

Using Social Media in Business Disputes

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BY DAVID OROZCO

LARGE COMPANIES FREQUENTLY exploit their vastly superior legal resources and capabilities to the disadvantage of smaller competitors. Frequently, the mere threat of litigation and the prospect of an expensive, prolonged lawsuit is all that is necessary to persuade a smaller business to acquiesce to the larger competitor's legal demands. However, I have recently studied an emergent defensive strategy that turns the tables on large companies when they legally threaten smaller enterprises. The approach involves soliciting public support, typically through social media and public relations, in hopes of achieving a favorable outcome. I call this technique "lawsourcing."¹

Lawsourcing in Practice

The idea of lawsourcing — a variation of what is often referred to as "crowdsourcing" — isn't completely new. Back in 1984, when Vermont-based Ben & Jerry's Homemade Inc. was a six-year-old upstart in the ice cream business, the Pillsbury Co. (then the owner of the Häagen-Dazs ice cream brand), attempted to curtail the growth of Ben & Jerry's by pressuring some distributors to become exclusive distributors and not to handle Ben & Jerry's products. Ben & Jerry's fought back hard, with a scrappy campaign built around the slogan "What's the Doughboy Afraid Of?" Founders Ben Cohen and Jerry Greenfield plastered their slogan on bumper stickers, the sides of buses, and airplane banners, and they posted a toll-free number on their ice cream containers. Pillsbury backed down, but not before Ben & Jerry's captured what one writer called "a generous scoop of free publicity for its guerrilla tactics."² (Cohen, in fact, was quoted as saying, "They tried to fight us in court, but we fought them in the public's mind instead.")

Lawsourcing campaigns can provide significant benefits, including greater brand awareness and loyalty and increased sales. In recent years,



THE LEADING QUESTION

How is social media changing business disputes?

FINDINGS

- ▶ Some smaller enterprises are turning to social media when threatened with legal action by larger companies.
- ▶ Such "lawsourcing" campaigns can help smaller organizations advance their legal and public-relations goals.
- ▶ Managers at larger companies should be aware of the "lawsourcing" option and that even very small players can use it.

social media and modern technology have provided a powerful platform and a set of tools for companies that want to fight back. By leveraging public support, companies can advance their legal and public-relations goals. Consider the case of Hampton Creek Foods Inc., a small San Francisco-based food producer. In the fall of 2014, Unilever, owner of the Hellmann's brand of mayonnaise, filed suit against Hampton Creek for using the word "mayo" to describe its vegan mayonnaise substitute, called Just Mayo and made without eggs. Unilever contended that the small company's use of the term was deceptive because by definition mayonnaise contains eggs as an ingredient. Hampton Creek fought back with a law-sourcing campaign that included commenting about the lawsuit on Twitter and Facebook, engaging with media sympathetic to its plight, and publicizing a Change.org petition launched by television food celebrity Andrew Zimmern.³ After a wave of publicity, Unilever agreed to withdraw its lawsuit. In announcing its decision, Unilever cited Hampton Creek's "commitment to innovation and its inspired corporate purpose." (However, Hampton Creek has since faced additional challenges to its use of the term "mayo"; the U.S. Food and Drug Administration warned Hampton Creek that "mayo" is slang for "mayonnaise," and federal regulations for mayonnaise require that it contain eggs.⁴)

Another recent high-profile example involved a battle between Vermont artist Bo Muller-Moore, who sells T-shirts adorned with the slogan "Eat More Kale," and Chick-fil-A Inc., the Atlanta-based fast-food chain. Claiming that Muller-Moore's slogan infringed on its federal trademark rights to the phrase "Eat Mor Chikin," Chick-fil-A sent Muller-Moore a cease-and-desist letter in 2011. Many people might have expected that Muller-Moore would capitulate to the letter's demands that he stop using his slogan and withdraw his application to trademark "Eat More Kale." Instead, he used it as an opportunity to launch a sophisticated law-sourcing battle that brought free legal representation, increased sales, strong public support, and media coverage in publications such as *Time* and *The New York Times*.⁵ In 2014, Muller-Moore got his trademark.

Sometimes, the fight isn't between upstart players and established competitors but between newcomers and government regulators. For example, the Florida Brewers Guild, a trade association for Florida's craft

brewers, in early 2015 launched a crowdfunding campaign to raise awareness and solicit funds for legal representation against large beer distributors and retailers who had challenged microbrewers' ability under Florida law to sell beer in their tasting rooms. The microbrewers soon raised about \$49,000, generated significant mainstream press coverage, and sparked a vigorous debate on social media. The effort resulted in victory; large competitors quickly dropped their legal opposition to the tasting rooms.⁶

Such battles are becoming more common. Tesla Motors Inc., the Palo Alto, California-based maker of electric cars, is using lawsourcing techniques to challenge state regulations that restrict Tesla from selling cars directly to consumers. Tesla's strategy leverages company CEO Elon Musk's strong social media presence and the Tesla company blog to inform sympathizers about the issues and urge them to tell regulators of their opposition to regulations restricting direct sales. So far, Tesla's campaign has yielded positive results, with large amounts of public support and states such as New Jersey and Nevada approving Tesla's direct-to-consumer sales and distribution model.⁷

Airbnb Inc., the San Francisco-based online accommodations marketplace, and Uber Technologies Inc., the San Francisco-based ride-sharing service, have likewise conducted lawsourcing campaigns to mobilize their users and service providers to oppose tougher regulations proposed by local governments. For example, Uber added a "de Blasio" feature to its mobile app to show New York City Uber users how New York Mayor Bill de Blasio's proposed cap on Uber drivers might affect the availability of Uber rides in the city.⁸

My research has uncovered several common themes that explain what makes for effective law-sourcing campaigns against large competitors. The points of commonality include:

A Compelling Story Each example leverages a narrative that resonates with a broad spectrum of supporters that extends far beyond existing customers. The effective narrative has a moral or ethical element that drives others to sympathize, support, and voice displeasure. This moral authority rests on a David vs. Goliath narrative (Eat More Kale and Florida Brewers Guild), an innovator vs. incumbent narrative (Tesla), or both (Just Mayo). To be even

more effective, this narrative encompasses a clear aspirational message that ties into a broader social theme, such as the sustainable food movement (Eat More Kale and Just Mayo), clean technology (Tesla), or the entrepreneurial business and job creation themes (Florida Brewers Guild, Airbnb, and Uber).

Strong, Engaged Social Media Campaigns In each case, the smaller entity possessed a strong, engaged social media presence and utilized major platforms such as Facebook, Twitter, and blogs in a complementary manner. The strategic use of hashtags was also often effectively used to create a social media forum that attracted attention, supporters, and contributors.

Direct Appeals For Support Through social media channels, companies asked people to like, share, or retweet their stories, sign online petitions on sites such as Change.org, support a boycott, provide microscale crowdfunding to cover upcoming litigation costs, or engage in an online discussion.

Leveraging Social Media For Mainstream Media Exposure Companies found ways to leverage the attention gathered through social media to generate mainstream media attention and coverage, particularly press coverage.

Being Authentic and Following One's Instincts In several of the cases, I noticed that smaller players followed their instincts and did what they thought was right as opposed to what was expected or prescribed in a standard playbook. In the Eat More Kale case, Muller-Moore actually went against his attorney's advice and posted a copy of the cease-and-desist letter on Facebook.⁹ This greatly increased support and drew attention to his case.

With the proliferation of social media and stakeholder activism, and increased regulatory oversight, companies are doing business today in an environment of heightened transparency.¹⁰ This transparency brings risks and rewards. Being on the receiving end of a lawsourcing campaign is one risk that managers — particularly managers at large companies — need to be aware of. First, managers should recognize that the lawsourcing option is something even very small players can initiate at a low cost. Second, they should work closely with their legal counsel to determine if legal

actions against competitors are worth pursuing from a business standpoint and to weed out any that rest on weak legal grounds; those with shaky business justifications or weak legal merits should be avoided. For cases with merit, representatives of the legal, marketing, and corporate social responsibility departments should assess the perceived value of litigation against a company and the risks of initiating litigation against a much smaller company. They should also consider whether the proposed legal action would conflict with the company's ethical standards, which could lead to public embarrassment. In many cases, managers should be able to find solutions that avoid catalyzing the use of lawsourcing.

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Reprint 57212.

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