

## Harnessing Creativity or Creating Liability?

### *Part One: Using User Generated Content and Engaging Users In Promotional Activities*

By Alan L. Friel

The growth of online social networking has not been lost on marketers, who hope to enlist Internet users in campaigns to promote their products and services. This article will appear in three installments. This first part examines the use of user-generated content (“UGC”) and user participation as part of a promotion. In the next issue, the use of online sweepstakes and promotions will be addressed in detail. The final part will look at how the developing law regarding e-contracting, online privacy and data security, commercial e-mails and children’s issues applies to Internet promotions and marketing.

#### **RIDING THE WAVE**

Lately, marketers are tapping into the user-created content phenomenon and running UGC contests and other promotions online, sometimes promising to run the winning video as a television commercial. Marketers are engaging in online promotions within the virtual communities of social networking and massively multiplayer online games (“MMOGs”). In addition, online promotions frequently encourage certain online user activities, such as recommending products to friends on their blogs

and sending e-mails about a product or service to their friends, sometimes by rewarding such activities with cash, coupons, prizes or sweepstakes entries.

UGC presents a host of potential legal problems, such as third-party intellectual property infringement (and in recent years, we have seen a great deal of litigation generated in this area). Sponsors and promoters that engage users in their promotions run the risk that user conduct and content will be attributable to them and that they will be deemed responsible for what the users say and do in connection with the promotion. In addition, the use of Web sites and Internet services are subject to the terms and conditions of each provider, and promotions must follow the rules of the applicable venues.

The combination of the ease in which digital media tools enable content creation and the ability to publish and distribute that content via the Internet has led to a proliferation of UGC. Social networking sites, MMOGs, blogs and UGC sites, such as YouTube ([www.youtube.com](http://www.youtube.com)), Facebook ([www.facebook.com](http://www.facebook.com)) and MySpace ([www.myspace.com](http://www.myspace.com)), are immensely popular. Television and cable networks are developing vibrant online sites to create a two screen experience; offering viewers the ability to interact, participate and create via the online offering. For example, on [www.current.com](http://www.current.com), the online offering of Al Gore’s youth-oriented cable net Current TV, users can connect with each other, contribute video programming that has the potential to migrate to the cable network and even create commercials for the net-

work’s advertisers. Knowing that engaging consumers is more valuable than bombarding them with banner and pop-up ads, online marketers are rushing to get Internet users to directly participate with their brands and are involving bloggers, UGC and social networking sites and other virtual communities as a way to do so. In the MMOG Second Life, for example, dozens of real-life brands have established themselves within the game environment, and ad insertion functionality and product integration are being added to many online games.

An initial area of concern for Web site providers, promotions operators and sponsors with respect to UGC and user participation is the distinct possibility that the user will infringe third-party intellectual property or personal rights. However, there are two laws that provide the possibility that the Web site that hosts such content is not liable for such content.

#### **CDA IMMUNITY**

The first is the Communications Decency Act of 1996 (“CDA”) (47 U.S.C. §230). The CDA provides that “[n]o 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” and expressly preempts any state law to the contrary. 47 U.S.C. §230(c)(1) and (e)(3). Web sites have been held to be an “interactive computer service” under the act. *Doe v. MySpace*, 474 F.Supp.2d 84, 8523 (W.D. Tex. 2007); *Gentry v. eBay, Inc.*, 199 Cal. App. Fourth 816, 830 (2002); and *Schnieder v. Amazon*, 31 P.3d 37, 40 (Wash. App. 2001). Online activities as both publisher and as distributor, by

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providers and users, have been found to qualify for the immunity, so long as such defendant is not the content originator. *See, Zeran v. America Online, Inc.*, 129 F.3d 327, 333 (Fourth Cir. 1997), *cert. denied*, 524 U.S. 937 and *Barrett v. Rosenthal*, 40 Cal. 4th 33, 49 (Cal. 2006) (reversing lower court that had rejected “majority” view). CDA immunity does not include protection from violation of federal criminal law, the Electronic Communications Privacy Act of 1986 or intellectual property law. However, at least in the Ninth Circuit, the carve out from immunity for intellectual property law has been held to only include federal intellectual property law and not state law claims such as rights of publicity. *See*, 47 U.S.C. §230(e)(1), (2) and (4). *See also, Perfect 10 v. CCBill LLC*, 488 F.3d 1102 (Ninth Cir. 2007); *cf. Almedia v. Amazon.com*, 456 F.3d 1316 (Eleventh Cir. 2006) (not reaching the question of whether state rights of publicity claims are exempted). In order to be sure to qualify for the protection, the provider or user should not edit or actively direct the content; however, it can take efforts “in good faith to restrict access ... to obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable content.” 47 U.S.C. §230(c)(2). *Compare Zeran*, 129 F.3d at 331 (no liability for content originating with third parties and §231 not intended to restrict “editorial or self-regulatory” functions); and *Blumenthal v. Drudge*, 992 F.Supp. 44 (D.D.C. 1998) (immunity applied even though operator paid for the content, had certain editorial rights and promoted the content and content provider); *with Hy Cite Corp. v. badbussinessbureau.com*, 418 F. Supp. 2d 1142 (D. Ariz. 2005) (denying motion to dismiss where operator alleged to have included editorial comments to and titles for user postings); *Fair Housing Council v. Rommmates.com LLC*, 489 F.3d 921 (Ninth Cir. 2007) (“if [a provider or user] is responsible, in whole or in part, for creating or developing the information, it becomes a content provider [not merely a service provider or user] and is not entitled to CDA immunity”) *vacated for hearing en banc* at 2007 U.S. App. LEXIS 23922 (Ninth Cir. Oct. 12, 2007); and *Ben Ezra, Weinstein and Company, Inc. v. America Online, Inc.*, 206 F.3d 980 (Tenth Cir. 2000) (operator failed to provide evidence content was solely created by third parties and that its efforts to correct errors through deletions and correction

requests was not development or creation of content by the operator).

Accordingly, a provider or user’s own content, including corporate blogs contributed to by company employees, do not qualify for the immunity. The degree, however, of permissible involvement in directing, regulating and promoting UGC is unsettled, and care should be taken in this regard if a marketer’s activities have the possibility of qualifying for CDA immunity.

The standard for “objectionable content” is not clear, but it can be presumed to be objective rather than subjective and, thus, a provider or user should not edit content that it disagrees with or deems unfavorable to it, its sponsors or its or their products or services. It is reasonable, though yet to be determined, that given Congressional findings in the Act that the policy of the United States includes restricting children’s access to inappropriate online material, the objectionable standard will be treated differently for children’s Web sites. A serious question exists as to whether providers can police content that includes improper depiction or use of trademarks or products or false or deceptive advertising under the objectionable content standard, but a policy argument can be made that any content that infringes third-party rights or violates applicable law should be deemed “otherwise objectionable” and subject to restriction, blocking and removal without risking loss of the CDA immunity. Rather, the purpose of the CDA was to “encourage service providers to self-regulate the dissemination of offensive material ... [by] forbid[ding] the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.” *Zeran*, 129 F.3d at 331.

Further, a distinction can arguably be drawn between prohibiting, editing and removing content from a Web site that criticizes a sponsor or its products and services, which some courts may find obviates the third-party nature of the content, and enforcing a contest rule that disqualifies the user from winning prizes while leaving the content posting unchanged. If the sponsor of a contest on a Web site, rather than the Web site provider itself, is the party enforcing restrictive contest content guidelines in selection of the winner, then the Web site provider should at least be able to maintain that it was not regulating or directing the content in this manner. These issues, how-

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benefit directly attributable to the infringing activity" in a situation where it "has the right and ability to control such activity," has registered an agent of service with the U.S. Copyright Office and maintains a procedure compliant with the act for the removal of UGC upon a valid take down request, it should have a defense to copyright infringement claims by copyright holders. If the user whose content is taken down files a proper counter-notification requesting the restoration of removed content, the service provider must send a copy of such request to the party that originally requested the removal. Unless that party then obtains a court order supporting removal of the material at issue, the service provider must restore access to the material. A service provider does not have a duty to monitor its Web site for infringing content, but must terminate repeat offenders. See, 17 U.S.C. §§512(i)(1)(A) and 512 (m)(1).

The scope of the DMCA safe harbor is currently the topic of several pending law suits against UGC Web sites. See, e.g., *Viacom v. YouTube, Inc. et al.*, No. 1:07:02103 (S.D.N.Y. filed March 13, 2007); *UMG Recordings, Inc. v. MySpace, Inc.*, No. 2:06-07361 (C.D.Cal. filed Nov. 17, 2006); and *The Football Assoc. Premier League Ltd. and Bourne v. YouTube, Inc. et al.*, No. 07:3593 (S.D.N.Y. filed May 24, 2007). Amongst the issues to be decided in these cases is how much commercial activity by the site related to the UGC constitutes "direct financial benefit" that would preclude the Web site with an "ability to control" content from falling within the safe harbor, and what technical measures to prevent infringement are required by the Act. Charging the users posting infringing content set up and service fees has been found not to be a direct financial benefit. *Perfect 10, Inc. v. CC Bill LLC*, 481 F.3d 751, 767 (Ninth Cir. 2007); and *Ellison v. Robertson*, 357 F.3d 1072, 1079 (Ninth Cir. 2004); cf. *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (Fourth Cir. 2004) (suggesting in dicta no direct financial benefit from subscription service); and *Hendrickson v. eBay, Inc.*, 165 F.Supp.2d 1082 (C.D. CA 2001) (suggesting in dicta no direct financial benefit from service fees on online auctions).

Whether serving ads (contextual or otherwise) on the same page as UGC or within the UGC itself, using UGC as part of a spon-

sor's promotion of its products and services or as part of a sponsored contest or other promotion, or enlisting users to create user generated ads constitute "direct financial benefit" remains an open issue. Further, the courts need to establish what content guidelines and controls, beyond the ability to take down UGC that infringes third-party copyrights, falls short of constituting "an ability to control," and how CDA Section 230(c)(2)'s encouragement of good faith efforts to restrict obscene, lewd, lascivious, filthy, excessively violent, harassing and otherwise objectionable content interplays with the DMCA's restriction on a financially interested operator's ability to control UGC and still obtain the safe harbor. Finally, the use of content filters, such as Google's newly announced content fingerprinting system — advocated by many content owners as a measure Web sites should be obligated to employ — are likely to result in complaints by the fair use community that First Amendment protected transformative uses of third-party content are blocked by such technology. See, *Moveon.org Civic Action et al. v. Viacom*, No. 3:07:01657 (N.D.Cal. 2007) (alleging improper take down of political parody and criticism video incorporating clips from the TV show whose host was lampooned). YouTube recently announced that it was testing a copyright filtering system and a coalition of UGC Web sites and mainstream content companies announced guidelines calling for adoption of such types of filtering and blocking technology by the end of 2007. See, *Principles for User-Generated Content Services* ([www.ugc.principles.com](http://www.ugc.principles.com)).

The CDA immunity and the DMCA safe harbor will not apply other than to qualifying Web sites and online service providers and, in the case of the CDA only, to users of a service that distributes third-party content. Thus, if a company is operating a UGC promotion other than on its own site (e.g., via a YouTube user group), the company will not have a DMCA copyright-infringement shield, and may or may not have the ability to seek CDA immunity for non-intellectual property claims, depending upon its involvement with infringing UGC.

Theories of advertiser liability for involvement in a promotion that includes UGC that infringes upon third-party copyright include: 1) contributory infringement; 2) inducement

liability; 3) vicarious liability; and 4) tertiary liability. "One contributorily infringes when he 1) has knowledge of another's infringement; and 2) either (a) materially contributes to or (b) induces that infringement." *Perfect 10 v. Visa International*, 2007 U.S. App. Lexis 15824 (Ninth Cir. 2007).

Contributory liability has also been found where "a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to the infringement." *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1021 (Ninth Cir. 2001). "[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for [inducing] the resulting acts of infringement by third parties." *MGM Studios v. Grokster, Ltd.*, 545 U.S. 913, 936-37 (2005). Vicarious liability exists where the defendant: 1) possesses the right and ability to supervise; and 2) has "an obvious and direct financial benefit from the infringement." *Cherry Auction v. Fonovisa, Inc.*, 76 F.3d 259, 262-63 (Ninth Cir. 1996). In addition, recent litigation has attempted to advance a so-called "tertiary" theory that one that facilitates or enables a contributory or vicarious infringer is also liable as such. See, e.g., *UMG Recordings, Inc. v. Hummer Winblad, et al.*, 2006 U.S. Dist. Lexis 30338 (N.D. Cal. 2006) (suit against Napster's directors and investors; settled while on appeal). Depending upon the facts, the operators and sponsors of a UGC contest or other promotion could conceivably fall under one or more of these theories and, if they lack DMCA protection, may be found liable for the copyright infringement caused by users.

Accordingly, care should be taken to prohibit infringing activities and to take appropriate corrective action when it is discovered. Sponsors can reduce the potential for liability by restricting the content to be used to content that is either original to the user and/or certain pre-cleared content made available to the users for purposes of the promotion. It is also advisable to direct users to sources that explain the basic rules of copyright, intellectual property and personal rights (while disclaiming responsibility for the completeness or accuracy of that information) and to require clearance and

prohibit infringement. At least one major promoter of user-created ads has elected not to have submissions posted on a public Web site by users, but rather privately submitted, reviewed and cleared by the provider and its sponsors before the ads are publicly displayed. Such an approach opts for clearance and control as the preferred method of risk management over an attempt to fall under CDA and DMCA protection.

### TRADEMARK INFRINGEMENT

Neither the CDA nor the DMCA provide any protection for federal trademark infringement, dilution or tarnishment, and the CDA may not provide immunity for violations of the Lanham Act (15 U.S.C. §1125), which is part of the federal statutory scheme regulating trademarks and thus may also be part of federal intellectual property law that is excepted from CDA immunity. While not reaching the CDA issue, one federal court has suggested, in dicta, that although online providers have no duty to monitor for trademark infringement, contributory trademark infringement might be established if the defendant either: 1) intentionally induces another to infringe on a trademark; or 2) continues to supply matter knowing that it infringes or is used to infringe trademark rights. *Lockheed Martin Corp. v. Network Solutions*, 985 F.Supp. 949 (C.D. Cal. 1997).

Indeed, an online UGC contest has already spawned such an action. Quiznos was sued last year by its fast food rival Subway as a result of a user-generated video contest called the "Quiznos v. Subway TV Ad Challenge," where contestants were invited to compare a Subway sandwich to Quiznos' product and post video entries on Quiznos' Web site ([www.meatnomeat.com](http://www.meatnomeat.com)). In April 2007, a federal district court denied Quiznos' motion to dismiss the Lanham Act claim without prejudice based on putative CDA immunity, merely finding that it was premature to consider whether the plaintiff could establish no facts that would preclude immunity. *Doctor's Associates, Inc. v. QIP Holders, LLC*, 82 U.S.P.Q. 2d 1603 (D. Conn. April 19, 2007). While the case may eventually turn on allegations that Quiznos "altered or was otherwise creatively involved with ... the contestant videos," the issue of whether Lanham Act claims constitute "intellectual property" claims for which no immunity applies, or whether injunctive relief remains

available notwithstanding a finding of immunity, may also be visited by this litigation. *Cf. Noah v. AOL TimeWarner*, 261 F.Supp2d 532 (E.D. Va. 2003) (applying immunity to chat room operator for alleged violation of civil rights laws for failure to police hate speech in chat room despite claim chat rooms are public accommodations, but finding act does not bar claims of injunctive relief), *aff'd* 2004 US App. Lexis 5495 (Fourth Cir. March 24, 2004); and *Perfect 10, Inc. v. CC Bill, LLC*, 340 F.Supp.2d 1077 (C.D. Cal. 2004) (state unfair competition claim based on trademark infringement is not "intellectual property" law within the meaning of the Act), *aff'd as to this issue*, 481 F.3d 751 (Ninth Cir. 2007). Even if CDA immunity is found to apply to Quiznos' own Web site activities, it is alleged that Quiznos uploaded three of the videos to [www.ifilm.com](http://www.ifilm.com), for which activities it may well be treated as the actual provider of the content rather than a user distributing third-party content via a qualified service, having allegedly become actively involved in the selection and posting of that content.

### MIGRATION OFFLINE

Since CDA and DMCA protections do not apply to offline media, if UGC, such as a consumer-created, 30-second ad, is subsequently migrated to television, the sponsor will need to clear all aspects of the content. Several companies have elected to shoot entirely new ad spots based on user-generated ads that have won online contests. Even this approach may not be enough to protect against theft of idea or copyright claims by third parties if the underlying elements that are re-shot infringe the rights of another. The advertiser in such a case will lack the meaningful indemnity it typically gets from its ad agencies and their insurance companies when professional ads are commissioned. Further, the involvement of advertising agencies that are signatories to talent union collective bargaining agreements may violate such agreements if they assist sponsors in preparing UGC commercials using non-union talent for broadcast.

### VIRAL MARKETING

Another emerging practice is to pay or otherwise reward users for promoting, recommending or endorsing products or services online via user blogs, user generated

ads, chat rooms and viral e-mail. If the sponsor's inducement is not clearly and conspicuously disclosed, the sponsor runs the risk of a claim of engaging in deceptive or unfair advertising practices. State law unfair competition and deceptive advertising claims should be preempted by CDA immunity to the extent the sponsor is acting as a provider or user of a qualified service. *See, Perfect 10, supra*, 340 F.Supp.2d 1077. However, the federal FTC Guidelines Concerning Use of Endorsements and Testimonials in Advertising, provide that "[w]hen there exists a connection between the endorser and the seller of the advertised product which might materially affect the weight or credibility of the endorsement [e.g., payment to a non-expert or non-celebrity] ... such connection must be fully disclosed." 16 C.F.R. §255 and 16 C.F.R. §255.5. Consumer endorsements and testimonials must also "reflect the honest opinions, findings, beliefs or experience of the endorser," atypical results must be disclosed, and the endorser cannot make deceptive statements or claims that could not be substantiated by the advertiser. 16 C.F.R. §255.1(a), 16 C.F.R. §255.2 and 16 C.F.R. §255.1(a).

Even if the CDA provides immunity from FTC civil enforcement actions for online publication of UGC that violate such guidelines, the advertiser is subject to a claim that the immunity does not apply in cases where the advertiser should be deemed to have directed the content by designing a campaign that encouraged and facilitated the illegal user activity. A similar theory was accepted by a Ninth Circuit decision that refused to provide CDA immunity to Roommates.com for users' violation of fair housing laws by specifying illegal preferences for tenants because the Web site operator created a preference application with fields allowing users to list race, gender and sexual orientation preferences and, by doing so, "is a content provider of these questionnaires and [accordingly] does not qualify for CDA immunity." *Fair Housing Council v. Roommates.com LLC*, 489 F.3d 921 (Ninth Cir. 2007), *vacated for rehearing en banc*, 2007 US App. LEXIS 23922 (Ninth Cir. 2007), *but see, Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (Ninth Cir. 2003) (user profile created by responding to site questions and prompts was third-party content). Further, the sponsor's activi-

ties may not be limited to the acts of publishing or distributing third-party content via a qualifying service such that CDA immunity might apply. Accordingly, efforts should be made to enable users to educate themselves on how to avoid infringing third-party rights and applicable laws, and certainly sponsors should not encourage or invite activities that are clearly or likely improper in this regard. In addition, associating the sponsor's own content with UGC that contains inappropriate content, such as false, deceptive or unsubstantiated product claims, may be enough to infect the sponsor's content by implication. Accordingly, a sponsor that clearly discloses that UGC, and the claims therein, are exclusively created by the user and not substantiated or endorsed by the sponsor, may be at a lower risk of claims by competitors or regulators for the UGC posted on the sponsor's Web site or as part of the sponsorship of a promotion or other activities on another site, and such disclosures should support the sponsor's claim that the content is solely third-party content for which it should not be responsible.

The Word of Mouth Marketing Association ("WOMMA") has promulgated a Code of Ethics calling for honesty of relationship, opinion and identity, respecting the rules of the communications venue and protecting privacy and minors (see, [www.WOMMA.org/ethics/code](http://www.WOMMA.org/ethics/code)). One online promotional technique that clearly violates the WOMMA Ethics Code, and is likely a deceptive and unfair advertising practice, is "astroturfing" — the practice of a few people posing as mass numbers of grass roots consumers or activists promoting a particular cause. Certainly, there is no CDA protection for a sponsor's own deceptive chat room seeding, astroturfing or posting of false user profiles. See, e.g., *800-JR Cigar, Inc. v. GoTo.com, Inc.*, 437 F.Supp.2d 273 (D.N.J. 2006) (no immunity for operator's own activities benefiting its advertisers); and *Anthony v. Yahoo, Inc.*, 421 F.Supp.2d 1257 (N.D. Cal. 2006) (fraudulently posting false user profiles to induce subscribers to a dating service was not third party content and thus immunity does not apply). Similarly, encouraging or inducing users to engage in such activity, or failing to provide disclosures in connection with a UGC or user participation promotion that

disaffirm any attribution to the sponsor of user content or conduct and warn consumers that the UGC may be inaccurate, may preclude the chance of obtaining CDA protection. However, the limitations imposed by the DMCA and the CDA on the extent of control that can be exerted on UGC in order to maintain the potential protection those acts provide leaves open the question of to what extent a sponsor can police user activities in this regard. Again, a distinction may be able to be drawn between content and conduct guidelines that merely preclude user rewards or disqualify users from the opportunity to gain something of value (e.g., winning a contest), or tied to a license to use sponsor's content, from those that result in the editing or removal of the user postings.

#### ADDRESSING THE RIGHTS TO UGC

In addition to third-party content, UGC promotions need to take into consideration both the rights to the UGC created by the user and how users will be permitted to use the sponsor's content. Both issues can be addressed through licensing arrangements as part of the terms and conditions of the promotion. If the sponsor is seeking to avail itself of the DMCA safe harbor, it will not want to acquire all of the rights to the UGC, at least during the period in which the UGC will be posted by the user on the sponsor's Web site. Otherwise, the content becomes that of the sponsor and it will be a direct infringer if the content is infringing. Similarly, an exclusive license to the sponsor may also preclude the DMCA safe harbor as being a form of ownership interest. If the sponsor desires to eventually obtain all the rights to the submitted UGC, it can consider a narrowly tailored option that might be later exercised after the online portion of the promotion ends. As to the sponsor's content, a sponsor desirous of having its own content included in the UGC should provide for a narrow, limited, revocable, non-exclusive license tied to specific usage guidelines. This license will be similar to the types of licenses content owners grant to fan sites. The sponsor might also consider providing a content bin of specific content that can be used and prohibit the use of other sponsor content. Though terminating the content license for violating these guidelines does suggest CDA and DMCA control

and direction issues, revoking a license is different from editing postings, and removal of content upon termination of such a license may be treated differently than enforcing content guidelines on UGC that lacks licensed content. Again, however, the law remains unsettled in this regard.

#### CONCLUSION

In sum, exploiting UGC and activating users to participate in promotional activities carries substantial risk that the provider, promoter and/or sponsor may be responsible for the conduct and content of the users. Care must be taken in designing these promotions to mitigate these risks. Further, as will be discussed further in the third installment, use of other parties' Web sites necessitates compliance with their terms and conditions of use. It should be determined who amongst the sponsor, the promotional firm and cooperating Web sites will be responsible for potential liability, what indemnities should be made as between these parties and what insurance coverage is available to cover potential claims. In addition, as will be discussed in the next two installments, regulatory compliance with respect to sweepstakes and contests, collection and use of consumer data and use of e-mails for commercial purposes will be required to operate a promotion that does not run afoul of applicable law.

