



## Grass Roots Marketing In The Digital Age: Beware The Legal Pitfalls



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Video and other digital content created by customers and posted on such social media as Facebook and Twitter to promote goods and services and build brand recognition are being used by businesses increasingly to get their names out and their products known to key demographics.

This “user-generated content” (UGC) marketing technique is powerful, effective and inexpensive.

But it is also rife with potential legal pitfalls of which businesses will need to be aware.

For anyone not familiar with the field, the main thrust of UGC is for companies to encourage consumers of their products to create their own media content promoting those products. This type of marketing, by definition, engages users of the products, thereby enhancing brand loyalty among current users and spreading brand reputation to others by going “viral” (through the multiplier effect of social media).

Not surprisingly, UGC entered the mainstream of internet advertising around 2005, coinciding with the rise of such social media as Facebook, MySpace, and YouTube. Because of their communal nature, social media provide companies with major platforms for UGC initiatives beyond the companies’ own web pages.

Typically, for online content to be considered UGC, it must be publicly available – for example, on the company’s website, on YouTube, or on a social networking profile page. (Sending advertisements through e-mail to one’s friends would not be considered UGC.)

In addition, the consumers themselves must put in effort to create an original piece of work. A video parodying something current in popular culture would count as UGC whereas merely uploading part of some popular artist’s music video would not. A typical UGC marketing campaign might involve a competition (with its own set of rules) in which consumers create and upload videos demonstrating and promoting a product’s various uses.

The legal issues surrounding UGC are complex and many. Here are some of the more prevalent concerns, including the potential for liability for copyright infringement and civil law suits:

### Copyright Infringement

Perhaps the most obvious issue relating to the UGC marketing model is authorship. Ordinarily, the *Copyright Act* (Canada) provides protections for original works. According to the Supreme Court of

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Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada*, the word “original” means, “if not creativity per se, at least some sort of intellectual effort.”

In Canada, an author (or, in the case of video, the maker) automatically receives copyright protection for their original works. There is no need to register. The work is protected for the life of the author plus 50 years. If an original work is created during the scope of employment, the employer is considered to be the owner. By contrast, an independent contractor will own his or her originally created work.

Where UGC is concerned, it is clear that a consumer who creates and uploads original work promoting the company’s product is the copyright owner (since the consumer is not the company’s employee). Accordingly, businesses actively promoting UGC for future marketing endeavours should ensure that the terms of submission include an assignment of copyright in the company’s favour and any necessary permission to distribute, make available, or otherwise use the copyrighted material.

UGC also holds the potential for infringing third party rights. If some consumer uploads an original film that includes copyrighted music or video clips, the business behind the UGC initiative may be liable for a copyright infringement claim from that third party. Ordinarily, when one creates original work that includes third party content, one must obtain a license to use the third party content in order to avoid liability. Most creators of UGC are not sophisticated and therefore not likely be aware of this requirement. Meanwhile, depending on the size of the UGC initiative, it may not be feasible for the business to properly satisfy itself that the creators have obtained the requisite license(s). Effective legal planning can protect businesses from these kinds of licensing and copyright issues.

#### **Tort Liability**

Utilizing UGC properly as a marketing technique can be highly lucrative, but companies should ensure that their UGC strategies consider the possibility of liability in tort (fault-based liability).

It is possible, for example, that some UGC uploaded to a company’s website includes the personal information of individuals not responsible for making the content, and who did not want their information broadcast online. It is incumbent upon companies to ensure that submitters understand and comply with Canadian privacy laws, especially given that social networking can expressly or implicitly encourage the dissemination of a third party’s personal information. As the privacy commissioner pointed out in a speech earlier this year, “A television ad by Rogers, broadcast in 2008, advertised a young person photographing a friend and then sending that image directly to his or her (the photographer’s) Facebook album to share it with third parties. Yet such publication of an individual’s image without obtaining his or her prior permission is contrary to the directions of the Supreme Court.”

On a related note, companies permitting the uploading of UGC on their websites and on Facebook pages should be aware of libel and defamation issues. If submitted content includes libelous or slanderous material, the businesses hosting the UGC could face liability. A company’s liability in this area may depend on the level of activity the company has in the UGC initiative. If the business merely publishes or distributes the material via its website, then it may be treated as an “innocent disseminator.” In order for this defense to apply, the distributor must prove that it had no knowledge of the defamatory material and no reason to suspect that the material might be defamatory.

Finally, it is worth noting that liability can arise in negligence. A user who becomes injured in the process of creating UGC for a video competition might have a claim against the sponsor of the competition. Likewise, people who injure themselves imitating the UGC might have claims against the sponsor of the competition. Thus, the terms of submission of any UGC initiative should include a Code of Conduct that expressly prohibits dangerous or illegal actions.

**Conclusion**

UCG is already one of the major forms of viral marketing. It is a relatively cheap and effective way for businesses to engage their customer base – to transform buyers of their products into promoters of those products – in order to build brand loyalty and spread brand recognition.

From a legal perspective, a number of serious issues must be considered, some of which have been addressed here. In addition to copyright and tort concerns, businesses thinking about UCG campaigns should also consider contract-related concerns, sector-specific legislation, and other practical matters.

Effective legal guidance in this growing area of law is the surest way to avoid liability issues on the path to any lucrative viral marketing campaign. ■