



Social Media Advertising in the Retail Space – Share This with Your Friends

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“Tweet,” “share,” “pin,” and “like.” If you spend any amount of time exploring the social media universe, these are the buzzwords that you are certain to encounter along the way. To the digital marketer, these words translate into a cheap and efficient method to reach a very large audience. Indeed, the inherent viral nature of social media presents marketers with an unparalleled direct gateway to the consumer marketplace. However, while the benefits of using social media to tap new and existing customers are many, individuals and retail businesses that use the medium for commercial purposes must be aware of the potential legal pitfalls that lie in wait for the careless user. To be certain, utilizing social media in connection with retail advertising may trigger a range of legal issues, including, copyright, and trademark infringement, defamation, and rights of privacy and publicity, in addition to a host of advertising related rules and regulations.

Usually, posting a photograph to your Facebook page is a benign activity that involves almost no risk of liability. In the commercial context, however, that same photograph must be owned by or licensed to the poster, and it must not depict any unsanctioned copyrightable images, trademarks, persons, or brands. Similar assurances are also necessary for the use of any designs, graphics, music, video, or other artistic content. The availability of such materials online and the fact that similar content is freely linked or posted by users via personal social media accounts does not mean that those materials may be used by a commercial business. Specifically, the Digital Millennium Copyright Act, together with various other federal and state laws, address infringing use and prescribe the procedures and penalties applicable to such wrongful activities.

Legal issues may also arise from the use of personal and celebrity endorsements or the utilization of so-called “native advertising.” Generally, these techniques are employed without concern as long as they are accompanied by substantive disclosures designed to mitigate the likelihood of consumer confusion, deception, or unfairness. However, compliance with these disclosure mandates is difficult given the space, format, and usage limitations inherent with micro-platforms and/or the ever-shrinking screen size of consumer devices. Fortunately, the Federal Trade Commission has offered helpful guidance concerning the required content and format of disclosures, along with best practices for the use of consumer, celebrity, and expert endorsements.

Retail advertisers must also consider the potential implications of using social media to dialogue directly with consumers. For example, inviting users to contribute content to a public forum may present risks involving the disclosure of confidential information, defamation, or brand-image issues. Some related legal issues that arise in the user generated content context involve the misuse of #hashtags, unsanctioned hyperlinking, and unintentional intellectual property infringement. Accordingly, the decision to engage the public via social media will inevitably require a site administrator to weigh the benefits and risks associated with monitoring and editing such public forums.

Finally, it is equally important to be aware of the platform-specific terms of use and restrictions that apply to advertising and commercial practices. For instance, certain platforms prohibit the administration of sweepstakes and contests on their platforms except in limited circumstances, while others prohibit the dissemination of unauthorized advertising and promotional materials. Complicating the matter even further, site and platform terms are in a state of almost constant flux requiring the careful attention of diligent advertisers.

In light of the risks involved, legal counsel can offer helpful guidance and advice to retail marketers seeking to harness the next online fad and reap the benefits of viral advertising. The dynamic character of the medium and the resulting pace of change necessitate, if not demand, the counsel of seasoned experts. Understanding the ever shifting landscape will not only minimize the potential costs, risks and liabilities associated with digital marketing activities, but may also help to avoid the unwanted attention and embarrassment entailed in making a very public blunder on the World Wide Web.

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