

Being 'Media-Relevant' — What It Means And Why It Matters

Law360, New York (September 11, 2013, 2:50 PM ET) -- Rapidly emerging multiplatform media channels are driving the way consumers interact with and use new media. As a result, developing an effective, reasonably calculated notice program now means that outreach efforts need to be “media-relevant” — targeting the right audience and using the right media, at the right level of reach, at the right time.

Here’s a snapshot of how Americans are using media:

- Nearly half the U.S. population is accessing the web through smartphones and tablets.[1]
- Consumers use smartphones throughout the day, while tablet use rises sharply at night.[2]
- Online radio reaches over 86 million listeners weekly.[3]
- Job seekers[4] are using Twitter and Vine to summarize their resumes in 140 characters or six-second videos.
- A University of Chicago study[5] found that most people say visiting social media sites, such as Twitter, and checking email are harder to resist than cigarettes and alcohol.
- High-end smartphones may soon be replaced by Google’s Glass — a Star Trek-like eyeglass frame with Wi-Fi “head up display” that can be tethered via Bluetooth to Android devices or an iPhone. It can take photos and video with just a wink, translate your voice to other languages or map a location, among other things. Facebook and Twitter are already talking about apps for this device that interface with social networks in just a blink of an eye.

So does this mean that traditional media is dead? No, not at all. In fact, a number of magazine titles are healthy and building circulation, and many readers still love paper. But a preference shift is occurring, as noted by Pew Research Center’s study on the state of the news media, which reports a slight downward trend in overall magazine hard-copy circulation.

Interestingly, the report also indicates that at least some of those “lost” hard-copy readers may simply prefer reading those titles via tablet or smartphone. Further to the point, Magazine.org[6] reports that hard-copy magazine and social media work effectively and may have broader reach when used in combination. Among the report’s key findings, 66 percent of avid magazine readers retweet articles from magazine Twitter feeds, and over 60 percent have shared magazine content on Facebook.

The newspaper publishing industry is in a similar evolutionary situation. As hard-copy circulation continues to decline, a growing number of papers, large and small, are cutting costs by publishing only three days a week.

Additionally, many papers looking to better serve their readers are shifting models by establishing both online and mobile platforms. And there's good reason for this shift: Pew reports that nearly half of all American adults are turning to their cell phone or tablets for some local news and information.

The ever-changing media environment means that practitioners will need to take a new approach to notice, taking into consideration media preference of their class members, especially in cases where younger consumers comprise a significant percentage of class members.

According to the online media measurement company, comScore, there are about 79 million millennials, (generally characterized as 18 to 32) who use more media, and in different ways, than older generations. Millennials tend to be untethered, consuming most media content on their phones, laptops and tablets.

Further complicating matters, they also tend to use multiple media channels concurrently: Facebooking, Keeking, texting, checking email, listening to online radio or looking at Snapchat pop-ups on a smartphone.

These and other factors may place even greater importance on plain language across all audiences. Communication visionary Marshall McLuhan had it right when he said that the "medium is the message." The technology is driving expectation for messaging. That's why notice content will continue to evolve into shorter, more engaging language.

Internet banner advertising has already cleared the plain language path in numerous court-approved notice programs. Clear and concise language is critical where shorter active content typically translates into higher engagement in a quick-scanning medium such as online or mobile.

Internet banners accommodate about 15 to 20 words — typically, the headline of a summary notice. Mobile banners, Facebook news posts, tweets of 140 characters with shortened URLs (bitly and Ow.ly codes) and Vines with six-second videos all have a powerful ability to expand the reach of notice and, in a fashion similar to a television commercial, grab attention of class members and then direct them to an information hub, such as a website or toll-free number where they may seek more in-depth and detailed information about a given matter.

Therefore, as consumers continue to divide their attention across multiple media channels and devices, effective and relevant notice programs will need to follow those consumer preferences by incorporating a mix of communications silos, i.e., emerging media along with traditional media, in order to properly reach target audiences. Approved settlements have already taken this approach, including *Altieri v. Reebok International LTD*, 4:10-cv-11977-FDS (D. Mass.); *In re Skechers Toning Shoe Products Liability Lit.*, 3:11-md-2308-TBR (W.D. KY).

Social media channels such as Facebook have been successfully incorporated in court-approved notice programs. Additionally, Twitter offers another powerful communication approach. Peter Thiel[7], co-founder of PayPal, states that Twitter's impact is on par with that of the printing press. "The technology is a fundamental breakthrough in how humans communicate."

You don't have to look far to see what he means. Remember this tweet? "Suspect in custody. Officers sweeping the area. Stand by for further info." It's how the Boston Police Department communicated to the press and the world that the Boston Marathon bombing suspect had been captured.

Or, the tweet broadcast on CNN by a passenger on board the Air Asiana plane during the San Francisco crash: "I just crash landed at SFO. Tail ripped off. Most everyone seems fine. I'm ok. Surreal..."

And during the 2013 Super Bowl black out, the cookie giant Oreo tweeted this relevant tidbit: “You can still dunk in the dark.” In fact, 300-character press releases via Twitter are now a quick and accepted way for many top reporters to receive news.

Practitioners and judges need to take note. According to comScore’s recently published white paper, “Mobile Future in Focus,” “[s]martphones and tablets are ushering in a new era, with consumers becoming increasingly agnostic about how, when and where they engage with content.” It really doesn’t matter what platform you use.

Think about it, you can be hiking or shopping when you use your smartphone to email, tweet, vine or buy and listen to books. You can relax on your sofa with your iPad to watch your favorite television show, play a game or look at the day’s events — no matter where you are or the time of day. Consumers are grazing on information practically 24/7, 360. And it’s creating a new syndrome, identified in a study by the University of Maryland called “the fear of missing out” or FOMO.

So, what is the impact on notice? In the class action context, it’s necessary to incorporate multiple media touch points (traditional and new media) in channels your target class members are using, as determined by sophisticated media research, in order to provide multiple opportunities to see the notice. This approach will become increasingly necessary to adequately reach potential class members.

The Second Circuit’s decision in *Hecht v. United Collection Bureau Inc.*, No. 11-1327 (2d Cir.) (dated Aug. 17, 2012), in which the court found that money damages predominated over injunctive relief, underscores this point. In *Hecht*, the court held that a one-time ad in *USA Today* did not provide adequate notice to absent class members. The court, citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), explained that “if money damages are substantial, then class members must have a due process right to notice and the opportunity to opt-out.”

Therefore, the question practitioners need to ask now is: What are my bright-line rules, and how can I stay media-relevant to reasonably reach class members in this complex media environment? It is still true that the bright line for notice is the requirement of Rule 23(b)(3), tested and guided primarily by two decisions of the United States Supreme Court: *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and *Mullane v. Central Hanover Bank & Trust Co.*, 311 U.S. 306 (1950).

In *Eisen*, the court applied the due process requirements of *Mullane*, holding that “notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” While the two decisions created a requirement of actual notice to reasonably identifiable class members, they also created a more flexible standard of “reasonableness” to unidentifiable “interested parties.”

But the “reasonableness” of the effort now needs to consider a number of complex factors to stay media-relevant: media preference, how and when the target is using the channel and how and where impressions are viewed.

Practitioners and judges alike should be asking more questions about the notice program, such as the following:

- Should the notice appear in print, online and/or on a gadget or a combination of platforms and why?
- How much emphasis should be placed on traditional magazine and newspaper? Newspaper is consumed across multiplatforms — print, online and mobile device.
- Will my ads air across terrestrial radio or on a PC? 120 million Americans listened to online radio during the past month.[8]
- Will my email or banner ads appear via mobile or Internet? The mobile web will overtake PC-based web by 2015.[9]

Now more than ever, media-relevant outreach needs to occur in layers across owned (blogs and niche websites), earned (news sites and networks) and paid channels (advertising). Satisfying judicial standards for reasonable notice will mean that practitioners, with the assistance of qualified notice experts[10], have a clear understanding how consumers think about, engage and use media in order to appropriately reach a target audience in a media-relevant way.

Mobile, online and social media channels, along with shifts in consumer behaviors, have fundamentally changed the way class members expect to receive news and information — and notice. The media environment is complex and splintered. Consumers use multiple media channels concurrently and attention is limited.

Working with a qualified notice expert who complies with Fed. R. Civ. P. 26(a)(2) and Fed. R. Evid. 702 will help ensure you have selected the most appropriate media to reach potentially affected class members and that your notice programs are accurately reported to the court.

--By Jeanne C. Finegan, HF Media LLC

Jeanne Finegan is president of HF Media. She previously served on the Consumer Product Safety Commission.

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[1] [PewInternet.org reports 2012](#)

[2] [Jumtap MobileSTAT October 2012 report](#)

[3] [Arbitron.com – Infinite Dial 2013](#)

[4] <http://online.wsj.com/article/SB10001424127887323820304578412741852687994.html>

[5] <http://news.uchicago.edu/article/2012/01/27/study-finds-lure-entertainment-work-hard-people-resist>

[6] <http://www.magazine.org/sites/default/files/SOCIAL-f5%20website.pdf>

[7] <http://money.cnn.com/2013/05/01/investing/twitter-thiel-andreessen/>

[8] Arbitron.com – Infinite Dial 2013

[9] <http://gigaom.com/2010/04/12/mary-meeke-mobile-internet-will-soon-overtake-fixed-internet/>

[10] See Expert Opinion: It's More Than Just a Report ... Why Qualified Legal Experts Are Needed to Navigate the Changing Media Landscape, Hon. Dickran M. Tevrizian, Jeanne C. Finegan APR (12 CLASS 464, 05/27/2011).

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