

Women in the Law

Navigating Internet Marketing in the Current Version of the Digital Age

By Anne S. Cruz and Avril G. Love

The emergence of social media and other online content as advertising has sped up the pace and broadened the sources of advertising, making compliance with evolving law more difficult to manage. While the basic tenets of advertising law remain unchanged—advertising must be truthful, fair, substantiated, and not misleading—they must be applied at a frenetic pace to comply with detailed rules specific to various emerging media. Because it can be impractical for all advertising to undergo legal review before publishing, companies should develop best practices and train marketers to adhere to them.

Generally, all express and implied claims must be truthful and not deceptive. 15 U.S.C. §57a(a)(1)(B). A claim arises impliedly if a significant minority of consumers—about 20 percent—could interpret the claim from the advertising, even if other interpretations are reasonable. An ad cannot include or omit information that is likely to mislead consumers under reasonable circumstances and is “material” or important to a consumer’s decision to buy or use the product. See Commission Enforcement Policy Statement on Deceptively Formatted Advertisements (FTC Statement), available at www.ftc.gov. Staying truthful online requires continually reassessing the quality of the information published.

Claim Substantiation

Advertisers must have evidence that forms a reasonable basis for their claims (substantiation) before they are made. Be sure your basis is defensible. Substantiation evidence



should be generated by someone qualified, generalizable to the consumers to whom the claims will be made, and generated with generally accepted methodology. A statement may still be deceptive if made before the advertiser substantiated the claim, even if it is later proven to be true.

Disclosures

Disclosures must be clear and conspicuous to prevent consumers from being misled. Dot Com Disclosures FTC March 2013; 16 C.F.R. §1.5; FTC Statement, *supra*. Yet, what does this mean in the digital age with various devices and platforms? Keep in mind these factors:

- Locate the disclosure as close to the claim as possible. Do not relegate them to terms of use sections.
- Make sure the disclosures are visible on all devices and platforms where the ad will appear.
- Hyperlinks may be used if the platform does not allow for full disclosure, but the link must be obvious, close to the claim, labeled to convey the significance of the information, take the user directly to the disclosure, and styled to alert the user to the existence of a link.

- The disclosure should use font, color, and size to be prominent given the entire context of the ad.
- Display disclosures before the point of purchase and repeat them as needed.
- Video ads should display disclosures for an adequate duration to be read or heard.
- Use plain language so the disclosure is understandable.

Carefully monitor that digital disclosures are effective and that terms and conditions are enforceable. Construction of your website is as important as the terms themselves—include a requirement that users must click a box to agree before they can complete a purchase. Monitor hyperlinks disclosures by assessing click-through rates and other information about consumer use and make changes to ensure disclosures are viewed. Be careful that “scrolling” advertisements have cues included to lead consumers to disclosures. SMS advertising, loyalty programs, sweepstakes, certain mobile carriers, and states require specific disclosures. Consult a professional to develop best practices you can apply to all your advertising.

Privacy

Protect consumers’ personal information. Have a privacy policy conspicuously posted where personal information is collected whenever possible. Tell consumers what personal and non-personal information is collected, how it is used, with whom it is disclosed, how it is secured, retained, and destroyed. Provide users the ability to change privacy settings to opt in or out of various uses of their information. In the US, there is not a widespread obligation to destroy data. However, abroad, such as in the European Union, consumers have a right to access



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and correct their own data, and to have it be “forgotten.” For example, under California’s Shine the Light Act, advertisers must disclose that consumers have the right to request information about disclosures to third parties made for direct marketing purposes. Minors have special privacy rights in most jurisdictions that vary. Be diligent.

User Generated Content

User generated content is an important source of advertising. Terms of use should have provisions governing rights in user generated content. Companies must monitor the content, but be mindful before allowing consumer reviews on your website. In December 2016, the Consumer Review Fairness Act (“CFRA”) was enacted to protect customers’ ability to share opinions about a business’s products, services, or conduct. 15 U.S.C. §45b, *et al.* CRFA prohibits form contracts that 1) restrict the ability of a user to review a company’s products, services, or conduct; 2) impose penalties against a user giving a review; or 3) require people to give up certain intellectual property rights in their content.

CRFA may also be interpreted to prevent removing consumer reviews, even negative ones, except in limited circumstances. Companies may prohibit and remove content containing information that is private, false, unrelated to the company, or otherwise potentially unlawful, such as libelous or obscene among others. Other than these limited circumstances, if a company allows customers to generate reviews, it may not generally restrict or remove negative reviews from its website.

Companies also need to monitor for possible intellectual property rights violations. Keep copyright and trademark issues in mind. CRFA disallows form contracts that transfer certain intellectual property rights in posted content except for non-exclusive use licenses.

Conclusion

Online marketing offers new platforms to reach consumers. Yet, the same guiding tenets apply—content must be truthful, fair, substantiated, and not misleading. Savvy advertisers should adhere to best practices to promote their brands with confidence. 