DOES YOUR CLIENT REALLY OWN THE CONTENT FROM THAT SUCCESSFUL SOCIAL MEDIA CAMPAIGN YOU JUST RAN?

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There have been a few really good user-generated content social media marketing campaigns recently. A quick and informal survey of a the terms and conditions of a number of these marketing campaigns showed some lack of understanding regarding whether ownership (copyright) in user generated content could be transferred to advertisers by users simply accepting terms and conditions electronically.

User generated content is essentially content such as photos, videos and comments that contributors submit mainly through social media platforms and for which they are usually not paid.

A fast food chain encouraged customers to send in "selfies" of themselves, a chocolate manufacturer has a promotional competition at the moment that envisages user generated MP3s, photos and comments being used. These are examples of user generated content campaigns and promotional competitions.

The terms and conditions ("**the terms**") for these campaigns and promotional competitions vary in the extent to which they protect the advertiser. One of the most inconsistent terms regards ownership of any user generated content. Some advertisers' terms stipulate that they become the owners of any user generated content whilst others only require that they be given an extensive licence to use the user generated content.

We considered the terms and conditions of a few promotional competitions that have been held over the past six months. Our informal survey was very extensive (okay six might not be regarded as extensive) but of the six, three didn't seem to have a grasp of the complexities that affect the transfer of ownership (copyright) in user generated content.

Requiring promotional competition participants to electronically accept the terms and conditions of a promotional competition is perfectly acceptable and will, for the most part, result in the participant being bound by the terms. The intellectual property aspects of the terms require a little more care though, especially if the promoter wants to take ownership of any user generated content that has been submitted.

Some promoters seem to assume that, by getting participants to electronically agree that they have given away (assigned) their ownership in the user generated content, they have effectively become the owners of the user generated content. This is far from the truth if they intend to rely solely on the electronic terms.

We need to consider the Copyright Act, 1978 in order to determine what the law requires for lawful transfer. It provides as follows at section 22(3):

"*No assignment of copyright and no exclusive licence to do an act which is subject to copyright shall have effect unless it is in writing, signed by or on behalf of the assignor, the licenser or, in the case of an exclusive sublicence, the sublicenser, as the case may be.*"

The Copyright Act defines writing to include "*any form of notation, whether by hand or by printing,*

typewriting or any similar process." It does not define "sign".

The Electronic Communications and Transactions Act, 2002 ("**the ECT Act**"), provides certainty as to whether an electronic agreement such as those that some promoters use, constitutes writing. Section 12 confirms that an online/electronic agreement such as those in use would constitute writing. In this regard, section 11 states "

"*A requirement in law that a document or information must be in writing is met if the document or information is-*

(a) in the form of a data message; and

(b) accessible in a manner usable for subsequent reference."

Section 13 does however deal with the meaning of signature and provides as follows:

"*(1) Where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used.*

(2) Subject to subsection (1), an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form."

So unless entrants are going to use advanced electronic signatures when electronically entering, a promotional competition, the promoter would do well to ensure that any agreement to transfer ownership in the user generated content is concluded in writing on paper and signed.

As a precaution, the promoter should ensure that the terms and conditions stipulate that the entrant will be required to sign documents transferring ownership of the user generated content. These documents could take the form of an IP assignment agreement.