

## Avoiding Legal Pitfalls In Podcast Advertising

By **Gonzalo Mon** and **Ariel Collis**

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Once known only to technophiles, podcasts are rapidly heading toward the mainstream. An Edison Research study estimates that 73 million Americans will listen to podcasts this year.[1] Advertisers have increasingly spent money to capture this growing market. For example, an Interactive Advertising Bureau, or IAB, study found that between 2015 and 2017, ad revenues for podcasts increased 275 percent to just over \$257 million.[2] There is evidence to suggest that these advertising dollars may be well-spent.



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Every year, we see large numbers of complaints, regulatory investigations and lawsuits involving ads that run in other mediums, such as TV, radio and digital. So far, the podcast world has been largely immune from these sorts of challenges, and that has lulled some advertisers into a false sense of security about the risks of advertising in that medium. In reality, though, most of the legal issues that exist in other mediums also exist in the podcast world — and some of them may even be exacerbated in that world. As advertising dollars continue to flow in that direction, legal challenges are sure to follow.



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In this article, we've focused on two of the legal issues that may be most likely to pose challenges for companies that advertise in podcasts.

### Advertising Laws Apply

Every time advertisers discover a new medium in which to advertise, there are many that seem to think — or maybe just hope — that the laws that govern the “more traditional” mediums don't apply in the new medium. We saw that when companies started to focus on internet ads in the early 2000s; we saw that a decade later when companies started to focus on social media; and we're seeing that again now with companies that are experimenting with podcasts. Unfortunately for those people, it's just wishful thinking. In fact, the same laws apply.

If you read Law360, odds are you know this already, but what you say in an ad — even in a podcast — needs to be truthful and not misleading. Among other things, that means that you need to have evidence to support any objective claim you make in the ad and that your claims need to be worded carefully so that they don't go beyond what the evidence can support. It also means that if you need to disclose information to prevent the ad from being misleading, you need to make that disclosure in a “clear and conspicuous” manner.

Why are we starting with what you probably already know? Because the IAB reports that more than 67 percent of ads in podcasts are read by the host.[3] And because, sometimes, the hosts ad-lib. Although ad-libbing may improve the flow of the podcast, it can also cause legal issues. Mark Twain once observed that “the difference between the almost right word and the right word” is like “the difference between the lightning bug and the lightning.” That's

true in the world of advertising law, too, where small differences in wording can lead to big liability.

Getting podcast hosts to stick to the script may not always be easy. However, if a host's ad-lib gets you in trouble, your chances of getting out of that trouble are significantly higher if you can demonstrate that you aren't the source of the problem. To that end, make sure that you give the podcast company an approved script with clear instructions, and keep a record of those communications. You can also ensure that your contract has strong indemnification and insurance provisions. Of course, if wording is critical, you can also record the ad yourself.

### **Mind the Lines**

Some research suggests that ads in podcasts tend to resonate more with consumers than ads in other formats. For example, in a 2016 IAB survey, 65 percent of podcast fans stated that they were "more willing to consider purchasing products and services they learn about during a podcast."<sup>[4]</sup> Why is that? Part of the answer is simply that some consumers prefer to buy products from companies that advertise on their favorite podcasts.<sup>[5]</sup> But there's more to it than that, and part of the answer has to do with the medium itself.

Because of the niche content of podcasts and the feeling of intimacy that some consumers experience by virtue of listening to the podcasts privately through headphones, many podcast fans have a strong emotional connection with their favorite shows. And because most ads are read by the host in a conversational tone, it's likely that the lines between what is content, what is personal opinion and what is a paid advertisement get blurred.

Many advertisers privately welcome the blurring of those lines because many listeners are more likely to believe something that is said by a trusted host than by an untrusted corporation. But the very things that fill advertisers' dreams are the things that keep some regulators up at night. For example, the Federal Trade Commission has often reminded companies that blurring these lines too much can violate the law. They've also issued guidance explaining what advertisers can do to help consumers know the difference.

The FTC's best guidance appears in their guidelines on "native advertising." Those guidelines primarily deal with visual ads and address things like visual separation of content. Much of the concepts can be applied to audio ads, though, and some companies have already done that. For example, the Gimlet podcasting network has issued Media Advertising Guidelines stating: "You will always know when Gimlet hosts are reading advertisements on our Gimlet shows. You will hear special ad music, you will hear the hosts announce that they are about to read content brought to you by an advertiser."<sup>[6]</sup>

Not all podcasters or advertisers will want to be that direct. Many worry that too much of a clean break between ads and content could turn off listeners and ruin the effectiveness of the ads. That's certainly understandable, but it's usually possible to find a middle ground. For example, short of formal music and announcements, advertising scripts can be written in a way that lets listeners know that the upcoming plug is for an advertiser, without ruining the conversational tone.

## Be Proactive

Although we haven't seen any cases involving the issues we described above in the podcasting world, there are certainly plenty of cases dealing with identical issues in virtually every other advertising medium. And based on the trends we've seen in other areas, as podcasts move more into the mainstream, we're likely to see regulators and plaintiffs attorneys turn their attention to where the money is going. The goal is to be proactive and stop the problems before they find them.

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[1] The Podcast Consumer 2018, Edison Research and Triton Digital, at 5.

[2] IAB-PwC Podcast Ad Revenue Study, June 2018, at 7.

[3] *Id.* at 11.

[4] "IAB-Edison Research Podcast Advertising Study," 2016.

[5] *Id.* In that same study, 60 percent of fans stated that, "given equal price and quality, they prefer to buy products from companies that advertise on their favorite podcasts."

[6] <https://www.gimletmedia.com/gimlet-and-advertising/> (Accessed Aug. 17, 2018).