



Outside Counsel

Expert Analysis

Hightailing to Better Retailing Options

From my father, who was chief merchant at the department store my family had founded and run for much of the last century, I learned about the business of retail long before I came to practice the law of retail. One thing he made sure I understood: Enjoy doing whatever it is you just learned to do, but never get too comfortable because you will very shortly be learning to do something different. That was how fast the business was changing, even then—and how prophetic was his advice for now.

I was recently reminded about what he said as I walked down one mile of Lexington Avenue on the Upper East Side of Manhattan, a prime residential neighborhood, and counted 18 empty storefronts, including two that

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were flagship-sized. The stock market was setting records and unemployment was low, but if you wanted to buy a pair of jeans on

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that walk, you were out of luck. Meanwhile, at my wife's favorite outlet complex in Reading, PA, they were shutting stores in former factory buildings and ripping out wooden beams to sell into the antique materials market. Online shopping is widely seen as the reason, of course. Whether working in-house or providing assistance

from a law firm, here are a few points for lawyers to keep in mind when counseling the business team of a retailer finding its business and in transition.

Leases

The retailer signed one (or perhaps many) when traffic was good. The lease may run for some time. Maybe the retailer is obligated to pay the landlord a percentage of its sales. Does it sometimes feel you could play badminton on the sales floor and not risk hitting a single customer? Maybe the reversal is temporary, but given the trends, consider it is never too early for counsel to work with the business team about going back to the landlord to ask for concessions or simply to give up the premises. As hard as it may have become for the retailer to maintain profitability in the space, it will likely be just as hard for the landlord to find someone else who could do better. Do not mistake friendly

handshake agreements to amend leases for guarantees that binding written agreements will say what is anticipated. This is real estate: everything has to be in writing, done the proper way; and don't count on it as completed until it really is done. Just in case, when modifying an existing lease, or entering into a new one, make sure you have an easy-to-use right of sublet.

Taxes

Remember when it seemed that almost anything bought online involved a shipping charge but came free of sales tax? There was much debate some time back about the potential effect of permitting returns at a physical store by customers who buy from the online affiliate. Would that cause the online company to have a presence in the state of the return, thereby requiring that the online company charge that state's sales tax on all purchases shipped to addresses in that state? The short answer is that state tax authorities did not let this one slip by, and it is pretty much settled that the online store has to charge sales tax in any state where an affiliated operation has a physical "footprint." So don't be overly concerned about taking online returns at shops—or, for that matter, permitting in-store pickup of online orders; but do make sure

that tax counsel knows exactly what is happening and where it is happening in the flow of goods to and from customers (and to and from vendors, of course).

Legal Language

If you are selling online, you are operating a sales site, which means that you should expect to be held to a higher standard of care concerning "PI" (your users' personal information) than the operators of purely informational sites. When asked to draft what business people may refer to as the "site legals," there is a temptation to go onto the website of a competitor or other retailer and copy its privacy policy and its terms and conditions (sometimes called "terms of use"), which is the contract made between the site owner and the user. State laws differ, and any other retailer's business practices might be different, even from those of its main competitors. The legal terms on a sales site therefore need to be custom-tailored to the site owner's specific situation. It takes some time and possibly a bit of extra expense, but doing it right is important, especially when it comes to the financial information (starting with credit card numbers) of customers.

You will need to sit down with the business team and get very

specific answers to questions on the user experience. And please keep this in mind: to have a privacy policy in place and not follow it can sometimes be worse than not having a policy at all. Once the policy is made and posted, staff have to be trained on how properly to enforce it. Consider it good practice to follow up with the people operating the site at least twice each year on whether changes in the law or the company's business practices require amendment, either to the privacy policy or to the terms and conditions.

Special Care for Special Products

If the business is trading in alcohol, tobacco, firearms, pharmaceuticals or other items for which transportation across state lines or internationally is subject to special regulation, you already know the particular sensitivities. Keep an eye on what would happen under applicable law when goods flow from a distribution center in one state to a customer in another state, only to be returned at a bricks-and-mortar store in a third state. A straight online play would have the retailer control the point of receipt of return (that is, the returns center), but when physical stores can take back merchandise, it is important to remember that the goods, once out, can turn up

anywhere the retailer is able to accept returns.

Intellectual Property

It is not that the laws about selling counterfeits, infringing on trademarks, violations of privacy and other rights and responsibilities regarding intangible rights are different online than in a shop; the difference is how visible it all becomes to potential plaintiffs. What you do online is observable by the world, and when the world orders your goods, a violation can theoretically be claimed anywhere that the goods can be delivered and, in some cases, anywhere that certain content is even seen. That is the hidden cost of even a modest online presence for a retailer that is used to selling from a physical location. Time and money should be spent to be sure that the retailer practices good intellectual property compliance in all channels of trade.

Customers' Comments

If you were to ask my father whether it would be possible for a large bulletin board to have been installed on the ground floor of his department store for his customers to make disparaging comments about the merchandise, and if you were to tell him that those comments could not be taken down and would be visible to the world, he

would have called you a few colorful words that he had learned in a short but active intercontinental life. That is exactly, however, how an online operation works: the retailer posts pictures and a description of the goods, and underneath customers get to praise or trash them—at the retailer's expense and under its brand. Customers expect that, and merchants put up with it even if those comments can prove to be embarrassing to the brands of both the retailer and the vendor.

Because the retailer is legally responsible for the website, it has to vet each comment, whether good, bad, indifferent or damning with faint (or even misspelled) praise. The content cannot be edited, but the review needs to meet the retailer's decency and accuracy standards; those standards must be established and made easily accessible in advance, usually in the terms and conditions. No one should be permitted to use the comments section to make personal attacks or to spread what could prove to be false information unrelated to actual product being reviewed.

A prudent course is to establish ground rules that comments deal only about customer satisfaction with the product—and only if the customer bought it from the retailer hosting the comment.

Just to be sure, it is usually recommended that the terms of use state explicitly that all comments become property of the retailer—which is sound for copyright purposes (no one else can copy without authorization text that you own) but also to help at least partially to restore control of the narrative about the product and the store.

Conclusion

In short, for a company used to being in a real place, employing real people to sell real things, virtual retailing can come as a legal and business shock at first. The competition is just as intense, and Amazon is out there, in front of everybody, but it expands your market from where you are to, potentially, anywhere that anyone can be. The key to legal success is the same as with traditional retailing, only more so: anticipate the likely problems and be ready with solutions before those problems arise.