

Five Advertising and Marketing Law Trends To Take You Through 2020

By Kyle-Beth Hilfer

As 2020 commenced, in-house attorneys were grappling with predictable advertising and marketing law trends. Legal teams may have flagged for attention outgrowths of last year's regulatory activities, such as data privacy issues, influencer marketing, consumer reviews, social media copyright issues, ADA compliance for gift cards, "Made in the USA" origin claims, auto-dialers, and product health claims. Then, in the second quarter of 2020, the COVID-19 pandemic abruptly shook up priorities. A revised list of "hot topics" in advertising and marketing law has emerged. Of course, health and safety branding and advertising claims are squarely in the regulatory eye, but perhaps more revealing are marketing trends that cause brands to recalibrate and innovate. This article explores five significant advertising and marketing trends and associated legal issues in the current climate.¹



tions to commence enforcement on July 1, 2020. By the middle of July, the AG had sent warning letters⁵ to various online companies, giving them 30 days to come into compliance. If you have not already focused on the new California Consumer Protection Act (CCPA) and the emerging laws in other states, now is certainly the time to do so. In-house counsel should work business colleagues to review the brand's data collection and retention practices and disclosure practices. You could need new internal processes, public-facing policies, and contractual updates.

Trend One: The Shift to Online Offerings

With pandemic cancellations and closures lingering and consumers staying home, brands are meeting their customers where they are—on their computers. Even as commerce finds a "new normal" into the fall, those digital inclinations will likely remain in place for the foreseeable, if not long-term, future. Now is the time to ensure that your client's digital footprint is current with applicable laws.

If your brand is new to e-commerce, you likely have a variety of policies to implement around shipping, returns, payment processing, and tax collection. With shipping systems strained, it is a good idea to remind your marketing team about the Federal Trade Commission (FTC) Mail Order Rule.² This detailed rule provides a full explanation of all the requirements for the timing of shipping and customer communications. Violations can mean serious penalties. In fact, in April 2020, the FTC published a \$9.3 million settlement ("record-setting" according to the agency) with Fashion Nova regarding its unmet promises of fast and quick shipping.³ In addition, if you are in a regulated industry (e.g., alcohol, financial services, or health), you have unique issues with which to contend in launching on e-commerce.

What about the consumer data your client collects online? Despite uncertainty swirling around its CCPA regulations and the pressures of the pandemic, the California Attorney General announced⁴ its continued inten-

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As digital spending increases, brands need to compete for consumer attention. Brands are turning to other digital tools, including live streaming, virtual avatars, and social and experiential marketing. Ad tech is riding high, as meaningful data is crucial to these efforts. In-house counsel should focus clients on mapping customer data, implementing privacy protocols, and preparing for customer accountability. You may also be examining vendor contracts to define services more clearly, negotiate data protection addenda, and provide crucial contractual protections.

Trend Two: Compassion and Cause

Brands probably spent most of last quarter examining their core values and trying to demonstrate their caring ethics and social awareness to customers. In this quarter, brands may be looking to highlight charitable connections. Just mentioning a charity in advertising, however, may trigger contractual or trademark concerns.

In addition, more than half the states have laws governing a commercial co-venturer (CCV). A CCV is gener-

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ally defined as a commercial entity that conducts a sales promotion to benefit a charitable organization or purpose. While the states' laws vary, requirements may include a written contract between the CCV and the charity, disclosures in advertising and on-site, registration and bonding, and various accounting or bookkeeping requirements.⁶ Inside counsel might look to multistate guidance, Better Business Bureau guidance, and individual state's guidelines that offer interpretations of these CCV laws.

Campaigns that tout purchase-related donations are likely to fall within the CCV statutes. Details like minimum, capped, or rounded donations also require special attention. Counsel may be able to work with the marketing team and adjust the campaign to avoid the CCV laws, while still presenting its charitable contributions to the consuming public.

In addition, while the urge to help nonprofits at this time is strong, be aware that raffles by commercial entities are considered illegal lotteries if not run in accordance with the 50 states' sweepstakes laws. For example, you may ask a consumer to post or tweet to enter, rather than purchase, and then the brand would make a donation for every sweepstakes entry received. Such a promotion may not necessarily trigger the CCV statutes, but bears thorough examination for other legal issues.⁷

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As brands connect to consumer compassion and social justice, they may establish a non-profit entity to make charitable donations or help the public good through calls to action. In-house counsel will want to consider closely the nexus between the for-profit and non-profit entity. At what point has the brand established itself as a professional solicitor of charitable donations or a fundraising counsel? There also may be tax implications for the brand that require consideration.

Trend Three: Building Customer Loyalty

As the COVID-19 outbreak interrupted business, there was a flurry of brand adjustments to loyalty programs. In some cases, companies adjusted program terms to permit extensions on redemption times (e.g. the airline and hotel industries). In other cases, companies rushed to bring new loyalty programs to market. For those brands who did not make any adjustments yet, now is the time to consider how existing or new loyalty programs might benefit them.

In-house counsel will want to work with the marketing team on the loyalty program's structure. The program's terms and conditions, when properly publicized, serve as a binding contract with the consumer. The terms should explain how the consumer earns and redeems points. Tiered programs need close attention for clarity. Because loyalty programs are rarely static, the terms should be drafted proactively to allow for changes or even termination. While program alteration clauses have generally been upheld in courts, marketers want to be careful

with changes on redemption values without notice, particularly if they are retroactive.

In reviewing advertising and marketing material for the loyalty program, in-house counsel should take care that the terms of the program are accurately described. Any mismatch between the terms and conditions and the marketing materials or changes post-launch could result in litigation.⁸ Finally, statutes like CAN-SPAM or the TCPA, as well as California's CCPA, have specific requirements for marketing and implementing loyalty programs. There are also questions as to whether the ADA applies to loyalty programs.⁹ Email or text message marketing for the program that fails to meet statutory requirements can also create a significant risk of financial liability.

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These days, loyalty programs are about far more than points and free products. The most successful brands earn loyalty not only for great products or services but for the lifestyle they offer to their loyal customers. Gamification is now a crucial part of loyalty initiatives. Members may have opportunities to enter prize promotions that offer them coveted experiences. Those programs are subject to the 50 states' sweepstakes, lottery, and gambling laws. Some programs allow their customers to "gift" rewards to charities. In so doing, the brand may become a CCV, as described above. Finally, brands are leveraging their most loyal customers to serve as brand influencers. Background checks are essential to ensure these customers do not detract from the brand story. Furthermore, a well-crafted contract with the influencer spokesperson should, at a minimum, mandate compliance with FTC endorsement guidelines, shield the brand from unsubstantiated claims about products or services, and provide strong termination rights.

Trend Four: World-Building

Even before the pandemic, consumer attention was fractured at best. In a world where the news is harsh, the economy is tentative, and people are isolated and scared, engagement is challenging. Customers long for escapism, nostalgia, and community. Which world would you want to live in, the world, for example, of Coca-Cola, Patagonia, Bon Appetit, or Home Depot? The nimblest brands have learned from video games and Hollywood that content sells as much as products and services. Thus, they are creating immersive worlds for their customers.¹⁰

What are the entry points into these worlds? Of course, creative advertising, whether a 30-second television spot, an Instagram story, or a product placement, invites consumers to visit. In-house counsel may also see an uptick of free trial offers, negative options offers, and automatic renewal options. The FTC has long taken interest in these types of continuity programs.¹¹ The states are paying close attention too. Joining existing legislation, new laws have been passed over the last couple of years in California and the District of Columbia. Vermont's new law went

into effect on July 1, 2020, offering more protection for consumers.¹² (New legislation on autorenewal is currently pending, for example in California and New York, as of the date of this writing.¹³) Credit card companies also have standards for automatically renewing charges.¹⁴ Following an uptick in enforcement in the last year¹⁵ and increasing pressure to protect vulnerable consumers, in-house counsel should be on the look-out for process issues around consent, disclosure, renewal, and cancellation.

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Once consumers have entered your brand's world, how do you get them to visit again over and over? Storytelling, gamification, user-generated content opportunities, and experiential marketing are crucial to your world's success. All these strategies have intellectual property implications, rights of privacy and publicity issues, and other liability issues. Influencer marketing will also likely come into play here to link the real world and your brand's world. Your chosen influencers may be provocative risk-takers who generate excitement. In-house counsel will want to conduct due diligence on these influencers, their full online and offline presence, and the extent their followers are real rather than bots.

Trend Four: Consumers Are Financially Stressed

As always, you want to keep your client from being seen as the "bad guy," even if intentions were good. With consumers facing job loss or financial insecurity, brands may look to appeal to consumers by offering great prizes. Sometimes brands make mistakes in this area.

In May 2019, Google hosted a "Google Assistant Refer a Friend Sweepstakes." In the first version of the sweepstakes, they required a purchase, rendering the promotion an illegal lottery, and they quickly amended their rules.¹⁶ (Note: amending rules after a sweepstakes starts is risky as it could void your contract with the entrants and subject you to other legal claims of inequity to those who already entered.)

Brands may also offer consumer engagement through sweepstakes promotions that promise "you've won!" There are unique rules around implementing "everybody wins" sweepstakes. In addition, if your advertising materials imply a greater value prize than actually exists, that could spell trouble as well under deceptive marketing principles.¹⁷

A recent lawsuit highlights the dangers of unclear advertising and a promotion that over promises and under delivers. In April 2020, Reese Witherspoon's company Draper James looked to reward hard working teachers during the pandemic with free dresses. More than a million teachers applied, but there were only 250 dresses available. A class action lawsuit ensued, with Draper James alleging that it should have been clear that this promotion was a sweepstakes, not a mass giveaway. In

fact, Draper James made some critical mistakes in advertising this promotion, and it failed to include a full set of rules that could have easily warded off this kind of legal headache.¹⁸

In fact, other offers of free products can create legal issues. Loyalty programs touting benefits such as, "It's just like cash," or "It's like getting our product for free" can be problematic. The National Advertising Division of the Council of Better Business Bureaus recommended that Staples alter such advertising claims.¹⁹ It reasoned that free merchandise and the opportunity to earn points are substantially different offerings.

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If brands want to give to consumers, they certainly will use tried and true programs like sweepstakes and contests. The Draper James case underscores the need for in-house counsel to establish a working relationship with the marketing team, particularly for fast-moving social media promotions. In addition, more innovative brands are also thinking of other ways to help their customers beyond free product. Can they help them develop new skills or enhance personal growth? Duolingo, for example, launched a partnership with Twitch to help users build foreign language skills.²⁰ As your marketers develop innovative co-branding initiatives focused on supporting customers, in-house counsel will want to consider trademark and copyright implications, not only to combat counterfeit goods, but also to leverage and protect valuable intellectual property.

Conclusion

As this difficult year moves into its last quarter, brands are preparing for societal shifts and seismic changes in consumer behavior. With a focus on granular data, brands that will thrive are preparing for positive messaging, storytelling, and enhanced consumer engagement. They are also trying to make the sales process frictionless for customers with new technologies and options. Without sufficient legal guardrails, these efforts may end up as a liability. In-house counsel who stay ahead of the trends and shift priorities readily are better equipped to serve as trusted advisors to their marketing teams.

Endnotes

1. This article was written in mid-July 2020 and does not account for any developments in the law or marketplace since that time. It is also worth noting that the regulatory watch list from early 2020 remains salient, even if priorities have shifted.
2. <https://www.ecfr.gov/cgi-bin/text-idx?SID=57dc33c1112b6477ab5c4a1a68955b37&mc=true&node=pt16.1.435&rgn=div5>.
3. <https://www.ftc.gov/news-events/blogs/business-blog/2020/04/93-million-ftc-settlement-suggests-mail-order-rule>.
4. <https://www.forbes.com/sites/martyswant/2020/03/19/citing-covid-19-trade-groups-ask-californias-attorney-general-to-delay-data-privacy-enforcement/#5dacce335c30>.
5. <https://www.mediapost.com/publications/article/353549/california-sends-warning-letters-over-ccpa-violati.html>.

6. In addition, Section 5 of the FTC Act and the states' "little FTC" acts also govern these kinds of promotions. These statutes all prohibit deceptive, misleading, and unfair advertising. Pursuant to these principles, the advertising for a cause-related campaign must not mislead the consumer about the brand's connection to the charity, the amount of any donations, or how the consumer's purchase might impact the donation.
7. Consider, for instance, whether the promotion implicates other types of regulations such as the FTC Endorsement & Testimonial Guidelines, depending on the nature of the required post. Also check the social media platforms terms and conditions for running this kind of promotion.
8. AutoZone settled a class action lawsuit over changes it made to its loyalty program for almost \$50 million. See, <https://www.azrewardslitigation.com/wp-content/uploads/2019/11/Settlement-Agreement-2.pdf>.
9. As of the date of this writing, the legal community awaits a decision in *Gil v. Winn-Dixie Stores, Inc.*, 17-13467, pending in the 11th Circuit on the ADA's applicability to a website. Previously, the Container Store lost in the First Circuit when the National Federation of the Blind challenged its loyalty program as discriminating against blind consumers. *National Federation of the Blind v. Container Store, Inc.*, No. 16-2112 (1st Cir. 2018).
10. See, <http://marketingfutures.ana.net/podcast19> and <https://wildcardcreativegroup.com/insights>.
11. See, e.g., the FTC's Negative Option Rule (recently in comment period for FTC review), Telemarketing Sales Rule, as well as Section 5 of the FTC Act. Other relevant federal legislation includes the Restore Online Shoppers Confidence Act and the Electronic Funds Transfer Act.
12. The law calls for specific opt-in requirements for consumer contracts of a minimum initial term of one year with renewal for longer than one month. The law also has requirements around cancellation options. In particular, it takes a page from California in requiring the seller to permit the consumer to terminate online any one-year automatic renewal contract that she entered into online. See, <https://legislature.vermont.gov/Documents/2020/Docs/ACTS/ACT089/ACT089%20As%20Enacted.pdf>.
13. https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB2811; <https://www.nysenate.gov/legislation/bills/2019/S1475>.
14. See, <https://newsroom.mastercard.com/2019/01/16/free-trials-without-the-hassle/>; and <https://usa.visa.com/dam/VCOM/global/support-legal/documents/subscription-merchants-visa-public.pdf>.
15. See, e.g., *FTC v Urthbox* (settlement May 2019), <https://www.ftc.gov/enforcement/cases-proceedings/172-3028/urthbox-inc-matter>; and *FTC v. Match Group Inc.*, <https://www.ftc.gov/enforcement/cases-proceedings/172-3013/match-group-inc>. California's Automatic Renewal Task Force has brought cases against multiple companies. There have also been private class actions, for example, *King v. Bumble* 2019 U.S. Dist. LEXIS 112916, (N.D. Cal. Jul. 8, 2019).
16. When Google updated the rules to not require a purchase, they realized that they would be flooded with entries and changed the number of times you could enter. Consumer feedback was not great. See, e.g., comments at https://9to5google.com/2019/05/23/google-assistant-referral-contest/#disqus_thread.
17. See, e.g., \$21 million settlement in *FTC and Missouri AG v. Next-Gen, Inc.* (regulators challenged sweepstakes because prize-winners need to pay to collect); <https://www.ftc.gov/enforcement/cases-proceedings/172-3133/federal-trade-commission-state-missouri-v-next-gen-inc>. Indiana's AG also challenged Hopkins and Raines, Inc. because the gift promotion included actual "prizes" that were much smaller than promised and they were not really prizes. See, https://content.govdelivery.com/attachments/INAG/2019/04/05/file_attachments/1187866/Hopkins%20Raines%20Complaint.pdf.
18. <https://www.hollywoodreporter.com/thr-esq/can-reese-wITHERSPOON-beat-a-lawsuit-an-awkward-covid-19-lottery-1302972>, describing complaint and motion to dismiss filed in July 2020.
19. NAD Case # 5185 *Office Depot v Staples, Inc.* See, <https://bbbprograms.org/archive/narb-recommends-staples-modify-discontinue-free-claims>.
20. <https://www.twitch.tv/team/duolingo>.

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