



IP* Mistakes from the Start-Up's Perspective – and How to Avoid Them



Presentation for Brand Camp Boston

October 4, 2011

Paul G. Sweeney

Alexander J. Aber

* (And Other Legal Concerns with Social Media and Branding)

Social and Interactive Media Clients



keep watching.



Overview

- Platform Differences?
- Content Ownership
- Intellectual Property Infringement
- Online Policies
- Defamation
- False Advertising/FTC Blogger Rules

Platform Differences?

- Trick Question: Existing laws apply equally to online and offline conduct – platform does not matter
 - If you defame someone online, you can be liable in the same manner as if you defamed them in traditional media
 - Ditto for intellectual property infringement and misappropriation
- Don't Forget: Just because you see people engaged in certain conduct online or in social media does not mean it is legal
- *Respondeat Superior* applies to tweets!

Content Ownership

- All employees and service providers should assign intellectual property rights to the Company by contract
- Be wary of “moonlighting” consultants and their obligations to existing employers
- You don’t need to register your © works with the US Copyright Office in order to enjoy copyright protection

Intellectual Property Infringement

- Use copyrighted works only with a proper license
 - Willful Infringement: triple damages and attorneys' fees
 - Generally no liability for re-tweeting a copyrighted image
- Creative Commons (www.creativecommons.org)
 - Images and Works are still subject to license terms
- Right of Publicity: Even if you have a license to display an image, you may also need consent from the subject of the image
- Unauthorized Use of Trademarks: References to company name versus use of TM or logo
- Fair Use may be a defense

Online Policies

- Terms of Use and other policies should be carefully considered
 - Site policies are contracts
 - Potential liability to Hosted Site for breach of representations and warranties in contract
 - Note differences in ownership rights and license grants under *LinkedIn v. Twitter*
 - Self-Hosted sites should adopt suitable policies

- Digital Millennium Copyright Act
 - Take-down policy should be explicit and followed faithfully
 - Don't forget to register the DMCA Agent with the US Copyright Office

- Generally no liability for statements made by “Commenters”

Defamation

- Slander/Libel – subsets of defamation

- Elements
 - Statement of fact (not opinion)
 - Causes harm/damages
 - Relates to a living person or entity/thing (recall the Oprah case and her comments about beef)
 - Substantially false
 - Fault – public v. private person
 - ** Truth is a defense

False Advertising/FTC Blogger Rules

- Blogger must disclose any benefits received in exchange for promotion
- Blogger and advertiser can be liable



Questions?

Paul Sweeney

(617) 832-1296

psweeney@foleyhoag.com

Alex Aber

(617) 832-3028

aaber@foleyhoag.com

These materials have been prepared solely for educational purposes. The presentation of these materials does not establish any form of attorney-client relationship with the authors or Foley Hoag LLP. Specific legal issues should be addressed through consultation with your own counsel, not by reliance on this presentation or these materials. Attorney Advertising. Prior results do not guarantee a similar outcome. © Foley Hoag LLP 2011