

November 2016

## Tweet Upon a Star: Organic Brand Engagement with Celebrities on Social Media Platforms

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# TWEET UPON A STAR: ORGANIC BRAND ENGAGEMENT WITH CELEBRITIES ON SOCIAL MEDIA PLATFORMS

KRISTIN M. ADAMS\*

## ABSTRACT

*Social media is a rapidly evolving form of digital communication in the modern age. Brands continue to focus increasing resources on garnering consumer attention on social media platforms and are demanding measurable results from agencies or internal social media marketing teams. To both increase and demonstrate the value of a brand's social media presence, many companies are engaging in behaviors that entail riskier legal strategies. Perhaps the most substantial legal land mine is "real-time content," in which brands create and post content on vastly accelerated timelines with truncated legal approval processes in order to interact meaningfully with consumers. This Note will examine the dearth of guidance in the current legal landscape and provide pragmatic advice to brands wishing to win at the real-time content marketing game. When activating social media platforms, brands should take stock of their corporate approval structures and preemptively determine the level of risk that a particular brand prefers with respect to the legal ramifications of its social media content. This is especially true when engaging in real-time with celebrities. In order to assess and mitigate social media risks, this Note argues that legal counsel should develop social media content guidelines and conduct regular content calendar review sessions with the social media account team in order to identify and remedy social media risks.*

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## INTRODUCTION

With the downturn of the United States economy and decreased corporate advertising budgets, increasing numbers of brands are turning to, or relying more heavily on, social media advertising campaigns.<sup>1</sup> Studies reveal that 70 percent of brands will increase their planned social media advertising spending—the highest increase of any advertising budget category; 67 percent also intend to increase expenditures on social media engagements.<sup>2</sup> Likewise, 66 percent of companies have a dedicated social media team—a 9 percent increase over 2014.<sup>3</sup> Increased social media spending and funded social media engagement teams come with an added pressure for social media investment to result in trackable conversions to website hits, direct sales, or spikes<sup>4</sup> in brand affinity.<sup>5</sup> However, many of these key performance indicators (KPIs), which purport to track return on investment (ROI), fail to adequately capture ROI, as it is often difficult to measure when, and to what degree, social media platforms influence a consumer's purchase decision.<sup>6</sup> This

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<sup>1</sup> *The Year of Social?*, EMARKETER (Nov. 14, 2013), <http://www.emarketer.com/Article/Year-of-Social/1010386> [<https://perma.cc/9KG6-F88P>] cited in Shea Bennett, *88% of Brands Will Use Social Media Marketing in 2014*, ADWEEK: SOC. TIMES (Nov. 14, 2015, 5:00 PM), <http://www.adweek.com/socialtimes/smm-2014/493217> [<https://perma.cc/5JHH-LKJP>]. The percentage of United States companies using social media for marketing purposes has steadily increased: 85 percent in 2012, 87 percent in 2013, 88 percent in 2014, and a projected 89 percent for 2015 (based on surveys of company marketing plans). Bennett, *supra*.

<sup>2</sup> *2015 State of Marketing*, SALESFORCE: MARKETING CLOUD 3 (2015), [https://secure.sfdcstatic.com/assets/pdf/datasheets/mc\\_2015stateofmarketing.pdf](https://secure.sfdcstatic.com/assets/pdf/datasheets/mc_2015stateofmarketing.pdf) [<https://perma.cc/B3V5-692C>].

<sup>3</sup> *Id.* at 27.

<sup>4</sup> Sam Petulla, *4 Keys to Calculating ROI for Content Marketers*, CONTENTLY: BRANDS (June 2, 2014), <http://contently.com/strategist/2014/06/02/4-keys-to-calculating-roi-for-content-marketers/> [<http://perma.cc/DC3G-953T>].

<sup>5</sup> Brand affinity relates to the strength of a brand's emotional connection with consumers. Jeff Jacobs, *Brand Loyalty and Brand Affinity: What's the Difference?*, QUALITY CERTIFICATION ALLIANCE: BLOG (Oct. 9, 2013), <http://www.qcalliance.org/2013/10/09/brand-loyalty-and-brand-affinity-whats-the-difference/> [<http://perma.cc/B3V5-692C>].

<sup>6</sup> *Id.* The consumer decision journey, or path down the purchase funnel, varies for every consumer and for each transaction they make. The consumer must consider the brands, evaluate them, and decide to purchase a specific product at a specific time. The social media conundrum is that it is nearly impossible to measure when a social media post affected that consumer's *later* decision to

pressure is causing some brands to take riskier approaches to social media in order to garner more of the measureable KPIs, such as direct engagements or earned media impressions.<sup>7</sup> One such risk is organically engaging—that is, without notice and without contractual agreement—with celebrities across social media platforms.<sup>8</sup>

This interaction may arise in a number of ways: a celebrity may genuinely value the brand's product or service and at-mention the brand,<sup>9</sup> telling the brand how much the celebrity likes them; or, a brand may at-mention the celebrity's official social media account in a post.<sup>10</sup> While this at-mentioning of celebrities is commonplace for everyday private individuals, brands must do so cautiously because it is often impossible for consumers to delineate between paid/sponsored celebrity endorsements and these spontaneous organic conversations.<sup>11</sup> In fact, the Federal Trade Commission (FTC) aims to avoid exactly this type of consumer confusion.<sup>12</sup> While the FTC regulations regarding social media advertising endorsements are outdated, the FTC is investigating brands for similar incidences of consumer confusion on social media.<sup>13</sup> Likewise, because the

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purchase a good. This causes skepticism about what the ROI on a social media campaign actually is. *Id.*

<sup>7</sup> See *infra* Part I (discussing social media engagement mechanics and brand social media engagement opportunities); *infra* note 145 (discussing earned impressions).

<sup>8</sup> Leah W. Feinman, *Celebrity Endorsements in Non-Traditional Advertising: How the FTC Regulations Fail to Keep Up with the Kardashians*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 97, 102 (2011).

<sup>9</sup> See *infra* note 42 and accompanying text.

<sup>10</sup> Kat Dennings (@OfficialKat), TWITTER (June 4, 2014, 9:19 AM), <https://twitter.com/officialkat/status/474223771478269952> [<http://perma.cc/826T-NMKC>] (highlighting the conversation the actress spontaneously had with the Denny's Diner brand on Twitter); Arby's (@Arby's), TWITTER (Jan. 26, 2014, 5:28 PM) [hereinafter Arby's Tweet], <https://twitter.com/arbys/status/427614008946855936> [<http://perma.cc/6E3R-3ZLS>] (demonstrating an instance in which a brand at-mentions a celebrity without the celebrity's prior consent).

<sup>11</sup> Feinman, *supra* note 8, at 133 (“[I]t is unclear as to whether a reasonable consumer would assume that a celebrity who appears in a well-publicized advertising campaign for a product or brand is also compensated for writing about the product on her social networking site.”).

<sup>12</sup> The FTC uses a “clear and conspicuous” standard for celebrity endorsement disclosures. 16 C.F.R. § 255.5 (2009).

<sup>13</sup> Letter from Mark K. Engle, FTC, to Kenneth A. Plevan, Skadden, Arps, Slate, Meagher & Flom LLP (Apr. 20, 2010) (on file with FTC website), <https://>

brands are benefiting in some way from the association with the celebrity—through increases in likes, shares, retweets, or follows—celebrities are now beginning to bring lawsuits against brands who misappropriate their names or images.<sup>14</sup> Such a legal risk, and the accompanying fines and legal fees, could easily outweigh the potential benefits of engaging in these risky content posting strategies.<sup>15</sup>

This Note will consider the legal rationales behind why brands should or should not engage in certain online conversations, and it aims to provide pragmatic solutions so that brands can reasonably avoid unnecessary legal exposure in a very confusing and rapidly evolving legal landscape.<sup>16</sup> As a case study, it will examine the instances in which brands organically engage with celebrities on social media sites, with particular emphasis on Twitter. It will begin by providing an overview of how social media platforms function, with a focus on engagement mechanics, such as the retweet and attention actions. It will then discuss real-time marketing philosophies and examples of real-time organic celebrity engagements. In Part II, this Note will survey the potential causes of action against brands that profit from an organic association with a celebrity. Prior to concluding, Part III will provide recommendations for

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[www.ftc.gov/sites/default/files/documents/closing\\_letters/anntaylor-stores-corporation/100420anntaylorclosingletter.pdf](http://www.ftc.gov/sites/default/files/documents/closing_letters/anntaylor-stores-corporation/100420anntaylorclosingletter.pdf) [<http://perma.cc/2HFX-JT7K>].

<sup>14</sup> Kimberlee Morrison, *Cutting Through the Social Media Jargon: What are Reach, Impressions and Engagement?*, ADWEEK: SOC. TIMES (Sept. 17, 2015, 1:30 PM), <http://www.adweek.com/socialtimes/cutting-through-the-social-media-jargon-what-are-reach-impressions-and-engagement/626743> [<http://perma.cc/J72S-FTMP>] (discussing how brands measure success on social media platforms, such as through “impressions” and “engagements”); *see generally infra* notes 99–102 and accompanying text (demonstrating how a brand intended to profit from engaging on social media).

<sup>15</sup> Sanford E. Warren Jr., *Copyright Infringement Risks Associated with Using Social Media*, IRMI (June 2011), <https://www.irmi.com/articles/expert-commentary/copyright-infringement-risks-associated-with-using-social-media> [<http://perma.cc/G93T-2ABH>].

<sup>16</sup> While many pertinent legal concepts certainly exist, they have not yet definitively been applied to social media scenarios. It is highly likely that even as courts do begin to apply the existing legal concepts to social media, the platforms will evolve at such a rapid rate that the precedent will struggle to keep pace. Theodore F. Claypoole, *Privacy and Social Media*, ABA: BUS. L. TODAY, (Jan. 2014), [http://www.americanbar.org/publications/blt/2014/01/03a\\_claypoole.html](http://www.americanbar.org/publications/blt/2014/01/03a_claypoole.html) [<http://perma.cc/2Q6Q-T6Q7>] (questioning specifically how state privacy laws, as an example, will adjust to evolving social media platforms).

risk management when engaging with celebrities via Twitter and other social media platforms.

### I. SOCIAL PLATFORM FUNCTIONALITY AND ENGAGEMENT OVERVIEWS

Social media is a primary form of communication in modern society.<sup>17</sup> Merriam-Webster Dictionary defines “social media” as “forms of electronic communication ([such] as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content ([such] as videos).”<sup>18</sup> In fact, social media is such a prominent subject in current society that it is in the top 10 percent of all searches on Merriam-Webster.com.<sup>19</sup> Facebook, Twitter, Instagram, Google+, Tumblr, Pinterest, Snapchat, FourSquare, Reddit, YouTube, and LinkedIn are some of the most popular social media platforms in the United States.<sup>20</sup> Facebook is the largest social media site both within the United States and internationally.<sup>21</sup> Facebook has more than 1.28 billion active monthly users, and 72 percent of adults in the United States visit Facebook at least once per month.<sup>22</sup> Twitter is the third most popular social media site

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<sup>17</sup> Dave Lee, *How Twitter changed the world, hashtag-by-hashtag*, BBC NEWS: TECH. (Nov. 7, 2013), <http://www.bbc.com/news/technology-24802766> [<http://perma.cc/T84Q-XRFD>] (“[Twitter] has cemented itself as the home of live, global chatter.”); Doug Gross, *5 ways Twitter changed how we communicate*, CNN (Mar. 21, 2011, 1:41 AM), <http://www.cnn.com/2011/TECH/social.media/03/21/twitter.birthday.communication/> [<http://perma.cc/4MPR-PN97>] (Some call Twitter “a powerful tool for democracy.”).

<sup>18</sup> *Definition of Social Media*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/social%20media#> [<http://perma.cc/3DWR-PUDA>].

<sup>19</sup> *Id.*

<sup>20</sup> Shea Bennett, *Facebook, Twitter, Instagram, Pinterest, Vine, Snapchat—Social Media Stats 2014*, ADWEEK: SOC. TIMES (June 9, 2014, 3:00 PM), <http://www.adweek.com/socialtimes/social-media-statistics-2014/499230> [<http://perma.cc/F5N7-LU5W>]; see also *Leading Social Networks Worldwide as of September 2016, Ranked by Number of Users*, STATISTA, <http://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> [<https://perma.cc/922J-YEXV>].

<sup>21</sup> *Leading Social Media Websites in the United States in October 2015, Based on Share of Visits*, STATISTA, <http://www.statista.com/statistics/265773/market-share-of-the-most-popular-social-media-websites-in-the-us/> [<https://perma.cc/TM59-TWRB>].

<sup>22</sup> Bennett, *supra* note 20.

domestically, and it has 255 million active monthly users.<sup>23</sup> Users send 500 million tweets per day, and 46 percent of users tweet at least once per day.<sup>24</sup> Instagram has 200 million active monthly users, while LinkedIn has 187 million, and Pinterest has 40 million.<sup>25</sup> While Twitter may not have as many users as Facebook, the Twitter user experience allows for the most organic real-time conversations.<sup>26</sup> As such, this Note will focus on Twitter as a case study of real-time social platform engagements between celebrities and brands.

### A. *Twitter Mechanics*

Twitter is a digital meeting place for “friends, family, and co-workers to communicate and stay connected through the exchange of quick, frequent messages.”<sup>27</sup> To start tweeting, a user needs only to sign up for a free account; Twitter will even recommend initial actions to help educate new users.<sup>28</sup> The first thing users must do when creating a Twitter account is to decide on a username, commonly called a Twitter “handle.”<sup>29</sup> Next, users must decide what the first communication will be: messages posted via a Twitter account

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<sup>23</sup> STATISTA, *supra* note 21 (showcasing Twitter as trailing only Facebook and YouTube in active monthly users).

<sup>24</sup> Bennett, *supra* note 20.

<sup>25</sup> *Id.*

<sup>26</sup> Dominique Jackson, *Facebook vs. Twitter: Which Is Best for Your Brand*, SPROUT SOC. (Sept. 15, 2015), <http://sproutsocial.com/insights/facebook-vs-twitter/> [<http://perma.cc/6Z6G-PB2T>] (“[As opposed to Facebook,] Twitter is where users go when they want real-time content. If a company is hosting or attending an event, Twitter is where people go to follow along with the action while it’s happening. As soon as people consume one Tweet, they quickly go back to their feed to see what else is happening.”).

<sup>27</sup> *New user FAQs*, TWITTER, <https://support.twitter.com/articles/13920#> [<http://perma.cc/J2B6-HCUA>] [hereinafter *New User FAQs*].

<sup>28</sup> See *Getting Started with Twitter*, TWITTER, <https://support.twitter.com/articles/215585?lang=en#> [<http://perma.cc/HRW5-RFRH>] [hereinafter *Getting Started*].

<sup>29</sup> Shea Bennett, *4 Reasons Why You Need to Change Your Username on Twitter*, ADWEEK: SOC. TIMES (Apr. 11, 2015, 6:00 AM), <http://www.adweek.com/socialtimes/twitter-username-tips/453851> [<http://perma.cc/2RCX-XGCA>]. Note that Twitter handles exist in the form of “at-account name.” If one creates a new account with the username ‘StruggleTheCat,’ the handle will appear as ‘@StruggleTheCat’ and would be verbalized as “At Struggle the Cat.”

are called “tweets,” which may contain text, photos, videos, and links.<sup>30</sup> Notably, Twitter limits each post to a scant 140 characters, so as to emulate original cellular text messaging conversations.<sup>31</sup> Users would continue sharing daily thoughts, pictures of kittens, inspirational quotes, or the occasional emoji to express a surprisingly vivid array of emotions.<sup>32</sup> If the content<sup>33</sup> is interesting enough, the new account will start accumulating followers.<sup>34</sup>

Twitter also allows users to engage more directly with other users.<sup>35</sup> If the account @surfergirl8989 wants to communicate directly with her friend, @skaterchick247, she has multiple means of doing so.<sup>36</sup> First, let us imagine @surfergirl8989 posts a hilarious tweet, and @skaterchick247 wants to acknowledge how funny the tweet is. The simplest engagement between the two individuals would be a “like.”<sup>37</sup> @skaterchick247 could click a heart-shaped icon on @surfergirl8989’s tweet, which would notify @surfergirl8989 that @skaterchick247 has liked her tweet.<sup>38</sup> The like engagement

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<sup>30</sup> *Getting Started*, *supra* note 28.

<sup>31</sup> New User FAQs, *supra* note 27.

<sup>32</sup> Merriam-Webster defines “emoji” as “any of various small images, symbols, or icons used in text fields in electronic communication (as in text messages, email, and social media) to express the emotional attitude of the writer, convey information succinctly, communicate a message playfully without using words, etc.” DEFINITION OF EMOJI, Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/emoji> [<https://perma.cc/FMP3-3TZA>].

<sup>33</sup> In the advertising, social media, and digital marketing industries, the term “content” refers to any and all things posted to a social media account. *See What are replies and mentions?*, TWITTER, <https://support.twitter.com/articles/14023#> [<http://perma.cc/X7CX-AXBF>] [hereinafter Replies & Mentions].

<sup>34</sup> *Grow and engage your follower base*, TWITTER: BASICS, <https://business.twitter.com/basics/grow-and-engage-your-follower-base> [<http://perma.cc/V42A-DYUG>] (discussing how to grow one’s account). When someone “follows” a specific Twitter handle, it means those people have elected to subscribe to that handle’s tweets. *FAQs about following*, TWITTER, <https://support.twitter.com/articles/14019?lang=en#> [<http://perma.cc/CY5V-FRXD>]. Tweets of all accounts that a person follows will appear on a customized Twitter Feed on that account’s homepage upon logging into Twitter. *Getting Started*, *supra* note 28.

<sup>35</sup> *Types of Tweets and where they appear*, TWITTER, <https://support.twitter.com/articles/119138#> [<http://perma.cc/83HL-HMNZ>].

<sup>36</sup> *Id.*

<sup>37</sup> *Liking a Tweet*, TWITTER, <https://support.twitter.com/articles/20169874#> [<http://perma.cc/9RKX-M8HY>].

<sup>38</sup> *Id.*

on Twitter is very much akin to the like on Facebook.<sup>39</sup> To verbalize her adoration for @surfergirl8989's tweet, @skaterchick247 could "reply" to @surfergirl8989's tweet. A reply begins with the handle of the person to whom the tweet is replying and appears in @surfergirl8989's timeline.<sup>40</sup> This reply is only visible to people who follow both @surfergirl8989 and @skaterchick247.<sup>41</sup>

Now, imagine @skaterchick247 simply would like to initiate a conversation with @surfergirl8989. @skaterchick247 would say something to the effect of, "Thanks @surfergirl8989 for being the best team captain! #GoTribe."<sup>42</sup> Including @surfergirl8989's handle in the middle of the tweet makes this a "mention," otherwise known as an "at-mention."<sup>43</sup> Twitter will notify @surfergirl8989 that she has been at-mentioned, and the tweet including the at-mention will

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<sup>39</sup> Akarshan Kumar, *Hearts on Twitter*, TWITTER, <https://blog.twitter.com/2015/hearts-on-twitter> [<http://perma.cc/WR3K-TQ7P>]. Note that Twitter has recently switched from "favorites" to "likes" as of November of 2015. *Id.* Twitter released a statement saying,

We are changing our star icon for *favorites* to a heart and we'll be calling them *likes*. We want to make Twitter easier and more rewarding to use, and we know that at times the star could be confusing, especially to newcomers. You might like a lot of things, but not everything can be your *favorite*.

*Id.*

<sup>40</sup> *Posting Replies and Mentions*, TWITTER, <https://support.twitter.com/articles/20169871#> [<http://perma.cc/9EZN-C2WN>].

<sup>41</sup> *Types of Tweets and where they appear*, *supra* note 35.

<sup>42</sup> "Mentions" on Twitter are sometimes vocalized as "at-mentions" in the vernacular. The meanings are identical; however, this Note will refer to them "at-mentions" for the sake of clarity. See, e.g., *@Mention People and Groups in Posts and Comments*, SALESFORCE, [https://help.salesforce.com/apex/HTViewHelpDoc?id=collab\\_add\\_mentioning\\_people.htm&language=en\\_US](https://help.salesforce.com/apex/HTViewHelpDoc?id=collab_add_mentioning_people.htm&language=en_US) [<http://perma.cc/JD48-JLUG>] (showing employees how to "@mention" their peers).

<sup>43</sup> It is worthwhile to note that brands operating on Twitter will often utilize at-mentions in a manner that makes them appear to be more organic. By placing a period directly in front of an at-mention, it appears that the brand is simply replying to a celebrity's generic tweet. While this simple reply would be seen by a negligible number of people (as those people would need to follow both the brand and the celebrity), placing the period at the beginning of the tweet makes it an at-mention, and it is visible to everyone following the brand. Lance Ulanoff, *Here's how Twitter @mentions are changing*, MASHABLE, <http://mashable.com/2016/05/24/twitter-mentions-explained/#VrjEo6.aSEqX> [<https://perma.cc/836K-YJFC>].

be visible to anyone following @skaterchick247, unless @skaterchick247 has protected her tweets.<sup>44</sup>

Lastly, assume @skaterchick247 sees a tweet that uniquely expresses a proposition she supports, and she wishes to share that tweet without modifying it. This reposting of someone else's tweet is termed a "retweet."<sup>45</sup> Generally, the idea is that one retweets a proposition not only because that individual liked the content, but also as a value proposition demonstrating that person's association with the group or individual being retweeted.<sup>46</sup> Retweeting preserves the content and includes attribution to the original source, showing all other Twitter users whose original idea the tweet conveys.<sup>47</sup> Consequentially, an individual will generally elect to retweet when the original content was shared by a celebrity, news outlet, or organization.<sup>48</sup> Retweets and at-mentions are of particular applicability to brands that engage with celebrities over social media.

### *B. Brand-Specific Social Media Engagement Behaviors*

Just as consumers can engage with one another over social media platforms, brands can become part of the conversation—and the goal is to genuinely engage, rather than to awkwardly insert branded or promotional content into a trending conversation.<sup>49</sup>

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<sup>44</sup> Note that users can also "direct message" each other in specific instances; however, direct messaging is not integral to this paper's discussion of public conversations between brands and celebrities. *About Direct Messages*, TWITTER, <https://support.twitter.com/articles/14606#> [<http://perma.cc/A68X-Y2XM>].

<sup>45</sup> FAQs about Retweets (RT), TWITTER <https://support.twitter.com/articles/77606#> [<http://perma.cc/2383-KVRA>].

<sup>46</sup> *Id.* (describing user behavior on Twitter regarding retweets: "Sometimes people type RT at the beginning of a Tweet to indicate that they are re-posting someone else's content. This isn't an official Twitter command or feature, but signifies that they are quoting another user's Tweet").

<sup>47</sup> See Michael Barthel & Elisa Shearer, *How do Americans use Twitter for news?*, PEW RES. CTR.: FACT TANK (Aug. 19, 2015), <http://www.pewresearch.org/fact-tank/2015/08/19/how-do-americans-use-twitter-for-news/> [<http://perma.cc/X79M-VE64>] (noting that "a significantly higher proportion" of users retweet when sharing news, including entertainment news). In fact, the most commonly shared type of news on Twitter is entertainment news. *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Dara Fontein, *The Social Media Glossary: 207 Essential Definitions*, HOOT SUITE (Oct. 13, 2015), <http://blog.hootsuite.com/the-2015-social-media-glossary>

This is often not as easy for brands to achieve as it may sound.<sup>50</sup> Since brands typically suffer through lengthy approval processes that span many months before publishing, brands are struggling to navigate the approval waters rapidly enough to engage with a tweet before it becomes irrelevant—which could occur in a matter of minutes.<sup>51</sup>

The first and most infamous brand to successfully engage in real-time on a national scale was Oreo.<sup>52</sup> Now near legend in advertising lore, Oreo capitalized on the 2013 Super Bowl blackout with a spontaneous tweet that beautifully connected the Oreo cookie with the Superdome’s darkness: the text read, “Power out? No problem[,]” featuring an image of a barely illuminated Oreo cookie, the Oreo logo, and superimposed text reading, “You can still dunk in the dark[.]”<sup>53</sup> Thanks to Oreo, “real-time marketing” was born.<sup>54</sup> Now brands fight to emulate Oreo’s success.<sup>55</sup>

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-207-essential-definitions/ [http://perma.cc/BL23-J9VB] (“Twitter ... use[s] an algorithm to define which topics and hashtags are currently trending.”).

<sup>50</sup> See Bhasin, *infra* note 170 and accompanying text (showcasing spectacular brand failures on social media).

<sup>51</sup> Aaron Taube, *We Got A Look Inside The 45-Day Planning Process That Goes Into Creating A Single Corporate Tweet*, BUS. INSIDER (May 24, 2014, 2:17 PM), <http://www.businessinsider.com/huge-social-media-manager-does-all-day-2014-5> [http://perma.cc/2DB5-WQE3] (discussing a simple corporate tweet that took almost two months to create and approve).

<sup>52</sup> Gregarious Narain, *Here’s Why Real-Time Marketing Won’t Work (and What Will)*, CONTENT MARKETING INST. (Apr. 8, 2015), <http://contentmarketinginstitute.com/2015/04/real-time-marketing-wont-work/> [https://perma.cc/9QQC-AXX3].

<sup>53</sup> *Id.*; see Exhibit B.

<sup>54</sup> Robert Hof, *Real-Time Advertising Has Arrived, Thanks To Oreo And The Super Bowl*, FORBES (Feb. 4, 2013, 5:26 PM), <http://www.forbes.com/sites/Roberthof/2013/02/04/real-time-advertising-has-arrived-thanks-to-oreos-and-the-super-bowl/#655a1a5f449f> [https://perma.cc/2X38-UCBV].

<sup>55</sup> *Id.* The Oreo “Dunk in the Dark” tweet was not only innovative, but it was also highly engaging. After the evening of the Super Bowl, the tweet had 15,000 retweets and earned Oreo’s Twitter account’s 8,000 new followers. Jennifer Rooney, *Behind The Scenes Of Oreo’s Real-Time Super Bowl Slam Dunk*, FORBES: CMO NETWORK (Feb. 4, 2014, 11:40 AM), <http://www.forbes.com/sites/jenniferrooney/2013/02/04/behind-the-scenes-of-oreos-real-time-super-bowl-slam-dunk/#2715e4857a0b77e2409659ee> [https://perma.cc/9PXV-L9CT]. The brand’s Instagram following increased from a mere 2,000 followers to 36,000 followers. *Id.* The image itself was shared on Facebook and Twitter more than 20,000 times and generated 525 million earned media impressions (five times the number

“Real-time” is the new buzzword in the advertising industry—every client wants a real-time success that will go viral.<sup>56</sup> With decreasing advertising budgets, agencies feel pressure to find a “Dunk in the Dark” moment for their clients: the question is: how far can brands push the envelope of real-time organic behaviors before hitting legal roadblocks?<sup>57</sup> Because real-time interactions require decisions in a matter of minutes, typical risk assessments and legal counsel approval safeguards are neglected in an effort to succeed at the real-time marketing game.<sup>58</sup>

Regardless, many brands actually are able to engage in real-time on a smaller scale, as they engage with consumers every day.<sup>59</sup> Indeed, genuine engagements between the brand and consumers strengthen brand affinity and mitigate negative sentiment.<sup>60</sup>

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of people who even watched the Super Bowl itself). Audrey Engelman, *Timing is Simply Black and White: How Oreo Turned The Super Bowl Blackout Into An Opportunity*, LIVE OAK COMMS. (Apr. 12, 2015), <http://liveoakcommunications.com/timing-is-simply-black-and-white-how-oreo-turned-the-super-bowls-mistake-into-an-opportunity/> [<https://perma.cc/G9WM-A72Y>].

<sup>56</sup> Rob Carpenter, *Real-Time Marketing Isn't What You Think It Is*, EVERGAGE (June 15, 2014), <http://www.evergage.com/blog/real-time-marketing-isnt-what-you-think-it-is/> [<https://perma.cc/UZ6F-R5Q9>]. Real-time marketing is defined as the practice of brands engaging with their audience via content, advertising, and product placement that is relevant to a specific current event or cultural happening. The content is most often in the form of a “meme” or graphic advertisement shared through social media channels. *Id.*; Scott Stratten, *Why No One Will Watch Your Crappy Corporate “Viral” Video, and How to Fix It*, FAST CO., (July 30, 2012, 9:00 AM), <http://www.fastcompany.com/1844017/why-no-one-will-watch-your-crappy-corporate-viral-video-and-how-fix-it> [<https://perma.cc/RET4-W8QE>] (discussing client expectations of “viral videos”).

<sup>57</sup> Saya Weissman, *Brands court legal danger in real-time rush*, DIGIDAY (Feb. 17, 2014), <http://digiday.com/brands/legal-real-time-marketing/> [<https://perma.cc/EX9M-NW7Z>] (“[T]here are myriad legal issues that brands need to take into account for everything they post online. To actually be creative and entertaining means taking legal risks. But brands that are too conservative are also at risk—of coming off as banal at best, downright corny at worst.”).

<sup>58</sup> *See id.*

<sup>59</sup> Brent Gleeson, *6 Ways Brands Build Trust Through Social Media*, FORBES: ENTREPRENEURS (Oct. 31, 2012, 4:11 PM), <http://www.forbes.com/sites/brentgleeson/2012/10/31/6-ways-brands-build-trust-through-social-media/> [<https://perma.cc/Q4HL-U3E9>].

<sup>60</sup> Jon Gibs, *Measuring Success in Social Media*, HUGE (Jan. 15, 2014), <http://www.hugeinc.com/ideas/report/social-roi> [<https://perma.cc/NBM4-Q7RE>] (discussing brand sentiment garnered through social media).

Brands often field customer service requests on social platforms, while others seek out and engage with consumers directly and spontaneously.<sup>61</sup> While there is always a risk of appearing a bit like Big Brother when watching customers, consumers are generally excited to receive a personalized message from a large brand.<sup>62</sup> As brands may encounter legal complications when using a consumer's content, at-mentions and direct messages are popular forms of communication for brands.<sup>63</sup> Such a situation may arise when, for example, Apple launches a new iPhone; Phone Company Z, which would sell the new phone, may scrape social channels for the hashtags #iphone and #phonecompanyZ and like all the photos of consumers' new phones. @phonecompanyZ may even comment on users' photos to the effect of, "Hope you love your new #iphone!"<sup>64</sup> Likewise, if a consumer tweets at @phonecompanyZ complaining of something about his new phone, @phonecompanyZ may respond by offering a new device or directing him to customer service.<sup>65</sup> An interesting conundrum arises when a community manager finds that a celebrity has at-mentioned, hashtagged, or otherwise engaged with the brand.<sup>66</sup> To what extent could—or should—the

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<sup>61</sup> See Littleton, *infra* note 62; Jeff Lesser, *How Twitter can play a role in customer service*, TWITTER (July 17, 2015, 6:02 PM), <https://blog.twitter.com/2015/how-twitter-data-can-play-a-role-in-customer-service> [<https://perma.cc/9PGZ-2D52>].

<sup>62</sup> Tamara Littleton, *Why your brand should use social listening right now*, ECONSULTANCY: BLOG (Jan. 8, 2014), <https://econsultancy.com/blog/64074-why-your-brand-should-use-social-listening-right-now/> [<https://perma.cc/J9XR-2X2V>] (discussing how brands may listen to consumer conversations on social media in order to engage with consumers in real-time).

<sup>63</sup> See, e.g., Joel Windels, *Research: Brands Still Don't Listen to Customers on Twitter*, BRANDWATCH (Jan. 20, 2015), <https://www.brandwatch.com/2015/01/research-brands-still-dont-listen-customers-twitter/> [<https://perma.cc/5UAZ-5XWK>].

<sup>64</sup> See *Consumers Will Punish Brands that Fail to Respond on Twitter Quickly*, LITHIUM (Oct. 29, 2013), <http://www.lithium.com/company/news-room/press-releases/2013/consumers-will-punish-brands-that-fail-to-respond-on-twitter-quickly> [<https://perma.cc/MF93-2UQQ>].

<sup>65</sup> *Id.*

<sup>66</sup> This likely happens through social listening, in which one "invest[s] in technology that not only tracks mentions, but monitors sentiment, emotion and intent" to purchase a brand's goods or services. Littleton, *supra* note 62. By listening to what consumers are saying about a brand, community managers can respond in real-time to address the problem, provide customer service, or engender further brand goodwill. *Id.*

brand engage with that celebrity? This Note will aim to answer that question and provide recommendations for doing so with the least amount of legal risk.<sup>67</sup>

*C. Case Study: Arby's Tweets at Pharrell Williams During the Grammys*

Perhaps the most well-known organic celebrity engagement to occur on Twitter was a tweet from fast-food restaurant chain Arby's, addressing musician Pharrell Williams.<sup>68</sup> On the evening of January 26, 2014, Pharrell Williams was attending the Grammy Awards.<sup>69</sup> While walking down the red carpet, Williams wore a cowboy-style brown hat with a striking and unintentional likeness to the Arby's logo.<sup>70</sup> The Arby's social media team seized the opportunity to engage in real-time and to at-mention Williams while doing so.<sup>71</sup> The Arby's tweet simply read, "Hey @Pharrell, can we have our hat back? #GRAMMYS[.]"<sup>72</sup> Adding to the social media frenzy, Williams himself responded to the tweet with his own pithy retort: "Y'all tryna start a roast beef? [ ]"<sup>73</sup> The Arby's tweet has garnered over seventy-eight thousand retweets and over fifty thousand likes.<sup>74</sup> Arby's social media manager, Josh Martin, revealed that the tweet also prompted over ten thousand replies and produced approximately six thousand new followers on the platform.<sup>75</sup> To put these metrics into perspective, Martin indicated that the tweet earned more than 384 times the reach of an average Arby's

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<sup>67</sup> *Infra* Part III.

<sup>68</sup> Arby's Tweet, *supra* note 10. See Exhibit C.

<sup>69</sup> Breeanna Hare, *Grammys 2014: Pharrell's hat gets life—and Twitter—of its own*, CNN (Jan. 27, 2014, 1:46 PM), <http://www.cnn.com/2014/01/27/showbiz/celebrity-news-gossip/grammys-2014-pharrells-hat/> [<https://perma.cc/Z9RX-2AG5>].

<sup>70</sup> *See id.*

<sup>71</sup> Arby's Tweet, *supra* note 10.

<sup>72</sup> *Id.*

<sup>73</sup> Pharrell Williams (@Pharrell), TWITTER (Jan. 27, 2014, 1:23 AM) <https://twitter.com/Pharrell/status/427733647081209856> [<https://perma.cc/2XAT-UF57>].

<sup>74</sup> Arby's Tweet, *supra* note 10.

<sup>75</sup> Amy Gesenhues, *Arby's Social Media Manager Gives Inside Scoop On Tweet To Pharrell That Rocked the Grammys*, MARKETING LAND (Jan. 29, 2014, 4:21 PM), <http://marketingland.com/guy-behind-arbys-tweet-pharrell-williams-rocked-grammys-72222> [<https://perma.cc/64DW-B8GA>].

tweet.<sup>76</sup> The Arby's public relations firm estimates that "the advertising equivalency would be 84 million impressions with a \$22 million price tag."<sup>77</sup>

## II. POTENTIAL CAUSES OF ACTION

From the above examples, it is clear why brands want to engage in real-time: the potential for free earned media impressions and digital prominence is vast. However, social media engagements can be unexpectedly risky due to both the exceptionally short time-frame for approvals and the necessity of fielding immediate feedback from the market.<sup>78</sup> This Part will consider a case where a brand's social media tactic went horribly wrong, to the extent that the opposing party brought legal action against the brand and secured a potentially sizable settlement.<sup>79</sup> That case, *Heigl v. Duane Reade, Inc.*, is currently the most on-point example of the legal ramifications of real-time marketing gone wrong, and it should serve as a cautionary tale for brands or community managers looking to do the same.<sup>80</sup>

### A. Case Study: *Heigl v. Duane Reade, Inc.*

When a brand engages with any celebrity organically on social media, that brand exposes itself to a litany of potential legal actions.<sup>81</sup>

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<sup>76</sup> *Id.*

<sup>77</sup> Josh Martin, *Arby's: Always-on listening, engagement our secret to success on Twitter*, TWITTER (Mar. 20, 2014, 7:17 PM), <https://blog.twitter.com/2014/arbys-always-on-listening-engagement-our-secret-to-success-on-twitter> [<https://perma.cc/XZV9-J8AP>].

<sup>78</sup> Weissman, *supra* note 57.

<sup>79</sup> *See infra* Part II.A.

<sup>80</sup> While cases of consumers bringing legal action against brands for using their content without permission are more common, Heigl's case is a prime and current example of the dangers brands face from engaging with celebrities without that celebrity's permission. *See, e.g.*, Sydney Ember & Rachel Abrams, *Retailers' Use of Their Fans' Photos Draws Scrutiny*, N.Y. TIMES (Sept. 21, 2015), <http://www.msn.com/en-us/news/technology/retailers%E2%80%99-use-of-their-fans%E2%80%99-photos-draws-scrutiny/ar-AAexT0X?ocid=SL5EDHP> [<https://perma.cc/4XXD-FCL7>] (discussing how often brands use consumer content without permission and noting that consumers can take legal action if they choose).

<sup>81</sup> Weissman, *supra* note 57.

Unfortunately for brands today, there is a dearth of precedent to guide in-house or contracted legal counsel through the murky waters of implied social media endorsements.<sup>82</sup> While brands can employ strategies to mitigate their potential risk exposure, those hoping to increase exposure and brand affinity may cross the line of what celebrities in the market are willing to tolerate.<sup>83</sup> Since the law in this area is still in its infancy, courts may be more likely to take test cases than if there was settled case law.<sup>84</sup> Consequentially, brands should beware when engaging with a celebrity with whom they have no official contract for social media at-mentions.<sup>85</sup>

Such an ideal test case arose in 2014, when Katherine Heigl, famous for her role as Doctor Izzy Stevens on the long-running television show *Grey's Anatomy*, sued a pharmacy chain for six million dollars for using Heigl's image and social media persona without her permission on the pharmacy's social media channels.<sup>86</sup> While the complaint will be discussed below, the case was ultimately settled out of court: Heigl filed to dismiss the lawsuit with prejudice, while Duane Reade donated an undisclosed amount to Heigl's charity.<sup>87</sup>

On March 18, 2014, Heigl decided to do some shopping at a popular New York Pharmacy chain called Duane Reade.<sup>88</sup> As is typical, a celebrity gossip media source captured photos of Heigl's shopping

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<sup>82</sup> *Id.*

<sup>83</sup> See *infra* Part II.A.

<sup>84</sup> See generally Sharon D. Nelson & John W. Simek, *Mitigating the Legal Risks of Using Social Media*, 35 WYO. LAW. 34 (2012); Randy L. Dryer, *Advising Your Clients (And You!) in the New World of Social Media: What Every Lawyer Should Know About Twitter, Facebook, YouTube, & Wikis*, 23 UTAH B.J. 16 (2010).

<sup>85</sup> Weissman, *supra* note 57.

<sup>86</sup> See Heigl Complaint, *infra* note 88.

<sup>87</sup> Eriq Gardner, *Katherine Heigl Ends Lawsuit Over Duane Reade Tweet (Exclusive)*, HOLLYWOOD REP. (Aug. 27, 2014, 12:20 PM), <http://www.hollywoodreporter.com/thr-esq/katherine-heigl-ends-lawsuit-duane-728552> [<https://perma.cc/E9AE-G737>].

<sup>88</sup> Complaint, Heigl v. Duane Reade, Inc., No. 1:14-CV-02502 (S.D.N.Y. Apr. 9, 2014) [hereinafter Heigl Complaint]. Heigl won a Primetime Emmy for her work on *Grey's Anatomy* and has been nominated for two Golden Globe Awards. *Id.* As further testament to her fame, the Complaint confirms Heigl has 754,000 Twitter followers, and a Google search at the time returned over 3.2 million results. *Id.* Such details tend to support a high commercial valuation of Heigl's image. *Id.*

expedition and posted the photos and relevant information online.<sup>89</sup> While journalists are often protected by the Fair Use Doctrine, this protection does not extend to brands using the same content for commercial gain.<sup>90</sup> Heigl had no contract with the Duane Reade brand; yet, Duane Reade's social media content manager tweeted the photo of Heigl leaving the Duane Reade store in New York City with copy<sup>91</sup> reading, "Love a quick #DuaneReade run? Even @KatieHeigl can't resist shopping #NYC's favorite drugstore," including a Bitly link<sup>92</sup> to the gossip site where the store found the image of Ms. Heigl.<sup>93</sup> As the tweet began to attract engagement, Duane Reade also reposted the tweet's content, including the photo of Heigl, altering the text to now read: "Don't you just love a quick #DuaneReade run? Even Katherine Heigl can't resist shopping at #NYC's most convenient drugstore!"<sup>94</sup> While many brands would likely view using a celebrity's photograph without authorization as especially risky, Duane Reade's actions after the initial tweet

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<sup>89</sup> *Katherine Heigl Signs with WME After Leaving Creative Artists Agency*, JUST JARED (Mar. 17, 2014), <http://www.justjared.com/2014/03/17/katherine-heigl-signs-with-wme-after-leaving-creative-artists-agency/> [<https://perma.cc/S36B-GA4R>].

<sup>90</sup> 17 U.S.C. § 107 (1988 & Supp. II 1990). *But see generally* Manal Z. Khalil, *The Applicability of the Fair Use Defense to Commercial Advertising: Eliminating Unfounded Limitations*, 61 *FORDHAM L. REV.* 661 (1992) (discussing the applicability of the Fair Use Doctrine to commercial advertising).

<sup>91</sup> In the advertising industry, text on either printed or digital advertising pieces is generally referred to as a "copy." *What is Advertising Copy?*, L. DICTIONARY, <http://thelawdictionary.org/advertising-copy/> [<https://perma.cc/M5S8-FX5L>].

<sup>92</sup> *See* BITLY, <https://bitly.com/> [<https://perma.cc/X2MF-E2ZX>]; *Unleash the Power of the Link*, BITLY, <https://bitly.com/pages/links> [<https://perma.cc/YP6K-2EBT>]. Bitly is a popular choice for brand social media community managers to use to shorten the often long and confusing website addresses that the brand would like to share in a social media post to short sharable links. *Id.*

<sup>93</sup> Emily Yahr, *Can Katherine Heigl really sue Duane Reade for tweeting her photo? Yes, and here's why.*, WASH. POST: STYLE BLOG (Apr. 11, 2014), <https://www.washingtonpost.com/news/style-blog/wp/2014/04/11/can-katherine-heigl-really-sue-duane-reade-for-tweeting-her-photo-yes-and-heres-why/> [<https://perma.cc/AQD4-W5FQ>]; *see Legal Watch-Out: Activating Social Media With Celebrities*, IEGRS (Apr. 6, 2015), <http://www.sponsorship.com/iegsr/2015/04/06/Legal-Watch-Outs--Activating-Social-Media-With-Cel.aspx> [<https://perma.cc/5HFG-FUJC>].

<sup>94</sup> Heigl Complaint, *supra* note 88.

and Facebook post certainly did not help the company's cause.<sup>95</sup> The company's actions would indeed have made *Heigl v. Duane Reade, Inc.* a very strong test case on the merits.<sup>96</sup> Heigl's causes of action included: (1) the right to privacy and publicity under New York Civil Rights Law, (2) unfair competition under New York common law; and (3) Lanham Act violations.<sup>97</sup> As stated in Heigl's complaint, the basic premise underlying each of these claims is that "[Heigl's] picture, image, and likeness enjoy a wide-spread recognition and monetary value. To prevent any diminution of that value, Plaintiff has carefully and deliberately protected her valuable professional name, picture, image, likeness, and persona ... from exploitation through *unauthorized* commercial advertising."<sup>98</sup>

Most notably, Heigl's legal counsel sent Duane Reade a cease and desist letter demanding the pharmacy respond and remove the relevant content—Duane Reade allegedly ignored Heigl's request entirely.<sup>99</sup> At no time, either before or after posting, did Duane Reade ever seek authorization to use the photo or associate itself contractually with Heigl's image.<sup>100</sup> Furthermore, one must consider the types of messages Duane Reade traditionally shares over its social media channels: a survey of Duane Reade's content aptly demonstrates the brand uses its channels for promotional purposes and commercial gain.<sup>101</sup> The chain's Twitter account routinely features Duane Reade's promotions and products, including links to advertisements for specific products.<sup>102</sup> The complaint further alleges that Duane Reade did not feature any other celebrities on its social media channels in a similar manner.<sup>103</sup> As a consumer who follows the brand and would be accustomed to branded product

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<sup>95</sup> *Id.* at 10.

<sup>96</sup> *See generally supra* note 94 and accompanying text.

<sup>97</sup> Heigl Complaint, *supra* note 88, at 10–14.

<sup>98</sup> *Id.* at 4 (emphasis added).

<sup>99</sup> *Id.* at 10.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 5–6.

<sup>102</sup> *See id.* at 6 (“Defendant’s Tweets predominantly promote commercial advertisements for a wide range of its products and services. For example, on March 14, 2014, Defendant tweeted ‘Crunch, crunch Munch! It’s National Potato Chip Day! Enjoy!’ followed by a link to an advertisement for Defendant’s own ‘DeLish’ label food product.”).

<sup>103</sup> *Id.* at 8.

promotions and unaccustomed to celebrity endorsements, it is very likely the consumer would assume an endorsement relationship between the celebrity and the brand.<sup>104</sup> While this sort of consumer confusion is exactly what the FTC aims to avoid, the FTC's lack of current, detailed social media guidelines and relatively selective brand sanctioning leaves many issues of first impression to the courts.<sup>105</sup> The remainder of this Part will discuss legal concepts relating to Heigl's causes of action, of which attorneys should remain cognizant when advising brands on social media strategies, focusing on unfair competition and rights to publicity.

### *B. Notable Causes of Action*

This Note aims to provide a pragmatic framework for mitigating legal risks when engaging in social media content marketing, paying particular attention to the issues regarding spontaneous interactions with celebrities. This Note will not address the merits of Heigl's case; rather, it will survey relevant legal issues of which brands and content marketers should be aware when initially advising clients.

First, Heigl's case specifically alleges unfair competition under state law.<sup>106</sup> Being a common law doctrine and intended to apply over time, the doctrine is highly malleable and meant to extend to protect changing property interests and business evolutions.<sup>107</sup> This notion is particularly helpful to celebrities who wish to prohibit brands from engaging with their social media content in manners that the celebrity does not approve.<sup>108</sup> Consider the Restatement of Unfair Competition's stance:

A representation is to the likely commercial detriment of another if: (a) the representation is material, in that it is likely to affect the conduct of prospective purchasers; and (b) there is a

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<sup>104</sup> Feinman, *supra* note 8, at 111–17.

<sup>105</sup> *Id.* at 121–27.

<sup>106</sup> Heigl Complaint, *supra* 88, at 13.

<sup>107</sup> *See Dior v. Milton*, 155 N.Y.S.2d 443, 455 (1954), *aff'd* (1956).

<sup>108</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION ch. 2, intro. n. (AM. LAW INST. 1995). Unfair competition includes “representations falsely describing the qualities or characteristics of a seller’s goods or services” or “false advertising.” *Id.*

reasonable basis for believing that the representation has caused or is likely to cause a diversion of trade from the other or harm the other's reputation or good will.<sup>109</sup>

Comment A of the Restatement clarifies that a person can be liable if the false or misleading representation is "likely to cause harm to the *commercial interests* of the other."<sup>110</sup> Materiality is defined in Comment B as when a "significant number of prospective purchasers are likely to attach importance to the representation in determining whether to engage in a proposed transaction[;]" proof of reliance harm is not necessary.<sup>111</sup> Furthermore, courts may consider "representations that relate to matters that the purchasers ordinarily consider important."<sup>112</sup>

Secondly, Heigl alleges an invasion of her right to publicity.<sup>113</sup> While the Restatement provides an overview, case law provides three distinct balancing tests to determine the victor when a right of publicity claim meets a First Amendment defense.<sup>114</sup> Though three Right to Privacy balancing tests exist, the *Rogers*<sup>115</sup> and the

<sup>109</sup> *Id.* ch. 2, § 3.

<sup>110</sup> *Id.* ch. 2, § 3, cmt. a (emphasis added).

<sup>111</sup> *Id.* ch. 2, § 3, cmt. b.

<sup>112</sup> *Dior*, 155 N.Y.S.2d at 455. The court in *Dior v. Milton* stated:

The modern view as to the law of unfair competition does not rest solely on the ground of direct competitive injury, but on the broader principle that property rights of commercial value are to be and will be protected from any form of unfair invasion or infringement and from any form of commercial immorality[.]

See RESTATEMENT (THIRD) OF UNFAIR COMPETITION ch. 2, § 3.

<sup>113</sup> Heigl Complaint, *supra* note 88, at 11–13.

<sup>114</sup> *Hart v. Electronic Arts, Inc.*, 717 F.3d 141, 149–54 (3d Cir. 2012) (comparing the three balancing tests and explaining application rationales); *see also* *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 580, 578–79 (1977) (finding no First or Fourteenth Amendment privilege for press in the circumstances where the event is also news).

<sup>115</sup> *Rogers v. Grimaldi*, 875 F.2d 994, 1000–01 (2nd Cir. 1989) (holding the use of celebrities' names allowable where the art does not purport to reflect the celebrities' actual lives). Ultimately, the balancing of freedom of expression with the celebrity's right of publicity took a very simple form: "the right of publicity [will] bar the use of a celebrity's name in a movie title [only when] the title was wholly unrelated to the movie or was simply a disguised commercial advertisement for the sale of goods or services." *Hart*, 717 F.3d at 155 (citing *Rogers*, 875 F.2d at 1004). As some courts have duly argued, the *Rogers* Test is incredibly strict and voids many causes of action when there is only a tenuous connection

Transformative Use<sup>116</sup> tests are the two primary balancing mechanisms.<sup>117</sup> The third and least popular test is the Predominant Use test.<sup>118</sup> If courts trend toward the Transformative Use test, it will likely prove to be a powerful tool for celebrities to protect their images, particularly against brands that do not have the same First Amendment protections as consumers.<sup>119</sup> This Note highly

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between the artistic work and the celebrity's name or property. *See Hart*, 717 F.3d at 155. Additionally, and perhaps more problematically, it is unclear whether the *Rogers* test applies broadly, or if it is narrowly constrained to the context of celebrity names in titles of artistic works. *Id.*

<sup>116</sup> *See Comedy III Productions, Inc., v. Gary Saderup, Ind.*, 21 P.3d 797, 808–10 (Cal. 2001) (first incorporating the idea of “transformative use” into publicity rights from copyright law). In developing the test, the *Comedy III* court explained that the celebrity's “right of publicity cannot, consistent with the First Amendment, be a right to control the celebrity's image by censoring disagreeable portrayals.” *Id.* at 807. While satire and cartoons are obviously protected under the First Amendment, creative expressions falling outside these obvious categories may be subjected to the Transformative Use test. *Comedy III*, 21 P.3d at 809. The test considers

whether the celebrity likeness is one of the “raw materials” from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question. We ask, in other words, whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness. And when we use the word “expression,” we mean expression of something other than the likeness of the celebrity.

*Id.*

<sup>117</sup> *Hart*, 717 F.3d at 152.

<sup>118</sup> The Predominant Use test is an even more recent development than the Transformative Use test, and was first developed by the Supreme Court of Missouri in 2003. *See Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003). The Missouri Supreme Court considered both the Transformative Use test and the *Rogers* test to be too rigid, precluding causes of action “whenever the use of the [celebrity's] name and identity [are] in any way expressive, regardless of its commercial exploitation.” *TCI*, 110 S.W.3d at 374. The court found in favor of the celebrity, holding that “the metaphorical reference to Twist, though a literary device, has very little literary value compared to its commercial value.” *Id.*

<sup>119</sup> *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 868 F. Supp. 1266, 1268 (N.D. Okla. 1994) (explaining that “the Constitution ‘accords a lesser protection to commercial speech than to other constitutional guarantees of expression’.... ‘Lesser protection’ is not the equivalent of ‘no protection.’”) (internal citations omitted).

encourages brand in-house or external counsel to consider the relevant favor or disfavor of these tests when advising clients.

Lastly, the Heigl complaint also alleges Lanham Act violations.<sup>120</sup> It is likely that the same test would be applied to social media as traditional media with negligible variation.<sup>121</sup> As such, this Note will not address the specific tests further, and it will instead focus on pragmatic manners that brands can preempt the legal risks of engaging in real-time social media strategies.<sup>122</sup>

### III. RECOMMENDATIONS TO BRANDS FOR RISK MITIGATION

It is likely that most brands would wish to avoid being in Duane Reade's position. This Part aims to provide pragmatic tactics to identify and mitigate legal pitfalls on social media. It will begin by addressing overarching considerations for brands when building a social media content strategy. It will then make recommendations regarding tactical procedures for social media guidelines broadly with a particular focus on real-time organic celebrity engagements. While the considerations and recommendations this Part discusses will be tailored specifically to Twitter, the general principles are typically applicable across extant social media platforms.

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<sup>120</sup> Heigl Complaint, *supra* note 88, at 10–11.

<sup>121</sup> See Brian D. Wright, *Social Media and Marketing: Exploring the Legal Pitfalls of User-Generated Content*, 36 U. DAYTON L. REV. 67, 74 (2010) (discussing Section 43(a) of the Lanham Act with respect to traditional and social media marketing campaigns simultaneously without differentiation).

<sup>122</sup> Section 43(a) of the Lanham Act notes, in relevant part, as follows:

- (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or any false designation of origin, or false or misleading representation of fact, which—(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125 (2012).

*A. Considerations When Developing and Implementing Brand Social Media Guidelines*

This Note highly recommends conducting a preliminary survey of the relevant brand's social media use case prior to developing a strategy and subsequent creative content guidelines.<sup>123</sup> Such preliminary considerations should include, but may not be limited to: internal reporting structures, approval processes, the company's degree of risk aversion, timing of content pieces, and public relations (PR) risks.<sup>124</sup> Depending on the brand's comfort with these considerations, one may be more influential in guideline development than others—it will be a different analysis contingent on each brand's history and current market goals.<sup>125</sup> Lastly, the brand's resource allocations can impact its ability to respond quickly.<sup>126</sup>

The first issue to consider is the company's approval and reporting structure.<sup>127</sup> Perhaps most fundamentally, one must take into account the nature of the relationship between the community managers and the lead decision makers at the brand headquarters.<sup>128</sup> Generally, the more direct line of communication between the

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<sup>123</sup> Kyle-Beth Hilfer, *Minimizing Legal Risks for Clients Using Social Media to Advertise and Market their Brands*, 38 WESTCHESTER CTY. BAR ASSOC. NEWSLETTER (2012) (“At the outset, the brand owner must determine what type of social media site to launch.”); *see also* Susan C. Hudson & Karla K. Roberts, *Drafting and Implementing an Effective Social Media Policy*, 18 TEX. WESLEYAN L. REV. 767, 767–68 (2012) (similarly advocating an employee-specific social media policy).

<sup>124</sup> *Id.* at 768 (describing the considerations an employer should take when establishing a social media policy).

<sup>125</sup> *See* Corey Padveen, *How to Manage Your Risk Averse Brand on Social Media*, T2 SOC. MEDIA AND DIGITAL MKTG. BLOG (May 12, 2014), <https://t2marketinginternational.com/manage-risk-averse-brand-social-media/> [<https://perma.cc/4B68-PDYU>].

<sup>126</sup> *Social Network Ad Spending to Hit \$23.68 Billion Worldwide in 2015*, EMARKETER (Apr. 15, 2015), <http://www.emarketer.com/Article/Social-Network-Ad-Spending-Hit-2368-Billion-Worldwide-2015/1012357> [<https://perma.cc/SVM9-LU8A>]. The increase in per-user spending demonstrates that brands are realizing how many resources are required for effective social media marketing campaigns. *See id.*

<sup>127</sup> The company's approval and reporting structure will evolve over time to perhaps be more social media-friendly, though many companies initially place many procedural roadblocks in front of community managers. *See* Taube, *supra* note 51.

<sup>128</sup> *See id.*

community manager and the final decision maker, the better.<sup>129</sup> Sometimes the community managers will work within an internal marketing department and thus have the potential to have a more direct line of communication with the brand's senior management.<sup>130</sup> This would be a relatively simple reporting structure and make for rapid approvals.<sup>131</sup> Many larger brands elect to outsource their advertising—including social media efforts—to full-service or niche advertising agencies.<sup>132</sup> In fact, some companies even have multiple agencies managing their advertising efforts.<sup>133</sup> Logically, the more steps a creative piece must pass through for approvals, the longer the process will take.<sup>134</sup>

In addition to the agency's creative process, brand clients will likely need multiple approvals for most content pieces.<sup>135</sup> Within and/or among those agencies, the reporting structures can be equally complex: a community manager may report to a supervisor who may consult a strategist, creative team, accounting manager, project manager, and a proofreading team, before a project is sufficiently complete to share with the brand clients.<sup>136</sup> Once shared with the client, the content piece may need to go through various approvals on the brand side.<sup>137</sup> The primary agency point of contact

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<sup>129</sup> See, e.g., *id.*

<sup>130</sup> See, e.g., *id.*

<sup>131</sup> See, e.g., *id.*

<sup>132</sup> Jennifer Rooney, *The Rise Of The In-House Agency: CMOs, Industry Respond To ANA Report*, FORBES: CMO NETWORK (Oct. 21, 2013), <http://www.forbes.com/sites/jenniferrooney/2013/10/21/the-rise-of-the-in-house-agency-cmos-industry-respond-to-ana-report/#19cf99975c675df218615c67> [<https://perma.cc/ZCA7-UH8D>] (demonstrating that larger brands are trending toward in-house marketing teams, with 58 percent of surveyed companies in 2013 having in-house departments, exclusive of any public relations teams); Bill Duggan, *The Rise Of The In-House Agency*, ASS'N OF NAT'L ADVERT. (Sept. 5, 2013), <http://www.ana.net/blogs/show/id/26949> [<https://perma.cc/J7JT-WJXN>].

<sup>133</sup> See *Structure of the Advertising Industry*, ADBRANDS.NET, [http://www.adbrands.net/advertising\\_industry\\_structure.htm](http://www.adbrands.net/advertising_industry_structure.htm) [<https://perma.cc/P6DE-TPA7>] (discussing how advertising agencies often pair with media agencies to deliver content).

<sup>134</sup> See generally Taube, *supra* note 51.

<sup>135</sup> See *id.* at 4.

<sup>136</sup> This process may be further frustrated by additional managerial approvals within each department. See *id.*

<sup>137</sup> *Id.*; Ed Burgoyne, *Ad Agency Process & Roadmap*, CREATIVE COMMONS: AD SUBCULTURE 1, 6, 8, 10, 12–13, 15, 17 (2013), <http://www.slideshare.net/edburgoyne/adsubculture-workflow-1> [<https://perma.cc/4NF9-BR43>].

may need to share with copious teams, such as: legal, product (more likely for retail brands), PR, localized state or area teams, headquarters superiors, and sponsorships teams.<sup>138</sup> These copious levels of approvals—within agencies, between agencies, between agencies and clients, and within client teams—dramatically lengthen the timelines for creative approvals.<sup>139</sup> If a brand determines that extensive approval timelines are necessary due to their levels of legal risk aversion, then the brand will likely be impaired if that brand ever decides to undertake real-time content engagements.<sup>140</sup> This is often the case with offer-driven content strategies or content in highly regulated industries, which generally require more extensive feedback from multiple teams.<sup>141</sup>

Secondly, a brand should assess how risk-averse it is, as a matter of corporate policy.<sup>142</sup> Brands are like people in that they have character traits: relaxed brands like DiGiorno Pizza, Charmin, and Denny's Diner appear less risk-averse than a very traditional brand with staunch corporate structure or which operate in highly regulated industries.<sup>143</sup> Denny's Diner is known for its bizarre [and

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<sup>138</sup> See, e.g., Burgoyne, *supra* note 137, at 10, 12–13, 15.

<sup>139</sup> Imagine that a national chain of coffee shops uses an external advertising agency for its advertising efforts, including social media. Imagine further that an advertising client in a regional office would like a geo-targeted Twitter post to appear from the national brand Twitter account advertising a regional offer for “\$2 off any holiday drink.” The request sounds simple enough. The client sends a request to the national headquarters who then sends a request to the agency, but then the agency responds with follow-up questions the client must answer before creative conception can begin: What are the legal mandates to include in the creative? When will the post be live? What drinks constitute a holiday drink? Would the client like to emphasize any particular holiday drink? Are there exclusions? This certainly is not an exhaustive list. See *id.* at 17; see also Taube, *supra* note 51.

<sup>140</sup> Burgoyne, *supra* note 137, at 17; see Taube, *supra* note 51.

<sup>141</sup> Ken Allard et al., *Brands as Publishers*, HUGE (Aug. 12, 2013), <http://www.hugeinc.com/ideas/report/brands-as-publishers> [<https://perma.cc/99DB-72LT>].

<sup>142</sup> See generally Hilfer, *supra* note 123 (discussing social media risk management).

<sup>143</sup> Lindsay Kolowich, *10 of the Best Brands on Twitter (And Why They're Successful)*, HUBSPOT (May 24, 2016), <http://blog.hubspot.com/marketing/twitter-best-brands#sm.00000qrjipf1afou116phsgrb2tvh> [<https://perma.cc/VWL2-UZ56>]; *10 Brands Doing an Amazing Job on Social Media*, SOC. TIMES (July 30, 2015), <http://www.adweek.com/socialtimes/michael-patterson-10-brands-amazing-social-media/624169> [<https://perma.cc/W2SN-55HK>]; Jeff Beer, *That Diner Feeling: How Denny's Became a Weirdly Successful Content Marketer*, FAST CO. (July 23,

successful] presence on Tumblr and Twitter, and it has routinely pushed the envelope by engaging in slightly riskier social media behaviors than other brands may be comfortable undertaking.<sup>144</sup> Some brands are willing to take on additional legal risk in specific facets of their content strategies in order to gain a relatively greater number of earned impressions.<sup>145</sup> However, other brands do not see the cost-benefit analysis as weighing in their favor: these brands would rather remain silent in organic or even planned conversations in order to mitigate all foreseeable degrees of legal or PR risks.<sup>146</sup> It is likely that some degree of risk-affinity is necessary to be successful on social media. While it may be safer (meaning, more formulaic and familiar to advertisers and marketers) to push retail-driven offers with extensive legal disclaimers, the consumer experience of such content is dramatically reduced—and the amount of brand affinity the company would be gaining may be negligible or even negative.<sup>147</sup> If a brand is incredibly risk-averse, it is not as likely to be successful with an organic social media strategy component.<sup>148</sup>

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2014), <http://www.fastcocreate.com/3033345/that-diner-feeling-how-dennys-be-came-a-weirdly-successful-content-marketer> [<https://perma.cc/LRM6-FNNM>].

<sup>144</sup> Andy Neuenchwander, *11 Times the Denny's Tumblr Was hilariously Awesome*, BUZZFEED (Aug. 19, 2015), <http://www.buzzfeed.com/andyneuenchwander/dennys-has-a-tumblr-account-and-its-hilariously-awesome#.obdkLYA1Z> [<https://perma.cc/6UCG-WYL6>] (relating Denny's tumblr successes); Jacob Geers, *17 Tweets That Prove @DennysDiner Has the Best Twitter-Game on the Internet*, THOUGHT CAT. (Sept. 27, 2015), <http://thoughtcatalog.com/jacob-geers/2015/09/17-tweets-that-prove-dennys-has-the-best-twitter-game-on-the-internet/> [<https://perma.cc/53MJ-N9FD>] (showing examples of Denny's Twitter successes).

<sup>145</sup> John Hazard, *Legal Approvals Are Killing Brand Newsrooms. Here's How to Get Past Them*, CONTENT STRATEGIST (Sept. 2, 2014), <https://contently.com/strategist/2014/09/02/legal-approvals-are-killing-brand-newsrooms-heres-how-to-get-past-them/> [<https://perma.cc/82WU-GQGC>].

<sup>146</sup> See Hilfer, *supra* note 123 (discussing how to “minimize risk” rather than eliminate it entirely).

<sup>147</sup> See *Consumers to Brands: The Louder You Scream, the Less We Care*, MARKET0 (June 22, 2015), <http://investors.marketo.com/releasedetail.cfm?releaseid=918797> [<https://perma.cc/7J5Q-AZV4>].

<sup>148</sup> Kieran Dahl, *The State of Social Media Content, in 12 Charts*, CONTENTLY: CONTENT STRATEGIST (Sept. 14, 2015), <https://contently.com/strategist/2015/09/14/the-state-of-social-media-content-in-12-charts/> [<https://perma.cc/Z9SX-72M3>]. The article notes that “[m]aking sharable content is more important than ever before[,] ... [s]hares intrinsically get additional impressions—the halo effect of earned media, if you will—which means more exposure for your brand.” *Id.*

Lastly, a brand should think about *why* they want to be active on specific social media platforms—and *in what way* they would like to be active.<sup>149</sup> Is it merely to push retail offers? If so, no real-time content strategy is necessary—though it would be prudent to have such a strategy in case the need arises.<sup>150</sup> It is better to have a plan than to take on unassessed risk in the heat of the moment when the excitement of real-time prominence is bordering on intoxicating. Imagine if the Arby's brand had never contemplated real-time engagement and the “Pharrell's Hat” moment arose: the opportunity would either have been lost or the brand could have exposed itself to severe legal consequences with an ill-planned tweet.<sup>151</sup> Brands may also elect to use their social media platforms as PR tools—to share brand success stories, news, and community engagements.<sup>152</sup> Such a use is not as risky as true real-time content, since the content is likely to be brand-owned and pre-approved by the brand.<sup>153</sup>

Lastly, brands should assess how many resources they are willing to dedicate to social media prior to launching their platforms.<sup>154</sup> With the long timelines—extensive teams needed to ideate quality content, and always-on-call community managers needed to respond at any hour to brand needs—the costs can accumulate quickly.<sup>155</sup> Demanding real-time management beyond business

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<sup>149</sup> See Hilfer, *supra* note 123, at 3.

<sup>150</sup> See *id.*

<sup>151</sup> See *id.*

<sup>152</sup> Michael Bush, *How Social Media Is Helping Public-Relations Sector Not Just Survive, but Thrive*, ADVERT. AGE (Aug. 23, 2010), <http://adage.com/article/news/social-media-helping-public-relations-sector-thrive/145507/> [<https://perma.cc/X7A7-6WDG>].

<sup>153</sup> See Stephen Dale & Melissa Chue, *Here's How to Succeed with Real-Time Content Marketing*, ADVERT. & MARKETING (Oct. 21, 2015) (“[R]eal-time content marketing should be 90% pre-approved brand messages and 10% reactive posts crafted through careful curation, social listening, and anticipating key moments and conversations from past events.”).

<sup>154</sup> Jason Falls, *The 2015 Pricing Guide to Getting Marketing Done*, JASON FALLS CONSULTING, <http://www.jasonfalls.com/marketing-pricing-guide/> [<https://perma.cc/BM4C-N7SF>] (“At the end of a full needs assessment you may find that you need 10 different marketing consultants/advisors/agencies to help you do different things optimally. At this point, it becomes a question of priority and budget.”).

<sup>155</sup> *Id.*; see also Taube, *supra* note 51; Burgoyne, *supra* note 137.

hours may cost more than a typical agency employee.<sup>156</sup> Likewise, agencies bill at increased rates for more senior personnel: a senior strategist who plans *how* a brand will engage may charge over \$200 an hour.<sup>157</sup> Funding entire creative, media, account, and strategy teams can add up rapidly.<sup>158</sup> If signing a scope of work with an agency, it is likely that a brand is funding entire headcounts for 40 hours per week, including agency overhead.<sup>159</sup> Such a cost commitment may not be in the cards for even large brands, depending on executive priorities and current revenue analyses.<sup>160</sup> Additionally, brands must consider the cost of legal counsel, either retained or in-house.<sup>161</sup> If your brand is highly structured with vast amounts of required approvals, or if it is exceedingly risk-averse, real-time content may not be the best social media plan.<sup>162</sup> However, as the Section below will discuss, tactics exist to help even those highly risk-averse brands with laborious approval processes to *appear* to engage in real-time discussions.<sup>163</sup> In addition, the below Section will detail methods to help brands that truly do want to engage in real-time content to tailor their creative guidelines to reflect their individual approval processes and risk aversions.<sup>164</sup>

### *B. Recommendations for Brands Electing to Engage in Real-Time Content*

This Section will outline recommendations for real-time content engagements. Various procedures and smart planning can increase brand affinity and earned impressions, while mitigating legal and public relations risks.

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<sup>156</sup> See Taube, *supra* note 51, at 3.

<sup>157</sup> See Falls, *supra* note 154. Assuming a client does not sign an annual scope of work, agency hourly prices likely range from \$50 per hour to over \$200 per hour. These resources add up quickly in light of the hours a simple tweet requires.

<sup>158</sup> See Burgoyne, *supra* note 137, at 1, 6, 8, 10, 12–13, 15, 17.

<sup>159</sup> Falls, *supra* note 154.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> See *supra* note 146 and accompanying text.

<sup>163</sup> See *infra* Part III.B.

<sup>164</sup> Olsy Sorokina, *5 Reasons Why A Social Media Content Calendar Is Important for Your Business*, HOOTSUITE (Nov. 6, 2014), <http://blog.hootsuite.com/how-to-create-a-social-media-content-calendar> [<https://perma.cc/VP92-574E>] (“[Y]our social media marketing plan requires a ... content strategy to support it.”); see *infra* Part III.B.

A content calendar with pre-approved content is logistically prudent for both real-time brands and more risk-averse brands.<sup>165</sup> This is because a content calendar allows a brand and its team of either internal or external community managers to identify and discuss opportunities for real-time engagement—and to acknowledge and assess the risks associated with content related to the identified events.<sup>166</sup> Many brands have success with this approach, regardless of their prowess in true real-time engagements.<sup>167</sup>

The procedure is simple: community managers set up a monthly call with clients and present their plan for the upcoming month.<sup>168</sup> The community manager will walk the clients through the content calendar, providing an overview of what the content may look like.<sup>169</sup> For example, imagine that Company A's community manager identified that Veterans Day was on November 11. He may note to the clients that he plans to post a seemingly innocuous "Happy Veterans Day" tweet. It is very possible that Company A had received bad press for discriminating against veterans in the past. The tweet could easily inflame followers and bring past claims into present internet discussions—potentially spawning subsequent lawsuits, and, at the very least, significant public relations problems.<sup>170</sup> Obviously, brand clients would want to avoid this and would inform the community manager. A potential crisis could be averted due to a simple monthly planning meeting.

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<sup>165</sup> *Id.* ("Creating a plan, a template, or a calendar simply means that you make all the necessary information available to all the relevant stakeholders in one place.")

<sup>166</sup> *Id.*

<sup>167</sup> Mark Traphagen, *How Coke & Denny's React To Real-Time Events On Social Media*, *MARKETING LAND* (Nov. 24, 2014), <http://marketingland.com/coke-dennys-react-real-time-events-social-media-108687> [<https://perma.cc/ZNC5-BCM5>].

<sup>168</sup> *See* Burgoyne, *supra* note 137, at 5–6, 9, 18; *See* Brittany Berger, *4 Tools to Build a Social Media Content Calendar*, *SOC. MEDIA EXAMINER* (Nov. 12, 2015), <http://www.socialmediaexaminer.com/4-tools-to-build-a-social-media-content-calendar/> [<https://perma.cc/7XVY-275J>] (noting social media posts often require approvals and review from multiple parties).

<sup>169</sup> *See id.*

<sup>170</sup> Kim Bhasin, *13 Epic Twitter Fails By Big Brands*, *BUS. INSIDER* (Feb. 6, 2012), <http://www.businessinsider.com/13-epic-twitter-fails-by-big-brands-2012-2> [<https://perma.cc/8V2Q-ZNH5>] ("Every single tweet that a brand sends out can make a big impact, because of the intrinsically viral nature of Twitter.")

Such discussions would occur on each topic for the month, with clients likely circulating the content calendar through the brand headquarters to ensure no similar issues.<sup>171</sup>

The same approach can be applied to mimic real-time engagements.<sup>172</sup> One of the most successful real-time content posts which could easily have been planned and pre-approved, was the Denny's "iPancakes" post.<sup>173</sup> Prior to the new iPhone's launch, many sources were reporting rumors that the phone would not have as many new features as originally anticipated—and that the most noticeable update was to be the device's new golden color.<sup>174</sup> The Denny's content team could easily have anticipated that Apple would soon launch a new iPhone 5s in the upcoming weeks and would have had weeks to develop content for the event.<sup>175</sup> The creative team need only create concepts based upon technology industry speculation that the most exciting new feature of the phone [sadly for Apple] would be its gold coloration.<sup>176</sup> Creation of the "iPancakes" idea and creative executions before the actual iPhone 5s launch announcement would allow the agency ample time to secure any approvals necessary with clients and to make the client teams aware of the potential risks of posting content so closely resembling that of Apple's brand marks. Planning and securing pre-approved content can transform what was initially a risky engagement into a carefully considered and, subsequently, less risky and more informed endeavor.<sup>177</sup> The same approach is applicable to any predictable events: social media managers know well in advance the nominees for Academy Awards, the expected due date for a British royal baby, and anticipated technological advances.<sup>178</sup> This approach

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<sup>171</sup> Burgoyne, *supra* note 137, at 5–6.

<sup>172</sup> Chris Taylor, *Denny's Ad Mocks Gold iPhone 5S*, MASHABLE (Sept. 10, 2013), <http://mashable.com/2013/09/10/dennys-ad-gold-iphone-5s/#iiogN2hUS5ql> [<https://perma.cc/XQ2V-XRD9>].

<sup>173</sup> *Denny's iPancakes*, SHORTY AWARDS (2014), <http://shortyawards.com/6th/dennys-ipancakes> [<https://perma.cc/MZU3-VF6H>]; *see* Exhibit D.

<sup>174</sup> Taylor, *supra* note 172.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Supra* notes 168–71 and accompanying text; *see also* Traphagen, *supra* note 167 ("Planning enters in, too, like anticipating events likely to go viral (#royalbaby for example) and having campaigns ready for their marketers.").

<sup>178</sup> *See, e.g.*, Taylor, *supra* note 172; Lauren Johnson, *Here Are the Top 10 Branded Tweets About the Royal Baby*, ADWEEK (May 4, 2015), <http://www.ad>

works equally well for both more and less risk-averse brands.<sup>179</sup> Of course, it likely provides a substantial benefit to risk-averse brands in that it allows them to engage in real-time organically, without as much risk as a truly real-time content piece—since all the necessary approvals have been secured in advance.<sup>180</sup> Of course, any real-time content, pre-approved or otherwise, carries some legal risk exposure, but elongating approval timelines for predictable events could lessen this exposure substantially.<sup>181</sup>

Even social media posts which necessarily must occur in real-time, such as Arby's "Pharrell's Hat" tweet, should be created and posted under established risk mitigation guidelines. The Arby's community manager explains that Arby's has established voice guidelines and "strict guardrails around what [the brand] participate[s] in and what topics are off limits."<sup>182</sup> When the "core team"—brand, legal, customer relations, and public relations—are aligned regarding direction, the legal risk of any given tweet is likely minimized.<sup>183</sup> However, it does not guarantee that there is no risk.<sup>184</sup> What is important is that the brand and its legal counsel have the opportunity to intervene before a risky tweet is live in the Twittersphere.<sup>185</sup>

Brands may also elect to create a "war room" during events which are most likely to spark real-time opportunity.<sup>186</sup> The idea behind a war room is that a brand collects all its key decision makers in one centralized location so that content can be conceived by

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week.com/news/technology/here-are-top-10-branded-tweets-about-royal-baby-164496 [https://perma.cc/32BX-EL9W]. Any of these tweets could easily have been planned in advance, as brands were well aware of the royal baby's arrival. See, e.g., Taylor, *supra* note 172. At most a brand would have needed to prepare two permutations of the tweet, so as to be prepared whether the child was a prince or princess. *Id.*

<sup>179</sup> See Denny's *iPancakes*, *supra* note 173.

<sup>180</sup> Traphagen, *supra* note 167.

<sup>181</sup> *Id.*

<sup>182</sup> Martin, *supra* note 77.

<sup>183</sup> *Id.*

<sup>184</sup> See *supra* note 146 and accompanying text.

<sup>185</sup> Hilfer, *supra* note 123, at 2.

<sup>186</sup> Shenan Reed, *Here's How to Make Your Marketing War Room More Zeitgeist Than Zombie*, ADWEEK (June 21, 2015), <http://www.adweek.com/news/advertising-branding/here-s-how-make-your-marketing-war-room-more-zeitgeist-zombie-165445> [https://perma.cc/CL9Z-HF6H] (evaluating the merits of social media war rooms during real-time activations).

the creative teams and simultaneously vetted (and subsequently adjusted or revised) by legal and brand counsel.<sup>187</sup> While the trend is toward localized war rooms in which brands have daily—or frequent—check-ins with all the necessary legal and approving teams to respond quickly to trending topics, war rooms for events like the Super Bowl, the Grammys, the Academy Awards, major television show premiers, and the like will mitigate real-time marketing risks.<sup>188</sup> Legal counsel could easily halt any problematic content before they even reach a fleshed-out creative concept—and counsel may impart legal principles on their creative counterparts throughout the process.<sup>189</sup> Increasing the content managers’ understandings of legal pitfalls generally will serve the brand well in the long- and short-term.<sup>190</sup> Interestingly, Arby’s social media manager, who produced the infamous Arby’s tweet, was working alone in his home, rather than in the typical social media war room of the time.<sup>191</sup> While Martin does note that the Arby’s CEO has created an environment of “freedom and flexibility[,]” he also indicated that he will “run it up the flagpole” for the appropriate approvals if he feels the tweet is unnecessarily risky.<sup>192</sup> If Arby’s is operating without established guidelines to suggest when a tweet is deemed *substantially* risky with respect to celebrity engagements, Arby’s runs the risk of a rogue content manager whose individual assessment of risk may not necessarily align with higher-level corporate concerns.<sup>193</sup>

In addition to using the monthly content calendar meeting to preempt legal or PR issues and to develop pre-approved real-time content, the content calendar also serves to open a dialogue between community managers and head decision makers at the brand.<sup>194</sup>

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<sup>187</sup> *But see* Tanya Dua, *You can still dunk in the dark, but you don’t need a war room*, DIGIDAY (Feb. 4, 2016), <http://digiday.com/agencies/super-bowl-war-room-rip/> [<https://perma.cc/78CE-7LYS>].

<sup>188</sup> *See generally* Reed, *supra* note 186.

<sup>189</sup> *See generally* Gesenhues, *supra* note 75.

<sup>190</sup> *See generally* Anastasia, *Social Responsibility & Ethics in Marketing*, CLEVERISM (Feb. 6, 2016), <https://www.cleverism.com/social-responsibility-ethics-marketing/> [<https://perma.cc/RT5K-7MBD>].

<sup>191</sup> Gesenhues, *supra* note 75.

<sup>192</sup> *Id.*

<sup>193</sup> *See* Martin, *supra* note 77.

<sup>194</sup> Amy Gesenhues, *Tweeting For “America’s Diner”—5 Questions With The Guy Driving Denny’s Social Success*, *MARKETING LAND* (July 3, 2014), <http://>

Such dialogue is imperative to ensure community managers do not engage in rogue organic content opportunities.<sup>195</sup> Brands who engage in social media must ensure their Social Media Content Guidelines specifically define what actions the community managers may and may not undertake unilaterally. If the brand requires approval for *every* engagement, that should be written in the guidelines and the brand or agency should educate the community managers on the guidelines with frequent refresher trainings. If the brand is open to more risk, the guidelines should take a tiered form—dictating the various approval processes needed for possible engagements.

Taking a similar approach, the Erwin Penland advertising agency created a straightforward content guideline document for its Denny's Community Management Team.<sup>196</sup> When a brand elects to allow organic engagements between their brand twitter account and celebrities, specific guidelines are also prudent.<sup>197</sup> A hypothetical may best describe the at-mentioning guidelines: consider the case in which Celebrity X tweets "I love my iPhone." Community managers would likely wish to engage back with Celebrity X, but doing so in various manners would be more or less risky: a community manager should consult the brand social media at-mentioning guidelines before responding.<sup>198</sup> It would be relatively low risk, for example, for a community manager to simply retweet Celebrity X's tweet.<sup>199</sup> It would be slightly higher risk to retweet the tweet as "Check this out: RT @ CelebrityX I love my iPhone." Both of these are likely acceptable brand actions.<sup>200</sup> However, it becomes much riskier when the brand's response associates a celebrity with the brand.<sup>201</sup>

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marketingland.com/5-questions-guy-behind-dennys-social-success-89636 [https://perma.cc/T4HH-53BD].

<sup>195</sup> *Id.*

<sup>196</sup> Traphagen, *supra* note 167.

<sup>197</sup> Stacy Jones, *Creating Celebrity Driven Social Media Campaigns To Engage Consumers*, GROUPHIGH (Oct. 10, 2014), <http://www.grouphigh.com/outreach-marketing-summit/fall-2014/creating-celebrity-driven-social-media-campaigns-to-engage-consumers/> [https://perma.cc/CBU6-6DQF].

<sup>198</sup> This assumes the brand has authorized organic responses by community managers without approval, given that such responses fall within the pre-approved guidelines discussed above. *See infra* Exhibit A.

<sup>199</sup> *See infra* Exhibit A.

<sup>200</sup> *See infra* Exhibit A.

<sup>201</sup> *See supra* notes 81–105 and accompanying text; *infra* Exhibit A.

Having such protocols in place can significantly reduce the potential for a snafu similar to that which Duane Reade encountered when it tweeted about Katharine Heigl. For risk-averse brands, the guidelines will inhibit rash real-time responses; for brands willing to tolerate the risks of real-time, the guidelines will set out parameters within which the brand can more safely engage in direct communications with celebrities. Looking back to the Heigl complaint against Duane Reade, it is very likely that other celebrities would make similar complaints and rely on these same legal concepts when they believe a brand has created an inauthentic association with that celebrity.<sup>202</sup> Proactive legal counsel should conduct annual workshops to ensure the account leadership and community managers are aware of the broad legal concepts—and to increase awareness of the spirit of the unfair competition and privacy laws specifically.<sup>203</sup> Brand and community managers are often highly protective of their own brands—and should consider that celebrities each have a valuable brand to protect as well.<sup>204</sup>

#### CONCLUSION

There is undoubtedly at least some legal risk involved when brands engage organically with celebrities on social media. However, brands can manage and mitigate the risks by developing social media engagement guidelines, conducting trainings on the guidelines with all employees who are licensed to speak on behalf of a brand on the social media platforms, and having pre-approved logistics in place to secure rapid approvals in the event of an unplanned social media opportunity. From an advertising agency's perspective, a thorough understanding of each client's degree of risk aversion—holistically or to specific types of content—is key to avoiding social media snafus which negatively impact your relationship with those clients. Ultimately, brand or agency social media content managers must understand that a missed engagement opportunity is sometimes necessary based upon the client company's perspective on risk management and in light of market considerations.

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<sup>202</sup> *Supra* Part II.A.

<sup>203</sup> See generally Karthik Raman, *Protecting Intellectual Property Rights Through Information Policy*, UBIQUITY (June 2004), <http://ubiquity.acm.org/article.cfm?id=1008537> [<https://perma.cc/RFJ8-TGLJ>].

<sup>204</sup> Gesenhues, *supra* note 194.

**Exhibit A**

Hypothetical Brand Social Media At-Mentioning Response Guidelines for Community Managers.

**Tier 1: Low Risk**

Retweeting celebrity's tweet with no alteration

**Tier 2: Moderate Risk**

Retweeting with slight edit/no promotional brand message

Using specialized event hashtags (e.g., #superbowl)

**Tier 3: High Risk**

Retweeting with addition of brand sentiment copy

Replying at celebrity directly

**Tier 4: Prohibited Risk**

Utilizing celebrity images without consent, regardless of source

Using any celebrity-related content in connection with promotional messaging

**Exhibit B**

Oreo's Famous 'Dunk in the Dark' Super Bowl Tweet.<sup>205</sup>



<sup>205</sup> Oreo Cookie (@Oreo), TWITTER (Feb. 3, 2013, 5:48 PM), <https://twitter.com/oreo/status/298246571718483968> [<https://perma.cc/4XQH-584M>].

**Exhibit C**

Arby's Infamous 'Pharrell's Hat' Tweet.<sup>206</sup>

**Exhibit D**

Denny's Diner's iPancakes social media post graphic.<sup>207</sup>



<sup>206</sup> Arby's Tweet, *supra* note 10.

<sup>207</sup> Denny's iPancakes, *supra* note 173.