

Twitter for In-House Counsel

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Twitter – the ubiquitous social media website that permits registered users to send out messages (or “tweets”) of up to 140 characters to “followers” who subscribe to the users’ accounts – has become impossible to ignore. With its instantaneous distribution and growing user base (estimated at 60 million users as of January 2010), Twitter is an important part of any online marketing strategy and an excellent way to reach clients, customers, employees, and anyone else with an interest in your company and its business. Although companies ignore Twitter at their own peril, there are important legal considerations of which you should be aware when your company and its employees use Twitter. The following are a few tips for maximizing Twitter’s value to your company while protecting its reputation and proprietary rights.

Register and become verified. If your company decides to establish a presence on Twitter, you should immediately register accounts using your company’s name and key brands so that only the company can use them. Twitter has experienced a rash of fake accounts created to impersonate famous individuals and companies; registering and using your accounts will reduce the possibility of confusion. In addition, apply for Twitter’s “Verified Account” program, whereby Twitter will verify the accounts that actually belong to your company and display a “Verified Account” badge on your company’s legitimate Twitter pages.

Use your account. Twitter is used to discuss what’s happening *this instant*. Use your accounts to keep your customers updated about your products, services, and promotions. To establish a presence on Twitter and build a base of followers, consider running Twitter-specific contests, deals, or other promotions. In addition, actively using your company’s marks on Twitter may help potentially descriptive marks acquire distinctiveness and become eligible for federal trademark registration. Informative or provocative tweets can trigger conversations about your brands; the more often the public uses your marks and recognizes your company as the source, the more likely it is that your company will be able to claim protectable rights in the marks. Finally, perhaps the most practical reason for a company to be active on Twitter is that accounts are shut down when dormant for six months.

Twitter is a two-way street. Twitter can provide your company with a unique opportunity to establish an ongoing conversation with its target customers. Indeed, users will *expect* such interaction once your company demonstrates that it is active on Twitter. Your company is more likely to gain followers and reputation if, in addition to keeping your company’s customers updated on new developments and promotions, employees who operate the Twitter account regularly respond to comments, questions, and complaints received through Twitter. But – as discussed further below – be sure to establish and enforce clear policies regarding employees’ use of Twitter and educate your company’s employees

about the legal risks and considerations that accompany an active Twitter presence.

Remain vigilant. Twitter’s popularity makes it a great tool for companies seeking to promote their businesses, but it also attracts copycats looking to exploit a company’s reputation and goodwill in its proprietary brands. Unauthorized third parties may register names associated with or likely to be confused with your company and its products and services, and use those accounts to divert attention and sales from your company by offering competitive (or even counterfeit) products or services or disseminating false information. To minimize the damage these practices can inflict, companies should remain vigilant in monitoring Twitter and seek to identify unauthorized uses of their trademarks and copyrights, as well as signs that an account is being used to traffic competitive or counterfeit merchandise.

Report infringement. If a Twitter page misleads visitors into believing the account is associated with your company or its brands (for example, by using your company’s logo as the page’s wallpaper), you should report it to Twitter. Twitter’s policy is to first work with account owners to try and stop such infringements (for example, by changing the account’s name or removing infringing images or profile information), and then delete the account outright if necessary. Even if the account’s username does not technically infringe your mark, Twitter will remove accounts that demonstrate a clear intent to mislead others. However, if the account is obviously a parody, Twitter may allow it to remain active. Companies should be proactive in protecting their proprietary rights on Twitter, but don’t let fear of infringement stop your company from using Twitter. Registering your company’s name and brands before others do and maintaining an active Twitter presence will educate your audience that your accounts are authentic and the others are imposters.

Report impersonating usernames. Just as the growth of the Internet led to the registration of brand names as domain names by unauthorized “cybersquatters,” it is possible for name squatters (or “squitters”) to register well-known names and marks as Twitter usernames. Unlike some other social media websites (such as Facebook), Twitter does not allow com-

panies to block others from registering usernames containing their trade names and trademarks. However, Twitter's terms of service state that Twitter may "reclaim usernames on behalf of businesses or individuals that hold a legal claim or trademark on those usernames." Accordingly, if your company's names or marks have been co-opted, you may be able to convince Twitter to do something about it.

Consider remedies. The owner of an infringing account and/or username may be the most obvious defendant in an action stemming from Twitter-based activities, but involving Twitter itself may be a more effective strategy. For example, St. Louis Cardinals' manager Tony LaRussa and Fortune 500 company OneOK filed well-publicized trademark infringement actions against Twitter in the last year for Twitter's alleged refusal to remove accounts bearing their names. Both plaintiffs dropped their lawsuits after Twitter obliged. Although Twitter's liability for its users' actions remains unsettled, the mere threat of litigation may yield favorable results for a company that believes its proprietary rights have been violated.

Educate your employees. What your company's employees write on the company's and their own Twitter accounts about the company and their employment not only reflects on the company, but could expose the company to potential liability (e.g., for defamation, false advertising, or even securities fraud or other claims). Accordingly, your company should establish, publicize, and enforce an unambiguous policy gov-

erning its employees' use of Twitter (and all social media). Such a policy should include guidelines for the proper promotion of your company's business and brands and define the range of topics that may be confidential or otherwise off-limits for tweets. While such guidelines should encourage employees who tweet about your company and its business to be professional, honest, and interesting, they should also require employees tweeting from personal accounts to include a disclaimer in their profiles that their writings reflect their opinions, not those of your company. A corporate social media policy also should address, among other topics, the approved use of your company's trademarks, trade names and other intellectual property, and respect for the intellectual property of others. Such policies should be particularly clear for employees who maintain the company's Twitter account(s), as your company likely will be held responsible for their actions on Twitter. Examples of corporate guidelines for employees' use of social media are available at various publicly available websites, including <http://socialmediagovernance.com/policies.php>.

Ownership of tweets. Under Twitter's terms of service, all users grant Twitter "a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute [your tweets] in any and all media or distribution methods (now known or later developed)." This license is not limited to any particular purpose, so you should

ensure your company and its employees are conscious of the broad scope of this license before they post on Twitter, particularly if you would not want posted content distributed further without your company's consent. Further, you should ensure that your company has the authority to grant these rights to Twitter (i.e., think twice about posting any material to which your company does not own the rights outright). Finally, under Twitter's terms of service, users grant Twitter the right to place advertisements alongside their tweets. While Twitter currently does not place such advertisements, you should consider the potential consequences of this practice on your company.

Ownership of user accounts. While the practical aspect of transferring a Twitter account is accomplished by giving the account's password to the transferee, the issue of who owns Twitter accounts is still unsettled. In fact, in the event of an acquisition of a company's assets, it is unclear whether Twitter permits a company's Twitter accounts to be included in the sale. Twitter's terms of service state that if a user attempts to sell an account, Twitter will suspend it (although this is discussed in the context of name-squatting, rather than in connection with a broader asset or business transfer). If the issue of username transfer arises in a potential transaction, the parties should consider working with Twitter directly to ensure that the buyer receives the full benefit of the seller's Twitter presence and follower base. **IP**