

WINES & VINES

News Headline July 6, 2011

Wine Marketers: Mind Your Media

Direct-to-consumer session looks at legalities of third-party and social media sales tools

by Paul Franson

Napa, Calif.—Social media drew a crowd at the sixth annual ShipCompliant Direct Shipping Seminar & Users Conference on June 28. “Social Media and Third-Party Marketing,” one of the best-attended sessions at the Napa Marriott, focused on complex issues involved



Speakers John Hinman, Jerry Jolly and Suzanne DeGalan spoke about the legalities of new media at ShipCompliant's Direct Shipping Seminar & Users Conference.

with marketing wine on the Internet and the thorny subject of third-party agents. Must these be licensed? The California ABC has stated “yes” but has yet to enforce the ruling.

Beverage law specialist Jerry R. Jolly of the law firm Pillsbury Winthrop Shaw Pittman, Sacramento, Calif., led the session. Jolly spent 31 years with the ABC (Department of Alcoholic Beverage Control), the last as director. He admitted that trade practice regulations are the trickiest and least understood part of California alcohol regulations. “We’re dealing with laws written in the ’30s, then rewritten in the ’50s, with many changes since. The laws are antiquated, and the industry is moving at a lightning pace,” he said. “The statutes trail what the industry is doing. That’s why the ABC has such a tough job. They have to obey the statutes, but the reality goes beyond what was intended.”

He reminded attendees that the ABC’s mission is both protecting public safety but promoting California’s economic well-being: Wine is, obviously, a big and important business in the state.

Jolly addressed tied-house laws, which state that no supplier may—directly or indirectly—furnish or give anything of value to any off-sale retail licensee. He recommended extreme caution with programs involving both suppliers and retailers. “If a retailer receives any benefit from supplier payment or involvement, it could be problematic,” he warned.

The law also prohibits any licensee—directly or indirectly—from giving any premium, gift or free goods in connection with the sale or distribution of any alcoholic beverage, “except as may

be specifically authorized.” There are 60 exceptions, but prohibitions seem to include free shipping or “buy one, get one free” offers.

Third parties face one controversial rule: Only licensees may exercise license privileges, including decisions regarding the purchase and pricing of alcoholic beverages. Last year the ABC specified that this includes marketing or soliciting sales. Although many websites, magazines and independent clubs clearly engage in these practices, ABC said a license is required.

Whether the third party is called a “marketing agent” of the winery or “agent of consumer,” the licensee will be subject to discipline, ABC stated. But it’s not always clear what license the third party should have. Since third parties aren’t licensed (and few authorities seem inclined to pursue them), the burden falls on the wineries involved. The ABC is seeking industry comments about this provision and could eventually either change it or enforce it aggressively.

Jolly noted that the biggest issue tends to be fees for services provided: If they are based upon sale of alcoholic beverages, such as a percentage of sales, then they are problematic. Flat fees, as for advertising, seem safer.

Driving sales with social media

John Hinman of Hinman & Carmichael, San Francisco, another law firm specializing in alcohol issues, addressed, “Can you be both effective and legal when using social media advertising to drive sales?”

He started with an opinion by the California Attorney General, given July 7, 1966: “Operation of a ‘liquor by wire’ service...Is not precluded by California law. The party who forwards the order for the purchaser, or promotes and operates the ‘liquor by wire’ service is the agent of the buyer.”

The legalese: “‘Sell’ or ‘sale’ and ‘to sell’ includes any transaction whereby, for any consideration, title to alcoholic beverages is transferred from one person to another and includes the delivery of alcoholic beverages pursuant to an order placed for the purchase of such beverages and soliciting or receiving an order for such beverages...”

A key question is whether third-party service providers are sellers or advertising media and technological administrators. Hinman listed a number of different models:

In the third-party wine club model like the *Wall Street Journal* Wine Club, the third party controls the customer base, has invested in the customer experience and has a stake in creating a positive customer experience. The licensee pays the wine club a royalty or fee for access to its membership base and right to use the wine club trademark and membership list in different ways.

Multi-media producers like QVC and the Home Shopping Network use multi-media, such as video or TV, to reach consumers with visual sales messages, either live or taped. Hinman said they’re very effective. Order information is often processed by telephone banks. Compensation is a percentage of total revenue produced through the medium.

Hinman noted problems with this approach in the order acceptance process and payment protocols: “Operators standing by...”

With a marketplace like Buy.com or Shop.com, the customer is directed virtually to a retailer or winery, which accepts and processes the sale. Compensation is a percentage of revenue based on traffic through the site. One problem is that customers often want to have one shopping cart for all their purchases, including wine mixed with other goods. "This will not work with alcoholic beverages under direct shipment permit regulations," Hinman said.

Flash sales sites are the hottest trend at the moment. They're one-time, limited offers made by companies like Lot18 or Gilt. Another example is Groupon, from which the customer buys a voucher for a specific product (or is directed to the seller's site), then redeems the voucher at a retail or producer licensee location. The legal problem here is that the flash site controls the customer and the transaction.

Hinman reported that William Kelly of the Massachusetts Alcoholic Beverages Control Commission was asked by a retailer about using a Groupon coupon. His response: "I am hopeful that the long-established, clear, bright lines of the boundaries of legality have not vanished in the rear-view mirror of entrepreneurship driven by unbridled and imprudent, if not reckless, enthusiasm."

In other words: "NO."

Hinman suggested the best practice would be for the licensee to accept the order, process the credit card and remain responsible for proper fulfillment.

He added, in this case, "The licensee is advertising and soliciting orders in an advertising medium—the advertiser is not the seller. "The distinction of who is doing the solicitation must be clear in all materials and in the advertising contract. The advertiser should earn a flat fee, not a percentage of the sale.

Hinman warned, "Keep always in mind that the licensee is the one who has a license at stake in the transaction, not the advertiser."

Social stumbles

Suzanne DeGalen, also of Hinman & Carmichael, discussed dodging legal pitfalls in social media. Her first statement told it all: "Social media is still 'media.'" The general laws still apply, including copyright laws, trademark laws, privacy rights and First Amendment issues.

In addition, federal advertising standards for wine are in play: no false or misleading statements, no disparagement of other producers or products, no statements inconsistent with labeling and no misleading health claims.

DeGalen noted, "Every post, blog entry, uploaded video and tweet from your company is an advertisement." At the very least, all advertisements must state the name and address (county and state) of the permit holder responsible for its publication; all statements appearing in any written, printed or graphic advertisement shall be in lettering or type size sufficient to be conspicuous and legible.

One new issue is the QR Code appearing on many wine labels. "The TTB says it's an advertisement," DeGalen said. That means any QR Code on a label submitted to the TTB for COLA approval will be checked by the TTB for advertising compliance, so follow the federal

advertising rules.

Ensure that all QR Code links—website, testimonials, video, etc.—are compliant. Monitor any changes to the website or other linked material; these change the QR Code's impact.

Another issue that may not be obvious: Currently the alcoholic beverage industry encourages members only to place ads in media where at least 70% of the audience consists of adults 21 and older. Many state attorneys general want the industry to adopt a standard requiring that 85% of the advertising audience is 21 and older. That includes ads in social media.

Be aware that your customers—fans—could post potentially illegal content on your social media site, including privacy violations, copyright and trademark infringement, harassment, impersonation and defamation.

DeGalen recommended that you add appropriate disclaimers and other language to the terms of use to your website but conceded that, with services like Facebook, Twitter or other public social media sites, you can only rely on their terms of use.

You needn't be too worried about a customer posting a comment on your social media site that seems to violate the federal advertising standards for wine: Regulations state that an "advertisement" does not include editorial or other reading material for which no money or valuable consideration is paid or promised, and which is not written by or at the direction of the permittee.

Employees are another matter. Businesses must educate and require disclosure from employees and any influential bloggers the companies work with on social media marketing programs. Employees who discuss your company or its products on their own personal social media sites must disclose their affiliation with your company on these blogs, Facebook pages, etc.

A good guideline is to tell staff not to blog, post or tweet about your company or its products without approval.

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