

# Taking The “Affiliate” Out of Affiliate Marketing

by Rachel Hirsch



**W**e all have heard of the term “affiliate marketing.” Unfortunately, the term affiliate can be easily misunderstood, generating confusion and scenarios that are neither rewarding nor fun. Maybe the time has arrived to rethink the use of the term “affiliate.”

In simple terms, affiliate marketing is simply a type of performance-based marketing in which a merchant business rewards one or more of its affiliates for customers generated by that affiliate’s marketing efforts.

Although the term “affiliate” is commonly-used in the Internet marketing industry, the term “affiliate” has an entirely different meaning in other contexts, which can spell trouble for all parties. Indeed, in other contexts, the term connotes a legal relationship between two businesses.

In typical legal parlance, affiliates are organizations or individuals that control each other or that are controlled by a third party. Control may consist of, among other things, shared management or employment and common use of facilities, equipment, and employees. One consequence of affiliate relationships in business is that merchants can often be on the hook for the conduct of their affiliates and vice versa.

It should come as no surprise that astute plaintiffs’ lawyers are always on the lookout to reach the assets of a parent company in the event of misconduct by one of its affiliate entities. To the extent that the business relationship is not obvious, courts, as part of litigation, often require companies to file corporate disclosure forms identifying any parent or affiliated corporations.

In the Internet marketing industry, advertisers and networks certainly do not want to be exposed to legal liability for an affiliate marketer’s misconduct, nor does an affiliate want to be on the hook for the quality or efficiency of the merchant’s product. And this is exactly where the Federal Trade Commission, among others, appears to be headed. And these circumstances are not merely confined to instances where the advertiser or network is encouraging the misconduct.

So what happens, for example, when a network is subjected to liability due to the actions of a rogue affiliate? Should a network be liable for an affiliate who has gone off the beaten path, despite the network’s internal compliance procedures?

Logically speaking, the answers to those questions should be “no.” But because of the traditional use of the term affiliate, staff attorneys at the FTC and motivated plaintiffs’ attorneys may be all too willing to answer that question in the affirmative. I have personally witnessed the look of confusion on an opponent’s face when trying to explain why a network is not the same entity as its affiliates or vice versa and why imposing liability on one for the action of the other is not logical under the circumstances.

While the best evidence of the distinct relationships is often found in the network’s contractual agreement with its affiliates and the course of conduct between the parties, perhaps an even better solution to defining the network-affiliate relationship is taking the “affiliate” out of the term affiliate marketing. “Publisher” marketing, anybody? **FF**