

## **Digital Advertising and Digital Disruption –**

**Sean Collin**

### **For ICCA Conference panel session in Rome, Italy (Oct.2018)**

#### **Introduction:**

The World Wide Web has increasingly become the principal place for launching and anchoring advertising and marketing campaigns. Digital campaigns differ significantly in nature from traditional print advertising. Not only is the medium different, but the very nature of how the technology utilized functions introduces many new considerations from those traditionally associated with a media campaign in the print, radio or television advertising arenas. This presents new risks, and new opportunities.

Through technology the Web allows for the targeting of prospective customers in ways that were not possible previously. The ubiquitous nature of Web pages, Social Media pages and their generally worldwide accessibility also differentiates Web campaigns from traditional advertising. Where once an advertiser could be somewhat assured that they knew the geographic footprint of their campaign, with the Web, information and images flow across the world at the speed of the internet.

The speed and volume at which information can be provided and shared on the Web is tremendous. This magnifies successes, failures, and as a result, introduces new challenges. These characteristics create many issues for advertisers as a matter of law and regulation. These issues are multi-jurisdictional. They also create new commercial opportunities and new commercial risks for those participating in Digital campaigns.

#### **Understanding The Technology Behind & Driving Digital Advertising:**

One of the principal functions of In House Counsel is to identify, abate or eliminate Client risk. Understanding some of the foundations of digital media campaigns will enhance a Counsel's ability to achieve this goal. There are three primary means by which a digital advertising campaign can be successfully distributed on the Web.

The first is by a web site on which advertising is displayed to be "ranked" highly by a search engine. The most popular search engine today is Google, although there are many more, and many countries have their own champions for such use, particular examples being China and Russia. A search engine analyses web sites for various characteristics, such as popularity, relevancy, time people spend on the web site, usefulness of information, and quality. Based on proprietary, and evolving, criteria to that search engine, a web site is then "ranked" by it. 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 web sites relevant to the result. A higher rank will be displayed earlier in the search results created. Successful media campaigns may actually increase the rank of the web site on which they are based due to increased traffic to the site.

The second is to launch a campaign on one or more social media sites. Social media sites are web sites and systems designed to facilitate the sharing of information. Well known examples are Facebook, LinkedIn and Twitter. Some social media sites are more focused in nature and others for general discourse. A successful media campaign on a social media site will result in participants on that site “sharing”, “resharing”, “tagging”, or otherwise showing others the value of the campaign through social media communication. “Going Viral” is when a campaign is shared beyond the original targeted audience and is then reshared, tagged, and communicated on other social media sites and/or in other groups on the same site.

The third means to direct a successful digital advertising campaign is through paid communication targeting users on a social media site, or through paid advertising and higher search placement in results through a search engine. Both of these 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 “succeed” by achieving a distribution of the content they are offering followed by some economic benefit, ie. the purchase of a good, service, or consumer participation. In a sense, this suggests “the more the better”. Digital platforms such as web sites, search engines or social media sites benefit financially from more users. Users that use the systems more are even of greater financial benefit. As a result, the technology supporting digital campaigns are effectively designed to share and distribute information as fast and as far as possible.

### **Understanding the Legal Implications of The Digital Advertising Platforms:**

Legal systems are territorial in nature. Moreover, they are territorial within a territory such as state laws within Federal laws and national laws within Community law, to give an EU example. While the Web may be “Balkanized” through countries limiting access to websites through country level server technology, such as in the case of China, Russia, and North Korea, the Web is fundamentally designed to reach everywhere. Information posted on a web site hosted in Palo Alto, California can be viewed on a screen in San Francisco, or just as easily in Rome, Paris, Dubai or Rio De Janeiro. Thus the distribution of web content does not generally reflect national legal territorial boundaries.

Accordingly, the analysis necessary for legally “clearing” a digital campaign for a Client is much more complex than clearing one for local, country specific, or territorial specific distribution. While the Web may display content anywhere it is able to be viewed, the reach of country specific or state specific laws may apply to digital platforms located well outside their own physical jurisdiction. A “war story” would be useful here to illustrate our point.

Our client was a global building products company. They came up with an agreed “global” digital media campaign. As part of the campaign, 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 Client’s website regarding viewing the products was German. None of the social media or web site advertising was specifically directed at the German market. Within a couple of weeks of launch, the Client received a cease and desist letter from a German law firm. They alleged that our Client’s product descriptions and advertising claims on the website were not in compliance with German national law, or the law of one 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 German and products were sold elsewhere in the EU was enough of a nexus for German law to apply. Our Client had to settle the case and pay a fine to avoid potential prosecution. This is an example of exactly the issue we are describing.

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 Web 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 EU, so as Germany is part of it, a logical (although somewhat stretched) legal nexus could be applied. Unfortunately, the application of national law can also cut the other way against Clients. Accordingly, the above war story may be complimented by another with a very different outcome.

A Client was doing a home services business in the United States along the Canadian border. Television signals, radio signals, and even hard copy newspapers ended up crossing the border towns regularly between the countries. Our Client ran a very successful digital social media campaign to garner attention to its franchise opportunities and services in the border areas. A franchise meeting was directed to service company professionals in the USA but was attended by a person that resided and operated across the border in Canada. At no time did the Client direct any web content, media or social media to Canada specifically or make any commercial offering in Canada. The Canadian service provider learned about the campaign components at the meeting, and then promptly began to replicate the campaign in Canada under the same brand name. As a result, the USA directed digital media campaign was effectively “pirated” and exploited by a third party “cross border”. The Canadian party, while completely unauthorized, was a “free rider” on the success of the legitimate social media campaign along the border and the reverse confusion caused by the Canadian party was able to be exploited by it as if it were the legitimate advertiser. While the case ultimately went to court in both the United States and Canada, it did not end well for either party. It cost a tremendous amount in legal fees, time and less than optimally productive energy.

In both of the above examples it can be seen that the implications of National laws were simply imposed on the commercial realities generated through what were in both cases commercially highly successful digital campaigns. In the first case, a Client has to pay damages and fines in a country and state to which it did not specifically contemplate the campaign reaching. In the second case, a third party was able to effectively disrupt the campaign by “seizing it” across a border and trading on both reverse confusion and the fact the Client did not file for trademark protection in Canada first or promptly enough.

So how can Counsel advise Clients that could find themselves subject to national or state laws unintended from running digital media campaigns? What are the best practices?

### **Best Practices In Clearing Digital Media Campaigns:**

The intersection of the application of technology and the application of law can assist Counsel to limit legal liability. Digital Campaigns subject to going “viral” may not be limitable as to where the invitation to view the offer end up. They can, however, be limited in certain fashions as to parties from which jurisdiction can view the website making the product or service offer itself.

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 certain country, and thus legal, jurisdictions. If such an issue appears to be a potential problem for a Client, 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 U.S. The application of such technology as discussed above 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 on-line offer itself. The ideal language to achieve this objective may still be jurisdictionally specific. By making it clear in writing that the offer 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.

Multi-jurisdictional campaigns suggest a multi-jurisdictional analysis up front. If you know that your Clients offer will cover certain jurisdictions, ensuring that your Client 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 or as forwarded to them. Accordingly, there is no substitute for up front preparation.

A critical point is education of the Client to the issues raised in this paper. Clients in a digital age are often lured by the speed, reach, and scope of a digital campaign without understanding the legal consequences. We were recently reminded by the General Counsel of a Fortune 100 company that the rules for what is noticed on the Web are very

much dependent on the target that a company presents to competitors, plaintiff's counsel, regulators, and consumers through their on-line campaigns. He noted that his Client can effectively get away with "nothing" on the Web. The slightest legal misstep is followed by law suits and regulatory demands for compliance. As a result every digital campaign for his Fortune 100 Client has to be vetted thoroughly, internationally, and multi-jurisdictionally before it is launched. There can simply be no gaps in preparation to avoid and minimize risk. In truth the same should be true for all of our Clients, But to move them there, education and preparation is the key.