

The Top 10 Legal Risks Impacting the Value of a Consumer Product Brand

WRITTEN BY

LuAnne Morrow | Nanette C. Heide

You put in the hard work to conceive and design your product, choose a trademark, and build your customer following, but taking your product brand to the next level and attracting an equity investment based in large part on the value of the trademarks and goodwill associated with your consumer product requires other skill sets. Not only must you protect your trademarks by way of registration, but you also need to protect your brand identity by complying with the many consumer protection, privacy, advertising, and consumer product laws. This compliance is important to build trust with customers, manage legal risk, and improve your chances of that equity investment.

Based on our experience of counselling clients in the consumer products space, these are 10 legal risks that threaten the value of a consumer product brand:

1. Failure to clear and protect your trademark.

Clearance searches and strategy with expert advice.

Using comprehensive search and analysis, a trademark attorney can help you determine whether your trademarks can be registered or if there are risks for registration or use due to pre-existing trademarks or other issues.

Trademark registrations in the U.S. and jurisdictions where expansion in the next five years is likely.

Trademark protection is jurisdictional, so knowing where your key markets are now and will be in the next five years will help to inform your filing strategy and provide opportunities to leverage international treaties to lower the costs of trademark protection.

2. Online sales practices that use dark patterns, junk fees, negative options, or other practices contrary to consumer protection laws.

State and federal laws.

Many states have strict consumer protection and privacy laws. Along with these state laws, the Federal Trade Commission (FTC) Act governs the activities of businesses selling goods and services online, such as the regulation of dark patterns (deceptive design tactics used in an online environment that subtly manipulates the end user's decision), fees added to prices for goods or services that offer no value (also known as junk fees),

automatic renewal unless a consumer opts out (negative option practices), and click-to-cancel requirements for subscription-based purchases. If you are selling to consumers in other countries, similar or stricter foreign laws and regulations may also apply.

Failure to comply with the relevant legislation may result in investigations, claims, and fines, all of which are likely to be made public and could damage the reputation of your brand and your customer relationships. Past investigations or ongoing claims may also adversely impact equity investment or value for acquisition when investors discover these issues during due diligence.

3. Making environmental, performance, or quality claims about your product that are misleading or unsubstantiated.

Truth in advertising.

The underlying principle of the federal law is that ads must be truthful, not misleading, and, when appropriate, backed by scientific evidence. These principles apply to all forms of advertising and labelling. The FTC enforces these rules and is particularly focused on claims that could impact consumers' health, claims about food, over-the-counter drugs, dietary supplements, alcohol, and tobacco, as well as conduct related to high-tech products and the internet.

Environmental and health claims.

The FTC has issued Green Guides to assist companies in crafting accurate and not misleading claims with respect to the environment and the consumer. The U.S. Food and Drug Administration (FDA) partners with the FTC to monitor health and fitness claims, such as claims of weight loss, disease prevention, or impact on cognitive abilities, and frequently acts against companies making unsubstantiated claims.

The numerous guides, cases, and advisory opinions on these issues can be overwhelming to navigate, and knowledge of the guidance and applying it to your business is essential to avoiding action by the FDA, FTC, or consumers that could result in recalls, re-packaging, fines, damages, reputational losses, and negative impact on brand value.

4. Inadequate or noncompliant packaging and labeling.

Federal law.

The federal law on packaging and labeling, the Fair Packaging and Labeling Act, is enforced by the FTC and FDA. In addition to the standard requirements, certain products have specific regulations both at the federal and state level.

Multijurisdictional.

If you plan to export your product outside the U.S. or establish manufacturing in other countries, counsel on the specifics of the requirements in those countries is essential and may impact your package design in the U.S.

Prop 65 and other warnings.

In addition to standard requirements, certain jurisdictions such as California have specific warning requirements alerting consumers to risks such as exposure to cancer-causing chemicals.

Managing the design and marketing priorities for your package and label with the legal requirements that are often changing requires expert advice and can reduce the risk of consumer lawsuits and requirements to re-label products, among other legal risks.

5. Lack of diligence in advertising, including by influencers and other endorsers.

FTC guidelines.

The FTC has issued excellent guidance on advertising claims and in particular the role influencers or brand ambassadors play in advertising law compliance. Staying within the law requires vigilance in reviewing endorsements as well as in the drafting of advertising and influencer agreements to require compliance.

Reviews and endorsements.

The numerous opportunities for consumers to review and comment on your company products and services, along with the many platforms such as Yelp and Amazon that employ consumer reviews, can often lead brands to manufacture reviews or manage poor reviews ineffectually. Genuine reviews not only comply with the law but also can contribute positively to brand value.

Product-specific laws.

Be aware of product-specific laws, such as those for cannabis, tobacco, alcohol, and state regulations that could restrict methods of advertising, access to websites by age, or require that products not be shown in association with certain activities in advertising.

For both startup and well-established businesses, social media posts, partnering with brand ambassadors, and other forms of advertising require specific knowledge and consistent review. It is easy to fall afoul of laws and regulations, so incorporating legal compliance into any advertising campaign plan is essential.

6. Not having a privacy policy or not following company policies on privacy.

Although there is no federal law governing the protection of personal information (other than health information), there is a network of state laws as well as laws in other jurisdictions that could apply to U.S. companies. Cybersecurity breaches and failure to have policies and follow them can all lead to significant legal and reputational risks. Investors and purchasers are more frequently expecting to review policies and security plans and requiring representations and warranties with respect to privacy compliance, and it will pay off in the long run to establish policies and enforce them internally as early as possible.

7. Poorly drafted commercial agreements with manufacturers and suppliers.

Many businesses, especially at startup, place very little value on the quality of agreements with manufacturers and suppliers; however, these agreements can be a key tool for protecting your trademark through proper licensing language, setting and enforcing quality standards, requiring legal compliance with the regulations we have highlighted in this article, and managing product liability risks. In the due diligence process for acquisition or investment, these agreements will be scrutinized for these terms and any restrictions on transfer or change of control, and issues with key agreements can sideline transactions, so it is well worth the investment in well-drafted agreements with key business partners.

8. Inadequate terms and conditions for sale or your website.

Every business website should have current website terms and conditions, and e-commerce sites should also have comprehensive terms governing the sale of goods or services. These terms will form the basis for your relationship with consumers and are regulated primarily by state consumer protection laws. Failure to comply with state regulations may lead to claims, and more commonly, unclear terms on returns, refunds, and shipping costs can lead to issues with customers resulting in reputational or customer loss.

9. Not regularly monitoring your trademark and enforcing your rights.

Ensuring your trademark is used properly internally and by licensees is essential to preserving your trademark rights and brand value. This can be accomplished through internal policies that are routinely enforced and license agreements that allow for periodic review of trademark use and quality of goods and services and include the right to terminate for breaches. In addition, it is important to ensure your trademark is not used without permission. There are many tools available to monitor the internet for such unauthorized use as well as the trademark registers in any country where you have trademark rights. Taking action to stop such infringement, whether by issuing cease and desist letters, opposing trademark applications, or taking other legal action, will be important to preserving your trademark rights.

10. Lack of customer service.

Customer complaints, if handled well, can mitigate risk of claims and complaints to regulators. A proactive approach to customer relations as well as a savvy social media strategy can be the difference between a brand building and losing value.

Managing these risks may significantly improve your trademark value and position your company for acquisition or investment by creating a strong brand, and customer relationships and minimizing claims by regulators and others that could negatively impact brand value.

The Consumer Products and Intellectual Property groups at Troutman Pepper Locke have the experience to assist you in managing these risks and to guide your consumer products company for successful business growth.

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