



Digital Advertising in an Age of Disruption

Media and Publishing



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IN AN AGE OF DISRUPTION



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CHEAT SHEET

- **Legal risks.** When deciding which digital advertising campaign to deploy, in-house counsel should be brought in to assess legal implications related to jurisdictions, digital privacy, and use of algorithms.
- **Search engine ranking model.** One digital advertising model is increasing the ranking of the website on a search engine by increasing traffic to the site.
- **Social media campaign.** Another advertising model is using information collected about audience interests, demographics, and behaviors to personalize ads on social media sites like Facebook, LinkedIn, Twitter, or TikTok.
- **Pay to play.** The third digital advertising model is paying the platform (social media or search engine) to use their technology to direct advertising or content to a particular user group.

In today's economy, national and international advertising and marketing campaigns are tested, launched, and anchored digitally. The access, flexibility, and cost structures afforded to such campaigns have made this the method of choice. New digital technologies and business models are affecting and changing the behavior of all parties in the supply chain from suppliers and distributors to retailers and consumers

Furthermore, digital advertising today is highly affected by technology disruption. Best practices, like checks and balances, that traditionally prevented perils in "real world advertising" are often lacking in the planning and management of such digital campaigns. The ease, speed, reach, scope, and measurability of a digital campaign are selling traits to companies that often fail to consider the legal underpinnings of using the technology and its consequences. Counsel's guidance in this area is critical.

"Don't put anything in writing that you do not want on the front page of the news" and "run it past our director of communications before it goes out," was once sound advice in a pre-digital world but has become antiquated in this age of blogging/texting/tweeting. Although many traditional rules apply, there is a new landscape caused by increased regulations and technological development. On one level, traditional best practices in content review can still catch early problems. However, regarding regulations, the challenge is timing. Consider how the digital economy has changed and grown in the last five years. As in-house counsel, we need to keep abreast of all new laws and regulations being put in place and their impact on new technology in advertising before problems arise.

Companies today are expected to have detailed and multi-faceted social media touch points with customers and stakeholders. This does not mean that advertising law has suddenly relaxed, or that corporate legal obligations in each legal jurisdiction have gone away. In many cases, with new digital privacy and consumer protection laws and regulations going into effect around the world regularly, the legal field is more complex than ever.

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Digital campaigns differ significantly from traditional print, radio, and television advertising. This creates new company risks and opportunities, both needing strategic legal direction in advance from in-house counsel. Consider how Amazon and Facebook have disrupted the advertising world by changing how content is accessed by customers and monetized by advertisers. Television can't attract advertisers the way they used to when there were only a few national networks. Even they must now link to and coordinate with social media campaigns. Advertisers are using cross-platform strategies to impact all segments of society and ensure that their ads are seen both offline and online. The goal is to enhance one another instead of competing. Since the mediums are profoundly different, the ads need to fit the platform as do the legal checks done by counsel. In social media, there is a more direct, real-time, and interactive exchange with customers that doesn't exist with TV. This is not to underestimate the power of TV, which is still a high-reach medium. With TV, advertisers can get their message across without having to be confronted with user comments, which allows them to control their brand image in a different way.

The internet allows for the targeting of prospective customers in ways that were previously not possible in other forums. The ubiquitous nature of websites, social media pages, and their generally worldwide accessibility also differentiates digital campaigns from traditional advertising.

Where once an advertiser could be somewhat assured that they knew the geographic footprint of their campaign, now information and images flow across the world at the speed of the internet.

The speed and volume at which information can be provided and spread through the web is phenomenal. This magnifies the impact of time, successes, failures, and as a result, risk. These characteristics create many issues for in-house counsel for advertisers as a matter of law and regulation. These issues are multi-jurisdictional in nature and scope. So are the penalties and rewards around compliance and success for your company, whether planned or not.

The technology anchoring and directing digital advertising

There are three primary means by which a digital advertising campaign can be successfully distributed on the internet. In-house counsel will need to understand all three to successfully manage and abate their company's risks and direct them to the most profitable uses.

The first digital advertising model is by a website on which advertising is reviewed by an algorithm to be "ranked" and subsequently displayed by a search engine. The most popular search engine today is Google, although the basic ranking model is generally used internationally by other search engines. A search engine analyzes websites for various characteristics, such as popularity, relevancy, time spent on the page, usefulness of information, and quality. Each search engine has its proprietary and evolving search engine ranking system. Based on its proprietary criteria, that search engine "ranks" a website. When a search is done on that search engine by a user, the search engine will display results of the search in the order it ranks the websites relevant to the result on the user's page. A higher rank will be displayed earlier in the search results created for consumers to view. Successful media campaigns should increase the rank of the website on which they are based due to increased traffic to the site.

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The second is to launch an advertising campaign on one or more social media sites such as Facebook, LinkedIn, Twitter, or TikTok, whereby based on information collected about the audiences' interests, demographics, and behaviors, more personalized ads that are relevant to the targeted audience are employed.

The third means to direct a successful digital advertising campaign is through advertising communication targeting users on a social media or other websites, or through advertising and higher search placement in results through a search engine. Both techniques are "pay to play." A good example of this would be "Google Ad Words" for Google searches or "Boosting" on Facebook. In either case, those running digital campaigns are paying for the platform to use their technology to direct advertising or content to a user group they believe will be more likely to purchase the product or service offered.

Fundamentally, each of the above digital advertising campaigns succeeds by achieving a distribution of the content they are offering followed by some economic benefit (e.g., the purchase of a good, service, or consumer participation). In a sense, this suggests "the more, the better." Digital platforms such as websites, search engines, or social media sites benefit financially from having more users. Users who visit the systems consistently are of greater financial benefit to the site owners as "recurring revenue" sources. As a result, the technology supporting digital campaigns are effectively designed to share and distribute information as fast and as far as possible. The sites themselves are set up to profit whether your company does so or not. This is a very important system foundation to understand.

Support your company to understand the legal implications of the digital advertising platforms they choose and the style of campaigns they run

Some of the key drivers that your company needs to consider are jurisdictional issues, privacy, and use of algorithms. In terms of jurisdiction, legal systems are territorial in nature. Moreover, they are jurisdictional within a territory, such as state laws within US federal laws and national laws within EU Community law. While certain national distribution points of the internet may be "Balkanized" as countries limit access to websites through country level server technology (e.g., China and Russia), the internet is fundamentally designed to be reached from everywhere in the world. Thus, the distribution of web content does not generally reflect national legal territorial boundaries. This truth is increasingly being challenged by national and state governments as they seek to impose tax obligations on national or global web based sales, such as the recent example of France levying additional tax obligations on large web based advertising platforms.

Accordingly, the analysis necessary for legally "clearing" a digital campaign for a company is much more complex than clearing one for local, country specific, or territorial specific distribution. While the internet may display content anywhere it is able to be viewed on a screen, the reach of country specific or state specific laws may apply to digital platforms located well outside their own physical jurisdiction. Below is a company "war story" to illustrate our point.

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Our company was a global product business-to-consumer company. They came up with an agreed “global” digital media campaign for marketing their product direct to consumers. As part of the campaign, company offices in different countries had to agree on common product descriptions and advertising claims. The final product was reviewed for US and EU legal purposes and “cleared.” The campaign was launched. One of the languages available on the company’s website regarding viewing the products was German. None of the social media or website advertisements were specifically directed at the German market. Within a couple of weeks of launch, the company received a cease-and-desist letter from a German law firm. They alleged that our company’s product descriptions and advertising claims on the website were not in compliance with German national law, or the law of one German state. Upon review by German counsel, it was determined that although the website and campaign were not directed at the German market, the fact that the website was available in the German language and products were sold elsewhere in the European Union was enough of a nexus for German law to apply. Our company had to settle the case and pay a fine to avoid potential prosecution.

The above discussion regarding the potential “viral” nature of the technology supporting a digital campaign is also notable here. It is highly possible that the results of a successful campaign on the internet may end up directing advertising to consumers in legal jurisdictions that were not contemplated at all. In the above case, at least sales were made in the European Union, which of course includes Germany; a logical legal nexus could be applied that introduced unforeseen risk and liability to the company.

From the above example, it can be seen that the implications of national law were simply imposed on the commercial realities generated through a commercially highly successful digital campaign. The company had to pay damages and fines in a country and state to which it did not specifically contemplate the campaign reaching. So how can counsel advise companies that could find themselves subject to national or state laws unintended from running digital media campaigns? What are the regulatory obstacles and best practices?

Digital privacy

Europe has emerged as an aggressive enforcer when it comes to the US technology industry. In May 2018, the European Union put into place strict privacy regulations known as the General Data Protection Regulation (GDPR) that forces Silicon Valley companies to readjust their policies for EU standards, and by default elsewhere in many cases. GDPR sets the rules governing the processing of personal data within the European Union, including “the right to be forgotten” for consumers. It is backed up by significant financial penalties. Under GDPR, those organizations in breach of the rules will either be fined up to four percent of annual global turnover or €20 million (whichever is greater). In terms of digital advertising, gathering more refined data promises greater personalization, so in a sense, GDPR turns people’s personal data allowed by GDPR into a precisely directed fixed commodity. This is certainly positive for companies that are advertising digitally. They simply need to understand how they can use data within the legal framework of GDPR. Similar government initiatives around the world offer other types of obstacles for the unprepared and potential opportunities for those that comply.

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While California has “stolen headlines” recently in taking aggressive steps under state law to protect consumers with digital privacy, the United States has a long history of addressing the issue with federal legislation. Numerous laws are in place federally that address data privacy, internet use, and data security. Foundationally, this includes the 1974 Privacy Act, the Electronic Communications Privacy Act of 1986, the Children’s Online Privacy Protection Act of 2000, and the Computer Fraud and Abuse Act of 1986. Moreover, recent policy changes by leading US based social media companies regarding their use of gathered consumer data, and its dissemination, has practically strengthened consumer data privacy. So while the United States has largely not yet created the kind of privacy rights that European consumers enjoy, the pendulum is swinging towards more consumer protection. In-house counsel must stay on top of both state and national legal developments in this area, which could dramatically impact digital advertising and the legally appropriate use of consumer data.

The use of algorithms

Particularly important in the digital world is that you can determine pricing cross-border by just clicking on a website and seeing what the advertised prices are in another market. Prices are being set in ecommerce more and more via the use of sophisticated algorithms. These reflect market differences and other factors based on where the consumer is searching the web, among many other factors. Companies that are advertising pricing on their websites as well as the manufacturers supplying those products need to be aware of what they can and cannot do with them legally.

In 2018, the EU Commission had its first opportunity to deal with this issue. The Commission condemned practices by four consumer electronics companies — Asus, Denon & Marantz, Pioneer, and Philips — that intervened with online retailers that had offered their products at low prices. The Commission handed down fines of €111 million to the four companies. The manufacturers involved used sophisticated algorithms to monitor the prices of the retailers. The retailers used algorithms to automatically adjust retail prices to those of competitors. So, all involved were using algorithms. There is nothing illegal about the use of the algorithms by either retailers or manufacturers in the European Union. Commissioner Vestiger stated in her decision, however, that because the retailers used an algorithm to adjust its prices to those of competitors, price restrictions such as those targeted could affect a much wider market; hence the consequences of the actions of the manufacturers was far-reaching. What the manufacturers did that was in fact illegal was old-fashioned retail price maintenance by informing the retailers that if they did not follow the prices requested by manufacturers, they faced threats or sanctions, such as blocking of supplies. What this recent case tells us is that at least in Europe, the Commission is putting a spotlight on the use of algorithms and will monitor its use in all areas, including digital advertising.

Clearing digital media campaigns in today’s digital and regulatory environment

The intersection of the application of technology and the application of law can assist in-house counsel to limit legal liability. Digital campaigns going “viral” may display in many places in a random

and uncontrollable manner as the originator cannot control where they are shared by others. The legal source offer can, however, be limited in certain fashions using technology.

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It is possible to block viewers seeing website content from certain jurisdictions that have a country indication in their incoming IP address. Using such technology, viewers can be potentially limited to a certain country, and thus legal, jurisdictions. If such an issue appears to be a potential problem for a company, technology provides part of the solution. There is recent case law in the United States on this very issue regarding broadcasting content from Poland which can be viewed in the United States. The application of such technology as discussed would have addressed the issue satisfactorily to the court.

Another best practice approach is to expressly limit the offer to consumers in certain jurisdictions by legal language in the online offer itself. The ideal language to achieve this objective may still be jurisdictionally specific. By making it clear in writing that the offer of the subject of the digital campaign only applies to certain consumers in certain jurisdictions provides a strong argument that there should be no extraterritorial legal application.

Chief Executive Influencer

To help your CEO successfully manage their social media accounts, visit ACC Docket’s website: accdocket.com/articles/ceo-social-media.cfm

Multi-jurisdictional campaigns suggest a multi-jurisdictional analysis upfront. If you know that your company’s offer will cover certain jurisdictions, ensuring that your company has the intellectual property ownership covered for those jurisdictions in advance is key. Similarly, any permits, regulatory reviews, or advertising claim requirements applicable to those jurisdictions should be identified and complied with in advance. Everyone, including competitors and regulators, can see a web based digital offer, either directly on the platform or forwarded to them by another user. Accordingly, there is no substitute for upfront preparation.

A critical point is the education of your company. We were recently reminded by the general counsel of a Fortune 100 company that the rules for what is noticed on the internet are very much dependent on the target that a company presents to competitors, plaintiff’s counsel, regulators, and consumers through their online campaigns. He noted that his company can effectively get away with “nothing” on the web. All the content your company provides is instantly visible to whoever has digital access.

As a result, any legal misstep can be followed by lawsuits and regulatory demands for compliance. In the COVID-19 world of uncertainty and rapidly changing commerce regulations, this is particularly problematic. There can simply be no gaps in preparation if your company is to avoid and minimize

risk. Today is not the world it was a decade ago, or even last year. In-house counsel are needed more than ever.

ACC EXTRAS ON... Digital advertising

ACC Docket

[Ethics of Data in the Digital Era](#) (Aug. 2019).

[5 Answers to the Questions Every Advertising Lawyer Gets Asked](#) (Jan. 2018).

InfoPak

[Navigating US Legal Issues in Modern Advertising Campaigns](#) (June 2019).

ACC HAS MORE MATERIAL ON THIS SUBJECT ON OUR WEBSITE. VISIT WWW.ACC.COM, WHERE YOU CAN BROWSE OUR RESOURCES BY PRACTICE AREA OR SEARCH BY KEYWORD.

References

Spanski Enterprises, Inc. v. Telewizja Polska, S.A., March 2, 2018, Tatel, D.

Larger, well-known, or market leading companies that may provide an attractive target for regulators to publicly “make a point” to the industry or their stakeholders, companies perceived to have “deep pockets” by attorneys or plaintiffs, companies in industries deemed “unpopular” by a sector of the public, such as oil and gas, and companies in highly competitive industries, the actions of which are closely monitored by competitors, are all particularly vulnerable to having their social media and internet activities closely monitored for potential breaches of law and regulation. While all in-house counsel need to be aware, prepare for, and anticipate the issues raised in this article, social media activity for their company needs to be viewed through both the lens of accomplishing the anticipated marketing objective, and how what is said could be construed against it, by parties inclined to look for problems rather than positives in the messaging.

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Stacey van Hooven is vice president and general counsel for the Consumer Goods Business at Essity, a leading global hygiene and health company (formerly SCA). Essity is the world's second largest supplier of tissue products and has approximately 46,000 employees.

She has overall responsibility for providing legal support as well as managing the compliance/antitrust law program for the consumer goods business. As a member of the executive leadership team of the consumer sector of the business, she is also involved in corporate strategy and business development.

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She began her career as a trial attorney, representing corporate clients in civil commercial matters before both the state and federal courts in New York. Later, she served in New York City government supervising complex criminal and administrative investigations into suspected corruption by city officials and corporations doing business with New York. After moving to Munich, van Hooven spent more than a decade in private practice, most recently at Jacob Associates, gaining significant cross-border legal expertise in US-German corporate and commercial matters, specializing in mergers and acquisitions and international licensing arrangements. She has been with Essity since 2007.

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