

Legal Issues for Advertising in Social and Digital Media

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The Issues for Today

- FCC issues with digital ads
- Copyright and trademark issues
- Terms of use of social media sites
- Lots of FTC issues
 - Not misleading
 - Endorsements and sponsorship identification
 - Privacy and Security
- Still lots of legal uncertainties in digital media – we'll identify the big issues to help you spot potential problems
 - But consult your own experts to analyze the particulars of any situation as some of the potential problems really depend on the specific facts of any situation

General Issues to Consider

- Legal issues for digital media are all relatively new compared to traditional media – and the law hasn't had time to develop to address all the issues that come up
- Many legal issues have analog roots – not all that different in the digital world, so if a campaign would cause concern on the air, it may well cause concern online – though the “enforcer” may be different
- Need to worry about not only the laws in your state and Federal rules, but as the Internet is global, you can have issues in other states and even internationally

No Easy Answers to Digital Media Legal Questions – A Little Perspective

- Facebook started 2004 (open to everyone in 2006), Twitter in 2006
- Pandora and YouTube started 2005
- Netflix started streaming about 2007 and Amazon did in late 2006
- Craigslist (1995 in San Francisco and 2000 nationwide) and Monster.com (1994)
- **iPhone introduced in 2007**
- Compare this with broadcast regulation – around at the FCC since 1934, and before that at the Federal Radio Commission

A Couple of FCC Issues to Consider

- While the FCC does not regulate the Internet (at least not the content on the Internet), there are a few FCC issues that you should consider
- Restrictions on tying online reference to website in children's program to website that contains advertising ;
- While none of FCC political advertising rules apply to a pure digital sale, if the digital placement is sold as part of a package, the station needs to:
 - If the sale is to a candidate, treat opposing candidates in the same way
 - If the sale is to a commercial advertiser during a political window, allocate part of the purchase price of the package to the digital spots, and figure the per spot price of the broadcast spots without the value of the digital component to determine if the sale has LUR implications
- Unanswered question – if you run candidate ad on the air, you can't censor it and can't be held liable for its contents – no such restriction (and potentially no such protection) will apply online if you are streaming your over-the-air ads

Other Political Advertising Issues

- FEC already requires some disclosure of sponsor of political ads sold by website owners to third parties – proposals pending to make the sponsorship disclosure comparable to FCC disclosures
- Right now, no public file obligations for online political ads – legislation pending that could make a public file requirement to at least some online political ads
- Watch as these proposals advance at the FEC and in Congress

Watch the Terms of Use for Platforms on Which You Sell Ads

- Social Media have their own rules and regulations, and you need to be sure that you are following them
- Don't want to build up a legion of followers, only to have an account cancelled or limited
- You are warranting that you have all rights in what you post
- Limits on what you do on various sites – limits on advertising and promotions on some sites:
 - Facebook – e.g. any contest must specifically state that Facebook is not involved; pages on firearms, alcohol, tobacco, or adult products must be limited to 18 or older; no gambling promotion w/o Facebook approval; no promotion of prescription drugs
 - YouTube – no sale of advertising, sponsorships, or promotions placed on or within the Service or Content without YouTube consent – they allow creation of content channels where they share your income
- Be careful what the services can do with your content!

Be Careful With Content of the Online Ads

- For broadcast ads, when the ad is run, only those in your service area hear or see it – online it goes worldwide
- Make sure that you have all the rights to various components of your ads
- For static ads, don't use pictures without permission – even if you found the picture online
 - Lots of lawsuits over online pictures repurposed in someone else's digital media – just posting picture online does not make it available for everyone to use
 - Same with excerpts of online video
- Big issues with music use in ads

Music In Commercials

- Need permission directly from copyright holders for most uses of music in commercial messages
 - Not covered by ASCAP, BMI, SESAC or SoundExchange
 - Need permission from both performer and songwriter (or their copyright holder – usually the record label and the publisher)
 - Taking musical composition and putting new words to the music needs rights from copyright holder
- Sometimes the copyright holder asks for money, sometimes *lots* of money – but you need to find the right person to give you permission

Get to Know the FTC

- Statute prohibits “unfair or deceptive acts or practices in commerce”
- Authority granted in 1938
- Deception, unfairness are distinct
- **FTC is far less dependent on rulemaking than the FCC. The FTC is primarily an enforcement agency, bringing actions against specific companies.**
- FTC gets into all sorts of issues related to advertising including:
 - Deceptive ads
 - Online sponsorship disclosures
 - Information collection about children
 - Data collection and security issues

FTC Jurisdiction

- The FTC has enforcement authority over large swaths of the U.S. economy and can obtain broad remedies to address unfair or deceptive.
- Exceptions to FTC authority include:
 - Banks
 - Common carriers
 - Nonprofits
- FTC lacks:
 - Practical rulemaking authority
 - Civil penalty authority (unless authorized under a specific statute)
- FTC works with states, other federal agencies

Potential Consequences of FTC Actions

- FTC investigations are costly, time-consuming, and disruptive – even if they do not lead to an enforcement action.
- The FTC has broad authority to order changes in conduct and obtain monetary relief to resolve its complaints, including:
 - Cease illegal conduct
 - Audits of continuing operations
 - Destroy illegally obtained data
 - Pay consumer redress/equitable monetary relief
 - Impose compliance plans with as much as a 20-year duration
 - Maximum civil penalty is more than \$40,000/violation of FTC order

Defining “Deception”

- Legal standard
 - Statement or omission
 - Likely to mislead consumers acting reasonably under the circumstances
 - Material to consumer’s decision to buy or use a product or service
- The same standard applies to all aspects of advertising, data privacy, security, etc.
- FTC cases define more specific standards for endorsements, substantiation, imposing charges on consumers, disclosures/qualifying claims, and other aspects of advertising.
- Sources to consult:
 - Deception Policy Statement
 - FTC decisions in *POM* and *ECM Biofilms*

How “Unfairness” Is Defined

- Legal standard
 - Substantial injury to consumers
 - Not reasonably avoidable by consumers
 - Injury not outweighed by offsetting benefits to consumers or competition
- In contrast to deception, unfairness does not require express/implicit representations to consumers
- Examples of unfair practices
 - Unauthorized billing of consumers
 - Unilateral changes to contracts with consumers
 - Material retroactive changes to privacy policies
 - Failure to maintain “reasonable” security for personal information

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How the FTC Reads Ads

- False claims cannot be qualified or modified through disclosures.
- “Overall net impression” determines ad meaning.
 - Look at how all elements of an ad work together – view “the entire mosaic” rather than “each tile separately.
 - Disclosures and qualifications should be “clear and conspicuous,” meaning hard to miss,
- Claims can be express or implied, or made through omissions in an advertisement.
- Advertisers are responsible for any claim a “significant minority” of reasonable consumers would take away.
 - The intended audience matters – ads directed to children will be assessed from their perspective.

Claim Substantiation

- Objective claims need to be reasonably substantiated.
 - Puffery and subjective claims do not require substantiation.
- Must have reasonable basis for objective claims.
- The level of substantiation needed varies with the type of claim being made. Factors for determining reasonable basis include:
 - Type of claim
 - Type of product
 - Benefit of truthful claim
 - Ease of developing substantiation
 - Consequences of false claim
 - Expert consensus
- FTC pays particularly close attention to health-related claims.

Advertising and Business Partner Risk

- FTC can hold you directly liable for the deceptive acts of another company/person if you know about the deception and
 - Directly participate in the deceptive conduct or
 - Have the ability to control or have the authority to control it.
- Issues with “celebrity endorsers” – could include your talent endorsing products
 - Need to disclose real results and likelihood of those results – not just a success story and “your results may vary”

Native Advertising – FTC Requires Disclosure of Paid Online Content

- Do consumers understand content is an ad?
- Do consumers understand source of advertising?
- Require clear and conspicuous disclosures whenever you receive anything of value for posting online content
 - No exception for social media, even with limited space
- FTC monitors endorsers and campaign implementers – and has gone after some household names for non-disclosure
 - Recent warning letters to celebrities who don't disclose sponsored social media posts

Warner Brothers Home Entertainment

- Hired influencers through marketing firm
- Directed influencers' overall message
- Failed to require clear and conspicuous disclosure
- Many influencers posted obscure, incomplete disclosures
- Result: Warner Brothers was ordered to:
 - Refrain from misrepresenting independence of any influencer
 - Disclose any “material connection” with an influencer
 - Establish and maintain an internal compliance program to ensure appropriate disclosures by influencers

Lord & Taylor

- Gave dress and \$1000+ payment to fashion influencers
- Required influencers to use specific hash tags, Twitter handles
- Did not require influencers to disclose
- Result: FTC ordered Lord & Taylor to:
 - Refrain from misrepresenting independence of influencers
 - Clearly and conspicuously disclose material connection with influencers
 - Implement and maintain a program to ensure that influencers make appropriate disclosures, terminate relationships with those that fail to do so.

FTC's Role in Privacy and Data Security

- FTC uses its general consumer protection authority to go where consumers go.
- Online practices became important with the commercialization of the internet in the late 1990s.
- Mishandling of personal data became a top FTC concern.
- FTC has brought more than 100 privacy and data security actions, from small apps to Facebook and Google.
- Many enforcement actions and policy initiatives focus on emerging technologies (e.g., mobile devices and Internet of Things) but it's still important to get the basics right.

Data Privacy Tips

- Disclose your data practices.
 - Be accurate and non-aspirational. Privacy policies aren't marketing documents.
 - Look across all services, including website, mobile apps, including contest/promotion sites.
 - And note privacy policy requirements under California and Delaware law.
- Are you collecting “sensitive” information, such as health or precise geolocation information?
 - Opt-in consent is a good idea in most circumstances.
- Get opt-in consent before making more expansive use of data that has already been collected.
- If you collect information with online advertising, be careful what you do with it.
 - Children under 13 are protected by the Children's Online Privacy Protection Act (COPPA). Obligations begin at the time of data collection.
 - Email marketing is subject to the CAN-SPAM Act.
- Understand what third parties on your site or in your app are doing.
 - Are they collecting data in ways that violates statements in your privacy policy?

Data Security Tips

- Trend in disclosures about security is to be high-level and clearly disclaim any guarantee of security
- In absence of any claims about security, FTC can use its unfairness authority to hold companies to “reasonable security” standard
 - Doesn’t mean perfect security – a breach doesn’t mean the FTC will investigate or bring an enforcement action
 - Systemic failures, concrete consumer harm more likely to generate FTC interest
- Unreasonable security failures may include:
 - Weak default passwords
 - Easily bypassed authentication
 - Ignoring vulnerability reports
 - Failure to notify consumers of vulnerabilities
 - Exposing too much information by default
 - Failing to provide heightened security for sensitive data
 - Failing to exercise reasonable care in selection of vendors

Advertising Directed to Children

- COPPA applies to operators of online services (websites, apps, etc.) “directed to” children under 13 that collect/use/disclose personal information from children.
 - Also applies to general audience websites that actually know that they are collecting information from children
- COPPA and the COPPA Rule set detailed requirements, including:
 - Expansive definition of personal information (name, precise location, SSN, photograph, device/cookie identifier, etc.)
 - Notice to parents
 - Verifiable parental consent
 - Data security
 - Data retention and deletion
- Ad networks, other third parties are subject to a covered operator’s COPPA obligations
- Some exceptions for “internal operations” – but be careful.
- FTC can obtain civil penalties for COPPA violations
 - Disney (\$3 million); Yelp (\$450,000)

Check for FTC Business Guidance

- [Dot Com Disclosures](#): general guidance on the placement, format, and substance of disclosures in different media
- Endorsements: [Frequently Asked Questions](#) and formal [Guides](#)
- Data Security: “[Start with Security](#)” guidance draws general lessons from FTC enforcement actions
- COPPA: [Six-Step Compliance Plan](#) (high-level essentials) and [Frequently Asked Questions](#) (details)

Digital and Social Media Advertising

- Think carefully about what you are doing
- Check out all the laws that may apply where your content is received
- Watch developments in cases and legislation that further defines the limits of what you do
- Watch for news about lawsuits that may indicate where the next area of concern lies

For More Information

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