In the last two decades, technology has rapidly changed how we communicate, do business, shop, and save. Remember clipping coupons? Once upon a time, savvy consumers saved a few bucks by pulling out scissors and cutting coupons from printed mailers and inserts from local newspapers. Then the Internet—and social media—happened. Welcome to the new frontier of marketing and advertising!

While traditional printed coupons are still in play, that practice has been in decline since 1992, having given way in the marketplace to websites, digital ads, and mobile apps. Consider the profound impact of Google’s launch in 1998, Facebook’s in 2004, and Groupon’s in 2008. The first tweet was sent in March of 2006. Twitter’s “in-the-moment” mode of social networking quickly grew in popularity, and, according to the company’s website, 500 million tweets were sent every day in 2013.

The first convergent smartphone BlackBerry was released in 2003, Apple’s first iPhone in 2007, and the first iPhone version of a mobile coupon app was released in 2009. Next up, in early 2015, consumers will channel their inner James Bond as they tweet, text, and shop using their high-tech wristwatches.

Marketers have found opportunities to promote goods and services in clever ways with the advent of each development. Offers, promotions, and discounts now can be targeted more directly—and more quickly—to consumers. While this is inspiring for creative marketing teams, and fun for consumers, each new avenue brings with it a need for guidelines and protections for consumers and businesses. Current regulations are built on existing frameworks, and basic principles of protection apply, but with the rapidly changing landscape, federal and state regulators are constantly in catch-up mode.

The original concept of couponing was straightforward: a manufacturer offered an incentive to consumers to encourage them to try a new product or service. In 1887, Asa Candler was looking for a way to promote his company’s soft drink. He handwrote paper tickets that consumers could redeem for a free serving, a value of five cents. His marketing plan was a success, and by 1895, Coca-Cola was served across the United
States. The breakfast cereal industry was quick to take note, and in 1909, C. W. Post offered one-cent coupons to boost sales of Grape-Nuts. Couponing was in full force during the Great Depression of the 1930s as households looked for ways to stretch their pennies, and the trend reached its apex in 1992 when 7.9 billion traditional paper coupons were redeemed.

As marketers became more creative and their practices expanded, lawmakers stepped in to create regulations to protect consumers from fraud and aggressive marketing tactics and to protect business owners from unfair competition. The Federal Trade Commission (FTC) continues to oversee consumer protection laws, maintaining that truth in advertising, marketing, and sales practices apply to all media, including coupons delivered through social media platforms and on mobile devices. In its 2013 report, “.com Disclosures: How to Make Effective Disclosures in Digital Advertising,” the FTC specifies that for all ads, print and online (and on TV and radio), “(1) advertising must be truthful and not misleading, (2) advertisers must have evidence to back up their claims, and (3) advertisements cannot be unfair.”

More specifically to coupons, Title 27 of the Code of Federal Regulations (CFR), Section 6.96 Consumer Promotions, requires that the following conditions be met: “(1) all retailers within the market where the coupon offer is made may redeem such coupons; and (2) an industry member may not reimburse a retailer for more than the face value of all coupons redeemed, plus a usual and customary handling fee for the redemption of coupons.”

Although every state has its own regulatory body, states tend to follow the broad federal guidelines. California Business and Professions Code Section 1720 defines unfair competition to include “any unlawful, unfair, or fraudulent business act or practice, and unfair, deceptive, untrue, or misleading advertising.” Additional state-issued acts that speak to the regulation of couponing include the California Unfair Practices Act, which “prohibits price discrimination that lessens competition, generally paralleling the federal Robinson-Patman Act, which prohibits illegal price discrimination”; and California’s Cartwright Act, which prohibits anticompetitive activities such as price fixing, group boycotting, and price discrimination.

Interpreting and following the regulations can get tricky, especially as the marketplace continues to expand nationally and internationally. For example, some states require preapproval of promotions (California does not), and many states have maximum rebate amounts or separate requirements for instant redeemable coupons. Because any products or services offered on the Internet, from any industry, are essentially the same as what were once and may still be offered in brick-and-mortar businesses, it seems logical that the same regulations should apply. But as technology continues to change in unexpected ways, the challenge becomes how to enforce regulations that may or may not directly translate for new devices and apps.

And therein lies the conflict, for innovation is what marketing and advertising departments do best. They want...
what’s fresh, exciting, cutting edge. They want to use the new tools and the new forms of messaging. And if they are to attract the attention of and engage contemporary consumers—especially Millennial consumers—who are bombarded with advertising messages, they must create and act quickly on new opportunities.

It becomes a classic case of innovation versus tradition, and licensees risk being hit with hefty fines or the suspension or revocation of their licenses when they break the rules. Startups get into trouble as inexperienced staffers come up with outside-of-the-box ideas and want to launch them immediately, before a competitor beats them to the marketplace; upstarts don’t feel the need to operate under the requirements of the law. The FTC is unequivocal in its stance that digital and social media laws are “included in all [traditional] laws and guidelines designed to protect consumers from deceptive and/or misleading information,” but there continues to be debate as those laws are still open to interpretation. Some businesses may be willing to operate on the fringe . . . until they get caught. Recent examples in the news include Airbnb and Uber, who are operating like hotel and taxi services—but are they? And can they be regulated as such? Should they be?

Until these questions can be answered, attorneys must do their best to navigate the sometimes vague federal and state guidelines for their clients. The beverage industry is a popular testing ground, and case studies serve as head-ups for other industries that may be affected by similar rulings. For the alcoholic beverage industry, concerns range from “age-gating” to prohibit underage drinking to sacred “tied house” laws that keep markets open and protect profits. The California legislature makes the regulations and the Department of Alcoholic Beverage Control (ABC) enforces them. This past year, California Assembly Bill No. 1928 (AB1928) limited the use of coupons for beer, stating “a beer manufacturer or a beer wholesaler shall not offer, fund, produce, sponsor, promote, furnish, or redeem any type of coupon . . . including, but not limited to, a paper coupon, a digital coupon, an instant redeemable coupon, or an electronic coupon commonly referred to as a scan or scanback.”

This decision is perceived as a boon to distributors and as a blow to retailers, suppliers, and consumers. The grocery,
food, automotive, and other industries that offer coupons or promotions will need to keep a close eye on how their marketing strategies will be affected by any ripple effects.

Meanwhile, the Grocery Manufacturers Association Joint Industry Coupon Committee issued a report on digital coupons in 2012 that provides helpful tips that may be applicable guidelines for all industries. An updated report was released in November 2013, but is available only to GMA members. Visit gmaonline.org for more information. Contents include information on the creation, distribution, reporting, and auditing of coupons. Design guidelines and examples are provided, as well as a chart that compares requirements for paperless versus paper coupons and a checklist of key control points for digital coupons.

Another resource is the FTC’s aforementioned “.com Disclosures” report. In addition to providing tips on crafting disclosures, the guide gives insight into how digital advertising and marketing programs may be reviewed and evaluated by the FTC. On that note, the FTC states that while it does act on consumer complaints, the commission is “not actively monitoring blogs, websites, or individual social platforms.” That, of course, doesn’t give businesses a free pass to do whatever they want, but certainly some will push the envelope until applicable regulations are created in response.

Shopping for bargains on our watches may be only the next small step into the future. Expect to see continued expansion and innovation with mobile device digital coupons, including links to QR codes and to retailer and third-party apps. Technology like Apple Passbook, which allows consumers to scan their iPhones to redeem coupons or gift cards, or present digital boarding passes for airline flights, and Apple Pay, which lets consumers pay bills with their iPhones instead of their credit cards, will create additional opportunities. “Geo-fenced” offers—personalized promotions offered in real time while a shopper is in the store—are also becoming ubiquitous.

As thrilling as these advances are, each one presents new challenges, and attorneys need to encourage best practices for their clients in order to steer clear of liabilities.

It’s a brave new digital world out there, and more changes are coming that will have an impact on how businesses implement advertising and couponing.

Imagining the possibilities is kind of exciting.

Kathleen Guthrie Woods is a San Francisco–based freelance writer.

Thank you to John Hinman and Rebecca Stamey-White of Hinman & Carmichael for contributing to this article.