Legal and Marketing Departments Must Work as a Team for Brand Protection and Promotion in the Sports Industry

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In the pre-digital age, companies that strategically focused on brand protection and promotion often included only those companies selling directly to consumers - typically through more limited print and radio/television media. Company lawyers and their marketing counterparts might communicate on an as-needed basis when direct legal threats to the brand arose (from customer class actions or competitor advertising claims) or for more routine trademark enforcement measures. Today, we live in an omnichannel marketing world. Brand management and equity is big money and big effort. Employees are brand advocates, legal counsel are brand stewards, and influencers are brand field soldiers. Bigger brands means bigger opportunities, but it also means bigger risks. More than ever, internal and external legal and marketing teams must work closely together to leverage these brand opportunities and monitor and protect against these threats.

Managing Legal Disputes: Brand Consciousness

These days, Corporate counsel’s involvement in brand protection and promotion reaches far beyond well-publicized crisis communication strategies. Corporate counsel must manage legal disputes for brand benefit and protection at all stages in the legal process.

Marketing savvy lawyers at Budweiser, Netflix, and Jack Daniels have in recent years used clever “cease and desist” letters to protect brands in lieu of typical lawyer nasty-grams. In-N-Out Burgers recently served up a pun-filled internet favorite charming social media with its efforts to stop a brewery from using its intellectual property on its “IN-N-STOUT” beer. LeBron James’ legal team sent a cease and desist letter to the University of Alabama addressing concerns over copyright infringement after the university began its own barbershop web series called “Shop Talk.” The public is aware of these historically banal (yet necessary) legal missives because they have become brand promotion weapons in their own right. Legal communications such as these demonstrate a new dawn of legal “brand consciousness.”

Lawyers without “brand consciousness” pose a brand risk. Internal and outside counsel that fail to draft “cease and desist” letters with the internet audience in mind may generate social media fury. A classic example of lawyer-created brand tarnishment is Starbucks. Back in 2013, an

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outside lawyer for Starbucks set a formal legalese “cease and desist” letter to a small business owner in Missouri concerning the owner’s alleged use of Starbucks’s “FRAPPUCCINO” mark on its stout-style beer. The owner responded - blasting Starbucks for complaining about the owners’ limited sale of drinks in a small suburb outside of St. Louis and sending along a $6.00 check for the full amount of profit from the sale of the 3 beers utilizing the allegedly infringing mark. The internet responded too - suggesting that Starbucks could stop its corporate bullying and play nice.

The opportunities for brand “win or loss” during the legal process do not stop at the preliminary “cease and desist” stage. Lawsuit filings are now fair game for social media spread. Outside lawyers should carefully vet their pleadings with inside and outside marketing teams to ensure for potential favorable “soundbites” or - at the very least- unintended consequences of allegations that may have negative “spin” for the brand. Outside lawyers who appear for public court hearings must be brand conscious (recognizing that their statements in court could appear on social media within seconds). These lawyers should recognize that even the most historically routine events in a litigation can have adverse social media effects. For example, protective orders are entered in most commercial lawsuits to avoid proprietary or confidential company data from finding its way into the public eye. But what happens when a big company lawyer seeks such protection at a public hearing? The internet may assume the worst: the lawyers (and the company) are trying to hide something. The company brand suffers with each social media click.

Lawyers must keep marketing teams apprised of their public filings and appearances - giving them as much lead time as possible to manage the brand effect of these events. In-house counsel and their marketing teams should consider preparing brand policies and guidelines for outside counsel - and training of “brand consciousness” for legal department staff.

**Brand Advocates: Athlete Endorsements and Influencers**

On the flip side, marketing teams are increasingly utilizing athletes and celebrity endorsers and influencers for brand building and promotion without consulting internal legal teams. Social media influencers are everywhere. Marketers are taking on social justice, equity and inclusion in their marketing campaigns - sometimes using celebrity or athlete endorsers - which exposes brands to more risk. Nike’s decision to build a recent advertising campaign around Colin Kaepernick (who gained media attention for his stance on racial injustice, including his well-publicized decision not to kneel during the national anthem at football games) sparked protest and divided consumers. Social media influencers (who were paid millions of undisclosed dollars) played a critical role in the failed 2018 Fyre Festival, and regulatory agencies and the courts are starting to take notice.

Dependence on social medial influencers will continue to grow - as brands look to leverage influencers of all shapes and sizes and capitalize on ever-changing social media algorithms to ensure that their target audiences are reached. But caution ahead: influencer fraud is on the rise (with exposures of fake followers). Athletes - like other celebrities, YouTube stars and Instagram models - not following the rules. The implications surrounding a “Fyre Fraud Effect” may be enormous. Will the increased media attention surrounding the failed 2018 festival and its exposure of social media influencers dampen company dependence on influencer brand strategies?

Companies must ensure that their influencer armies are playing by the rules. Paid endorsements must be properly disclosed. Influencer statements must be honest and not deceptive or misleading. Influencer claims must be substantiated. What are the risks? For starters, federal regulatory enforcement. The Federal Trade Commission has brought its initial wave of enforcement actions against individual online influencers for deceptive endorsements without proper disclosures. Companies sponsoring influencers are equally liable.

Legal teams should monitor and train marketing teams to ensure that influencers avoid legal liability. Influencer contracts must require truthfulness and authenticity in all influencer social media postings. Marketing teams must carefully monitor content to make sure that product endorsements are authentic and substantiated. Influencers’ contracts must ensure for proper remediation efforts for non-compliance. And, of course, legal departments should be immediately apprised when the rules are broken - to ensure that brand crisis procedures are swiftly implemented to avoid further brand injury.

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