# #CONTRACT How Social Media Can Be Legally Binding

By David Willbe

**There is little doubt that new forms of social media can be a great help to an entrepreneur in running his business. As well as the networking opportunities that they afford, they can be a cost-effective way for the business to engage with its customers and potential customers – whether that's through advertising, promotion of special offers, customer service or a combination of the above.**

The risk with these new media, however, is that we engage with them less formally than we do with their older equivalents. Sending out a tweet to a disappointed customer whilst running between meetings is a very efficient way to provide customer service, but relatively little preparation goes into it compared to the process that would have accompanied a formal written response to a customer complaint – or even an email. As well as the more obvious risk of putting out public statements off the cuff, entrepreneurs should be aware that if they make offers or promises over social media then it may be that the business can be held to them – and not necessarily just by the person to whom they address.

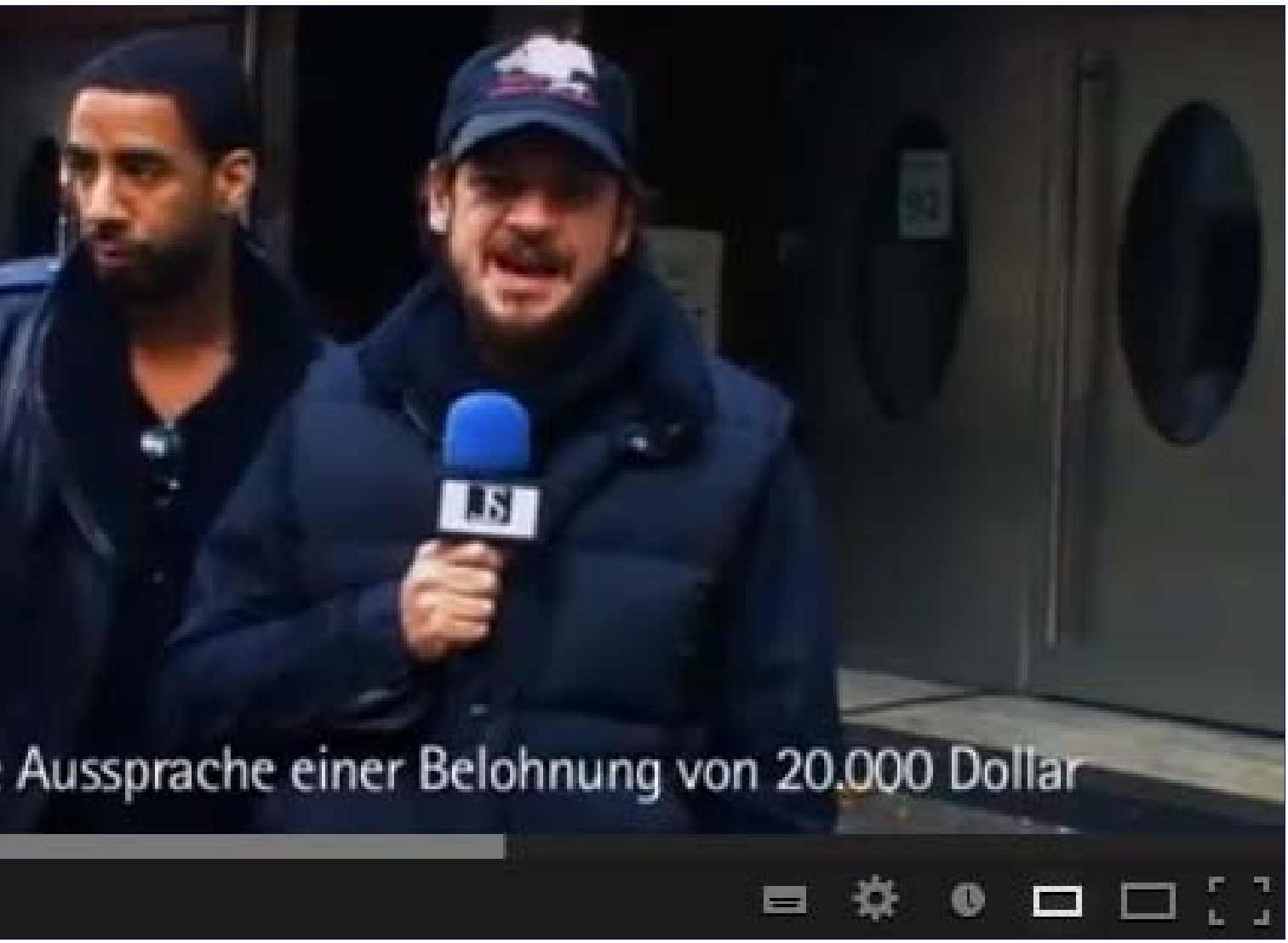
## Ryan Leslie and a Binding YouTube Clip

In October 2010, Mr. Ryan Leslie (a popular US recording artist) was on tour in Cologne, Germany. Whilst he was on stage performing, a black bag containing his laptop, portable hard drive, $10,000 in cash, some accessories and his passport apparently disappeared from a car. The following day, he posted a YouTube clip in which he offers a reward of $20,000 for the return of his property. On the 6th of November 2010, evidently having failed to locate the missing property, he uploaded another video which seamlessly combined the announcement of a new European tour, some smooth R&B sounds and an increase in the amount of the reward to $1 million. Reference to the reward, before and after the increase, was also made through Mr. Leslie's Facebook page and Twitter feed.

On 26 November 2010 a Mr. Armin Augstein found a black bag in the park whilst walking his dog. The bag contained a laptop, portable hard drive, Mr. Leslie's passport and some of his accessories – the $10,000 cash was missing, along with some gold jewellery, but otherwise the contents matched what had been taken from Mr. Leslie. Having taken the bag home with him, Mr. Augstein found the passport and looked Mr. Leslie


up on the internet – at this point he discovered the existence of the reward. The following day he dropped the bag off with the police, and emailed the address specified in the YouTube clips in order to let Mr. Leslie know where the bag was.

Although Mr. Leslie's tour manager did collect the bag from the police on the 29th, neither Mr. Leslie nor his "people" responded to Mr. Augstein's email – nor to a follow-up that Mr. Augstein sent a week later. Mr. Augstein called the mobile number listed in the YouTube video (which belonged to Mr. Leslie's tour manager) and, although encouraging noises were made, Mr. Augstein did not receive the reward or, indeed, any direct acknowledgement from Mr. Leslie. After some other attempts to make contact, including agreeing to an interview with a national German newspaper (from which his




# The basis for what was a very substantial claim was a contract formed through a set of postings on social media

name was withheld), Mr. Augstein instructed lawyers in March 2011 to pursue Mr. Leslie for the reward.

By the time the case came to court, it was agreed among all the parties that there was potentially a binding contract formed through the medium of those YouTube clips and accompanying social media items. Mr. Leslie's reward videos were actually offering a contract whereby he would pay $1 million to any person who could fulfill their side of the agreement by returning his property. The judge gave a preliminary ruling that, although the original video was far less clear, by virtue of the second clip it was plain that Mr. Augstein's side of the agreement had to be returning the "intellectual property" that was stored on the laptop and portable hard drive – predominantly sound files for Mr. Leslie's new album, and albums that he was producing for others.

The argument in court was whether Mr. Augstein had lived up to his side of the bargain, as Mr. Leslie claimed that the files on the portable hard drive could not be accessed when it was returned. Unfortunately for Mr. Leslie, he and his team then allowed the hard drive to be replaced by the manufacturer – at a time when they knew that they were being sued for the reward and might reasonably have expected the issue of recoverability of the data to come up in the case. The judge took a dim view of this and instructed the jury to assume that the intellectual property could have been recovered. The were jury found in favour of Mr. Augstein.

The result of the case, in some ways, is secondary – what ought to be the more sobering point for entrepreneurs is that the basis for what was a very substantial claim was a contract formed through a set of postings on social media.

## Mrs. Carlill and the Newspaper Ad

Although the Leslie case was held under New York law in 2012, the principle that a contract could be concluded in this way was arguably decided in an English court ruling over a century ago. In that case the Carbolic Smoke Ball Company manufactured and sold an item called "The Carbolic Smoke Ball," an inhalant which was intended to prevent people from catching influenza. So confident was the company in the effectiveness of its product that it placed adverts in various different newspapers offering a reward of £100 (a substantial amount of money at the time) to any individuals who used the smoke ball three times a day yet still caught influenza. Prints of that advert, even now, adorn the office walls of lawyers up and down the country.

Enter Mrs. Carlill, who claimed to have used the smoke ball as directed but nevertheless to have contracted influenza. Accordingly, she claimed her reward. The company refused to pay, on the grounds that their adverts were just a sales gimmick, and there was no way that it could be binding on them. The parties ended up in court.

The main question for the Court of Appeal was how a binding agreement could be formed between two parties. The law requires an offer and an acceptance to form a contract, but there are various different ways in which those things can take place – it need not necessarily be two signatures on a formal document. Taking products up to the checkout in a shop, for example, has long been seen by the law as offering a very simple contract – the customer will pay money to the shop and the shop will sell them those products. On occasion (usually due to age restrictions on the particular products) the shop will refuse that offer, but usually they will accept it by checking the items out.

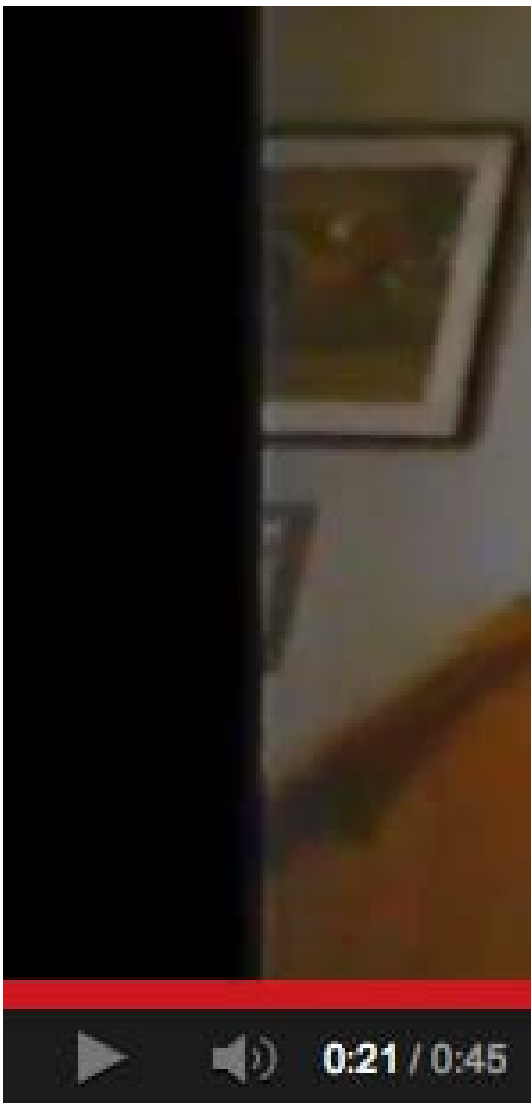
In this case, the court ruled that the advert was in fact an offer of a contract that had been made to "all the world" – i.e. the contract terms could be accepted by anyone who fulfilled the conditions. If a person wanted to accept the contract, all they had to do was use the smoke ball as directed. If they did not contract influenza then the contract expired worthless, but those who accepted the contract and did catch influenza would be entitled under the only substantial term of that contract to the sum of £100.

## Mr. Leonard and the Non-Serious Offer

One point that was key to the analysis in the Carlill case was that the company had deposited £1,000 in a bank account as a show of their "sincerity in the matter." This made it much more difficult for them to argue in court that the offer was never intended to be serious, although they did try. The law will, however, draw a line where what might otherwise be interpreted as an offer cannot reasonably be interpreted as being serious.

An example of this is Leonard v. Pepsico, Inc., another New York case. In this case, Pepsico ran a television advertising campaign where consumers were invited to acquire "Pepsi Points" by purchasing Pepsi products, and exchange them for "Pepsi Stuff." The television advertisements featured the wide variety of mid-90s merchandise available through the promotion, and the number of Pepsi Points required in order to obtain each item. The last item shown in the advertisement is a Harrier fighter, listed at 7,000,000 Pepsi Points – collection of which would require the consumption of around 190 Pepsis per day for one hundred years.

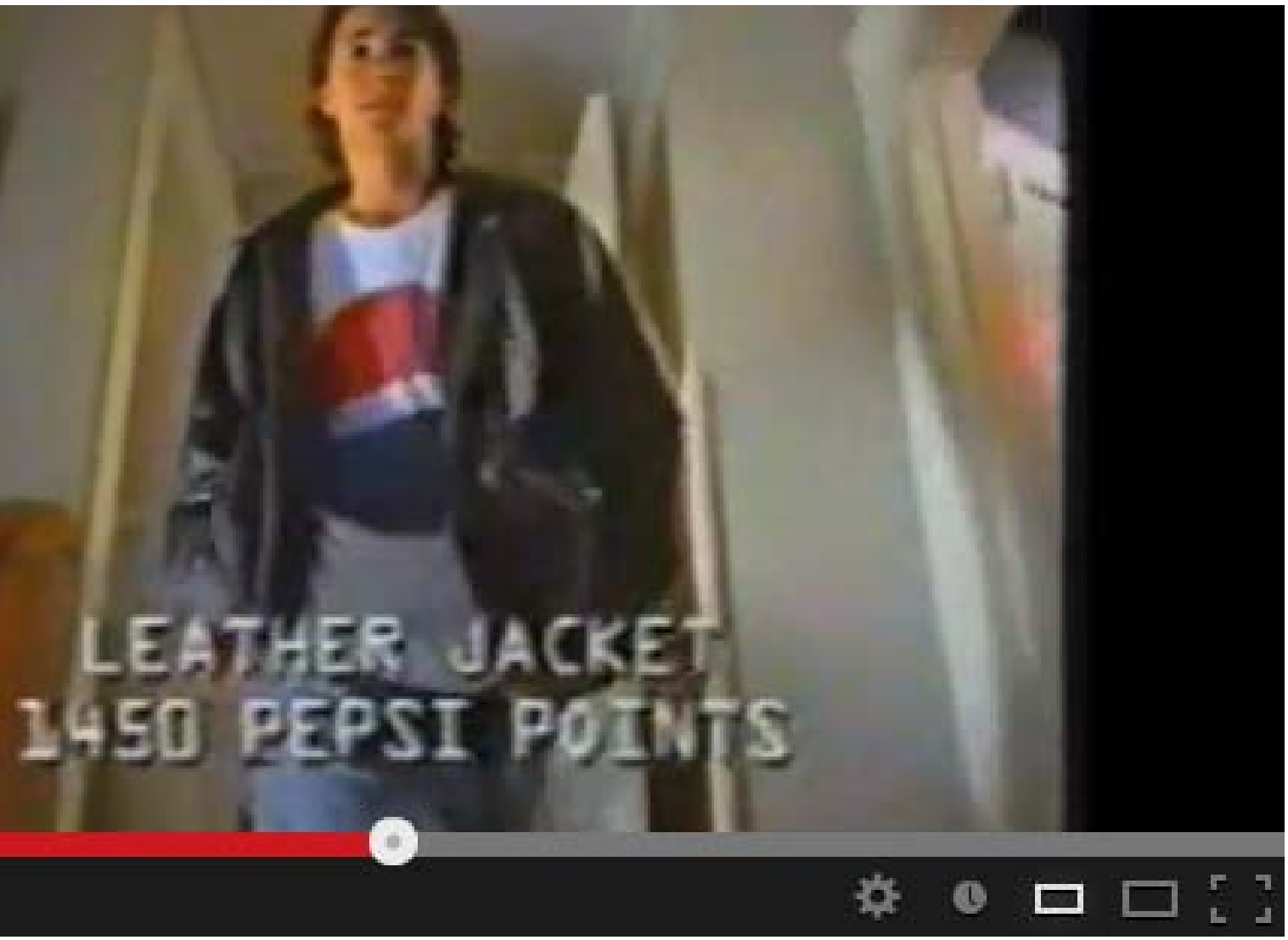
One Mr. Leonard, however, believed that he had found a loophole. The order form in the accompanying catalogue required at least fifteen original Pepsi Points to be submitted, but allowed applicants to purchase additional Pepsi Points in cash at a rate of ten cents per Pepsi Point. Accordingly Mr. Leonard submitted an order for one Harrier jet, duly accompanied by 15 Pepsi Points and a cheque for $700,008.50 to cover the remaining 6,999,985 Pepsi Points and postage and packaging. This was by no means a small price,




## Social media should be taken as seriously by businesses as any other medium

but represented a substantial discount to the $23 million price tag usually attached to a Harrier – if, indeed, he could find someone willing to sell one to him.

Pepsico, of course, rejected the submission and returned the cheque apologising for any misunderstanding and informing Mr. Leonard that this aspect of the commercial was intended




to be humorous. Leonard took Pepsico to court, and was given short shrift – the judge ruled that it was simply not reasonable for anyone to take the view that this was a serious offer of a contract, so there was nothing available for him to accept.

## Be careful what you offer to the world

The progression of these cases, from a newspaper advert through a television advert and on to social media, show clearly that it is possible to offer contractual terms "to the world." Provided it is clear and specific enough for someone to understand what the substance of the contract would be, and provided that it is not clearly a joke, contractual terms can be offered by any medium – and social media are no exception to that rule.

The application of that principle is wider than rewards and promotions, as it could also include statements made as to the quality of a particular product or its suitability for a purpose. As businesses try to engage with potential customers by demonstrating ways in which their products can be used, for example, they may in fact be giving warranties that the product is fit for that purpose.

Another point to consider is the status of an offer contained in a "mention" on Twitter, for example a response to a specific customer complaint or a special price being offered to someone in specific circumstances. If that offer were made by email or Twitter DM, i.e. a private communication, it would be made only to the recipient and clearly only capable of being accepted by them. If the offer is made in a tweet that mentions them, the position is less clear – although it is generally accepted that mentions are equivalent to addressing a tweet to someone, they are nevertheless public and it may therefore be possible to argue that the offer is being made to anyone in the same situation.

The overarching principle should be that social media should be taken as seriously by businesses as any other medium. Although they do provide businesses with the ability to communicate rapidly with customers and potential customers, this should not prevent thought being put into what is said on them – and care should be taken not to make accidental offers to the world.

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