

# Marketing blogs present new legal issues



By Bart  
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Over the past year or so, blogs have gone from strange Internet diaries to one of the next big things in marketing. Everyone wants to know what bloggers are saying about market trends and their products and services and how to use blogs to market their products and

## MARKETING AND THE LAW

services. This issue is hot (it has even been the subject of an AMA Hot Topic seminar) so

you can always count on lawyers to throw a bit of cold water on the fire.

Mind you, there is nothing wrong with a blog. But there are some legal issues that should be considered when developing a commercial blog to be used as a marketing tool. These issues are so new that they have not been the subject of legal proceedings, but if a blog is more than a "pet rock," I can guarantee they will come to light in a board room or courthouse near you soon. Two of the main concerns I see are the inadvertent leaking of trade secret information and potential false or deceptive advertising claims that could come about.

**Information disclosed on a blog should not be too valuable.** While the ROI of a blog is currently the subject of debate, often the goal of a marketing blog is to get consumers or the media excited about a product or service. Additionally, companies like Microsoft permit or encourage their employees to create blogs because they help to personalize what can be viewed as a faceless business enterprise. The employee talks (or types) about what is going on at the company and does so at her desk. This can be an exciting "inside" look at the company. However, it is important that the blogger not reveal too much inside information. Bloggers could unwittingly reveal information about new customers before a deal is signed or confidential terms of an agreement, new product developments before they are complete or publicly announced, new advertising campaigns or other confidential or trade secret information, which could be used by competitors to the blogging company's detriment. Therefore, an internal blogger must understand the limitations on what information can be put in the blog.

**Could the blog be viewed as an advertisement?** A blog supported by a company for marketing purposes could potentially be viewed as an advertisement, but it is still unclear whether and to what extent a blog would be subject to traditional advertising and marketing laws. Assuming the blog is created or supported for marketing purposes, theoretically the same rules could govern. For example, if a blogger makes a false statement about a competitor's product, would it be considered false advertising? Typically, individual opinions are not subject to liability because they are not statements of fact. However, the blog could be looked at in the same way as any advertisement. The line between First Amendment protected speech and advertis-

ing can really get blurry.

The First Amendment applies much more to individual speech than it does to commercial speech. Therefore, an "objective" citizen has more leeway to state his or her opinion than a paid endorser. The more a blog veers toward a commercial message supporting a product or service, the more likely it would seem that the contents of a blog would be subject to legal scrutiny, and could be challenged as improper if it includes false or unsubstantiated statements of fact or comparisons. There appear to be a couple of factors to look at that would seem to make a blog more commercial in nature.

One key issue would be whether the blogger is compensated by the company for creating the blog. If a blogger is paid, the individual could be treated in the same way as a paid endorser. The FTC has detailed guidelines on endorsements (available at [www.ftc.gov/bcp/guides/endorse.htm](http://www.ftc.gov/bcp/guides/endorse.htm)) which may apply to a variety of situations in which material facts concerning a blogger's relationship to a product or service promoted in the blog would need to be disclosed. For example, it is possible that a blog may ultimately need to bear some sort of disclaimer notifying the viewer of the blog that the person is being compensated for creating the blog. The toughest question though is whether an employee, creating a blog on her own time without receiving additional compensation, meets that criterion. As long as the blog makes this reasonably clear to a reader, no formal disclaimer would appear to be necessary.

Another issue is how much control the company exercises over the content of the blog. This could create a conflict with the concerns raised above about the actual content. A company with employees who are encouraged and compensated to create blogs could be caught in the middle of a dilemma as to whether to assert control over the material. If a company exercises control, they are more likely to be held responsible and liable for acts of copyright infringement, trademark infringement and false advertising based on the content of the blog. This is the same kind of quandary Internet service providers like Yahoo! have had to deal with since the beginning of the Internet.

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While there is no hard and fast solution, one way to consider dealing with a company-employee blogger may be to provide the blogger with training regarding what is proper and improper to post, and what the company will permit in the blog but not exercise control over the content on a case-by-case basis or review the content before it is published. In this way, the company can try to make sure that the blogger does not inadvertently hurt the company by posting something improperly but avoids the potential additional liability that advance content review could bring.

Ultimately, the question is not "to blog or not to blog," but how to make it work for the client. By keeping legal considerations in mind, hopefully blog marketing will not hurt or pose an unreasonable risk for the client. ■

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