

# ALCOHOL ADVERTISING IN THE DIGITAL AGE



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## Introduction

Suppliers and retailers of alcoholic beverages advertise their respective products and offerings in a wide variety of digital outlets. Questions arise as to how the complex legal landscape of alcohol regulation applies in these digital spaces. Advertising media include social network services (*e.g.*, Facebook), video sharing sites (*e.g.*, YouTube), blogs, and smartphone applications. In addition to these types of media which engage consumers directly on their televisions and personal devices, other types of media target consumers in retail places. These media include digital screens which are physically present in store, as well as seemingly invisible technology which targets the consumer in store on his or her smartphone.

## The Law Plays Catch-Up

Tied house laws, which address the financial relationships between supplier and retailer licensees, were enacted well before any digital media was invented. As a result, the alcohol laws have been playing catch up with this technology. Nevertheless, it is clear that social media qualifies as advertising for the purpose of alcohol beverage laws, and more and more jurisdictions are creating specific legislation to clarify this point. For example, Georgia, Kentucky, and Louisiana all now include social media in state definitions of advertising. On the federal level, the U.S. Tax and Trade Bureau (“TTB”) has confirmed that mandatory statements required in supplier product advertising are required in all forms of social media as well.<sup>1</sup>

## Paying for Technology: Compliance with State and Federal Tied House Rules

Technology can be expensive, and as a result retailers frequently wish to enlist supplier support to defray the cost of advertising both in and out of their premises. Generally, it is important to remember that the same rules which govern traditional advertising also govern these new

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<sup>1</sup> See TTB Industry Circular No. 2013-01, *Use of Social Media in the Advertising of Alcohol Beverages*.

technologies. Therefore, the same questions which come up in traditional advertising also apply here. For example, does the advertising involve the supplier paying for or buying advertising for the retailer in a manner that results in prohibited “cooperative advertising”? Does the technology involve the supplier providing or otherwise paying for a piece of equipment which is not covered by any applicable tied house exception?

The recent case of *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839 (9<sup>th</sup> Cir. 2017), involved the issue of an impermissible payment for advertising. The plaintiff in the case installs liquid crystal displays for advertisements in retail outlets. Advertisers pay plaintiff for the opportunity to feature their brand advertising in the retail location. Plaintiff in turn then pays the retailer a percentage of the advertising fees generated by the display. Suppliers of alcohol beverages refused to do business with the plaintiff out of concern that California’s alcohol beverage laws prohibited them from paying to place advertising on a retail premises. The plaintiff sued the California Department of Alcoholic Beverage Control to enjoin enforcement of this particular part of the state tied house law. In short, the plaintiff argued that the suppliers’ proposed advertisements were protected commercial speech, and that the state interests and concerns inherent in the Twenty-first Amendment were outweighed by First Amendment interests. An *en banc* panel of the Ninth Circuit held that the California advertising prohibition directly and materially advanced the state’s interest in maintaining the three tier system, and therefore was sufficient to overcome First Amendment scrutiny.

Because digital advertising has become so popular, a cottage industry has developed for screens, closed loop televisions, and other devices that sit in retail places to stream digital content. Retailers frequently ask whether these items can be paid for or loaned by suppliers. This is a state specific issue, and the answer to the question will vary from one jurisdiction to another. One way to analyze the issue is to determine whether the item really a digital sign (likely covered under a tied house exception) or an illegal thing of value (a gift not covered by a tied house exception). The Texas Alcoholic Beverage Commission (“TABC”) has published two Marketing Practices Bulletins on this subject which provide helpful guidance. The TABC articulated questions to be used to determine the true nature of the item. They include:

- Is the primary purpose of the item to advertise a product?
- Is it a permanent fixture?
- Is it a thing of value?
- How long will the item stay in the retail premises?<sup>2</sup>

### **Questions Raised by Smartphone Applications**

The uptick in digital advertising has also increased the number of smartphone applications directed at the marketing and sale of alcoholic beverages. Many retailers now have their own smartphone applications, and many interface with applications operated by non-licensees which drive traffic to the retail establishment.

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<sup>2</sup> See TABC MPB028, *Distinguishing Between a Sign and an Illegal Improvement*, and TABC MPB036, *Product Displays & Enhancement Items*.

Many of the best practices associated with applications which advertise alcohol are the same as the best practices for websites featuring alcohol products. These include, but are not limited to, age-gating and promoting responsible consumption.<sup>3</sup> In addition, however, smartphone applications also raise several other legal issues in the alcohol space, depending on the functionality of the application. Consider the following issue-spotter questions:

- Does the app, if operated by an unlicensed third party, improperly use or avail itself of the retailer's license to sell alcoholic beverages?
- Does the app facilitate an improper flow of funds between a supplier and a retailer?
- Does the app offer promotions which could result in violations of state happy hour or drink pricing rules?
- Does the app result in tied house exclusion by directing consumers away from one retailer and toward another?

### **Summary**

Digital communications promoting alcohol present compliance challenges in terms of their jurisdictional reach, and to whom they may be directed. It is best for industry members to consult state law to determine which laws and regulations governing traditional advertising may also apply in the context of digital advertising. Furthermore, many states have developed enforcement policies and other opinion statements on social media and related issues; therefore, consulting state agency resources is recommended.

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<sup>3</sup> For an excellent discussion of best practices such as these, *see* DISCUS Guidance Note on Responsible Digital Marketing Communications.