

Advertising and Marketing on the Internet

The Internet is the most flexible, cost-effective means of reaching current and prospective customers and new members yet to be developed. This flexibility can be leveraged to allow small companies and other organizations to compete aggressively with their larger, better-funded rivals. On the other hand, this flexibility can be misused to confuse, mislead, and deceive consumers on a large scale. With these benefits and concerns regarding online advertising and marketing in mind, the federal and state governments have developed a series of rules and guidelines designed to protect consumers while not unduly burdening the development of online commerce.

DECEPTIVE AND UNSUBSTANTIATED CLAIMS ARE ILLEGAL IN ANY MEDIUM

Just a few years ago, the Internet frequently was likened to the “old wild West” because advertisers and marketers seemed to disregard even basic advertising rules. Since then, the Federal Trade Commission and the state Attorneys General have been on a tireless campaign to reign in online advertising. Their message has been consistent: the fundamental rules that forbid deception and require substantiation for all objective claims apply to online advertising and marketing activities in the same way that they apply to advertising and marketing in traditional media.

Under the FTC’s deception standard, it is illegal to make a “material” misrepresentation or omission that misleads consumers

acting reasonably under the circumstances. A representation or omission is material if it would affect a consumer’s purchasing decision.

The FTC’s deception standard further provides that advertisers and marketers are liable not only for what they say expressly, but also for the ways that consumers in the target audience reasonably interpret their claims. Thus, for example, the FTC likely would find a “free trial offer” claim deceptive if the offer requires consumers to cancel within the trial period in order to avoid being charged. The FTC would take that position because, even though the express claim that consumers may use the product or service free of charge during the trial period is true, reasonable consumers are likely to interpret the claim to mean that they may use the product or service during the trial period and then make a decision to take affirmative action before becoming obligated to pay. Charging consumers who take no affirmative action to become obligated at the end of the trial period contradicts consumers’ reasonable understanding of the free trial offer, the FTC would say, and therefore is deceptive.

The FTC’s pre-claim advertising substantiation rule requires advertisers to possess a “reasonable basis” for all objective claims before making them. What constitutes a reasonable basis varies depending on, among other things, the product or service being advertised and what experts in the relevant field consider adequate substantiation under the circumstances.

Thus, the FTC tends to require a very high level of substantiation, such as two well-controlled clinical studies, for efficacy claims regarding health and safety products such as dietary supplements. Moreover, where there is an industry-standard testing procedure for a specific type of product, the FTC will be wary of efficacy claims regarding such products that are not supporting by testing under the industry standard methodology.

SHIPPING GOODS AND SERVICES TO CONSUMERS

Another rule that applies equally with respect to both online and offline conduct is the FTC's "Mail Order Rule." Under its Mail Order Rule, the FTC regulates companies' claims regarding when they will ship goods purchased by consumers. In recent years, the FTC has devoted significant resources to enforcing the Mail Order Rule against online merchants, ostensibly because the FTC wants to foster the development of online commerce by ensuring that consumers can trust online merchants' promises to ship goods within a specific time frame.

The Mail Order Rule requires that advertisers possess a "reasonable basis" for any claims that they make regarding when they will ship goods to consumers. If companies make no such representation, the Mail Order Rule imposes an obligation that they possess a reasonable basis for being able to ship the product within 30 days. The Mail Order Rule does not require that companies actually ship on time in every instance, but it does require that they send notices to consumers when they become aware that they will not be able to ship on time. These notices must state that the shipment has been delayed, provide a revised shipping date, and give the consumers an opportunity to cancel their orders and get

their money back. The Rule also provides detailed instructions on how marketers should handle failures to ship by the revised shipping dates included in these notices.

DISCLOSURES

Advertisers and marketers often use disclosures to modify, limit, or clarify claims that might otherwise be misleading. There are two essential rules for making disclosures. First, while disclosures may modify or clarify a claim, they may not contradict the claim in the text or audio of an advertisement. Second, disclosures must be "clear and conspicuous." In the context of advertising on the radio, on television or in print, a disclosure meets the clear and conspicuous standard if it is close to the claim being qualified, in language that consumers in the target audience are likely to understand, and in a large enough type and in a color contrasting against the background such that consumers are likely to see and understand it.

The Internet frees advertisers and marketers from the time and space limitations imposed in other media. The online medium allows advertisers to make more complete and detailed disclosures than is possible with traditional media. Because the same flexibility also can contribute (sometimes inadvertently) to making disclosures difficult to find, the FTC recently issued a set of guidelines to help online advertisers and marketers make effective disclosures in an online context. These guidelines provide, among other things, that:

- (1) Online disclosures should be in close proximity to the text that requires the disclosure, and on the same page if possible. Disclosures should not follow large areas of blank text, for example, because consumers might not know to scroll down to see the disclosures.

- (2) Disclosures cannot be “lost” in the other visual (and auditory) messages communicated on a website.
- (3) It is permissible to make disclosures available by hypertext link, provided that the links are appropriately labeled to draw consumers’ attention to the need to click and see the disclosure. (Disclosures regarding price, health and safety claims should not be made by hypertext link.)
- (4) Disclosures should be unavoidable and made before consumers have an opportunity to make a purchase. It is not enough to place disclosures in the “Frequently Asked Questions” page or after the “Submit” button.

E-MAIL MARKETING

There is no federal law regulating e-mail marketing. A number of bills designed to regulate e-mail marketing have been introduced in both the Senate and the House of Representatives in recent years, but none has passed. The only regulation of e-mail marketing at the federal level therefore is the FTC’s power to police deceptive and unfair practices to halt e-mail scams.

Regulators tend to fill a vacuum, which explains why 26 States have passed their own laws regulating e-mail marketing. These laws vary from state to state, but the most common rules among them do the following:

- (1) Prohibit misrepresentations regarding the identity of the sender, the transmission path, and in the subject line;
- (2) Prohibit the unauthorized use of a third party’s domain name;
- (3) Require that consumers be given the opportunity to opt-out of receiving future

unsolicited commercial e-mail from the sender (and contain a toll-free telephone number or e-mail address to do so);

- (4) Promptly honor all opt-out requests;
- (5) Prohibit the sending of unsolicited commercial e-mail in violation of the policies of the e-mail service provider; and
- (6) Require that unsolicited commercial e-mail state “ADV:” in the subject line, and disclose the name, address and telephone number or e-mail address of the sending entity.

There are a number of exceptions to these laws, including e-mails sent to consumers with whom the sender has a prior or existing business relationship, e-mails to consumers who have consented to receive the e-mails, and e-mails sent from an organization to its members. Again, these exemptions vary from State to State, so it is important to check with legal counsel before initiating any new e-mail marketing campaign.

ONLINE PRIVACY

Privacy has emerged as one of the most significant concerns that consumers have about the Internet. Despite the public pressure to pass minimum standards for protecting consumers’ privacy online, both Congress and the state legislatures have yet to pass any comprehensive legislation regulating the collection, use, and disclosure of personal information gathered online. Instead, Congress has approached privacy on a sector-by-sector basis. Thus, Congress has enacted laws regulating the collection, use, and disclosure of children’s personal information, financial and medical information, credit-related information, and information regarding telephone calls and video rentals, among other things.

Where Congress and the state legislatures have failed to act, the FTC and state Attorneys General have used their power to police deceptive and unfair practices to develop minimum online privacy standards. For example, both the FTC and the States (and plaintiffs' class action lawyers) have taken action against companies that allegedly have violated their own privacy policies. The state Attorneys General have gone one step further, bringing law enforcement actions against website operators that fail to disclose material aspects of their privacy practices, such as sharing consumers' personal information with unaffiliated third parties.

There are a number of online tools available to help an organization develop a privacy policy. These include the Michigan Attorney General's "Guide to Privacy Policies" (http://www.michigan.gov/documents/priv_guide_38445_7.pdf), the Direct Marketing Association's Privacy Policy Generator (<http://www.the-dma.org/library/privacy/privacypolicygenerators.html>), and the Organization [sic.] for Economic Cooperation and Development's Privacy Policy Generator (<http://cs3-hq.oecd.org/scripts/pwv3/pwhome.htm>). If your organization already has a privacy policy, it is critical to ensure that the organization is in compliance with it. To that end, it is advisable to conduct regular audits of the organization's privacy practices. These audits may be performed internally, but are far more valuable when performed by an independent third-party consultant such as an accounting firm, law firm, or consulting firm specializing in privacy audits.

No firm's practices remain static over time. Almost inevitably, an organization will decide to make changes in the way it collects, uses, and discloses individuals' personal informa-

tion. To the extent that implementing such changes would violate the existing privacy policy, the organization must decide whether to modify the policy and apply the changes only to personal information gathered after the changes are implemented or to apply the new policies retroactively to information gathered under the prior version of the policy. Of course, applying the new policy retroactively is administratively easier because the organization can treat all of the personal information it has collected uniformly. However, federal and state regulators have made clear that to do so would break the "deal" consumers made when they provided their personal information under the prior version of the policy.

As of the date of this writing, it is clear that regulators insist that consumers who provided their personal information under one version of an organization's privacy policy should be provided with notice of the new policy and an opportunity to choose whether to have their information treated in accordance with the terms of the new policy. It is not clear, however, how organizations should provide this notice, and by what means consumers should be given the opportunity to exercise such a choice. The clearest guidance to date comes from a settlement that the Attorney General of New York recently reached with Juno Online.

In May 2002, the New York Attorney General settled allegations that Juno, and ISP, had made material changes to its terms of service agreement without providing consumers with adequate notice and an opportunity to consent to these changes. This case is significant because, although it involved changes to a "terms of service" agreement (not a privacy policy), the New York Attorney General's theory of the case and the ultimate relief

would apply easily to a case involving retroactively-applied material changes to a privacy policy. As such, the Juno settlement offers the first detailed picture of regulators' expectations with respect to the implementation of material changes to an important agreement with consumers in the online context.

The Attorney General alleged that Juno violated New York law by requiring subscribers to participate in a project designed to make their computers' unused processing power available to third parties, notwithstanding previous representations that it would not do so. Although Juno had posted the changes on its website and sent members an e-mail stating that the agreement had been modified, the New York Attorney General found this notice insufficient.

Under the settlement, Juno agreed to provide subscribers with notice of any material changes to the service agreement at least 30 days prior to the effective date of the change either by e-mail, a "pop-up" screen, or U.S. Mail. Juno also agreed to clearly and conspicuously post the notice on its website and to identify the nature of any material change, state the effective date of the change, and provide a comparison to the prior version of the service agreement. The settlement is silent on whether Juno also must give consumers an opportunity to opt-out of the change, presumably because consumers who did not agree to the changes simply could cancel their accounts. As part of the settlement, Juno also agreed to pay \$30,000 to cover the costs of the investigation.

Under the Juno settlement, the minimum standards for notice and an opportunity to consent to the changes of a privacy policy appear to be:

- (1) Notice by e-mail, pop-up screen or U.S. mail; and
- (2) A clear and conspicuous notice on the website stating the nature of the change, the effective date of the change and a link to a document showing the actual changes; and
- (3) A clear and conspicuous opportunity to opt out of the changes to meet regulators' expectations.

We cannot say if this standard will be adopted by all regulators, but we can say that regulators are very likely to think that anything below this standard is a violation of consumer protection laws. Check with your attorney before changing your privacy policy for guidance under your particular circumstances.

The Internet provides an efficient way for even small corporations and non-profit organizations to reach current and prospective customers and members on a scale impossible with traditional media. Generally, the rules for advertising and marketing online track the rules for advertising in other media. There are, however, some special rules for advertising online, including the means of making disclosures, the use of e-mail as a direct marketing tool, and protecting consumers' privacy. Following these rules will keep your organization in good graces with regulators and consumers.