

Legal Implications of Marketing in the Era of New Media

By Gabrielle C. Bozza

Opt in? Opt-out? Pop-ups? Spam mail. . . unlocking media devices...MySpace. . . It seems these days that consumers, business owners, and advertisers are speaking a different language. The times of exchanging business cards and print advertising as the primary method of marketing your services or products are slowly fading away, only to be replaced by “Internet Marketing Campaigns,” banners, MySpace ads, blogs, and so on. Although the Internet and other forms of new media, such as advertising through cellular phones, create endless possibilities from a business perspective, there are also legal implications which must be considered when advertising in cyberspace.

One of the primary concerns is that the World Wide Web is, well, **world** wide and marketing strategies and promotional tools which are legal in the U.S. may not be legal in other parts of the globe. In recent years, the U.S. and the European Union (“EU”) have had lengthy debates over how to regulate the Internet and, more specifically, how to regulate the transactions, transfer of information, and advertising on the Internet. While the U.S. was typically in favor of allowing businesses to “self-regulate,” the EU was much less compromising and imposed stringent regulations on e-businesses, which were not only housed in one of the EU countries, but also any business which, by way of the Internet, penetrated its territory. This resulted in actions against major U.S. e-tailers such as Yahoo and eBay. Thankfully, the U.S. and the EU have come to some resolution whereby the two philosophies are able to co-exist; however, there are still some major sticking points which every business should be aware of. The most frequently encountered are privacy and data protection issues, tax implications, and jurisdictional issues.

Privacy and Data Protection

E-tailers should have a comprehensive privacy policy on their site which explains to users if and how their personal information will be used by the business or shared with others. Similarly, those advertising on third-party sites through banners, pop-ups or otherwise should be aware of (and comply with) the privacy policy of each site on which it advertises. There are various online privacy-seal programs which businesses can join such as TRUSTe.org or BBBOnline.com which provide consumers with some assurance that the site takes privacy issues seriously.

Tax Implications

It probably goes without saying that the countries around the Web tax some goods differently. It is important for e-businesses to know where their products are being shipped and whether any special tax circumstances apply in those countries. An important question to ask is whether the country in which you are conducting business via the Internet uses the value-added-tax system (VAT), which taxes an item at each stage of its production or distribution on the value added.

Jurisdiction

Being able to market your goods and services throughout the world is a good thing...that is, until your little company is hauled into court somewhere across the globe. The easiest (but not full-proof) way to avoid this is to include in your site's Terms of Use contract that any and all disputes which arise out of the consumers use of the site will be governed by the law of the state in which you are in **and** must be brought in that state. Some have been able to get around this issue by arguing that because the e-business is actively engaging in business transactions in the country in which the consumer resides, that business should be bound by and allowed to be sued in that country.

The advent of the Internet has tremendously increased the sales of businesses, both large and small. And, as a result, the opportunities for businesses to cross-promote and co-market also continue to grow. With sites such as MySpace -- a site geared to teens and young adults-- businesses are easily able to reach audiences which they may not have otherwise reached. Some other important factors to keep in mind when partnering up with other companies or Web sites advertising on the Internet is, as previously addressed, to be aware of and acknowledge the privacy policy of the site in which you are going to advertise on. Similarly, ensure that others comply with your policies. Also, when linking from your site to another's site, the best course of action is to get approval from the site to which you are linking. Also, make sure to respect and protect the intellectual property (trademarks and copyrights) of others and require them to do the same with yours.

The bottom line is that these alternative and increasingly popular e-marketing tools will continue to become ingratiated into the business realm, and it's important to carefully monitor the legal implications as precedents and cyberspace rulings are still being established.

A member of Broad and Cassel's Commercial Litigation and Intellectual Property Practice Groups, Gabrielle has assisted clients in a number of situations involving intellectual property and entertainment law issues. She is active with the Florida Bar's Entertainment, Arts and Sports Law Section and the National Academy of Recording Arts and Sciences, was a guest lecturer on music privacy for the University of Miami School of Communications and has hosted several roundtable discussions on entertainment-related topics. She earned a bachelor's degree from the University of Central Florida and a Juris Doctorate from Nova Southeastern University, Shepard Broad Law Center. She may be reached at gbozza@broadandcassel.com or (954) 764-7060.