

TargetMarketing

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7 TIPS TO NAVIGATE LEGAL RISKS OF CONSUMER ENGAGEMENT

by Samantha G. Rothaus

As advances in technology continue to impact the way people interact, many retail and fashion brands have embraced the potential of new digital and social media tools to enhance their consumer engagement. However, the traditional laws and regulations that continue to govern consumer marketing have created obstacles for some brands on the front line of exploring new digital strategies.

Below are tips on how brands can use various types of marketing strategies to increase their digital and social footprint, while steering clear of common legal pitfalls.

CONSUMER ENGAGEMENT RELATED TO BRANDING AND INTELLECTUAL PROPERTY

Hashtags are a great way to drive conversation and consumer engagement on social media and can also be used as branded trademarks or slogans to build reputational goodwill. However, brands should remember that hashtags are not necessarily free and fair game for anyone to use. The social goodwill that can be built by a good hashtag can be just as quickly eroded if it leads to a trademark dispute.

Tip: Before incorporating a clever hashtag into brand marketing — particularly if that hashtag was discovered elsewhere on social media — do some diligence to ensure that no third party has a trademark claim to that hashtag.

ENGAGING WITH CONSUMERS VIA NATIVE ADVERTISING

As fashion companies and retailers strive to make online marketing feel as natural as possible, integrations with other brands, individuals or websites are a popular way to build an audience in an authentic way. However, this type of native advertising is highly regulated by the Federal Trade Commission (FTC), which can impose stiff penalties against advertisers who do not clearly disclose the fact that they have sponsored, paid for or otherwise incentivized the integration in question.

Tip: If you are providing monetary payment or free products to someone for promotional purposes — whether it's for an individual to feature on his or her Instagram or personal vlog, or for a publisher like BuzzFeed, Wired, Glamour or US Weekly to include in a listicle, video or other piece of content — the paid nature of the promotion must be disclosed to consumers in a clear and conspicuous way to avoid regulatory action.

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CONSUMER ENGAGEMENT VIA INFLUENCERS AND MARKETERS RESPECTING INFLUENCERS' RIGHTS OF PUBLICITY

The above goes for the use of influencers. Paid promoters must clearly disclose the fact that their videos, tweets, posts and other promotion of a product is sponsored or paid. Smaller brands that do not work with high-profile influencers should also be careful to avoid promoting their products with the images or names of celebrities or other individuals who have not authorized such use of their identities. A company can risk significant liability for violating a person's right of publicity by using such a person's image in advertising without permission. A high-profile example of this occurred in 2014 when Duane Reade tweeted an image of Katherine Heigl exiting one of its stores, which had been posted on a celebrity gossip site. Duane Reade's tweet, "Love a quick #DuaneReade run? Even @KatieHeigl can't resist shopping #NYC's favorite drugstore," suggested that the actress endorsed the convenience store and sought to use her celebrity status to drive consumer engagement. Heigl sued Duane Reade for \$6 million and the store settled for an undisclosed amount (which reportedly was paid to a charity).

Tip: Even if you are operating on a micro level, do not post images of celebrities on social media to market and promote your products, unless you have permission. These activities are highly risky, as they can be very expensive to resolve in the event of a claim.

CUSTOMER LOYALTY AND REFERRAL PROGRAMS

Many brands, particularly retailers and e-commerce companies, have historically used rewards and referral programs to build customer loyalty and increase new business. Rewards may include periodic free gifts or discounts on merchandise or services in exchange for frequent shopping or new customer referrals. However, if customers must pay money to join the loyalty program, it would be deceptive to advertise that the rewards are "free." In addition, customers participating in a referral program may not always have the permission of their friends and family to provide contact information, which could violate those individuals' rights of privacy.

Tip: If you are operating a rewards program, to avoid regulatory or consumer class actions, steer clear of marketing "free" rewards if they come at a cost. When operating a referral program, you'll need terms and conditions and a robust privacy policy to avoid potential liability for privacy violations.

CUSTOMER ENGAGEMENT VIA AUTOMATIC RENEWALS

Subscription companies — including monthly "box" retailers in the fashion, cosmetics, personal care, pet goods and numerous other industries — commonly offer discounts on monthly deliveries of goods and services in exchange for automatic renewal of the subscription or membership fee. However, this strategy has recently been the subject of several legal and regulatory actions, particularly where retailers use deceptive tactics to make it nearly impossible for customers to cancel their subscriptions.

Tip: If you are considering or already using automatic renewal practices for customer retention, ensure that customers can easily cancel their subscriptions at any time and that the details of the automatic renewal program are clearly set forth at the time consumers sign up.

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CONSUMER ENGAGEMENT WITH GAMES AND CONTESTS

Many reward programs capitalize on the ubiquity of smartphones by styling their programs like mobile games, where consumers can play to win extra loyalty points or discounted merchandise. However, if these games are structured or operated like a lottery, or a contest or sweepstakes, they may be subject to state and federal regulations and may require detailed official rules.

Tip: Before launching a mobile gaming promotion, discuss the mechanisms of the game with counsel to determine whether any rules or regulations will apply.

CONSUMER ENGAGEMENT WHILE SPONSORING LIVE EVENTS

Another popular promotional tactic for fashion and retail brands is to host or sponsor live events, such as in-store appearances by celebrities or public figures associated with the brand, or stand-alone events like a concert or an athletic activity. Additional considerations are necessary if the event is livestreamed. Whether the company plans to livestream an event itself, or whether a spectator decides to broadcast his or her own experience, live-streaming raises potential legal concerns from a copyright and right of publicity perspective if the necessary permissions to broadcast the event online have not been fully accounted for in advance.

Tip: For any live event, appropriate contracts are necessary for all vendors and talent. In addition to clearing all necessary third-party permissions, if you intend to stream your own events, consult with the streaming platform's terms of service, which may prohibit the broadcast of certain content.

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