

A commercial website that is highly functional, conveys an effective sales pitch and is easy to use can result in a successful revenue source for a company's products or services. However, if the website does not comply with federal and state law requirements, this highly-prized revenue source can become an expensive, nightmarish problem. For this reason, legal review of a commercial website is essential to avoid potential legal entanglements with federal and/or state authorities.

We've created a short, user-friendly checklist that covers the essential issues that attorneys and paralegals look for when conducting a website audit. Using this checklist should help you identify any potential "red flags" with your site and avoid unnecessary problems down the road.

### **Website Audit Checklist:**

#### **Privacy Policy:**

- When was it last updated?
- Does it reflect current company practices?
- Has the content or operation of the site changed such that a revision to the policy is mandated?
- Will personal information be collected from children?
- Is there user generated content giving rise to additional privacy concerns?
- Does it adequately address FTC concerns?

**Terms of Use:**

- When were these last updated?
- Are ownership issues relating to the site's content adequately addressed?
- If there is user generated content, who will own it and what use may be made of it?
- Are there any specific product guarantees or warranties that should be addressed?
- Is there a disclaimer of liability provision?
- Is third-party linking addressed?
- Is there a Digital Millennium Copyright Act provision?

**Product Efficacy Claims:**

- Is the product category high risk?
- Has each claim - express and implied - been substantiated?
- Are there any "unfair" advertising issues (e.g., portrayal of dangerous or illegal conduct) requiring cautionary disclaimer language?
- Are there any comparative advertising claims and, if so, is there "apples to apples" comparative data supporting the claims?
- Do any of the claims include purported puffery and, if so, has an analysis been performed regarding the viability of this defense?

**Disclosures and Disclaimer Language:**

- Do their placement, size and content comply with FTC requirements for appropriate online disclosures?
- Are they clear and conspicuous?

- Are they in close proximity to the triggering claims?
- Are hyperlinks, where used, conspicuous by virtue of their wording and appearance?
- Are the hyperlinks in close proximity to the triggering claim?
- Are there any elements of the sales transaction which require additional, specific disclosures (e.g., negative options, club programs, etc.)?

**Testimonials:**

- Are testimonials included in the site (consumer, expert or celebrity)?
- Have affidavits/releases been obtained?
- Are they truthful and not misleading?
- Is there independent substantiation for each testimonial claim (i.e., apart from the testimonialist's own experience)?
- Is the use of the testimonials otherwise in full compliance with the FTC guide?

**Third Party Materials:**

- Is any third-party material posted on the site?
- Has consent been obtained for such use?
- What limitations apply to the use?
- Have any disclaimers of responsibility for such material been included in the Terms of Use?

**User Generated Content (UGC):**

- Does the site include consumer generated content?
- Does the consumer affirmatively opt-in to the Terms of Use as they apply to use of the content?
- Has a risk assessment been made regarding how the content might be misused?
- If so, what steps have been taken to minimize the risk?
- Have the ownership and use issues been adequately dealt with?

**Intellectual Property:**

- Does the site make proper use of trademark and copyright notices?
- Are trademark notices included with the first prominent use of the marks on each page of the site?
- Is a footer included on each page with the appropriate copyright notice?
- Does the copyright notice include reference to the current year?

**Sweepstakes:**

- Are there any sweepstakes or contest promotions on the site?
- Are adequate short-form rules displayed prominently?
- Are the complete official rules properly drafted and readily accessible prior to entry?
- Does the structure and entry mechanism of the promotion comply with applicable FTC policy and state laws?

As always, we're here to assist if you have any questions.