Insights: Alerts

5 Key Takeaways: Retail & Consumer Goods Industry Team Presentation “In the Trenches with Social Media”

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Kilpatrick Townsend's Retail & Consumer Goods Team presented a webinar **In the Trenches with Social Media**, focusing on risk mitigation and solutions. Led by **Barry M. Benjamin**, partner in the firm's New York office and chair of the Advertising & Marketing group, the webinar discussed various legal risks when a company engages with social media.

Mr. Benjamin previously spoke on a panel on similar social media issues at the 2016 INTA Leadership conference, and lessons learned from that can be found here. Takeaways from this recent webinar include:

- Legally, brand advertisers benefit from a lower level of First Amendment protected speech than individuals or media companies, and thus the ability to converse on social media about issues of the day is limited. It must be recognized that liability can arise from many situations when a company comments on an issue or speaks to other brands or celebrities on social media, whereas an individual posting the exact same thing would not face any liability. Brand advertising companies that sell goods and services that are not media companies need to take special care when participating on social media.

- Among the biggest threats to companies is social media engagement with celebrities, who are highly protective of their right of publicity. Celebrities' ability to maximize the value of their status may be reduced by a company that tries to associate itself with the celebrity, without consent and without paying the celebrity. Celebrity status can be fleeting, and the licensing or revenue opportunities can be limited - companies should not “dam a celebrity's revenue stream” by reducing their ability to sell their official endorsement. If a company does post about a celebrity without consent, even if the celebrity is in the current news cycle, the celebrity could assert that the company is only posting about the celebrity to bring attention to the company and enhance the value of the company's brand. Depending on the format or positioning of the company's social media posts, the possibility of a false association or sponsorship claim may be mitigated, but certainly not eliminated.

- Companies should develop social media policies, which senior management have weighed in on and approved, as well as train employees and agencies about what those policies say and require. If someone violates a term in the company's social media policy, the company is in a far better position to respond to a complaint by anyone – government regulator, celebrity, or another party – by saying human error, rather than saying no policy existed in the first place.

- It is not just celebrities that can assert claims. The owners of well-known movies or television programs that

may be referenced or alluded to by an advertiser may also potentially assert intellectual property infringement claims. The parameters of such claims are highly dependent on the circumstances. The use of hashtags and memes are also potential sources of infringement claims, so care must be when using the property of another.

- The FTC actively enforces their Endorsement Guides, and recently sent letters to influencers and endorses questioning whether their social media disclosures were sufficiently in compliance with the Endorsement Guides. Advertisers have active and affirmative obligations to ensure that any material connections they may have with influencers are properly disclosed to social media followers and the public in general.

Social media engagement can be a minefield of legal risk, but in today's environment, it's a necessity. Being aware of regulatory compliance obligations and having policies in place governing the oversight and issuance of social media engagement is the best way to limit legal liability. Being prepared to engage in the trenches of social media before problems arise can ensure that your company does not get bogged down in costly and long-lasting battles when they do.