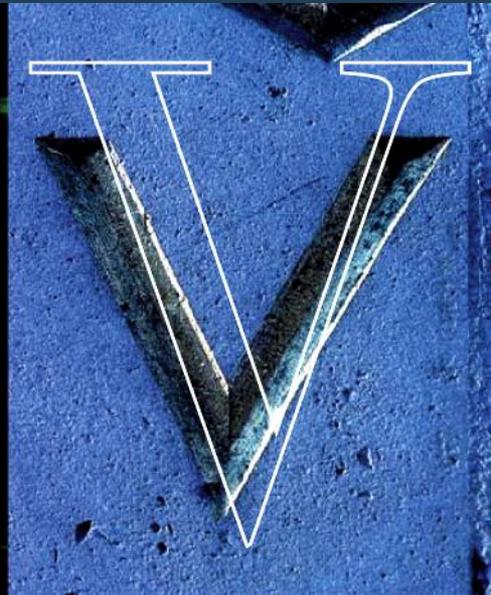
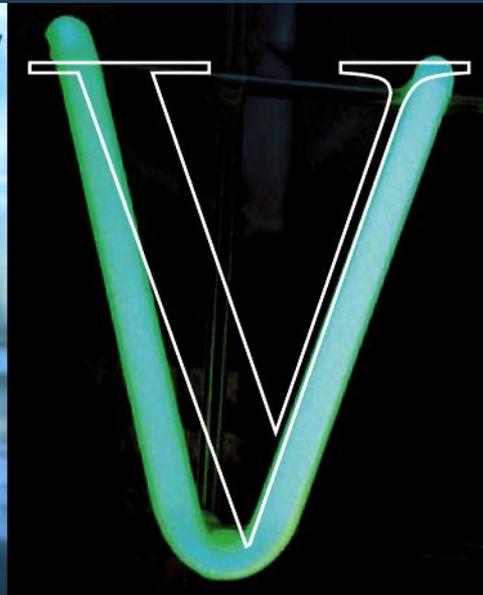
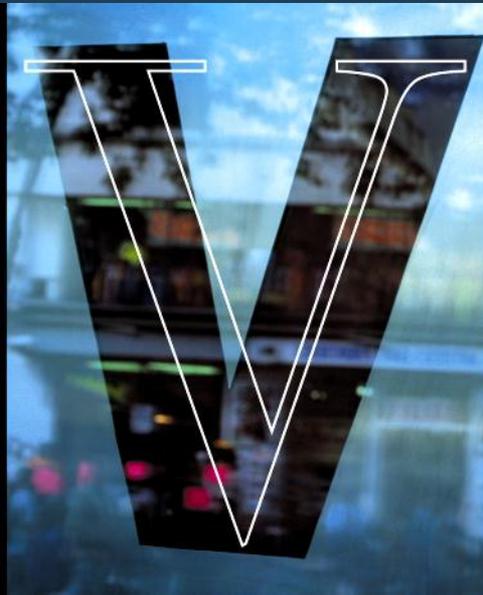
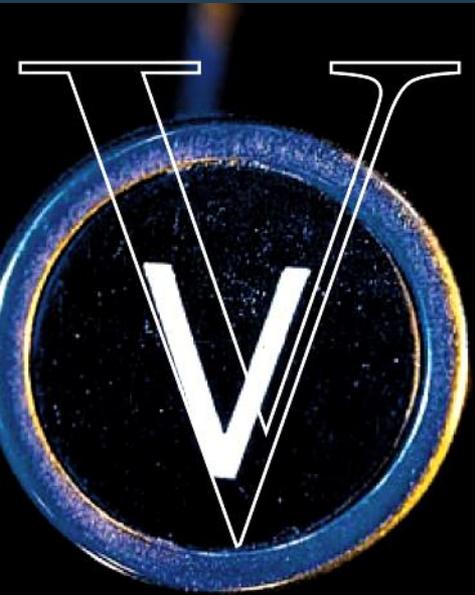


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Effectively Using New Promotional Techniques on Social Media and Mobile Applications Without Violating the Law

January 26, 2012

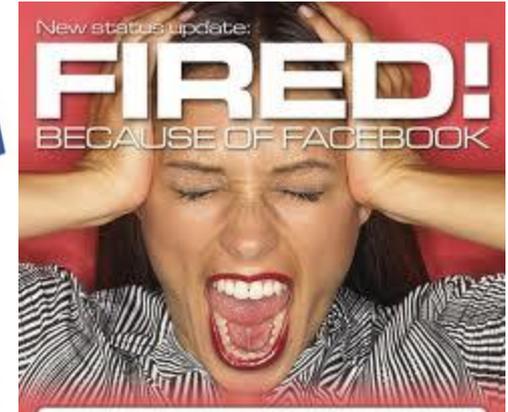
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What's All The Buzz?



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Risks and Benefits of Social Media

Risks Are Significant: Damage to reputation, legal violations, exposure of trade secrets/leaks, forum for complaints, distraction

- **Study** of companies with 1,000 or more employees reported that 17% had issues with employee's use of social media.
 - 8% of respondents fired someone for behavior on SM sites
 - 15% had disciplined for violating sharing/posting policies
 - 13% had investigated an exposure event
 - 17% disciplined an employee for violating blog/board policies
- Promotions gone wrong: United Airlines guitar fiasco; Dominos employee video; #McDstories McDonald's tweets
- Sunk cost arising from dismissed employees, plus potential for litigation/exposure from content that being posted
- ***But there are benefits to social media too:*** exposure; advertising; member networks; collaboration opportunities; real time customer service; interactive contests and promotions; collection of information; etc.



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Creating an “Inner Circle” Site: Feature Ideas and Legal Issues

- Rewards Programs
- Blogger Issues/Comments
- Sweepstakes and Contests
- User-Generated Content and Intellectual Property
- Refer-a-Friend/CAN-SPAM
- Mobile Functions
- Daily Deals and Gift Cards
- Auctions of Special Packages
- Privacy Issues





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Follow Advertising and Promotions Law Principles

- ***Reminder: Basic advertising and promotions law principles apply to all advertising and promotions on social media, as well as any terms and conditions imposed by the specific platform (e.g. Facebook rules for advertising, prize promotions)***
 - ***All*** claims require objective, verifiable substantiation, whether affirmatively communicating about products/services or responding to a question by a user
 - ***Applies to everyone speaking on behalf of company*** (can't use third party to make claims that you could not otherwise make)
 - Some options:
 - Use claims that have already been vetted and approved for other media
 - Refer back to substantiated source/static set of info to ensure consistency



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Rewards Programs Run through Facebook

facebook Search Maura Marcheski Home

Marriott Rewards Like

Travel/Leisure

Create a Page

'Like' us to discover new ways to reward yourself

JW Marriott® Cancun Resort & Spa

POST TO FACEBOOK Tweet

Welcome to the **Marriott Rewards® Facebook Community**

Explore the undiscovered. Experience local treasures. Travel with a mission. How will you use your rewards?

Wall Info Friend Activity Welcome NFL Experience Photos Questions

About
Marriott Rewards is the loyalty program offered by Marriott International....
More

210,644 like this
1,669 talking about this

Autograph Collection

Fairfield Inn & Suites by Marriott

Marriott Jobs and Careers

SpringHill Suites by Marriott

Double your rewards
Invite your friends and family to Marriott Rewards, and when they join, you will double your rewards and earn bonus points!
[Read More](#)

More places to discover
Now you can use your Marriott Rewards points at more than 80 new AC Hotels by Marriott across Spain, Portugal & Italy.
[Read More](#)

Share your story
Join the conversation with Marriott Rewards Insiders. Share your recent travel experience, connect with other travelers or ask a question about Marriott Rewards.
[Read More](#)

Recommended Pages See All
Will Smith Nicole Lagana likes this. Like

Sponsored Story See All
Gail Sullivan likes Fuse Pilates. Fuse Pilates Like

Sponsored See All
Ryan Homes-From the \$190s ryansavings.com
Pine Ridge Crossing: Affordably-priced, new construction townhomes in Anne Arundel County. Just 10 minutes from Downtown Baltimore!

Clip These Discounts
State Farm You don't need to cut coupons to get discounts up to 40% from State Farm®. Just go a Discount Double Check! Get A Quote.

Excellence You Can Trust
Award-winning Mitchell & Best single family homes & townhomes in Howard & Montgomery Counties and single family homes in Loudoun Co.
65 people like Mitchell & Best.

Via Privé Yoga Clothing
You practice yoga, you will love our clothing! Here is a free \$50 gift to you from Via Privé technical yoga wear. GIFT CODE: 201250
1,579 people like Via Privé.



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Rewards Programs Legal Issues

- Not heavily regulated; class actions under consumer protection laws largely unsuccessful
- Terms and conditions governing the rewards program are very important
 - Must reserve right to change the terms
 - Notice?
- Can create tax issues; possible unclaimed property issues
- Collection of information as part of sign-up can trigger privacy concerns → What about CA Song-Beverly Act and similar state laws (e.g., NJ)?
 - Restricts the type of information a retailer can collect at point of sale
 - *NJ Retail Merchants Ass'n v. Sidamon-Eristoff* (2012 Third Cir. decision re NJ stored value card law)
 - Song-Beverly does not apply to online transactions. *Salmonson v. Microsoft*(2012); *Mehrens v. Redbox* (2012).



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Blogging Issues: Endorsements and Testimonials

Are social media posters/commenters and bloggers receiving inducements subject to FTC rules re endorsements and testimonials?

FTC revised Endorsements and Testimonials Guides in 2009 to include examples addressing social media

- Bloggers or other social media marketers who have a relationship with the company about which they are blogging must disclose the relationship
- Entity needs to have policy/procedures to make sure bloggers disclose and monitor compliance
 - So, “influencer” who receives money or in-kind payments, including samples, must disclose relationship
 - Employees blogging on their own time should also disclose their affiliation when talking about the company



“You walk the walk and talk the talk. We need someone who can also blog the blog!”



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Blogger and Marketer Liability

- **Ann Taylor file closing:** FTC closed file when found retailer had policy, showed agency will be reasonable if advertiser has disclosure policy
- **Reverb settlement:** Agency employees posted false blog entries
- **Legacy Learning Systems** settlement: Legacy allegedly paid affiliate marketers to post favorable online reviews of instructional music DVDs that seemed to be from ordinary consumers. Reviews were not accompanied by disclosures
- **Lifestyle Lift:** First state “astroturfing” case; cosmetic surgery case provider fined \$300K by NY AG
- **Hyundai file closing:** Hyundai’s marketing agency gave bloggers gift certificates as an incentive to “include links to Hyundai videos in their posts and/or to comment on . . . forthcoming Super Bowl ads.” File closed because: (a) Hyundai did not know in advance about the incentives, which were offered by employee of Hyundai's marketing agency; and (b) offering an incentive to post about/endorse a Hyundai product was contrary to the social media policies of both Hyundai and its marketing agency
- **How to avoid future liability?**
 - Create a policy that requires employees that provide incentives to bloggers to instruct them to disclose they received compensation
 - Require media or ad agencies to have the same policy
 - Monitor some, if not all, of the bloggers receiving compensation, and notify and/or terminate those in violation



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Are “Likes” Advertisements or Endorsements?

- “Likegating”--*Coastal Contacts (NAD, 2012)*: Free glasses offer in return for liking the products on Facebook; company then publicized the number of “likes”, failed to disclose S&H charges and that not all models were free
- *Cohen et al v. Facebook (2010)*: Class action in state court under California law forbidding knowing use of a minor’s “name, voice, signature, photograph, or likeness, in any manner on or in products, merchandise, goods or services” (Cal. Code §3344) without first obtaining consent from a parent or guardian
 - Alleges Facebook encourages participation of children on site, then markets names and likenesses of children for use by advertisers, representing (without parental consent) that use of name and/or likeness of child as an endorsement can increase returns by 400% over advertising that does not include endorsement or likeness of child



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Legal Issues: Prize Promotions

- Federal and State Laws:
 - Gambling prohibited: cannot have prize, chance and consideration or will have illegal lottery
 - No Purchase Necessary
 - Free Method of Alternative Entry
 - Official Rules and Disclosures
 - How to Enter; “Like Us” for a chance to win
- Requirements of Social Media platforms: Facebook and Twitter rules; Google prohibition
- Special issues for prize promotions for children—COPPA and CARU
- States may require registration and bonding depending on value of prizes
- Privacy issues



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User Generated Content on Social Media

1. Prize Promotion rules/terms of use should include provisions releasing IP rights and limiting liability
 - Limit to only those rights needed—don't overreach
 - How does one obtain the signed, written release required to obtain copyright?
2. Screen and/or regularly review promotion entries, postings and comments.
 - Consider removing posted promotion entries if they pose legal risk
 - BUT, many companies no longer remove negative comments on websites due to backlash ("a screenshot is forever"), address in other ways
3. Consider using disclaimers stating that the sponsor had no hand in producing the user-generated content, and, where appropriate, stating that the content does not reflect the opinions of the sponsor
4. Use other tools such as DMCA policies, CDA to protect against infringing content



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Advertising Litigation: User Generated Content



- **Subway v. Quiznos** (Doctor's Associates, Inc. v. QIP Holder LLC)
 - Quiznos sponsored a nationwide UGC contest where people submitted videos comparing a Quiznos sandwich to a Subway sandwich. To generate interest, Quiznos posted user-generated video examples
 - Subway sued Quiznos for false advertising under the Lanham Act, claiming the examples contained false and misleading statements
 - **Issue:** Whether Quiznos was immune to false advertising claims under Section 230 of the Communications Decency Act for the videos submitted by the contestants
 - Section 230: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."
 - Case settled soon after the court denied Quiznos' motion for summary judgment in February 2010



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Refer-a-Friend Programs Run Via Social Media Platforms

facebook Search

Candybox Marketing · Refer a Friend
Consulting/Business Services · Edit Info

candybox marketing.

Tell your friends and colleagues about us

When they become a customer...

YOU GET
\$25 Gift Card
for Starbucks Coffee

THEY GET
\$25 Gift Card
for Starbucks Coffee

Share the offer...

➔ **Post to wall**

You get your reward once your friend or colleague becomes a customer.

Voucher Details

We will reward our customers a \$25 Starbucks Gift Card when your referral books and pays for our Social Media Workshop. Not valid for cash back. Can't be combined with other offers. There is no limit to the number of people that you can refer and the number of Starbucks Gift Cards that you will receive based on the criteria above.

Wall
Info
Candybox Marketing
Customize a Facebook Page
Refer
Photos
Blog
Links
Refer a Friend
Edit

About Edit

1. People are on the Internet. 2. People spend money on the Internet. 3. Is...
More

652
people like this

Likes See All

Microblogging
Social networks
Facebook
Blogging



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Refer a Friend and Email Components Federal CAN-SPAM Act

- Marketers may be subject to CAN-SPAM if they offer consumers payment or other consideration (coupons, points, discounts, additional sweepstakes entries) to forward a commercial email or provide addresses (but not if the marketer simply provides a means for forwarding or to provide addresses).
- Messages sent via Facebook can be subject to CAN-SPAM: ***Facebook Inc. v. MaxBounty, Inc.***
 - Facebook’s and Twitter’s policies prohibit promotions that offer inducements to “spam” emails (such as refer-a-friend)
- CAN-SPAM Act: commercial e-mail solicitations must include:
 1. Opt-out mechanism (opt-outs must be honored within 10 business days)
 2. Sender’s physical postal address
 3. Disclosure that message is a solicitation (“ADV” in subject line not required)
 - Prohibitions:
 1. False header information
 2. Misleading subject lines
 3. E-mail address harvesting or dictionary attacks
- A message is commercial if its primary purpose is to advertise or promote a commercial product or service (including comment on a commercial website).
 - Messages that are “transactional” in nature, such as those that complete or confirm a transaction, are not subject to CAN-SPAM’s requirements
 - E.g., a text message confirming sign-up for a gaming service is transactional, not commercial



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Mobile Marketing

- KEY → ***express prior authorization*** to receive marketing messages from the sender
- Adequate disclosures with limited space
- Mobile Marketing Regulators:
 - FTC: encourage self-regulation
 - FCC:
 - **CAN-SPAM**: “Mobile service commercial messages” (“MSCM”) is a commercial email sent to an email address referencing the Internet domain of a wireless carrier. The FCC maintains a list of wireless domain names that that can be used to send emails to wireless devices
 - **TCPA**: Prohibition on use of automatic dialing systems or an artificial or prerecorded voice to make commercial calls to wireless devices without the call recipient’s prior consent applies to text messages
 - State Laws
 - Florida AG specific disclosures required; e.g., indicated that price and terms of offer would need to be within 125 pixels of submit field, with other information presented in a minimum font size/color that contrasted with background
 - Industry Associations
 - Mobile Marketing Association Guidelines



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Florida Mobile Marketing AG Actions re “Free”

- ***In the Matter of Cingular Wireless, Inc.*** (Fla. Att’y Gen. Feb. 28, 2008); ***In the Matter of Verizon Wireless, Inc. and Alltel Communications, Inc.*** (Fla. Att’y Gen. June 16, 2008)
 - Settlement with AT&T Mobility over ads involving “free” offers in which AT&T agreed to pay \$2.5 million plus \$10 million in rebates to consumers; requires AT&T to include specific provisions in its agreements with third-party providers that regulate how those third parties market using mobile text messaging and similar mechanisms.
 - Unusual because AT&T is wireless carrier, not advertiser
 - Settlement with Verizon Communications had provisions that were similar to, but even more specific than, AT&T settlement
- ***In the Matter of Azoogleads US, Inc.*** (Fla. Att’y Gen. 2007)
 - Settlement with Azoogle over the company’s Internet ads for “free” ringtones that offer that in fact required that consumers purchase a subscription to \$9.99/month service to obtain; Azoogle agreed to pay \$1 million and prominently disclose the costs of any offer
- FTC and other states have also pursued cases in various contexts over the years against “free” offers, e.g., *Valueclick* settlement (2008) (\$2.9 million settlement with FTC for failing to disclose charges associated with allegedly “free” offer, *Adteractive* (2007)



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Text Messaging Promotions

- Same laws as prize promotions conducted through traditional media, plus unique issues.



Unique Issues

- Text Message as *Consideration*
 - *American Idol/Deal or No Deal Cases*
 - *Hardin v. NBC Universal, Inc. et al*
- Current Thinking
 - Promotions involving standard text messaging charges are probably relatively low risk, but with premium text-messaging promotions, one should offer something of equal value (e.g., free ring-tone, wallpaper, t-shirt) in return for entry.



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Swift v. Zynga Game Network Inc. **(N.D. Cal. Nov. 2010)**

- Zynga, Facebook and Adknowledge named in federal consumer class action suit alleging that third-party advertisers disseminated deceptive ads through Facebook games such as Mafia Wars and Farmville, in violation of CA's Unfair Competition Law (UCL) and Consumers Legal Remedies Act (CLRA)
 - Adknowledge provided ads to Zynga, who then displayed those ads to users of its popular online games
 - Plaintiffs alleged that many of those ads were scams (for example, requiring you to provide your cell phone number and then billing you unauthorized charges via your cell phone bill)
- Defendants moved to dismiss under Section 230 of the Communications Decency Act (CDA), claiming they were merely republishing material provided by a third party
- District Court denied defendants' motion to dismiss in November 2010, in part because the ads were tied to virtual currency that could be used in Zynga's games, and because Zynga was responsible for "the design, layout, and format of the special offers." The Court also reasoned that the offers "appear directly within Zynga's games."
- Introduces uncertainty re: extent of protection for interactive websites under CDA
- Litigation currently stayed while arbitration is sought

Daily Deals



Set-Up

- Paid Value + Promotional Value = Daily Deal
- Ex. Buy 20 min. massage for \$25, with a value of \$100 (75% savings) on 01/26/2012. Promotional value expires on 03/26/2012. Paid value expires 03/26/2017
- Advertise/communicate through various platforms: email, “white-label” sites, social media

Current Events

- Numerous class actions filed against *Groupon* and *Living Social* in February and March 2011
- Class actions have now consolidated.
 - *In re: Groupon, Inc. Marketing and Sales Practices Litigation*, MDL No. 2238 (U.S. Dist. S. Cal.)(15 lawsuits)
 - *In re: LivingSocial Marketing and Sales Practices Litigation*, MDL No. 2254 (US Dist. DC)





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Daily Deals Legal Issues

- Is a Daily Deal certificate a gift card or a coupon?
 - Federal gift card law--CARD Act (2009): Regulations promulgated by Fed Reserve Board extend to electronic transactions and codes; exception for paper certificates
 - State gift card laws: Often no definition of “gift card”; state trading stamp laws may require some cash value for coupons but little else in terms of regulation
- Restrictions on expiration dates/fees
 - CARD Act: Gift cards cannot expire within 5 years from the date they were activated; limitations on fees and requirements for disclosures
 - State laws:
 - No expiration date and/or fees
 - More restrictive date/fee requirements than federal law
 - Less restrictive than federal law (e.g., MD – cannot expire before 4 years)
 - Other variations/requirements such as cash-out, exceptions
- Abandoned Property Principles
 - Is an unused gift card abandoned property?
 - Do gift cards escheat to the state? If so, when?
 - Are there record-keeping requirements (i.e., due diligence)?



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Auctions and Reverse Auctions



- Bid on item; may be asked to pay for each bid (money, points)
- Functions much like a sweepstakes, similar issues, need similar disclosures
- Note: US gaming policy recently relaxed
 - DOJ reversed its position on the applicability of the U.S. Wire Act to online gambling that does not involve sports betting
 - May clear the way for States to enable intra-state online gaming
 - May signal that the Federal government will consider licensing and regulation permitted online gambling
 - Indicates less strict interpretations of games of chance v. lottery issues
 - Important for “gamification”, advergaming as well



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Privacy Issues in “Inner Circle” Sites



- Various platforms raise privacy issues at more than one level, and regulators from more than one arena are interested: FTC/other federal agencies, states, self-regulatory groups -- will be an important issue in coming years
 - Facebook settlement with FTC late last year: social media site agreed it would not make changes to how it shared user information without getting permission first
 - Google just announced changes to its privacy policy yesterday – will share data across different platforms and reduce from 60+ privacy policies to one, with no opt-out available → already discussion of backlash
 - MMA announced new privacy guidelines for mobile marketing last November
 - Digital Advertising Alliance – just undertook new advertising campaign to promotion its principles for behavioral advertising



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Privacy Issues

- Basic principles when collecting user data:
 - Must adhere to the promises made to consumers regarding privacy and data protection (privacy policies/other statements)
 - Must implement and reasonable and appropriate measures to protect personal data against theft
 - Must disclose when will use or sell data – remember, data is an asset
- “Hot” issues:
 - Geo-location
 - Behavioral advertising and tracking
 - Children’s privacy
- What comes next in terms of regulation?



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Avoiding Future Problems

- Implement appropriate terms and conditions and policies; keep them up to date. *E.g.:*
 - Social media policy (consider *internal* and *external* policies) and training
 - DMCA takedown
 - Blogger policy and monitoring
 - Privacy/data security policy
 - Document retention
- Make appropriate disclosures, whether required by law or aimed to protect from liability for third-party content
- Know what's out there: monitor employee and third party activity (UGC, bloggers) – third parties can help
- Ensure substantiation of advertising/website claims
- Ensure proper disclosure of company affiliation by all
- Secure trademark rights and register user names
- Address consumer complaints promptly
- Be prepared for a crisis
- Think before you speak!



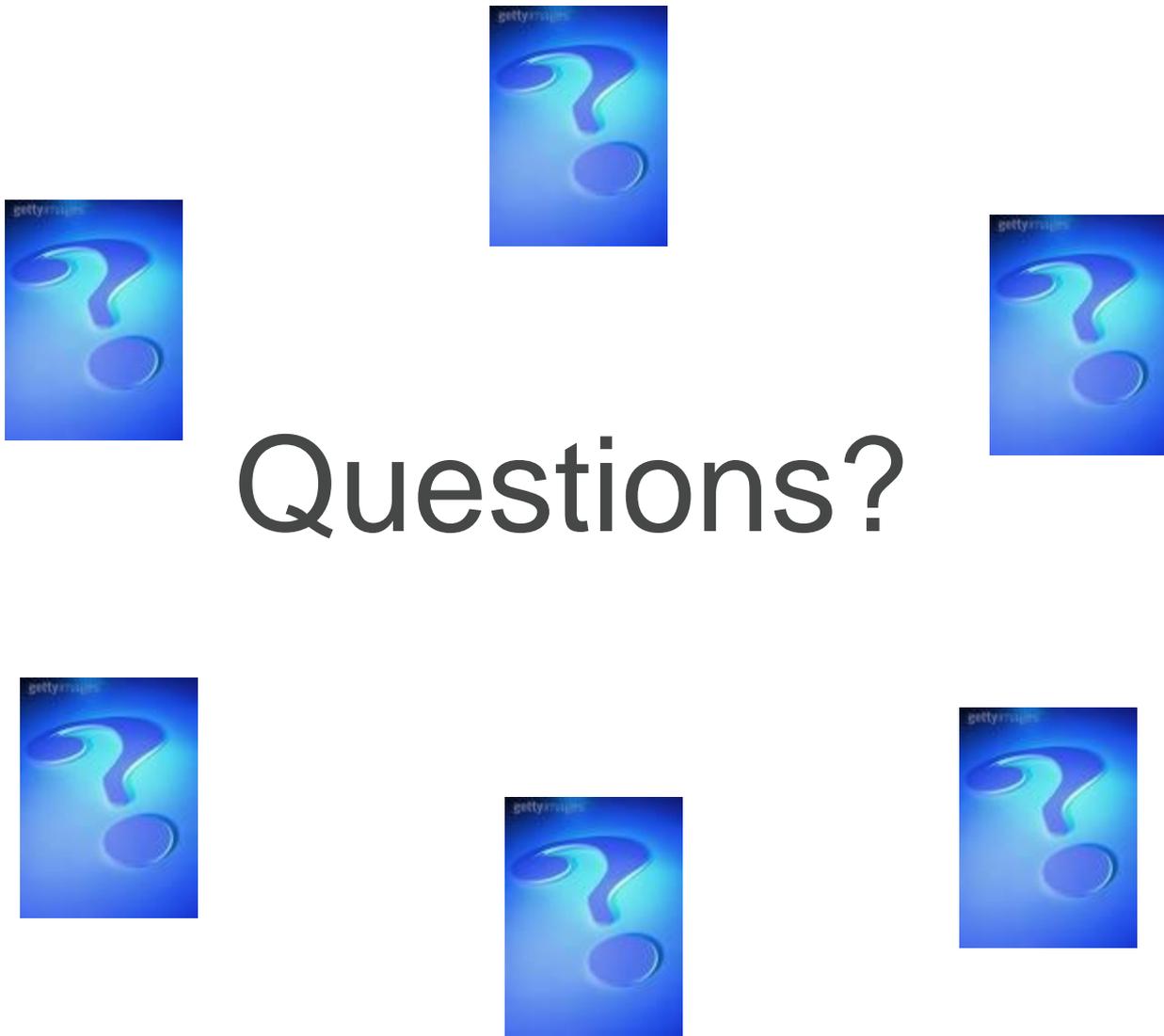
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Questions?

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Biography



Melissa Landau Steinman practices primarily in the areas of advertising and marketing, antitrust, trade regulation, consumer protection and general commercial law, litigating cases and counseling clients on matters that arise from these business concerns. She is uniquely familiar with the technology, retail and hospitality industries.

Ms. Steinman focuses her practice on assisting companies at every stage of distributing their products, reviewing advertising and marketing materials for all types of media, vetting pricing and "sales" claims, creating product warranties and advising clients on product safety issues, and addressing related intellectual property and privacy matters. She has represented clients in both private and government litigation relating to these matters, with experience handling both class action and Lanham Act matters, as well as Federal and State government investigations. Ms. Steinman wrote and edited the "Guide to Federal and State Regulation of Advertising," a comprehensive two volume book/CD-ROM on the law of advertising and promotions. She was recommended in Legal500 2010 and Legal500 2011 for her work in social media and sweepstakes law.

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