online reviews; Bell Canada agreed to pay a CAN\$1.25 million¹³ fine after the Competition Bureau discovered that Bell Canada employees were writing very favorable online reviews of the telecom company's goods and services without indicating that they were employees (a practice known as "astroturfing"). Part of the settlement agreement also prohibited Bell Canada from encouraging or incentivizing employees or contractors to create any reviews. The Competition Bureau's initiative here leaves no doubt that the regulator takes the view that astroturfing is offside the misleading advertising provisions of the *Competition Act*, and will vigorously enforce it. The Competition Bureau has issued guidance about the importance of genuine online reviews.¹⁴

Advertising Standards Canada ("ASC"), a voluntary industry organization, has a code of advertising conduct to which its members must adhere; *The Canadian Code of Advertising Standards*¹⁵. In October 2016, ASC revised the Code to specifically address the disclosure of any "material connection" between an endorser and a supplier in the online context. An exception exists if the connection should be reasonably expected by consumers, and the example provided in the Interpretation Guidelines¹⁶ to the Code is a celebrity endorsement of a product. If a material connection exists, it must be disclosed "clearly and prominently". The Interpretation Guidelines point to the FTC Endorsement

¹¹ <http://www.myfloridalegal.com/newsrel.nsf/newsreleases/8EB42E172E84A2D285257B8D006B4E44>.

¹² <http://www.nbcnewyork.com/news/local/NY-State-Attorneys-Office-Announces-Settlement-with-LifeStyle-Lift.html>

¹³ <http://www.theglobeandmail.com/report-on-business/industry-news/marketing/bell-to-pay-125-million-penalty-for-fake-reviews/article26806629/>

¹⁴ The Deceptive Marketing Practices Digest, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03946.html>

¹⁵ <http://www.adstandards.com/en/standards/cancodeofadstandards.aspx>

¹⁶ <http://www.adstandards.com/en/standards/interpretingTheCode.aspx>

Guide for examples. While the Code does not have the force of law, and the ASC does not have any investigative or enforcement abilities, a company's refusal to correct a contravention of the Code, may trigger the ASC to file a complaint with the Competition Bureau for pursuit under the *Competition Act*.

Core Concept 3: Necessary Disclosures Must Meet the "Clear and Conspicuous" Standard.

Law enforcement cases in this area have recently caught the attention of the advertising industry at large, which responded last year with a general acknowledgement of the FTC's disclosure requirements and a commitment to following the rules. At the same time, the industry has expressed confusion about how such disclosures can be made adequately.¹⁷

The FTC's *Dot Com Disclosures* provides prevailing guidance on how to make effective disclosures. The FTC updated these guidelines in March 2013 specifically to address the digital age, including the use of social media advertising. The *Dot Com Disclosures* emphasize a long-standing FTC principle that disclosures must be "clear and conspicuous," meaning that consumers must actually notice and comprehend the disclosure in the context of the entire ad. While this standard is simple enough to state, the practical realities of social media marketing (including, in some cases, limited characters and screen space) and the subjective applicability of the rule can make it hard to follow.

The FTC indicated in its 2013 *Dot Com Disclosures* that "Ad:" at the beginning of a tweet should be adequate, and the word "Sponsored" likely informs consumers that the message was sponsored by an advertiser. At the same time, the FTC expressed doubt about whether "#Spon" would be an adequate abbreviation for "#Sponsored" in a Tweet, if most consumers would not know what #Spon meant. Nonetheless, in 2016, the most commonly used abbreviations included #ad, #sponsored, and #sp, and usage of these hashtags on sponsored posts increased significantly over the prior year, likely due to the messaging spread by the FTC's high profile cases in this area.¹⁸ Other disclosures that may be acceptable in the areas of contest and sweepstakes (where influencers are rewarded with a sweepstakes entry for posting about the sponsor) include #[company]sweepstakes and #contestentry.

In Canada, there are no specific legal requirements relating to disclosure of sponsorships in the online context. However, as above, the Competition Bureau has taken the position that the general misleading advertising provisions of the *Competition Act* adequately cover the issue. Under the "general impression" test used to determine whether a representation is false or misleading, the Competition Bureau will consider

¹⁷ See, e.g., <http://adage.com/article/digital/ftc-cracking-social-influencers-labeling-promotions/305345/> (noting a sentiment that that FTC must be clear and consistent about its policies and enforcement).

¹⁸ *Id.*

the advertisement as a whole. Generally speaking, any disclaimers that are inconspicuous, or that contradict or restrict the representation made in the body of the advertisement will be ignored. By extension of this logic, any disclosure of a paid endorsement must be sufficiently prominent to be taken into account when considering the general impression of the advertisement. The Competition Bureau has actively enforced improper use of disclaimers. For example, Bell Canada agreed to pay a CAN\$10 million fine for including additional, mandatory fees in fine-print disclaimers.¹⁹

There are some principles that form the basis of the clear and conspicuous standard in social media disclosures in both countries. Among them:

- Advertisers should not assume that consumers read an entire website or online post (and thus might miss a disclosure).
- Disclosures at the end of a post might get cut off, especially if the post is re-tweeted, re-grammed, or re-pinned.
- Advertisers must draw attention to the disclosure; it's not effective to make the disclosure where some consumers might find it, but most likely will not.
- Hyperlinks may not be effective for making disclosures unless the hyperlink is clearly labeled to give a sense of the specific information to be found by clicking the link.
- Short-form disclosures, abbreviations, or icons may be adequate if they are presented clearly and conspicuously and if their meaning is immediately apparent.

As usage of proper disclosures increases, it may become more apparent that marketing interests in leveraging social media outreach need not conflict with legal requirements. Social media marketing will remain an attractive outlet to promote a brand, especially to younger generations. Marketers will need to pay close attention to the “teaching moments” offered by law enforcement advancements in this area and adapt internal policies and procedures accordingly.

II. Social Media and Intellectual Property Considerations

Intellectual property considerations should also be a factor in social media advertising campaigns and marketing promotions. U.S. and Canadian copyright law protects original works of authorship, which includes messages and pictures shared on social media. Social media platform rules typically emphasize that users continue to own anything that they post on the platform (*i.e.*, intellectual property rights are not lost by posting on social media). And while platform rules may allow advertisers to use posted content within the same platform, there are likely to be restrictions on re-using posted content for commercial purposes on a different platform.

Another intellectual property consideration is right of publicity laws, which provide that photos, videos, or other content that include or identify specific people should not be

¹⁹ <http://www.cbc.ca/news/business/bell-canada-pays-10m-over-misleading-ads-1.1016391>

used in a commercial campaign without permission.²⁰ The laws may apply to names, quotes, and even social media handles. Some states extend rights of publicity even after the death of the individual, thereby making the right inheritable by the individual's descendants and heirs. The basic rule on rights of publicity is that a marketer should obtain *written* permission to use a person's name, image, or other such characteristics for marketing purposes. This rule is particularly relevant to social media promotions that involve user generated content.

Celebrities have also invoked a right of publicity and privacy under circumstances where their names or images have been used in a post about a product or service when the celebrity is not a paid endorser. As one example, actress Katherine Heigl sued the Duane Reade drugstore chain for \$6 million for impermissibly posting on social media a photo of her holding Duane Reade shopping bags.

Trademark issues also arise in social media marketing. The unauthorized use of trademarks (including trade names, logos, and taglines) can lead to claims under the Lanham Act or, in Canada, the *Trade-marks Act*, if the use falsely suggests or implies that the use was authorized by the owner of the trademark or that there is an affiliation or connection with the owner. Some trademark owners are more vigilant and aggressive in enforcing their rights, with many trademark owners imposing very specific requirements for when and how their marks may be referenced. Major events – such as the Superbowl® and the Oscars® – are tradenames themselves and must be referred to on social media alternatively as #biggame or #awardsshow instead. Many celebrities are also aggressive in enforcing their marks.

Franchisors also need to consider whether their activity in social media creates any new intellectual property that should be protected through registration and enforcement. While most content utilized in a social media campaign can be examined through traditional intellectual property protection mechanisms, certain aspects of social media marketing and use are unique and need to be considered more closely.

Are hashtags and user names protectable as trademarks? As with any term, whether or not a hashtag or user name qualifies as a trademark depends on whether it has acquired a source identifying function similar to a tagline, or is merely a descriptive term, a call to action, or a means of sorting content online. In many instances, hashtags serve one of the latter functions and are not in themselves protectable marks.²¹

Can use of a hashtag constitute trademark infringement? If a hashtag is used in a manner that may create a false association with a competitor or other third party, it is possible that its use might be considered trademark infringement or false advertising. For example, in *Fraternity Collection, LLC v. Fagnoli*, a fashion designer who had

²⁰ Adler, J. & VanderBroek, M., *Right of Publicity Claims in a Digital Age* (Paper presented at the American Bar Association 39th Annual Forum on Franchising, November 2-4, 2016).

²¹ See USPTO Trademark Manual of Examining Procedure Sec. 1202.18.

previously designed products for Fraternity Collection, independently sold similar products using the hashtags #fratcollection and #fraternitycollection. Fraternity Collection filed suit and the court denied Fargnoli's motion to dismiss the false advertising and trademark infringement claims, holding that "[t]he Court accepts for present purposes the notion that hashtagging a competitor's name or product in social media posts could, in certain circumstances, deceive consumers."²² Conversely, other courts have declined to enjoin use of a hashtag. In *Eksouzian v. Albanese*, the court found that hashtags are "merely descriptive devices, not trademarks, unitary or otherwise."²³

DEVELOPING A SOCIAL MEDIA STRATEGY

As a starting point, franchisors who elect to embrace social media, and include various platforms in their advertising and communications, must do so with a well-planned strategy. However, even franchisors who do not want to actively participate in social-media advertising must also develop a social media strategy as they may be impacted by the social media activities of third parties and be unwillingly dragged into the fray, such as a customer complaint on YouTube or Twitter, or a pointed tweet from a competitor, to which the franchisor has no choice but to react. Either way, part of that strategy must include how to protect the franchisor's brand.

When crafting a social media strategy, there are a number of issues that franchisors must consider.

Will the franchise's social media presence be as one brand or many local identities? Franchisors must consider whether the franchise will be represented on social media as one brand or as many local identities (or some combination of the two). Communicating under a single brand identity, the franchisor should have one channel on each social media platform (i.e., one Twitter, Facebook and Instagram page) through which to communicate with its audience. A centralized social media presence gives the franchise a consistent message, helping it to find a "voice" for the brand online.

Alternatively, permitting franchisees to communicate through local social media can empower franchisees to connect and develop relationships with local customers. Engagement is the key to social media success. By listening to what audiences are saying, franchisees can enter into individualized conversations with prospective customers looking for specific products and services.

Of course, even if the franchisor elects to have a single voice, that does not preclude the involvement of its franchisees. In fact, the franchisor would undoubtedly want to avoid taking responsibility to monitor and respond to complaints about its franchisees' businesses on consumer review platforms such as Yelp! or HomeStars.

²² *Fraternity Collection, LLC v. Fargnoli*, 2015 WL 1486375, No. 3:13-CV-664 (S.D. Miss. Mar. 31, 2015).

²³ *Eksouzian v. Albanese*, No. CV 13-00728-PSG-MAN, 2015 WL 4720478, at *7-8 (C.D. Cal. Aug. 7, 2015).

If franchisees are permitted to maintain local social media accounts, there should be a process in place to allow the franchisor to take control in the event the franchise agreement terminates.

Who will control social media accounts? Another important issue to consider is who will actually manage social media accounts. How much, if any, control franchisees will have over social media accounts? Use of social media by franchisees may help to keep the brand top-of-mind among customers. However, if franchisees are to create local social media content, it is important to ensure that brand messaging is still consistent across the franchise system. One strategy is to have the franchisor approve standard content which franchisees will post to their social media pages. Reviewing individual posts can, however, prove to be extremely time consuming for the franchisor's marketing department. Another strategy is to have the franchisor's marketing department establish social media best practices and generate a library of social media resources for franchisees to use. A franchisor might also consider establishing monthly content calendars, under which it mandates that franchisees share certain posts through their local accounts on the same day. If franchisors do not take a proactive approach to social media, franchisees will often create and manage their own social media pages, potentially creating risks for the brand's messaging.

What, if anything, does the franchise agreement say about social media: It is important to consider what, if anything, the franchise agreement says about the use of social media by franchisees or the franchisor. Franchise agreements often give the franchisor ownership rights over all websites (including social media accounts) connected with its brand. As well, the franchisor often reserves the right to approve any content involving its trademarks (including social media posts) and to require the franchisee to remove any disapproved content from further display online. The franchisee may also be required to use and display the franchisor's forms, disclosures and privacy statements when posting to any websites or social media accounts connected to the franchise.

Communicating with the Franchisees: Even a well-developed social media strategy is of little use if the franchisees are unaware of it. Franchisors must clearly communicate their strategies to their franchisees, including the role of the franchisees in that strategy. Further, franchisors cannot assume that franchisees appreciate the rules of the road for social media engagement, and should consider setting out a guide even for when franchisees are clearly posting in their own accounts.

PREPARING FOR A CRISIS

A social media strategy must include a response plan to deal with any social media event that could potentially impact the franchisor's brand. These events can range from a single negative on-line review by a disgruntled customer all the way up to a social media crisis, where there is a viral reaction to an online or offline event. This section deals with how to prepare to protect the brand in the event of a full-blown social media crisis.

Anticipating a crisis: When faced with a crisis situation, franchisors must be prepared to respond quickly and decisively. A crisis involves a dramatic, often unexpected event with the potential to have a significant adverse effect on the franchisor, franchisees, employees and/or suppliers of the franchisor. A crisis could involve anything from a bomb threat at a franchised hotel to an online data breach of a franchised retailer. Though crises come in all shapes and sizes, there are several basic stages in any crisis. First, the time period during which the issues are arising which will eventually cause the crisis; next, the eruption of the crisis, followed by the management of the events surrounding the crisis, including media relations and the resumption of business operations; and finally, the resolution of the crisis and period of reflection on lessons learned from the event and the response by the franchisor. By their very nature, most crises cannot be foreseen. Franchisors cannot predict whether or when a crisis will hit their business— for instance, a natural disaster which destroys a franchised hotel or tainted food which puts the customers of a franchised restaurant into the hospital. While franchisors can generally do little to prevent a crisis, it is possible to anticipate areas of potential vulnerability and develop a communications response plan in advance.

Monitoring events: Franchisors should be attuned to the early warning signs of an impending crisis and have systems in place to monitor potential issues. Franchisors should regularly monitor mentions of their brands or products online. Franchisors should consider employing services like Google Alerts, Topsy.com, Social Mention and HootSuite, which offer varying degrees of sophistication in monitoring use of brands online. Franchisors can also consider establishing a formal keyword-based monitoring and reporting program using such paid programs as Sysomos, Trackur or Radian6. Proper monitoring can help to head off potential issues before they escalate into full blown crises.

In addition, franchisors should develop a system which educates the franchisees' employees to recognize a crisis and inform the franchisor's leadership. For instance, one large, multi-national hotel franchisor requires its franchisees to carry a wallet card that describes what they should do if an emergency occurs. If an emergency occurs, employees are instructed to: (1) notify the franchisor's public relations department, (2) notify the franchisee company representative, and (3) notify the franchisor's regional representative. The wallet card also details which types of events should be considered an emergency and immediately be reported, including a natural disaster, guest death, bomb threat, armed robbery, rape or sexual assault, or any incident related to a celebrity or public figure. The goal is to ensure that crises are reported to the franchisor in a timely manner so that they can be monitored and managed.

Identifying potential crisis risks: To be prepared for a crisis, franchisors should constantly assess the potential risks faced by the franchise system, identifying potential sources of crisis. Crises can be triggered by a myriad of sources. From within the franchise system, actions of the franchisor, franchisees, and employees can precipitate a crisis. Outside, customers, competitors, suppliers, and even unrelated third parties can trigger a crisis. The susceptibility of the franchise system to various kinds of risks will depend in large part on the type of business in which it is engaged. It is important to assess the relationships, situations, or events in a particular franchise system that could lead to a potential crisis.

Franchisor: The actions of the franchisor or brand owner can precipitate a crisis on social media. A franchisor can attract ridicule and abuse on social media due to well-intentioned but poorly received marketing promotions. Major brands have gotten themselves in trouble for adopting inappropriate hashtags or using ill-considered humor on social media. Online backlash can be swift and painful. Social media makes it easier than ever for audiences to expose and ridicule franchise missteps, on social media platforms like Twitter and Facebook, and on “news platforms” like Reddit and BuzzFeed. When implementing business decisions or releasing corporate messages, franchisors should consider and prepare for possible social media backlash.

Franchisees: Franchisees can also draw negative social media attention to a brand, whether intentionally, or merely by speaking out and voicing their opinion on an issue wholly unrelated to the brand. In a recent incident, an owner of a Dairy Queen franchise became engaged in a verbal altercation with a customer in which the owner used a racial epithet. Not surprisingly, the issue rapidly went viral in social media. Franchisee risks may not just be customer facing. While not everyone will get along in a franchise system all the time, the brand can be damaged if its members air their dirty laundry in public. Franchisees can damage the value of the franchise system – and their investment in it – if they take to social media with complaints about the franchisor. See page 20, which describes the case where a terminated Shoney’s franchisee posted numerous anonymous social media posts, including posts in which he impersonated a former Shoney’s CEO. The posts included numerous statements later found to be defamatory but which were highly critical of Shoney’s management and cautioned others against entering into a franchise agreement with Shoney’s. Obviously, such communication, if left unchecked, could be highly damaging to franchise sales efforts.

Employees: A crisis can also be triggered when franchisee employees make disparaging comments or engage in unbecoming conduct on social media. If a disgruntled employee makes negative comments about the brand or makes claims of sexual harassment or racial discrimination in the workplace using social media, such comments could draw adverse attention to the brand. Many franchised restaurant chains employing social media-savvy employees have felt the sting of unwanted social media attention after employees have posted photographs or videos of themselves on Facebook and YouTube engaging in unauthorized activities on work premises. For instance, in 2009, a group of Domino’s Pizza employees posted a YouTube video showing them tainting a pizza with bodily fluids. The video quickly went viral, damaging the franchised brand’s reputation and resulting in a marked drop of sales at its restaurants. Similarly, in 2013, an employee of American buffet restaurant chain Golden Corral posted pictures and video on social media which showed unsanitary conditions in a Florida restaurant’s kitchen. While the online actions of such employees are distinct from those of the franchisee or franchisor, and may result in discipline for the individual employee, the franchisor must be prepared to respond to such events using social media.

Suppliers: A crisis could arise out of the acts of a franchisor's suppliers. For instance, a restaurant franchise could be adversely impacted if it inadvertently purchases tainted meat or vegetables from a supplier on which it relies. In 2015, Chipotle faced an outbreak of E. coli, likely connected to contamination by a food supplier, which had a major impact on the restaurant chain's sales and consumer goodwill.

Customers: Customers also have the potential to wreak major havoc via social media. Users who have found that traditional customer service options do not offer adequate or timely responses, often turn to social media to voice their displeasure. Customers frequently use social media to complain about poor service, long wait times, sustainability practices, or even the political affiliations of the brand's leaders. In some instances, customer commentary is actually encouraged by the franchisor's social media accounts, which invite customers to tweet, post and otherwise share their experience with their brand. The potential for online media to go "viral" means that a customer complaint about one unit of the franchisor can be quickly seen by a large number of individuals worldwide, impacting the entire franchise system. Franchisors who invite customer participation on their social media accounts must do so knowing that they have imposed on themselves the onus to monitor and respond to the customers' comments.

Competitors: Social media platforms offer a quick, inexpensive method of promoting one's brand and standing out amongst one's rivals. Yet, advertising ethics and guidelines get shorter shrift from companies marketing on social media as opposed to through traditional advertising media. Franchisors should be on guard against potential attacks by their competitors using social media.

Unrelated third parties: A franchise system can also face a crisis due to the unforeseen acts of third parties. Hackers, criminals, and terrorists can all pose enormous risk to a franchise brand. For instance, when terrorists attacked a well-known branded hotel in Islamabad, Pakistan in September 2008, social media was rife with speculation that American chain hotels abroad could become terrorist targets. Faced with tragedy, the hotel chain's reputation for quality and safety came under attack. Data breaches by hackers have also become an enormous threat to franchise brands. Retail-based companies should be particularly attuned to this risk in the wake of massive hacks experienced by Home Depot and Target, who suffered credit card data breaches in 2014. Brand crises can also arise through acts of God, such as natural disaster or disease outbreak.

Developing a crisis response strategy

Crisis situations require franchisors to make quick decisions, often made with limited information and time for reflection. Given the importance to the entire franchise system of responding to a crisis on social media quickly and effectively, franchisors should develop a crisis response strategy in advance.

The importance of being prepared cannot be overstated. The time to prevent a crisis – and the ensuing damage to the franchise brand – is before one occurs. Developing a crisis response strategy helps to ensure that all members of the franchise system are prepared and know what to do if a crisis occurs. One of the most important (and overlooked) aspects of crisis response is coordination between the franchisor and franchisees. Crisis strategies must involve the franchisees and anticipate how to communicate with them about the crisis and social media messaging even if the franchisees' participation is limited to knowing to stay silent and let the franchisor respond.

To be prepared for a potential emergency, franchisors should develop: (i) a crisis response plan; and (ii) a crisis communications plan. First, the crisis response plan is an implementation plan that details the actions to be taken in a crisis and who will take them. It may be helpful to have various plans based on the type of crisis the franchise system is facing (i.e., different responses if it is affected by natural disaster versus an allegation of improper practices by an employee). For instance, a franchised restaurant chain might develop steps to take if there is a crisis relating to contaminated food, including contacting its food suppliers and investigating contamination. Each person on the crisis management team should have roles specifically delegated in advance to avoid wasting time determining responsibilities in the midst of a crisis when time is of the essence.

Second, the crisis communications plan should address how the business will engage: (a) internally with its franchisees and employees and (b) externally with its customers and other audiences using both traditional and social media. The crisis communications plan should include, where appropriate, basic messages for anticipated types of crises (for instance, how a franchised retailer would respond to a data breach). In crafting the plan, it is useful to consider how social media will be used to connect with various stakeholders. The plan should identify who will be in charge of communicating with the media on behalf of the franchisor and franchisees and delegate responsibilities for handling media requests. The plan should also identify the franchise system's leaders who need to be reached during a crisis and establish a system for communicating internally between franchisors and franchisees. It will save time in a crisis if the plan includes the contact information of: (1) the franchisor and key crisis management personnel; (2) crisis management advisors, including public relations or crisis communications firms if retained; (3) key suppliers; (4) franchisees or principals; (5) relevant government agencies; and (6) key press contacts. Flexibility is key when developing a crisis response plan. If plans are too detailed or fixed, this can hamper the ability of the business to respond to events as they develop.

RESPONDING TO A CRISIS

So, a franchise system is facing a crisis. What next? Despite the best efforts of a franchise system at planning and prevention, disaster can hit at any time. Effective crisis management includes containing the damage, investigating the cause, resolving the issue, protecting the brand, and managing communications. Below, we detail some best practices for responding to a crisis on social media.

Note that this presumes that the franchisor's brand is truly at risk of damage due to a social media crisis. Some social media events (not in the category of a "crisis") do not necessarily require a response, and simply put, silence can be the best strategy. For example, the seemingly casual and informal nature of Twitter exchanges has lent itself to some franchise systems taking humorous jabs at competitive systems. Responding to every such tweet would not only be time consuming, but may also lead to a protracted back-and-forth discussion, with no clear way to end the conversation. One such recent joust between Wendy's and Hardee's comparing a promotion that both restaurant systems were running, led to a protracted exchange that ended with Wendy's triumphantly tweeting "lol They blocked us". The conversation was then reported by several news outlets, with the angle that Wendy's "won" the joust. Hardees would likely have been better off not responding in the first place.

Establish a solid social media presence ahead of time. The best preparation for a crisis is to establish a strong social media presence well ahead of time. Franchisors should promote their brands and cultivate active communities on all current social media platforms (*i.e.*, Twitter, Facebook, Instagram, YouTube, Snapchat). As new platforms emerge, franchisors must be prepared to adapt their messages and cultivate new ways of reaching their audiences. Having an independent voice on social media can teach franchisors the most effective means of interacting with the social web and the appropriate tone to use when communicating with their online audiences.

Don't overreact. While franchisors may be tempted to go on the defensive to protect their brand online, it is important to respond proportionately to the crisis. Cooler heads will always prevail!

Respond quickly. When facing a crisis, franchisors are expected to respond quickly via social media, if only to say that the business is investigating and will provide further information. Do not "wait and see how bad it gets" before engaging on social media! A reactionary approach is likely to mean that a message or post may have been seen by millions of viewers online before the franchisor has chosen to respond. Social media users expect near instant feedback; they will notice if there is a lag in responding to them via Facebook, Twitter, or other forms of social media, and this in itself could reflect poorly on the brand. Be the first to respond to criticisms and continuously make statements via social media; this is the chance to control the message that the public hears. If used correctly, social media provides an opportunity to respond quickly and deescalate customer concerns.

Communicate the message through multiple platforms. When responding to a crisis, it is important to deliver the message through a variety of online media, including both conventional corporate websites as well as through social media platforms as the audiences for these media are different. Journalists are likely to look at the corporate website first for information, news, and press releases; but don't assume that simply posting a press release on the website is enough. After responding on official platforms, extend the response to other social media (*i.e.*, Twitter, Facebook, YouTube, or wherever customers are most likely to look). Continue to release information via the specific platform on which discussion about the crisis is taking place. If questions arise, refer the audience to an online hub (likely a corporate website) for additional

information. Messaging should be consistent across all online and social media platforms.

Respond to complaints with offers of help. If negative content about the brand appears online, franchisors can either ignore the comment, delete it, or respond directly to it. A common error is ignoring or deleting customer complaints. Unless a complaint is profanity-laced or inappropriate, the best practice is usually to leave up complaint posts and address them immediately. Responding swiftly, calmly, and politely to complaints on social media can help to avert potential crises. An irate customer can often be soothed by good customer service, namely a sincere apology and a gracious offer to help. Consider using some form of message like, “We’re sorry you had a bad experience with our product / service. Please send us a private message so that we can help you to resolve this problem.” Remember that the response will be seen by a larger audience than simply the customer who initially posted the complaint. By engaging positively and constructively with complaints on social media, a franchisor can demonstrate that it values customer service. Suppress the temptation to post fake positive comments in response to negative complaints and reviews. In addition to being a potential deceptive trade practice under the *Federal Trade Commission Act*, the business risks being publicly exposed as promoting “fake news.”

Take it Offline. A very common strategy employed by businesses who find themselves subject to critical comments online is to invite the complainant to contact the business directly. Otherwise, all correspondence is aired in the same forum. If the business has a relationship with the customer and has alternate contact information, they could, if warranted in the circumstances, contact the customer directly offline to resolve the issue. In such case, however, the business should also respond online saying that they will contact him or her directly, to demonstrate that they have not ignored the complaint.

Use an appropriate tone. The weight and tone of the language used on social media is often as important as the information actually conveyed. If consistent with the brand’s identity, humor is often an effective means of communication via informal social media. For example, if a brand engages in a Twitter joust with a competitor, using formal, corporate language would no doubt be subject to merciless mockery by the competitor. Responding in kind requires the adoption of an informal, casual tone. If that is not consistent with the brand image, then the better response is no response at all.

Speaking in a personal voice – rather than a staid “corporate” tone – can establish rapport with social media audiences, and using a corporate tone can have exactly the opposite effect: The recent United Airlines social media disaster (spawned by a viral video which showed a senior citizen being forcibly removed from his airline seat then dragged, bloodied and dazed, down the aisle) was significantly exacerbated by the airline’s CEO use of “corporate speak” in his statement about the incident. His reference to the customer having been “re-accommodated” led to a social media firestorm of memes and videos parodying the use of the word in violent situations.

When responding to a crisis, however, it is important to communicate in a way that demonstrates that the brand owner understands the gravity of the situation it faces. The tone of communications, on social media and otherwise, should be simple, honest and

straightforward. If spokesperson does not know the answer, they should endeavor to investigate to find out the answer and report back. To establish a reputation for integrity, it is important to actually follow through on promises to find out the answer to questions posed.

Keep listening. Throughout the crisis, continually monitor social media accounts and respond as quickly as possible. If not already in place, it may be helpful to set up alert systems to monitor key social media like Facebook, Twitter and YouTube.

Choose the spokesperson carefully. In times of crisis, identify a spokesperson early or the media will nominate their own. The designated spokesperson has a great deal of responsibility in establishing and maintaining a good relationship with the trust of the media and the public. Ideally, the spokesperson should receive media training with a communications professional. As the crisis unfolds, make sure the spokesperson has the most up-to-date factual information, including about the franchise system's response and its engagement with stakeholders. It is often best to designate a single spokesperson, ideally a leader or executive of the franchisor, who can act as the public face of the company (the more significant the crisis, the more senior the spokesperson should be). It is generally inadvisable to rely on a third party (such as a publicist) to speak on behalf of the business as they could be perceived as lacking skin in the game. When selecting a spokesperson, consider choosing the executive officer whose job title most aligns to the crisis event (*i.e.*, in the case of a food contamination issue, the spokesperson could be the Vice President of Suppliers).

Consider whether the franchisor or the franchisees should respond. Weigh the pros and cons of managing the message at the franchisor's head office versus allowing the franchisees to speak on an issue locally. Under many franchise agreements, the franchisor reserves the right to decide whether the franchisor or the franchisee will handle the crisis. If not currently included in the franchise agreement, consider adding a "crisis control provision" that clearly outlines the franchisor's expectations in the event of a crisis to help clarify this right. In the case of a major crisis, the franchisor often prefers to have its chief executive communicating directly with the media at the beginning of a crisis event to instill confidence and to reflect that the company understands the magnitude of the crisis. In the case of a crisis which affects the brand as a whole, franchisees often will not have the qualifications, platform, or resources to properly comment. On the other hand, it might be more beneficial for the franchisor to delegate crisis management to a local franchisee when the issue does not necessarily affect the brand as a whole. If the crisis is limited to a single franchisee's business, allowing the franchisee to manage communications can help to contain the matter (and media coverage) to a local, franchise-unit level. Nonetheless, franchisors may wish to reserve the right to give final approval on the franchisee's communications, allowing it to exercise some control over the messaging.

Stay on message. When managing a crisis situation, it is imperative that a consistent message is provided across the franchise system. Ensure that franchisors, franchisees, and employees are all "on message" when asked for information by implementing a strong internal system to communicate across the franchise system. The franchisor should provide franchisees with simple responses to media inquiries. For instance, "I

can't answer that question but this is the franchisor team member who can and here is their contact information." Providing basic media training and standard responses will help to keep the entire franchise system on message during a crisis. Even if a crisis is being handled at a local level by a single franchisee, it is important that the message they are delivering is consistent with that which is being provided by the franchise system as a whole. Conflicting messaging suggests disorganization within the franchise system and can damage the business brand.

Learn from past mistakes. After a crisis is over, it is important to reflect on the experience of a social media crisis and consider what lessons can be learned. To the extent that the franchise system has previously experienced a social media crisis, it is valuable to review this experience, considering how the communications response could have been improved and whether reforming the social media strategy would be advantageous going forward.

WHEN TO ESCALATE

For many brand-related issues in social media, legal action is not the solution, and often not even an option. However, in some cases, the brand owner is left with no alternative but to take some type of legal action. This section considers when to respond to a social media event with litigation, and what options exist prior to reaching that point.

Many potentially brand damaging social media events are best addressed from a customer service or public relations perspective. Social media makes it extremely easy for naysayers to share negative online comment about franchised brands. Unsatisfied customers, for instance, may make outlandish and untrue statements about the brand. Feeling that their brand is under attack, it can be extremely tempting for franchisors to pursue legal action – commonly in the form of cease and desist letters or defamation law suits – against their social media attackers. Franchisors, however, should weigh the pros and cons of pursuing legal action before doing so. Consider how the brand will be portrayed once it takes legal action. If not undertaken carefully, legal action taken with the goal of preserving the brand can have exactly the opposite effect by creating negative publicity. In Canada, beer producer Labatt discovered this when it took legal action to have the Montreal Gazette newspaper remove a photograph of a serial killer holding a bottle of Labatt Blue, one of its brands. When a prominent Canadian journalist heard about Labatt's actions, he launched a Twitter firestorm making fun of Labatt. In doing so, the Gazette picture was circulated far more widely than had Labatt taken no action at all.

In determining whether legal action is appropriate, it is important to consider the source of the attack. Lawsuits against customers are generally perceived unfavorably. Increasingly, many companies include "non-disparagement clauses" in their sales contracts. Such clauses –which often state something like, "your acceptance of this sales contract prohibits you from taking any action that negatively impacts the brand, its reputation, products, services, management or employees" – generally include a requirement that the customer pay liquidated damages if he or she breaches this obligation. Franchisors may be tempted to enforce such "non-disparagement clauses" by pursuing legal action against a customer who has made an online complaint or post

negative reviews on social media. Doing so tends to backfire publicly. A number of businesses have recently come under fire for pursuing legal action against customers who posted negative online reviews. After posting a negative review about a company which failed to deliver his Christmas gifts, one Utah resident was shocked to learn that the company was suing him for breach of a non-disparagement clause in his purchase agreement if his post was not taken down immediately. Similarly, a hotel in upstate New York came under scrutiny after it sued a newlywed couple who had posted a negative online review after an unsatisfying honeymoon stay. Suing or threatening to sue a customer or member of the general public can project an image of being harsh and unaccountable (and is now illegal in the United States – see the discussion of the Consumer Review Fairness Act in Part I). It will almost certainly invite more backlash and even unwanted media scrutiny than the initial online complaint.

Even with intellectual property infringement, legal action still may not be the best recourse. For example, when conduct within social media constitutes some form of intellectual property infringement, in many instances the first step should be to contact the infringer, either directly through the platform, or by traditional means of communication if contact information is available. Occasionally, infringement is inadvertent, and a polite request to the infringer will resolve the issue without need for further legal action.

As a further alternative to formal legal action, consider whether it would be worthwhile involving the social media platform itself with a complaint. While it is the general rule that social media platforms do not want to become involved in disputes between users, including commercial users and customers or competitors, in appropriate circumstances, the brand owner/franchisor may have recourse directly with the social media platform.

- **Check the terms of use.** Social media platform terms of use generally prohibit users from engaging in illegal conduct, including acts that constitute intellectual property infringement, libel, are malicious, misleading or discriminatory, involve nudity, and incite violence, among other prohibitions. A platform may remove content if it is convinced it that its terms of use have been violated. A useful example of this for franchisors is TripAdvisor’s policy prohibiting content that it believes contains “profanity, threats, prejudiced comments, hate speech, sexually explicit language, or other content that is not appropriate for our community.” TripAdvisor will require reviewers to resubmit material it deems overly inflammatory, which will often result in a less damaging review, or no review at all. Often times, there exist anonymous reporting tools to assist in removing exceptionally offensive material. Once flagged, the material will be reviewed by the platform and may be removed without further effort from the complainant.
- **Misuse of trade-marks and other IP.** Most, if not all platforms, have mechanisms in place to remove copyright infringing content. If the objectionable content contains copyrighted material, and is not a fair use, the copyright owner may demand the platform remove the content by notifying the designated agent for notice and takedown pursuant to the safe harbor

provisions of the Digital Millennium Copyright Act.²⁴ The agent is usually identified in the site terms of use. Whether a platform will assist in cases of trademark infringement is less certain. Many of the larger platforms, such as Facebook, will also review claims that user names, profiles or content infringe trademark rights but they are more reticent to intercede except in clear cases of trademark infringement. Use of company trademarks by consumers as user names for “gripe sites” will often be tolerated by the platform and viewed as free speech.

- **Misleading User Names.** Platforms often have a separate policy from the IP policy regarding misleading user names. Often this is referred to as impersonation. If a third party adopts a user name that consists of a trademark or other known entity name, it may violate the impersonation policy if that user is attempting to pass the social media account off as that of the company or one authorized by the company, especially if such use is for purposes of competition or appears to be in furtherance of a fraud.

In some circumstances, however, a brand owner has no option but to take legal action. An example is if one party engages in a campaign of posting multiple defamatory statements across a number of platforms. In such cases, fighting fire with fire is not only unlikely to be successful, it will also be time consuming. In the recent case of *Shoney’s North America, LLC v. Edward Ray Bay*²⁵, the franchisor successfully sued a former franchisee for posting a number of false and defamatory statements on a variety of social media channels.²⁶ The franchisee created a website to express his dissatisfaction, and posted several online comments in a manner that represented that there were multiple former franchisees who were equally dissatisfied with the franchisor. The franchisee also created an alter ego and used YouTube and Facebook to post negative comments about both the franchisor and specific individuals on the management team, using terms such as “crook”, “liar” and “snake oil salesman”. The court ordered all of the statements to be removed, and permanently enjoined the former franchisee from re-posting them anywhere.

If choosing to pursue legal action against a complaining customer or competitor, always assume that any materials sent to the affected party will be made public online. Once a cease-and-desist letter is sent to an online attacker, there is no guarantee that they will not return to social media to share (and mock) the letter. In fact, the sender should assume that the letter will be shared online, and draft the letter with that in mind, using appropriate tone, and avoiding the appearance of being overbearing, threatening or high-handed. In 2013, Ferrero, the maker of Nutella chocolate spread, attracted negative attention after a consumer published a cease-and-desist letter from Ferrero’s

²⁴ 17 U.S.C. §512

²⁵ *Shoney’s North America, LLC v. Edward Ray Bay* (2017), United States Bankruptcy Court, Southern District of Indiana, 15-59014.

²⁶ The authors gratefully thank Mark S. VanderBroek for bringing this unpublished case to their attention.

legal counsel on her blog. The letter demanded that the consumer stop promoting a self-invented holiday, “World Nutella Day.” Ferrero was seen as ungrateful for demanding that a fan stop giving it free publicity and its actions were widely mocked on Facebook and Twitter. Ferrero was ultimately forced to back down and – much to the relief of chocolate lovers everywhere – World Nutella Day lives on. The lesson to be learned is that, when initiating any legal action, franchisors should be cautious in the language and tone of the materials sent out. Be specific when outlining the facts justifying the decision to pursue legal action and consider how the decision could be perceived by the public.

Even if opting to pursue legal remedies, incidents with potential to damage the brand require more than legal action; they may require public statements from franchise system management. Before engaging a law firm or pursuing litigation, consider engaging a public relations consultant to help manage a communications crisis. Public relations professionals can help develop key messages during the crisis event, discuss how to deliver such messages in the most effective manner, review strategies to keep the franchise system “on message”, and rehearse key messages with designated spokespeople. Communications firms generally have extensive experience helping companies manage crises and can provide independent insight into what is likely to be effective in a given situation.

CONCLUSION

Social media platforms present brand owners, critics, competitors and customers with an unprecedented myriad of channels of communicating with each other, worldwide and in real time. The possibility of the instant communication of text, pictures and video (including live video) among hundreds of thousands, if not millions, of users presents opportunities that were laughably unrealistic even five years ago.

Of course, with those opportunities come commensurate challenges for brand owners. A brand owner cannot protect a brand in the social media maelstrom on a reactionary or ad-hoc basis. A brand owner must create a social media strategy that contemplates events from a single negative comment to a full-blown crisis. The strategy must also provide for flexibility and developments in social media offerings (e.g., sharing live video). Even if a brand owner elects not to actively participate in social media initiatives, it still must have a social media strategy that sets out that position, and also considers how to respond if the brand owner is unwillingly dragged into the fray and has no choice but to engage. No franchisor would do business without an insurance policy in place, and a well-considered and comprehensive social media strategy can be the best insurance policy a franchisor can have to protect its brand and reputation in the social media world.