



LEGALLY SPEAKING: HOW TO STAY OUT OF REAL-TIME MARKETING HOT WATER

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The start of any new year typically brings advertisers and their marketing agencies a veritable real-time marketing bonanza.

In short succession, events such as the NFL playoffs and the Super Bowl; the Golden Globes, People's Choice Awards, Grammy's and Oscars; and March Madness bring brands myriad opportunities to piggyback on their popularity. 2016 is no exception, with major events including the Olympics, the presidential election, and the World Series still to come, giving brands an effective and effortless way to join the cultural conversation.

Of course, the idea of advertising during a major sporting event or awards shows is nothing new. In the past, however, each advertisement constituted a planned media buy and was the product of months of hard work by advertisers and their agencies. Today, however, gaining consumer attention demands something different: a more agile strategy, often centered on social media. Termed real-time marketing, this type of advertising requires brands to engage with cultural and news-breaking events as they happen, instantaneously.

But what separates real-time marketing winners and losers? What did brands like Oreo and the Girl Scouts, which effectively capitalized on the Super Bowl XLVII blackout and this year's Oscars do differently from Red Lobster, which failed to take advantage of the free publicity from Beyonce's "Formation" video? In the case of Red Lobster, it is notable that at least some of the blame went to the brand's legal team, which some commentators speculated was overly conservative and slow to respond. How can CMOs and their staff effectively implement a real-time marketing strategy while controlling legal risks and negative publicity and not being hemmed in by legal advice that's too conservative?

MANAGING THE LEGAL AND PUBLICITY RISKS OF REAL-TIME MARKETING

The first step is to open the lines of communication between the legal and marketing teams.

Whether you are using outside counsel or in-house counsel, getting them involved early and planning ahead can alleviate many issues down the road, when time is no longer on your side. By discussing the general parameters of a campaign, your legal advisers can highlight potential risks, clear known problems in advance, and work with you to develop a game plan for when the event happens.

For example, a legal team can often clear any hashtags, explore and explain an event's social media guidelines, and provide general parameters for use of third-party intellectual property. In addition, you can decide how to deal with issues as they come up in real time--whether in a social media war room or over the phone. Finally, but perhaps most importantly, you can work with your legal team to best establish your company's tolerance for legal risk. While most lawyers don't like to admit it, there's a lot of legal chance involved in real-time marketing, and assessing the practical risk of getting a claim is even more important than knowing if a potential legal claim exists at all.

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Second, the marketing team should understand, at least in a basic way, the potential claims that could be made against the company. Of course, your lawyers should be primarily responsible for this function, but knowing the issues in advance will forestall creating materials that are dead on arrival. Typical risks include:

- >> **Trademark issues:** These can arise when using a logo or tagline that is likely to confuse consumers about the source of a product, even when used with a hashtag. For example, using #SuperBowl or #Oscars in any way that makes your brand seem like it is a sponsor of the event. But remember, there can be workarounds for these, including using alternate phrase (like #TheBigGame) or merely following the events trademark or social media policy. The Academy of Motion Pictures Arts and Sciences recently released such guidelines for the 2016 Oscars. The Olympics, by the way, are in a whole different category. The use of their marks are expressly prohibited by federal statute.
- >> **Copyright issues:** Probably one of the highest legal risks in real-time marketing, an advertiser could infringe a copyright if it copies photos, videos, music, text, or art owned by a third party or creates something “substantially similar.” For example, posting a meme to your Facebook page that includes a still from a movie would likely be copyright infringement, as would using an image of the Oscar statuette. Work-arounds here? Get permission in advance from the copyright owner or license still images from a stock photo house.
- >> **Right of publicity:** Another high-level risk area, the right of publicity protects a person from unauthorized use of a person’s “likeness.” You might remember how Duane Reade was sued by Katherine Heigl for \$6 million when it Tweeted a photograph of her coming out of one of their stores. For this reason, names, photos or videos, and even social media handles should not be used except in certain limited circumstances without permission. This risk has become particularly acute given the recent award to Michael Jordan of \$8.9 million when a brand did nothing more than congratulate him on being inducted into the Hall of Fame. Minimizing the risk here is difficult, but some suggestions include only engaging celebrities if they engage your brand first, never using a photograph or likeness without permission, and never connecting the celebrities directly to your brand.
- >> **Advertising law:** Don’t forget that both federal and state advertising laws require that claims made about your products or services must be truthful and non-deceptive. Real-time marketing is no exception. If you make any claims about your products or your competitors’ products, make sure that you have a reasonable basis for doing so, and don’t forget to ensure that all paid influencers disclose their connection to the brand.
- >> **Public relations issues:** While not a legal issue per se, lawyers are frequently called upon to analyze issues of taste and bad publicity. A poorly phrased Tweet could be extremely damaging to your brand. Ask yourself: Am I saying something stupid? Search hashtags before you use them. Pay attention to current events. And be careful not to offend your consumers.

Done well, real-time marketing can dramatically increase brand consciousness. When done poorly, however, real-time marketing can expose a brand to social media ridicule and raise significant legal risks. Keep in mind these basic legal risks and guidelines to fully unleash the potential of real-time marketing for your brands.

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ABOUT THE AUTHORS



Joseph J. Lewczak is a partner in the Advertising, Marketing & Promotions Practice Group. He may be reached at 212.468.4909 or jlewczak@dglaw.com.



Devin A. Kothari is an associate in the Advertising, Marketing & Promotions Practice Group. He may be reached at 212.468.4902 or dkothari@dglaw.com.

