

# Best Practices As More Retailers Join The Secondhand Space

By Stephanie Sheridan, Michael Allan and Meegan Brooks (October 22, 2021)

One of the biggest developments in retail in recent years has been the proliferation of the secondhand retail market, with both the explosion of online thrift stores that exclusively sell used items, as well as traditional retailers dipping their toes into the secondhand channel.

Below, we summarize the key issues retailers should evaluate before entering into the secondhand space.

## Reference Pricing

Secondhand products offer consumers tremendous value, not only because of the steep discounts from what the same items would cost new, but also by appealing to consumers' interest in green practices that promote recycling. While displaying price comparisons for secondhand goods to new items at full price is certainly tempting from a marketing perspective, comparison pricing can be risky without safeguards in place.

In the past few years alone, there have been roughly 200 lawsuits filed against retailers for advertising allegedly false and deceptive reference prices.

Deceptive reference price lawsuits are often based on claims that the referenced items are not apples-to-apples comparisons to the items offered for sale. These suits most often arise in the context of outlet stores, where some retailers sell outlet-exclusive items with slight differences from items sold in their mainline retail stores, and plaintiffs argue that the outlet items are inferior.

This outlet litigation presents some obvious parallels to practices by some secondhand retailers, because referring to an original sales price could be viewed as misleading, especially when the item being sold is used or has not been offered anywhere at full price for years.

Secondhand goods are not only used, but have likely not been sold in the market for long periods of time, making it difficult — not to mention burdensome — to accurately identify original selling prices.

The Federal Trade Commission's Guides Against Deceptive Pricing expressly allow retailers to advertise reference prices based on "merchandise of like grade and quality — in other words, comparable or competing merchandise," under Title 16 of the Code of Federal Regulations, Section 233.2(c).

When selling secondhand items that are not currently in production, retailers should take steps to ensure that each listed reference price fairly reflects the current market prices for similar items. Further disclosing the meaning of reference prices used by the secondhand retailer is another best practice to avoid claims of deceptive pricing practices.

The bottom line for retailers in the secondhand market is that careful attention must be paid



Stephanie Sheridan



Michael Allan



Meegan Brooks

when setting reference pricing, and clear marketing disclosures must be made, in order to reduce the risk of liability for a deceptive reference pricing claim.

### **Consumer-Generated Product Listings and Section 230**

Many marketplaces — such as those of eBay Inc. and Poshmark Inc. — permit private sellers on their platforms to create their own product listings, and sellers often include reference prices depicting the price at which the items previously sold. This can create problems when, for example, a seller misrepresents the products, such as falsely describing a product as "Made in the USA," or listing an inaccurate reference price.

Section 230 of the Communications Decency Act has offered some protection for websites that contain content published by people who visit the site. According to Section 230(c)(1):

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

Referencing the 2006 *Almeida v. Amazon.com Inc.* ruling in the U.S. Court of Appeals for the Eleventh Circuit, the provision says:

The majority of federal circuits have interpreted [Section 230] to establish broad "federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."

The future of Section 230, however, is far from clear. In May 2020, then-President Donald Trump issued an executive order that would have allowed federal authorities to hold companies like Twitter Inc., Google LLC and Facebook Inc. responsible if they were found to be infringing on users' speech by deleting or otherwise modifying users' posts.

President Joe Biden revoked the executive order on May 14. However, the White House subsequently announced that it is reviewing whether social media platforms should be held legally accountable for publishing misinformation.

Additionally, there are several bills now pending in Congress to amend parts of Section 230, and one — the 21st Century FREE Speech Act — that would repeal it altogether.

### **Sustainability**

Selling used fashion items has the attractive benefit of appealing to the increasingly environmentally conscious public, given that it eliminates the pollution and waste generated by producing new items.

Before promoting the environmental benefits of their business practices, however, secondhand retailers should review the FTC's Guides to the Use of Environmental Marketing Claims, or Green Guides, which describe best practices for green marketing.

Notably, retailers should avoid sweeping statements like "green" or "eco-friendly" without providing the specific bases for such claims.

Title 16 of the Code of Federal Regulations, Section 260.4(b), states that "unqualified general environmental benefit claims are difficult to interpret and likely convey a wide range of meanings."

For example, the term "eco-friendly" is "likely to convey that the product has far-reaching environmental benefits ... and no negative environmental impact."

However, the plaintiffs could potentially complain that the environmental impact of dry cleaning and shipping, inherent in the secondhand market, makes a secondhand program less environmentally friendly than represented.

### **Pawnbroker and Secondhand Dealer Laws**

Separate from the burgeoning online thrift store models where people sell their regular items, another very popular — and ever-expanding — market is for secondhand sales of luxury items. Secondhand retailers selling high-end goods — or any tangible personal property items bearing a serial number or personalized initials or inscription — should also be wary of extensive regulations under California's secondhand dealer law.

Retailers of goods that are subject to the law must obtain a license with the state of California under the California Business and Professional Code, Section 21641, and submit a report for every piece of tangible personal property on a daily basis.

The reports must include the name, address and photo identification of the seller, a complete description of the serialized property, a certification from the seller that she or he is the owner of the property, and a fingerprint of the seller.

The secondhand dealer must then retain the property for 30 days and produce the property to law enforcement, upon request, within one business day. On top of all these requirements, the secondhand dealer law expressly allows for local governments to impose additional stricter requirements concerning secondhand goods, as long as they do not conflict with this law.

The secondhand dealer law defines a violation as occurring when a person knew or should have known that an action that disobeyed the law was being committed.

It is a misdemeanor, and subject to a fine or even jail time. Enforcement actions can be brought under California's Unfair Competition Law by the attorney general, a district attorney or a county counsel.

A plaintiff could also potentially try to use the "unlawfulness" prong of California's Unfair Competition Law to bootstrap a claim under this law.

In the 2019 GameStop Inc. v. Superior Court of Riverside County agreement in the Court of Appeal for the State of California's Fourth Appellate District, GameStop said it would pay \$500,000 in civil penalties and costs to resolve the lawsuit by the district attorneys for Shasta and Riverside Counties alleging that the retailer's buy-sell-trade program, which allowed customers to trade in their used consoles, phones, tablets and other products in exchange for store credit, violated the secondhand dealer law.

EBay has also been targeted numerous times under this law, but has consistently escaped liability. According to the 2016 Estate of Graham v. Sotheby's Inc. opinion in the U.S. District Court for the Central District of California, "[i]t is virtually common knowledge that Defendant eBay is [a marketplace and] not a seller of goods."

## Intellectual Property

The expansive growth of the secondhand retail market also presents increased concern regarding intellectual property rights and potential liability. Although there have been a number of disputes and decisions in this space — most notably the 2010 *Tiffany Inc. v. eBay Inc.* finding by the U.S. Court of Appeals for the Second Circuit that eBay wasn't liable for trademark infringement for counterfeit items sold on its website — cases continue to arise, particularly as secondhand platforms grow and evolve.

These issues have most recently come to light in a case brought by Chanel Inc. against The RealReal Inc., in a case currently pending in the U.S. District Court for the Southern District of New York.

The RealReal is a luxury consignment retailer where customers can both buy and consign used luxury goods in accordance with its terms of service and consignment terms. In the 2020 *Chanel v. RealReal* opinion, the Southern District of New York cited RealReal as saying it had "developed the most rigorous authentication process in the marketplace," and is "the only resale company in the world that authenticates every single item sold."

Moreover, "[u]nlike most resale companies, The RealReal takes possession of all items and physically evaluates every item to authenticate it." According to The RealReal's own terms of service and separate consignment terms, brands are not involved in the authentication process and the "authenticity, quality, and value" are determined in The RealReal's own discretion following receipt and physical inspection of the goods.

In the Chanel case, Chanel investigated allegedly authentic Chanel products sold on The RealReal and concluded that at least seven were counterfeit. In 2018, it filed suit alleging trademark infringement, counterfeiting, false advertising, unfair competition, as well as various related state law claims.

The RealReal filed a motion to dismiss, which was granted only in part. In dismissing the trademark infringement, false endorsement, and unfair competition claims, the court noted that the Lanham Act "does not prevent one who trades a branded product from accurately describing it by its brand name, so long as the trader does not create confusion by implying an affiliation with the owner of the product."

The court thus concluded:

[I]t is highly unlikely that a customer buying a secondhand Chanel product from The RealReal — which unambiguously holds itself out as consignment retailer in a luxury market — would confuse the nature of The RealReal's business, the source of its products, or its affiliation — or lack thereof — with Chanel.

The court, however, reached a different conclusion with respect to Chanel's claims of trademark, counterfeiting, and false advertising — allowing those claims to proceed. In its unsuccessful effort to dismiss these remaining claims, The RealReal tried to compare itself to eBay. The court disagreed and held:

it is clear that The RealReal's business model and Consignment Terms are materially different than those of eBay such that The RealReal can be held liable for direct infringement. For example, under the Consignment Terms, it is The RealReal's responsibility — in its "sole discretion" — to approve for sale, price, display, market, and make available for sale the goods sold through its website and retail locations.

In other words, The RealReal retains the power to reject for sale, set prices, and create marketing for goods, and unlike eBay is more than a platform for the sale of goods by vendors. Also, pursuant to its Consignment Terms, although The RealReal does not "t[ake] title to the merchandise," it "maintain[s] [the] inventory of merchandise," and upon receipt of products from consignors "b[ears] the risk of loss" for the products.

Chanel remains pending and summary judgment is likely the next opportunity to determine how the Southern District of New York will view Chanel's claims in view of the evidence developed during discovery.

In the meantime, we can glean from the court's reasoning that certain of Chanel's claims were allowed to proceed given the extent to which The RealReal retained oversight over the used luxury products — including representations of the authenticity of the goods — being sold on its platform.

### **Conclusion**

The increasingly popular secondhand retail market provides many benefits — to consumers, the environment, and retailers. But retailers in this space must understand that selling used products implicates a number of novel issues that traditional retailers may not be accustomed to considering.

Before entering this new and rapidly evolving landscape, enterprising retailers should consider the issues described above in order to best ensure that they are following developing best practices in order to reduce liability risks.

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*Stephanie Sheridan is a partner and chair of the retail and e-commerce group at Steptoe & Johnson LLP.*

*Michael Allan is a partner at the firm, chair of its copyright practice and co-chair of its trademark group.*

*Meegan Brooks is an associate at the firm.*

*Steptoe & Johnson associate Amanda Schwartz contributed to this article.*

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