

Clearing Content For Digital Advertising: 5 Things To Address

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Law360, New York (July 19, 2017, 11:22 AM EDT) -- Advertisers in every industry are allocating a larger portion of their annual budgets to marketing in digital media channels, including through social media and mobile apps. As one would expect, advertising dollars are following the audience, and that audience has migrated to digital media channels. Many of the same rules and laws that apply to ads run on traditional media also apply to ads that are disseminated through social media and social apps. Companies must keep these in mind to avoid triggering a wide variety of penalties and claims

For example, content that is produced under a guild or union collective bargaining agreement, such as the SAG/AFTRA commercials contract, are subject to certain minimum terms and work conditions that need to be in place when hiring talent. In addition, advertisers in any medium need a legal basis for including any third-party copyrights, trademarks, publicity rights or other intellectual property in their marketing communications. Brands must also be able to show that they have legally sufficient substantiation for all express and implied product claims included in the advertisement.

But the speed and ease with which the digital ads can be created, posted and shared means that the amount of clearance work that must be done for messages disseminated across digital channels has increased, and will continue to grow, while the time for conducting that clearance work is contracting.

Major brands, publishers, celebrities, so-called social media “influencers” and the general public are all producing content at an incredibly high volume. Digital media tools and technology often enable marketing teams to shorten the traditional development process and move quickly from the idea stage to pushing out the message, leaving little time for thorough clearance work. Those same tools also allow for rapid, often real-time, leveraging of user-generated and third-party content in marketing messages.

The ad inventory that exists in digital media channels give advertisers greater flexibility to determine what the marketing message looks like and how long it should be, which in turn gives advertisers more leeway to create marketing messages that look like editorial content, potentially raising legal disclosure issues.



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At the same time, publisher and producer access to financing and contributions from major brands has increased, further blurring the line between editorial content, branded content and marketing messages, which risks imposing more rigorous advertising clearance obligations on producers who may be more accustomed to producing pure-play entertainment content.

Violating applicable legal rules could expose a party to claims from regulatory agencies, consumers or competitors, opening the door to a wide range of legal and equitable remedies. Depending on the law in question, the specific facts and the person or entity pursuing the claims, such remedies can include actual damages, treble damages, punitive damages, attorney fees, disgorgement of profits, injunctive relief and corrective advertising. Advertisers that violate social media sites' rules and policies also risk removal of the campaign from the platform or being barred altogether. While this does not result in the same type of legal and financial exposure that can result from a lawsuit or regulatory investigation, it can disrupt an advertising campaign and trigger derivative legal actions.

The speed with which advertising content can be created and published means that advertisers must be more thorough and vigilant than ever in their clearance efforts, and should implement a content clearance process that, at a minimum, addresses the following issues.

Permissions

Care should be taken to confirm that a company has permission to produce a post. This includes identifying all third-party copyrights, such as music and artwork, as well as other protectable elements, or images of individuals that appear in the post and confirming that permission to use those materials has been secured.

Some companies choose to evaluate the potential risk of using materials without clearance depending on the context in which the materials are used. Others choose to follow a more conservative approach and obtain written permission.

Regardless of the approach, all posts should be vetted for permissions.

Different uses and contexts can alter the clearance analysis. For example, a company referencing an individual consumer's post about that company on its company social media page can present less risk because it is in response to a conversation that the person initiated. But using an image of a celebrity without permission in a post about a product can possibly lead to right of publicity or false endorsement claims against the company.

Any clearance process should include red flag warnings that, when triggered, elevate the clearance question to someone on the company's internal or external legal team.

Disclosures

A clearance process should explore whether a post requires any disclosures. The most common required disclosure is one required by the Federal Trade Commission Endorsement and Testimonial Guidelines. For example, if the company has engaged an influencer, employee or celebrity to make a post on its behalf, does the post include a disclosure that alerts consumers to the material connection between the company and the individual featured in the post, or is that material connection already apparent from the context?

Substantiation

Does the post include any express or implied claims about a company product or service, and if so, can the company substantiate those claims?

Privacy

Will the advertiser or third parties acting on its behalf be actively or passively collecting any personal information or other data about users who view or interact with the advertiser's content or other campaign materials? If so, the advertiser must ensure that the data collection practices comply with all applicable laws, rules and regulations as well as with the advertiser's own posted privacy policy.

Social Media Policy

Implementing a policy that governs the use of social media by the advertiser's officers, directors, employees, agents and vendors is a simple way to help avoid exposure to risk. Social media policies can be detailed outlines that provide specific rules on content and steps for producing posts, general guidelines for employees to keep in mind when making a post, or something in between. But at base, the policy should outline the circumstances under which content can be posted.

Ideally, the legal department will be a part of the team that is involved in clearing the content before it is posted. But creating a policy, standing alone, will not shield a company from liability. Instead, the company also needs to monitor compliance and enforce noncompliance. If there are no monitoring practices in place to support the policy, things will fall through the cracks, especially given the speed at which marketing campaigns can be produced and distributed through digital channels. And if there is no consequences for noncompliance, regulators and courts could treat that as tantamount to not having a policy at all.

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