

BY KEITH D. KLEIN

Practical Advice for Using Social Media

THE ONSET OF SOCIAL MEDIA MAY have taken some by surprise, and others may have written off its arrival anticipating an equally quick departure. Whichever it may be, social media is not a passing fad and should be recognized as an integral part of marketing. Franchise systems experience special challenges when pursuing a social media presence and should consider the following:

1) Establish a protocol. Most social media websites enable participation by companies that register a subdomain (e.g., www.socialmedia.com/brand). Social media websites, however, are already a crowded space for brands, with multiple companies regularly battling for subdomains on a particular website. The situation is more complex for franchisors, who are expected to establish a social media presence for themselves, and also enable franchisees to do the same. Franchise systems should therefore include a protocol by which each franchisee can establish a unique identity within the social media marketing effort.

For example, a New York City franchisee offers a discount to the first 50 customers who respond to a Twitter post. With 30 franchised locations in Manhattan, consumers may be unable to determine the locations extending the offer. This may result in frustrated consumers responding to tweets at non-participating locations and disputes between neighboring franchisees.

A requirement that social media posts identify the participating locations sounds like a solution, but may not be feasible on sites such as Twitter where precious few characters (140) are permitted. The issue can be more effectively addressed by establishing a protocol for each franchisee's social media subdomain (e.g., www.socialmedia.com/brandcityintersection).

2) Understand laws applicable to social media. Understanding the legal issues around social media is imperative to participating in the process, particularly for those seeking to incorporate social media platforms on their own websites.

Two federal laws protect social media platforms from liability for third-party misconduct. The Digital Millennium Copyright Act affords immunity to qualified websites for copyright infringement by third parties. To qualify for protection, a company must be an Internet service provider, meaning any company that provides an online service, such as a website, discussion forum, etc. A website also must "not receive a financial benefit directly attributable to the infringing activity" and it must not have knowledge that it is hosting the infringing material. Franchisors should not be discouraged by the "financial benefit" condition for immunity; solutions exist to address this issue.

Once qualified, a website must take measures to avoid publishing content infringing on intellectual property of third parties. Most important, the website must identify a designated agent to receive "takedown notices" and must expeditiously comply with such notices.

The Communications Decency Act (CDA) also affords protection to social media websites. The CDA effectively shields most social media websites from liability for torts committed by others, even if the provider fails to take action after receiving notice of the harmful content. The CDA is not all-encompassing, however, because liability may still attach depending on the nature of the post and the relationship with the publisher.

In addition to these protections, Congress has imposed obligations on websites. The Children's Online Privacy Protection Act requires that websites targeting children under 13 years old disclose

what responsibilities they have to protect children's privacy and safety online, including seeking verifiable consent from a parent. And the Child Protection and Sexual Predator Act of 1998 requires that when websites become aware of potential child pornography on their site, they must report this information to the National Center for Missing and Exploited Children.

3) Establish policies for posting by franchisees. With a social media platform launched, the next hurdle involves effectively managing its content. Social media postings by franchisees in particular have increasingly become a hotbed of controversy.

To address this issue, the FTC promulgated "Guidelines Concerning the Use of Endorsements and Testimonials in Advertising," which focuses on the use of "endorsements" and requires disclosure of "material connections" between advertisers and endorsers. The scope of the guidelines expressly includes messages conveyed by bloggers or other "word-of-mouth" marketers.

Social media policies should explain these provisions to franchisees. In general, the best practice is simply to prohibit postings that fail to disclose the affiliation of the publisher to the brand.

4) Establish policies to retain social media subdomains. Maintaining control over franchisee social media subdomains is important, particularly in the event of termination. Amending the marketing manual to require transfer of social media subdomains will save the system substantial expense.

Social media appears to be here to stay. Franchise systems are best served by getting ahead of the associated legal issues instead of just hoping they go away. ■

Keith D. Klein is a partner at Bryan Cave LLP in Santa Monica, Calif. He is certified by the California Board of Legal Specialization as a specialist in franchise and distribution law. Contact him at keith.klein@bryancave.com or 310-576-2159.