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Social media is quickly becoming one of the most significant marketing, advertising and promotional channels for the hospitality industry. Recognized as a way to connect with guests on a level that is, on the one hand, highly personal, yet on the other, undeniably public, advertising and public relations departments at both the corporate and the property levels are moving quickly to leverage a host of emerging opportunities.

Unfortunately, from a risk-management and legal perspective, social media public relations, marketing and advertising efforts frequently present legal risks that are not always fully appreciated either by managers and directors, or those charged at the operations level with implementing the plans.

The potential risks

The potential legal risks are wide-ranging and cover areas such as trademarks and copyrights, rights of publicity and privacy, data security, labor and employment issues, and the like. They also include compliance with the rules and regulations of state and federal agencies, such as the Federal Trade Commission.

Other areas of concern include the terms of use of the various social media outlets, the handling of user-generated content and strategic decisions about monitoring comments and intellectual property usage.

Finally, all of this is further complicated by the global operations of the industry, as well as the global availability of posted content. As a result, there oftentimes needs to be sensitivity to European Union regulations, such as the EU directive on data-privacy.

Also, we can't forget policies relating to online employee activities, in general. For example, in September the acting General Counsel for the National Labor Relations Board issued guidance on disciplining employees for activity in social media. Given the significant number of issues raised by promotion, marketing and advertising, these employee-type issues will not be discussed further.

Unfortunately, this is one area where the involvement of the legal department often trails the activities of the marketing department. That said, there is no reason not to proactively review the avenues of social media and begin the process of developing guidelines to mitigate risk.

Mitigating risk

Within the industry, Facebook, Twitter, Flickr and comment-ready travel sites, such as TripAdvisor, remain the dominant outlets. Also significant are outlets such as YouTube, with many properties and cruise lines maintaining "channels."

Fundamentally, a significant number of arising issues are no different than they are in traditional advertising mediums and require nothing more than policy tweaking. For

example, most brand owners already have in place guidelines regarding proper use of trademarks. While adherence to these guidelines is essentially the same on a Facebook page as they are in a print advertisement, how well do the same guidelines work when you are restricted to Twitter's 140 characters? Do you use three bits of valuable real estate to indicate that your trademark is "(r)?" Is legal comfortable with short-handing or abbreviating a trademark to conserve space? What about the use of some or the entire trademark as a Twitter name? For the most part, the way that these questions should be answered is specific to the portfolio and brand names at issue.

Matters that present more novel issues relate to the almost real-time nature of social media marketing, advertising and promotion. When thinking about traditional advertising outlets, the creation of advertising includes, among other things, securing the appropriate releases from any talent included in the advertising. But what about an employee at a local property photographing guests with a smartphone and Tweeting the image, posting it on the property's Facebook page and adding it to a Flickr album? Do these activities require securing a release and permission? What if there are minors in the picture? Even more challenging, what if the person in the picture has some modicum of fame and is able to invoke the protections of the various state rights of publicity laws? And let's also consider the risk that the person is having a great time somewhere they are either not supposed to be or with someone they are not supposed to be with. While adherence to proper legal guidelines in these areas, including securing releases, might slow down the desired real-time nature of on-line marketing activities, adherence to such policies oftentimes constitutes best practices.

Another issue that highlights the various legal risks relates to the relationship with a new species of traveler—the "travel blogger." It is not unheard of for properties to take "special care" of recognized and influential travel bloggers. It is similarly not unheard of for properties to look to the content of these bloggers and republish or re-transmit the same. Yet such activities, if not properly disclosed, run the risk of running afoul of the Federal Trade Commission guidelines for endorsements.

In essence, these revised guidelines clarify what is meant by an endorsement and further revise when "material connections" between an advertiser and endorser must be disclosed. Under these guidelines, an endorsement is "any advertising message ... that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser ..." Under these same revisions, there is also a list of non-exclusive factors to consider to determine "sponsorship," e.g., (1) whether speaker is compensated by advertiser; (2) whether a product or service was provided for free by advertiser; (3) terms of any agreement between speaker and advertiser; (4) length of relationship; (5) prior receipt of products from advertisers; (6) likelihood of future receipt of products; and (7) value of items or services received from advertiser. Finally, where sponsorship is present, material connections between the advertisers and endorsers must be disclosed.

As can be seen from the wide array of legal issues implicated by hospitality use of social media for advertising, marketing and promotion, the development of internal guidelines is a critical step to guide the marketing and PR professionals. Among the minimum areas that should be covered in such a policy are:

- proper use of company intellectual property;
- acceptable outlets (i.e. Facebook and Twitter are OK, but only specific personnel will respond to negative comments on TripAdvisor);

- use of corporate assets versus personal assets;
- the preservation of content for legal and regulatory purposes;
- responding to unsolicited ideas or objectionable content on company promoted sites;
- compliance with relevant labor laws, such as being careful to avoid interfering with employee protected speech;
- the necessity for releases under appropriate circumstances;
- understanding of and adherence to terms and conditions of third-party sites (i.e. the difference between the Facebook and Twitter contest rules);
- blogger policies and celebrity endorsements.

The hospitality industry is beginning to fully grasp the power of social media to make deep and personal connections with guests and prospective guests. It is critical to put policies in place, and guidelines for adherence to these policies, that will help avoid these efforts giving rise to legal exposure.

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