

How to mitigate the risk of marketing-related lawsuits

Franchise marketing is an invaluable tool, but make sure to avoid these seven pitfalls

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Franchise owners undoubtedly understand the importance of good branding. A good brand is a source indicator and calling card for customers to recognize and relate to a company, its goods, and its services.

Beyond consumer recognition, a good brand is also valuable financially, as brand owners must account for goodwill as an intangible asset on the balance sheet. Because goodwill – and good branding – ultimately increases the bottom line, franchise owners would do well to focus on how to maximize brand value and minimize the threat of potential lawsuits.

Here are seven tips on how to stay on-brand and out of trouble:

1 Get it in writing

Every key agreement involving the brand should be in writing, including licensing, distributorship, and marketing agreements. Make sure to include social media brand ambassador and influencer agreements as well, as they are legally an extension of your marketing plan.

As a brand owner, you must maintain control over the messaging behind the brand, as well as the quality of the goods and services offered under the brand. If a franchise owner loses control of the brand, or brand messaging, it can lead to significant losses in reputation, goodwill, and even loss of the brand itself.

Therefore, the best way to protect the brand is ensuring the right contracts are in place to assert and maintain control of brand messaging.

2 Maintain brand guidelines

Franchise owners are dependent on franchisees maintaining and consistently using a brand to deliver a message about the goods and services. The only way to ensure consistency is to create and actively maintain brand guidelines along with product and service quality standards.

Are there certain fonts or colors that are integral to the branding? Are there key brand differentiators that should come across in messaging to customers in certain jurisdictions? These guidelines should be spelled out clearly for all franchisees, and where relevant, subcontractors.

A worst-case scenario for a franchise owner is to have a franchisee go rogue and initiate its own branding content.

3 Know thyself

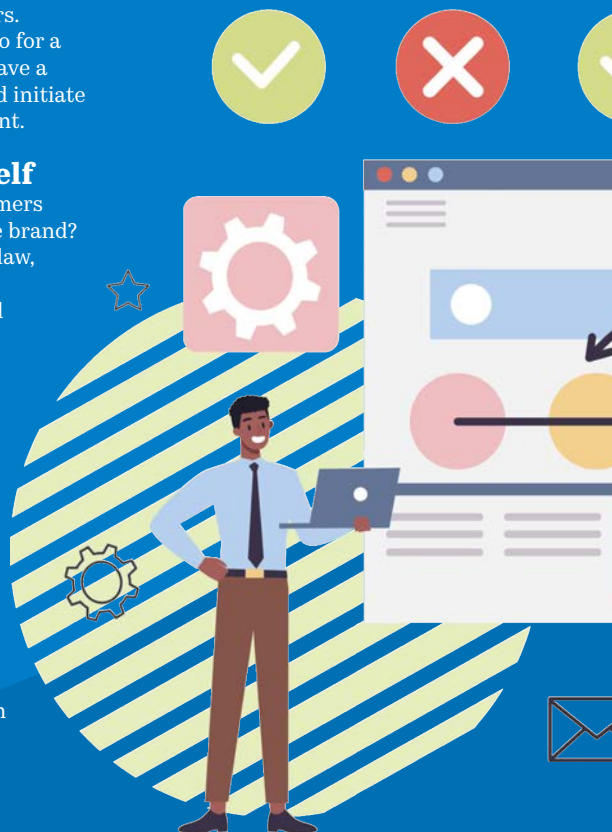
What are consumers saying about the brand? Under U.S. advertising law, and particularly claims related to products and services, brand owners carry a responsibility of knowing what consumers are generally saying about a brand.

This, of course, does not mean that a franchise owner must be aware of everything said about their brand, but there must be a general understanding of consumer perception of the brand. Franchise owners should actively monitor social media,

conduct consumer surveys, and engage in market assessments to gain a better understanding of their brand and its impact.

For example, a superiority claim that a product or service is “number one” can lead to successful false advertising claims brought by competitors if, in fact, the advertised brand does not have the highest market share in its category, according to recent cases brought before the National Advertising Division of the Better Business Bureau.

Further, both express and implied claims should be substantiated and/or carry disclaimers to prevent false advertising claims.



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4 Communicate clearly and conspicuously

“Clear” and “conspicuous” are key standards under the Federal Trade Commission’s guidelines for advertisers and endorsers (Section 5 of the FTC Act, 15 U.S.C. 45). Brand owners must be transparent and conspicuously disclose information about their products and services, being careful not to promote misleading or false information.

Ultimately, franchise owners carry the additional burden of making sure franchisees are also communicating clearly and conspicuously in their advertising. While this burden (and damages) may be shifted contractually, liability for false or misleading claims ultimately falls on the brand owner.

Instituting regular audits or monitoring of advertising claims, and regularly assessing whether

that program needs improvement, can help mitigate damages even in instances where the messaging fails and false advertising or inadequate disclosure becomes a viable claim.

5 Listen to your fans

Numerous franchise owners have made news for heavy enforcement against employees and fans alike for violating branding policies on social media (e.g., employees sharing “hacks” or secret menus). While the policies behind such punishment might put a franchise owner on the right side of the law, the court of public relations can be even more severe in its punishment.

In many cases, the infringer is not just a fan, but a brand ambassador or influencer, whose posts or videos are resonating with the very customers a brand owner would dream to have on its side. In these instances, it is best to join in on the fun and figure out how to take control of the messaging.

Through contractual tools like influencer or employee social media contracts, a brand can still allow a star fan or employee the space to use their winning persona to market the brand, but also maintain control over the ultimate brand messaging.

6 Do your homework

Franchise owners must understand social media beyond their own branding. In addition to social media platform rules, there are courts of public opinion that work in mysterious ways.

Popular culture can insist that an influencer is famous one day and a social pariah the next, and the next platform du jour is in development, while the tried and true platforms are losing market share.

It is not enough to have a team of marketers that understands the brand and its place in promoting the company mission. There must also be an understanding of the current pop culture and the brand’s place within it vis-à-vis the key customers to make a memorable, and not infamous, impact. In practice, before utilizing a meme or any pop culture reference, a brand owner should explore the meaning behind the reference, including its origins, and how it has aged over time.

Some pop culture simply does not age well, and franchise owners should be cautious of misguided efforts to be “more hip” that could ultimately hurt their brand.

7 Do your due diligence

Before adopting or expanding a brand, make sure to clear it for availability. Trademark rights are jurisdictional, meaning each country has its own laws and registration system. A brand might have sufficient protection and recognition in its original market, but will need to rebrand as it expands and grows into different markets and cultures.

A franchise owner should not assume availability or even that the brand will translate across borders. Due diligence and preplanning go a long way in saving time and money, and it is best to scrap an idea or brand earlier in the process rather than waiting to receive a letter asking to “cease and desist.”

The same idea goes for brand marking (such as TM / SM / ®), as most countries consider using the “®” notice in their country without a registration to be improper and may even impose fines against use of the symbol.

Ultimately, franchise owners can mitigate the potential risk of lawsuits by staying in sync with the brand, relevant market, and overall messaging.

