102:Advertising Law for the Generalist

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Faculty Biographies

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David A. Munn is an attorney in the intellectual property/contracts legal group at Fair Isaac Corporation, a data analytics company that is best known as the developer of FICO® credit risk scores. Mr. Munn is counsel to the company's myFICO.com consumer business that gives consumers access to their FICO credit scores and other credit-related information on the web. In addition, Mr. Munn heads up the Fair Isaac legal department's technology and process reengineering initiatives.

Prior to joining Fair Isaac, Mr. Munn was general counsel at Pella Corporation, a leading manufacturer of windows and doors, and associate general counsel at Menasha Corporation, a diversified manufacturing company. He began his legal career in the banking and commercial group of the Minneapolis office of Faegre & Benson. Prior to attending law school, he worked as a mechanical engineer for Monsanto and 3M.

Mr. Munn is been an ACCA member, and was formerly president and one of the founders of ACCA's Iowa Chapter. He has written articles and organized and participated in seminars dealing with technology and the practice of law, including heading up a session on technology tools for small law departments at ACCA's 2000 Annual Meeting. He is a member of ACCA's Small Law Departments Committee and E-Commerce Committee. He is a member of the Wisconsin State Bar Association and the ABA's law practice management section.

Mr. Munn received a BS from Iowa State University and his JD from Yale Law School.

Lisa B. Riedesel

Lisa B. Riedesel is senior corporate counsel for Select Comfort Corporation in Minneapolis. Her responsibilities include providing counsel in a variety of substantiative areas including general corporate, contracts, employment, litigation, and intellectual property law.

Prior to joining Select Comfort Corporation, Ms. Riedesel served as senior counsel and assistant corporate secretary of Department 56, Inc. and associate counsel of Rubbermaid Incorporated providing counsel in a variety of substantive areas including general corporate, licensing, litigation, employment, and intellectual property law.

Ms. Riedesel is a member of ACCA and currently serves on the board of directors for its Minnesota Chapter and the Twin Cities Chapter of the American Society of Corporate Secretaries.

Ms. Riedesel received a BS from the University of Minnesota, an MBA from Baldwin Wallace College, and a JD from The Ohio State University College of Law.

Althea Johnson Williams

Althea Johnson Williams is assistant counsel of LendingTree, Inc., an online lending exchange headquartered in Charlotte, North Carolina. Her responsibilities include licensing and regulatory issues, employment law, and general corporate matters.

Before joining LendingTree, Inc., she served as an assistant district attorney in Wilmington, North Carolina.

She is a member of the North Carolina Bar Association, the Mecklenburg County Bar and the North Carolina Association of Women Attorneys.

Ms. Williams received her undergraduate and law degrees from the University of North Carolina in Chapel Hill, North Carolina.

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Introduction

The consequences of failing to follow the rules when it comes to advertising have probably never been more serious. Not only are you being watched by your competitors, your customers, various regulatory agencies, attorneys general, trial lawyers, and the press, but the Nike vs. Kasky case[1] that has recently been in the news shows that even some "issue advertising" or public relations campaigns previously thought to be protected under the First Amendment may give rise to liability.

The basic rules of advertising are that your company's advertising should be truthful and not misleading, and that objective claims should be backed up by adequate evidence. The Nike case reminds us that "commercial speech," in other words, advertising, is entitled to less protection under the First Amendment than many other forms of expression. Previously, it was thought that companies had somewhat more freedom when their speech involved the advocacy of corporate positions and the defense of criticism against them. Until that case is decided, however, it casts a cloud over a corporation's right to defend itself against public criticism, and it means that you need to be even more vigilant to ensure that any public statement made by your company is subjected to some kind of review process.

The two primary Federal laws governing advertising are the Federal Trade Commission Act (FTC Act) and the Lanham Act. In addition, many states have laws governing. The FTC Act gives the Federal Trade Commission broad authority to regulate advertising. Section 43(a) of the Lanham Act gives private parties a right of action.

Section 5 of the FTC Act forbids "unfair or deceptive acts or practices" in trade or commerce.[2] A practice is unfair if it causes or is likely to cause a substantial injury that is not outweighed by other benefits to consumers and is not reasonably unavoidable by the consumers.[3] A practice is deceptive if it is a material representation or omission that is likely to mislead consumers and affect their decisions or behavior with regard to a specific product or service.[4]

Given statutory wording like that, it's not surprising that the world of advertising law involves many gray areas. What we'll do in this session is to briefly cover a number of issues that commonly arise in advertising and try to give you some guidelines and checklists to help you deal with some of these issues and keep your company out of trouble.

Notes:

1. *Kasky v. Nike, Inc*. (2002)27 Cal.4th 939 , 119 Cal.Rptr.2d 296; 45 P.3d 243 (May 2, 2002), Nike, Inc., *et al.*, Petitioners *v.* Marc Kasky, on writ of certiorari to the Supreme Court of California 02-575 (June 26, 2003). This case was brought under California's Unfair Competition Law, Cal. Bus. & Prof. Code Ann. §17200 *et seq*, and False Advertising Law, §17500 *et seq.*
See the article on the *Nike vs. Kasky* case at http://www.dwt.com/related_links/adv_bulletins/CMITSummer2002.pdf, which contains a discussion of the law governing commercial speech versus speech protected under the First Amendment.
2. 15 U.S.C. §45(a)
3. 15 U.S.C. §45(n)
4. "Deceptive" acts or practices are not defined by 15 U.S.C. §45, *et seq.*, but the FTC has defined deception in a policy statement. See *FTC Policy Statement on Deception*, dated Oct. 14, 1983, available at http://www.ftc.gov/bcp/policystmt/ad-decept.htm.

Advertising Review Policies

If your business operates in an industry where advertising is heavily regulated, such as food, drugs, and medical devices, your company probably already has an extensive advertising compliance program. For most small law practitioners and other legal generalists, however, advertising review is probably a minor part of our jobs.

To be most effective in advertising legal compliance, an attorney should be thoroughly familiar with the products and services offered by the company, the industry in which the company operates, and the competition, as well as understanding the principles of advertising law. Because in-house counsel tend to be extremely knowledgeable about their company and its products, it usually makes more sense for in-house counsel take the lead on advertising review and use outside counsel as necessary for unusual issues.

Unfortunately, considering the scarcity of good writing skills among business people, it also helps to be a grammarian, as you may find yourself doing a fair amount of content editing as well as legal review. When you combine legal review with editing duties, advertising review can take a lot of time, so you want to make sure that the quality of the material that reaches your desk is as high as possible. In most companies, the legal department will not be the first line of defense against false or misleading advertising. Your marketing and advertising people should be trained to understand the rules of the advertising road and how they apply to your company and its products or services. This is one area where a small investment of time in training your business people and developing clear policies is likely to pay off – both in the avoidance of problems and in making the best use of limited legal resources.

This program is intended to provide an overview of advertising law and to give the legal generalist enough background to develop a basic advertising compliance and review program. At the end of the materials there is a basic checklist for advertising review.

Relationships with Advertising/Marketing People and Ad Agencies

One of the first things you'll learn in dealing with advertising review is that it tends to be on a very short schedule. It pays to develop good relationships with your advertising, marketing, and public relations people and to encourage them to discuss issues and submit material to you for review as early as possible. However, no matter how much of this you do, in most companies you will invariably get some requests that require you to review and approve materials in 24 hours or less. That seems to be the nature of the advertising world, and it's something most of us just have to live with. At least you can be thankful that you are getting a chance to review the material before it goes out the door.

Most companies rely on outside advertising agencies to produce and manage at least some of their advertising. You may want to try to develop relationships with key people at your ad agencies and to devote some of your training time to ensuring that ad agency personnel have a better understanding of your company and the specific legal issues that they need to be aware of.

Although advertising agencies have a duty to independently verify that the advertising they produce is properly substantiated, and they can be held liable for misleading advertising, the reality is that they vary greatly in their approaches to legal compliance. Some of the larger agencies take their responsibility to ensure that the advertising they produce is truthful very seriously, and they have formal programs for reviewing advertising and documenting proper substantiation. Others have a much more casual approach. In general, unless the agency has a thorough knowledge of your company and its products, and is clearly serious about its compliance responsibilities, it's dangerous to rely on advertising agencies to ensure

compliance. Obviously, you need to review your contracts with advertising agencies to ensure that they reflect an appropriate allocation of responsibility and risk.

Resources:

Advertising agency contracts are beyond the scope of this program, but here are some resources you might find helpful if you find yourself having to review or negotiate an agency contract.

Checklist: Drafting an Advertising Agreement – From The Practical Law Company
http://www.practicallaw.com/scripts/article.asp?Article_ID=26471&plcfilter=&ViewType=ft

Sample Advertising Agency Contract – From Hall Dickler Kent Goldstein & Wood LLP

The FTC

The Federal Trade Commission is an independent federal agency charged with administering and enforcing the Federal Trade Commission Act.

The FTC's Statutory Authority in Advertising Cases

Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §45, forbids "unfair or deceptive acts or practices" in trade or commerce. A practice is unfair if it causes or is likely to cause a substantial injury that is not outweighed by other benefits to consumers and is not reasonably unavoidable by the consumers. A practice is deceptive if it is a material representation or omission that is likely to mislead consumers and affect their decisions or behavior with regard to a specific product or service.

Sections 12-15 of the Federal Trade Commission Act, 15 U.S.C. §§ 52-55, forbid the dissemination of misleading claims for cosmetics, devices, drugs, food, or services.

General Information

The FTC has jurisdiction over most advertisements. The FTC's Division of Advertising Practices is responsible for the enforcement of federal truth-in-advertising laws, with a specific focus on:

- Claims for foods, drugs, dietary supplements, and other products promising health benefits.
- Health fraud on the Internet
- Weight-loss advertising
- Advertising and marketing directed to children
- Performance claims for computers, ISPs and other high-tech products and services
- Tobacco and alcohol advertising, including monitoring for unfair practices or deceptive claims and reporting to Congress on cigarette and smokeless tobacco labeling, advertising and promotion
- Protecting children's privacy online
- Claims about product performance made in national or regional newspapers and magazines; in radio and TV commercials, including infomercials; through direct mail to consumers; or on the Internet [1]

Moreover, advertisement claims concerning health and safety and advertisements that make claims in which the consumer would have trouble ascertaining the validity of the claim are highly scrutinized by the FTC.

The FTC Inquiry

In an inquiry to determine if an advertisement is deceptive, the FTC views the advertisement from the point of view of a reasonable consumer. Instead of focusing on specific words, phrases or pictures, the FTC looks at the advertisement as a whole to determine the message that is conveyed to consumers. Both material "express" and "implied" claims in the advertising are scrutinized. A claim is considered material if it is important to the consumer's decision to purchase the product. Advertisers must have sufficient proof to support claims made in the advertisement. Lastly, the FTC can look at omissions in the advertisement (what the advertisement does not say) that can leave the consumer with an incorrect impression about the product.

Most cases initiated by the FTC end in a consent agreement in which the advertiser agrees to comply with the request of the FTC to stop the disputed practice or act. Generally, the advertiser is not required to admit to a violation of law in the consent agreement. However, if the parties are unable to reach a consent agreement, the FTC may apply for injunctive relief in the federal courts or issue an administrative complaint. The issuance of an administrative complaint by the FTC commences a formal action similar to a trial before an administrative law judge. Decisions by the administrative law judge may be appealed to the full commission. A decision by the full commission may be appealed to the US Court of Appeals and finally to the US Supreme Court.

FTC Penalties for Deceptive Advertising

In cases in which the FTC reaches a final determination and the advertisement is found to be deceptive, the advertiser is likely to face one of the following penalties:

- A Cease and Desist Order. Requires the advertiser to stop making the deceptive claim;
- Monetary Penalties. The amount of the penalty depends upon the nature of the violation, but can reach into the millions of dollars. Moreover, in some cases advertisers have been ordered to issue refunds to consumers that purchased the product.
- Corrective Advertising. In order to correct the misinformation supplied in the original advertisement, the FTC can require an advertiser to run new advertisements that specifically address the deceptive claim, provide specific disclosures in future advertisements, notify consumers of the deceptive advertising or provide other information to consumers.

Notes:

[1] *Guide to the Federal Trade Commission*, http://www.ftc.gov/bcp/conline/pubs/general/guidetoftc.htm

Resources:

Federal Trade Commission - *Facts for Businesses*, http://www.ftc.gov/bcp/conline/pubs/buspubs/ad-faqs.htm

The Lanham Act

The Lanham Act is the name by which the Trademark Act of 1946 is commonly known. However, in addition to covering trademarks, Section 43(a) of the Lanham Act, 15 U.S.C. 1125(a), the law governs false statements of facts made in advertising. False-advertising claims are often brought under that section, which provides in part that:

> "Any person who, on or in connection with any goods or services ... uses in commerce any ... false or misleading description of fact, or false or misleading representation of fact, which ... in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act."

Although the language in the statute says "any person who believes that he or she is or likely to be damaged by such act" may bring a civil action, Courts have interpreted this language to mean that only business competitors can bring an action. To establish a violation under the Lanham Act, competitors must prove the following: (1) the advertiser made false statements of fact about its product; (2) the false advertisements actually deceived or had the capacity to deceive a substantial segment of the target population; (3) the deception was material; (4) the falsely advertised product was sold in interstate commerce; and (5) the plaintiff was injured as a result of the deception.

Actual loss is not required to show an injury. All that is needed is a reasonable basis for the belief that the plaintiff is likely to be damaged as a result of the advertising. The penalties for a Lanham Act violation include the plaintiff's lost profits, the additional profits to the advertiser resulting from the deceptive ad, treble damages, and attorneys' fees.

Note that there is no requirement of willful falsification or intent to deceive.

Resources:

Section 43(a) of the Lanham Act, 15 U.S.C. 1125(a),
http://caselaw.lp.findlaw.com/scripts/ts_search.pl?title=15&sec=1125

Warner-Lambert Co. v. BreathAsure, Inc., 204 F.3d 87 (3d Cir. 2000).
http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=3rd&no=986502

The Broadcast Networks

Each commercial intended for network broadcast must be submitted for network clearance at each network, and approved before it is aired. The networks each generally have their own network commercial clearance guidelines available, which set forth their policies regarding various advertising techniques such as their disparagement policy and consideration of good taste. Often the guidelines may actually exceed the legal requirements, and the networks exercise broad discretion to approve or disapprove commercials. It is typical for the interpretations of the network guidelines by the networks and advertisers to vary. In addition, the networks also review the advertising claims in the commercial to ensure they are truthful, and not false, misleading or deceptive.

The networks typically require the storyboard and the script to be reviewed prior to the production of the commercial, and they also require review of the final commercial. Due to the time sensitivity and cost of the production process, the storyboard should be reviewed as early as possible, preferably by a person familiar with the network clearance process, even before it is presented to the network. During the networks' review, they may request substantiation for certain claims or require revisions to the commercial. If the substantiation is not provided or the revisions not performed, the network may reject the commercial.

If a commercial is rejected, it is important to clarify whether the rejection is due to a legal problem or a network policy problem. Legal problems provide few options other than complying with the networks' interpretations of the law. If the network requests substantiation for certain claims, it is best to present only the relevant substantiation in a well-organized format, and allow a reasonable amount of time for review. If the commercial is rejected due to a network policy problem, you may have more room for negotiation since the guidelines are policies and not law. One persuasive argument may be to present the network with examples of other commercials which show their decision in your situation is inconsistent with their previous decisions.

Resources:

I Have a Great Commercial, so Why Won't the Networks Air It? Loeb & Loeb LLP
http://library.lp.findlaw.com/articles/file/00326/000012/title/subject/topic/communications%20law_advertising/filename/communicationslaw_1_317

Television Network Clearance: A Step By Step Guide for Advertisers and Agencies
http://www.adlaw.com/rc/handbk/rf_abcGUIDE.html

Proper Substantiation

When are you required to have substantiation for advertising claims?

The FTC and state laws require advertisers to have a "reasonable basis" for all claims made in advertising before the claims are disseminated. The evidence showing that an advertiser has a reasonable basis for the claim is called "substantiation," and it generally means objective evidence that supports the claim made. Note that the advertiser must have this substantiation in hand prior to running the ad. The advertiser cannot meet its substantiation burden by assembling or developing evidence after the fact.

The prior substantiation doctrine is based on Section 5 of the FTC Act, which prohibits "unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." Each advertising claim must be reviewed individually, as the amount and type of substantiation required depends upon the type and scope of claims made and the type of product or service.

The first step in determining the necessary substantiation is to identify the claims that require substantiation. The substantiation requirement applies to objective, provable claims. Statements of general superiority that a reasonable consumer would not believe are communicating any objective and provable claim amount to "puffery" do not require substantiation. If an advertising claim is a subjective statement such as a personal opinion, which can't be measured or verified, it may also be deemed "puffery," and substantiation is not necessary.

When the advertising claim is express (e.g., "tests prove", "doctors prefer", "our product is 50% faster") the advertiser is required to possess at least the advertised level of substantiation.

Advertisers are also expected to have prior substantiation for implied claims. According to the FTC, "Implied claims are not explicitly stated in the advertisement and range from those that use language and imagery virtually synonymous with an express claim, through language that literally says one thing but strongly suggests another, to language which relatively few consumers would interpret as making a particular representation."[1] For example, showing an SUV climbing a steep, rocky slope would imply that the vehicle is suitable for that use. Claims can also be implied by brand names or slogans. (E.g., Scotch-Brite Never Scratch™ Wool Soap Pads; Better ingredients. Better Pizza.). In each case, if the claim is deemed to be an implied claim, the advertiser would be required to have prior substantiation to show that it had a reasonable basis for making the claim.

There are several factors to consider in determining if the advertiser has a "reasonable basis" for the advertising claim, including:

- type of claim
- type of product
- consequences if the claim is false
- benefits if the claim is true
- cost of developing substantiation for the claim
- amount of substantiation experts in the field believe is reasonable

The FTC requires a very high level of substantiation, usually competent and reliable scientific evidence, for health and safety claims. Therefore, an advertiser will typically need to provide tests, analysis, research, studies or other evidence based upon the expertise of professionals in the relevant area which has been conducted and evaluated in an objective manner by people qualified to review it and using procedures that experts in the field accept as accurate. See Brake Guard Products Inc. D-9277 (Jan. 23, 1998) http://www.ftc.gov/opa/1998/01/brake.htm.

Notes:

1. *Building a Record on Advertising Meaning and Substantiation*
http://www.ftc.gov/os/2002/09/fdaappendix.pdf

Resources:

FTC's *Policy Statement on Advertising Substantiation* - http://www.ftc.gov/bcp/guides/ad3subst.htm

Arent Fox: *The Interface Between Trademarks and Advertising Before the NAD*
http://www.arentfox.com/quickGuide/businessLines/advert/advertisingLaw/nadReview/nadReview0300/nadreview0300.html

Puffery

What is "puffery"?

Puffery can be a difficult concept to understand. According to the FTC's Policy Statement on Deception, the term "puffing" refers generally to an expression of opinion not made as a representation of fact.

Puffery may also be defined as exaggerated advertising or boasting, on which no reasonable consumer would rely. Puffing statements are generally individual expressions of opinion or

personal evaluation of the intangible element of a product, as opposed to factual statements. While puffery can include statements regarding product superiority, the statements are generally vague or highly subjective and not capable of measurement.

What substantiation is necessary for puffery?

As previously discussed, advertising law has traditionally distinguished between objective product claims and "puffery," and the type of substantiation necessary for each statement differs. Objective product claims, both express and implied, which involve performance, efficacy, preference, or other tangible and measurable attributes, must be supported by adequate substantiation, while subjective statements or opinions, which typically can not be measured or verified against accepted standards or tests, may be construed as "puffing" and are not required to be supported by substantiation.

Examples of "puffery" claims:

Ultimate fresh breath

The coffee perking in this pot is America's best loved coffee

You will love sleeping on this bed!

While some advertisers will assert that a wide variety of claims are "puffery", the FTC and the courts have used the following criteria to identify "puffery":

- If the claim is general rather than specific
- If the claim is not capable of measurement
- If the claim is phrased in terms of opinion as opposed to fact

What are the limits on puffery?

While an advertiser has some latitude in "puffing" his products, an advertiser is not allowed to misrepresent or assign the products benefits, which they do not possess. Statements made for the purpose of deceiving prospective customers can't be properly characterized as mere puffery. False descriptions of specific or absolute characteristics of a product, and specific measurable claims of product superiority based on product testing are not puffery and may be construed as false advertising. *United States Industries Corp. v Clorox Co*. 140 F.3d.1175, 1180 (8th Cir. 1998).

It may be difficult to discern between objective statements, requiring substantiation, and puffery. If there is any doubt as to the type of statement, it is best to substantiate all claims.

Resources:

FTC's *Policy Statement on Deception* http://www.ftc.gov/bcp/policystmt/ad-decept.htm

Puffing Without Blowing Your House Down - How Far Can Puffery Take You?
http://www.agencycompile.com/adlaw/law_hndbk06.asp

Advertising Puffery: Current Status
http://www.adlaw.com/rc/newsltrs/archive/arc_3_96c.html

Comparative Advertising

What are the rules when you are comparing your products and services against those of your competitors?

Advertising that compares your company's products to those of a competitor can be extremely effective, and truthful comparative advertising is encouraged by the FTC. In fact, the FTC has expressed concern about industry codes and standards that might be read as discouraging comparative advertising. However, comparative advertising is full of potential pitfalls.

Comparative advertising that makes objectively measurable claims about a competitor's products, or even comparisons against "a leading brand," where the name of the competitor is not stated, must be supported by adequate substantiation. In fact, a higher degree of scrutiny is warranted in the case of comparative advertising simply because the likelihood of a challenge is higher than with other types of advertising. A high percentage of the cases handled by the NAD involve comparative advertising. In addition to potential monetary exposure under the Lanham Act, advertising can be expensive to create, and the last thing you want is to have a competitor get an injunction requiring your company to stop running an ad.

If your company wants to claim that its product is "better than" a competitor's product, and if that claim relates to a measurable and factual claim of superiority (as opposed to "puffery" or general claims of superiority), it is necessary to have objective and valid evidence supporting the claim that your company's product is better. Be aware that if your claims are supported with test data ("tests prove" claims), a competitor may be able to show that your advertising is "false and misleading" if it can demonstrate that the test results supporting your claims of superiority are based on tests that are not sufficiently reliable or that they don't compare apples to apples.

A consequence of comparative advertising is that it is often necessary to use the competitor's trademarks in the advertising. As a general rule, a competitor's trademark may be used to describe a product for the purpose of comment, comparison, criticism, or analysis, including comparative advertising. This is called "nominative fair use" and is allowed under the law. "A manufacturer does not commit unfair competition merely because it refers to another's product by name in order to win over customers interested in a lower cost copy of that product, if the reference is truthful and does not likely confuse customers into believing that the copy is from the same source as the original." [1] Care must be taken to ensure that the use of a competitor's trademarks falls within the rules of fair use and does not cross over into the area of consumer confusion. See the further discussion of trademark issues below.

Be aware that some countries are less hospitable to comparative advertising than the US, apparently on the theory that the naming of a competitor represents an illegal taking of the competitor's trademark rights or that the use of a competitor's trademark, even for purposes of comparison, constitutes trading on the reputation and goodwill of the trademark owner.

Notes:

1. Amicus brief by the International Trademark Association in the case of *Playboy Enterprises, Inc. v. Netscape Communications Corp.* http://www.inta.org/downloads/brief_PlayboyExcite.pdf

Resources:

Comparative Advertising http://www.adlaw.com/rc/handbk/rf_comparative.html

FTC *Statement of Policy Concerning Comparative Advertising* - http://www.ftc.gov/bcp/policystmt/ad-compare.htm

Representative Cases:

Garden Way, Inc. v. The Home Depot, Inc., 94 F. Supp. (N.D.N.Y. 2000)

Deere & Company, Plaintiff-Appellee, Cross-Appellant, v. MTD Products, Inc., Defendant-Appellant, Cross-Appellee. 41 F.3d 39 United States Court of Appeals, Second Circuit. Humorous variation of a competitor's trademark held to constitute trademark dilution. http://cyber.law.harvard.edu/metaschool/fisher/integrity/Links/Cases/deere.html

S.C. Johnson & Son Inc. v. Clorox Co., 57 U.S.P.Q.2d 1912 (2d. Cir. 2001)

Infringement – Copyright, Trademark

Can we use a photograph we found on the Web?

Companies must have appropriate licenses to use all photographs and other images. Your business people are probably smart enough not to copy a photograph or other image to use in your company's advertising, but you should make sure they understand that the lack of a copyright notice does not indicate that the image is not copyrighted.

Resources:

For more information about copyrights, see *Ten Copyright Permission Myths* By Lloyd J. Jassin at http://www.gigalaw.com/articles/2000/jassin-2000-08.html.

Can we use a photograph of a building in an advertisement?

If your company doesn't own the building, this can sometimes be a tricky question. Some buildings have obtained trademark status (e.g., the Transamerica Pyramid) and other buildings are protected by copyright law. To be safe, you may want to obtain a release from the building owner.

Resources:

Sample Property Release Agreement form.

Can we use another company's trademarks in our advertising?

Sometimes it is necessary or appropriate to use another company's trademarks in your advertising. Trademark case law has established that "[a] manufacturer does not commit unfair competition merely because it refers to another's product by name in order to win over customers interested in a lower cost copy of that product if the reference is truthful and does not likely confuse consumers into believing that the copy is from the same source m the original." Calvin Klein Cosmetics v, Parfumes de Coeur Ltd., 824, F.2d 655, 668, 3 USPQ2d 1498, 1500 (8th Cir. 1987). See also: Societe Comptoir de L'Industrie v. Alexander's Department Stores, Inc., 299 F.2d 33 (2d. Cir. 1962); G.D. Searle & Co. v. Hudson

Pharmaceutical Corp., 715 F.2d 837, 841,220 USPQ 496, 500-501 (3rd. Cir. 19S3) [wherein the court stated that the defendant could continue to use the brand name METAMUCIL® on its generic product provided the trademark appeared in the same size type as the other words on the label, the trademark registration symbol "®" was used with the METAMUCIL® trademark and a disclaimer was added stating that there is no association between the generic product and METAMUCIL®); The Upjohn Co. v. American Home Products Corp., 598 F. Supp. 550,561,225 USPQ 109, 117 (S.D.N.Y. 1984) (wherein the court allowed the defendant to use the trademark MOTR® in its advertising provided that a disclaimer was added stating the MOTR® trademark was owned by another company).

One of the more interesting questions in trademark law today involves to what extent a company may use a competitor's trademarks to drive traffic to its Internet site. Using a competitor's trademarks in "metatags" or other Internet search engine enhancement techniques has generally been held to be an infringement of the competitor's trademark. In other words, such use of another company's trademarks is not fair use. However, the courts have yet to decide whether the practice of paying for placement using a competitor's trademarks as keywords, where the mark does not actually appear on the web site or in the metatags constitutes unfair competition.

It may be that the lack of reported cases on this issue is that the cases are commonly settled out of court. It's hard to defend a clearly bad-faith use of a competitor's trademarks. However, it's also likely that there is a lot of this kind of trademark infringement going on without any knowledge by the trademark owner. It's often not easy to discover the trademark misuse, and it can take a lot of resources to track down and deal with it when you do find it.

Go to the Google keyword suggestion tool at https://adwords.google.com/select/tools.html or the Term Suggestion or View Bids tools at Overture http://www.content.overture.com/d/USm/adcenter/tools/index.jhtml and try to find some of your trademarks that are available for purchase by your competitors.
Check out http://www.domainsurfer.com to find uses of your company's marks in domain names.

Resources:

To help prevent others from misusing your trademarks you might want to post some guidelines on your Web site. Here are links to some sample policies governing third-party use of companies' trademarks and logos:

http://www.sun.com/policies/trademarks/
http://www.rational.com/media/corpinfo/trademark_usage.pdf?SMSESSION=NO
http://www.intel.com/intel/legal/tmusage2.htm

Has Your Trademark Been Poached? By Sean Carton
http://www.clickz.com/tech/lead_edge/print.php/2106731.

Trademark Infringement in the Online Marketplace
http://www.investigation.com/newsletter/7n_1/newsletv7n1_1.htm.

Cnet News.Com Article - http://news.com.com/2100-1023-827445.html

Clikz.com Article - http://www.clickz.com/article.php/969061

Truthfulness of Images

Can we use image enhancement techniques to alter how a product looks?

Although advertisers have always manipulated photographic images to improve the way their products look, today it is easier than ever to change images or even create images from scratch using digital techniques. In many cases, a certain amount of enhancement doesn't do any great harm, and may even be desirable if it creates a more accurate portrayal. But when does enhancing an image cross the line to become false advertising? Obviously, it depends on the circumstances.

In reviewing advertising, you need to be aware of the pitfalls of using images that do not accurately portray reality. You may need to question your advertising people about the truthfulness of any images that show your products or your competitors' products. How was the image created? Was it changed in any way? Do any changes relate to a fundamental characteristic of the product? In other words, could a change in an image render the ad false or misleading?

Don't let your company make the mistake Volvo did in 1990, when it filmed a monster truck running over the tops of a line of vehicles and crushing all but the Volvo. Very impressive, and apparently intended to recreate an actual incident. However, Volvo and/or its ad agency had decided the commercial would work better if the roof of the Volvo were reinforced. That turned out to be a huge embarrassment for Volvo and its agency once that fact came to light.

Resources:

There's a Fine Line Between Enhancement and Deceit - http://www.gowlings.com/resources/publications.asp?showWhat=684

Visual Truth in the Digital Age: Towards a Protocol for Image Ethics http://www.businessit.bf.rmit.edu.au/aice/events/AICEC99/papers1/ROB99035.pdf

Disclaimers and Disclosures

What are the requirements for disclosures?

Everyone is familiar with disclaimers and disclosures – the fine print usually found at the bottom of the ad. In general, disclaimers and disclosures are not favored. It is better to modify an ad to eliminate the need for a disclaimer or disclosure than to use a disclaimer. However, if a disclaimer or disclosure is needed, it must not contradict the express text of the ad or be used to correct a misimpression the ad would otherwise create. An advertisement will be evaluated based on the overall net impression of the ad.

The FTC's requirements regarding disclosures and disclaimers can be summarized as follows:

- Prominence: The disclosure must be big enough for consumers to notice and read;
- Presentation: The wording and format must be easy for consumers to understand;
- Placement: The disclosure must be in a place where consumers will look; and
- Proximity: The disclosure must be near the claim it qualifies.

More specifically, here's what the FTC has to say about disclosures and disclaimers in the case of Internet Advertising (the complete text can be found at http://www.ftc.gov/bcp/conline/pubs/buspubs/dotcom/index.html#III)**: "**Advertisers must identify all express and implied claims that the ad conveys to consumers. When identifying claims, advertisers should

not focus only on individual phrases or statements, but should consider the ad as a whole, including the text, product name and depictions. If an ad makes express or implied claims that are likely to be misleading without certain qualifying information, the information must be disclosed. Advertisers must determine which claims might need qualification and what information should be provided in a disclosure. If qualifying information is necessary to prevent an ad from being misleading, advertisers must present the information clearly and conspicuously.

A disclosure only qualifies or limits a claim, to avoid a misleading impression. It cannot cure a false claim. If a disclosure provides information that contradicts a claim, the disclosure will not be sufficient to prevent the ad from being deceptive. In that situation, the claim itself must be modified.

Disclosures that are required to prevent deception—or to provide consumers material information about a transaction—must be presented "clearly and conspicuously." Whether a disclosure meets this standard is measured by its performance—that is, how consumers actually perceive and understand the disclosure within the context of the entire ad. The key is the *overall net impression* of the ad—that is, whether the claims consumers take from the ad are truthful and substantiated.

In reviewing their online ads, advertisers should adopt the perspective of a reasonable consumer. They also should assume that consumers don't read an entire Web site, just as they don't read every word on a printed page. In addition, it is important for advertisers to draw attention to the disclosure. Making the disclosure available somewhere in the ad so that consumers who are looking for the information *might* find it doesn't meet the clear and conspicuous standard.

Even though consumers have control over what and how much information they view on Web sites, they may not be looking for—or expecting to find—disclosures. Advertisers are responsible for ensuring that their messages are truthful and not deceptive. Accordingly, disclosures must be communicated effectively so that consumers are likely to notice and understand them."

Most industries need be concerned only with the type of general guidance provided above. However, in certain situations (e.g., 900 numbers and financial transactions), the FTC or state or federal law specifies how certain disclaimers and disclosures must appear.

Trademark Usage Basics

Any advertising review policy must include a review to ensure that your company's trademarks are used properly. Most companies have published internal guidelines to assist employees and third parties such as ad agencies and consultants in the proper use of the company's trademarks. If you need to develop guidelines for your company, there are many good examples available on the Internet. (E.g., Sun Microsystems Trademark and Logo Usage Guidelines at http://www.sun.com/policies/trademarks.

One of the most famous – and most often broken – rules of trademark usage is that a trademark is an adjective and should not be used as a noun. The reason given for the rule is that using a trademark as a noun runs a risk of the mark becoming generic. Examples of trademarks which have become generic are escalator, kerosene and aspirin. Lawyers are always trying to drill that rule into their clients, who do whatever they can to get away with breaking it – because using a trademark as an adjective often results in a very awkward construction. Of course, there are many examples of well-known companies that don't follow this rule. Ford and Coke are the most-cited examples of trademarks that are commonly used, even by their owners, as nouns. If your company is lucky enough to have trademarks as famous as Ford and Coke you may be able to safely ignore the rule, but most of us should try to follow it whenever possible, even though the risk of any given trademark becoming generic may be very low.

Since a trademark is not a noun, do not use a trademark as in a plural or possessive form or as a verb.

Use the proper symbol to indicate the registration status of a mark in the United States:

® = A federally registered trademark or service mark
™ = A trademark that is not registered, but that a company wishes to protect
SM = A service mark that is not federally registered

Note that some words can be both a trademark and a company name (E.g., Dell makes Dell® computers.) It is acceptable to use a company name as a noun, and the ®, ™, and SM symbols should not be used.

It may be appropriate in some cases to include a statement such as "Acme® and Widget™ are trademarks of Acme Corporation" to further clarify ownership of your company's marks.

Finally, don't waste your time trying to get the news media to use the trademark symbols. Although you should make sure they are included in press releases, etc., the Associated Press Stylebook, which many news organizations follow, states that trademarks should be capitalized, but that the trademark symbols (®, ™, SM) should not be used.

Consumer Surveys

When would consumer surveys be used?

The substantiation relied on by advertisers often consists of consumer survey evidence. Consumer surveys are also commonly used by regulators or competitors challenging advertising. Proper design and execution of a consumer survey is essential if it is to have any value. In most cases, you will want to rely on independent market research professionals to design and conduct a survey.

To prevail on a false advertising claim under 43(a) of the Lanham Act, a plaintiff must prove that the defendant has made false or misleading statements as to its or another's product and that there is actual deception in the statements – or at least a tendency to deceive or mislead a substantial portion of the intended audience. Therefore, for an actionable false advertising claim to proceed, a plaintiff must prove either "literal falsity" of a claim, or "implied falsity". The plaintiff has the burden to prove false advertising.

If the case involves literal falsity, this may be proved by demonstrating that the tests employed "are not sufficiently reliable to permit one to conclude with reasonable certainty that they established the claim made". See Proctor & Gamble Co. v Cheeseborough-Pond's Inc., 747 F.2d 114 (2nd Cir. 1984); S.C. Johnson v The Clorox Co. 241 F. 3d 232 (2nd Cir. 2001).

Implied falsity requires extrinsic evidence in the form of expert testimony or consumer surveys. The consumer surveys should clearly indicate consumers' reaction to the advertisement and specifically that the consumers are misled or confused. It will not be sufficient for a plaintiff to show how consumers would react, but rather a plaintiff must show how consumers do react. Consumer surveys should establish that a "statistically significant" number of consumers believe the false belief allegedly communicated in the advertisement. It is likely any consumer survey will be highly scrutinized to ensure the consumers were properly screened; the geographic area and consumers surveyed were sufficient to project the results throughout the advertiser's market; and the tests were independent. If the consumer survey doesn't provide evidence that consumers are misled or confused by an advertisement, it is likely a claim for false advertising will fail.

In view of the proof necessary for a claim of false advertising, based on implied falsity, it is important the parties, specifically the plaintiff, appreciate the importance of consumer surveys during any litigation involving false advertising.

Resources:

Consumer Surveys in Trademark Litigation http://www.cll.com/articles/article.cfm?articleid=36

http://www.agencycompile.com/adlaw/law_hndbk03.asp

Testimonials

Are there rules on how endorsements or testimonials may be used in ads?

The FTC's Guide Concerning Use of Endorsements and Testimonials in Advertising and the FTC's Policy Statement on Deception provide guidance on the use of endorsements and testimonials by consumers, celebrities and experts for all consumer products.

The FTC's Guide Concerning Use of Endorsements and Testimonials in Advertising requires that endorsements and testimonials reflect the honest opinion, experience or results of the endorser. An advertiser must be able to substantiate an endorser's statements, and should not include any endorsement or testimonial in an advertisement which includes misleading statements.

Endorsements by a consumer must reflect the typical experience of the consumers who use the product, and not just a few satisfied consumers. Therefore, if an endorsement doesn't reflect what other consumers will generally experience, the advertiser must clearly and conspicuously disclose either what consumers can expect to experience or the limited applicability of the endorser's experience. A disclosure that simply says "not all consumers will get this result" or "your results may vary" is not a sufficient disclosure.

If an endorsement presents or implies it is by an actual consumer, actual consumers should be used unless the ad provides a disclosure.

Endorsements by celebrities must reflect their honest experience or opinion. An advertiser must continue to have good reason to believe the celebrity's endorsement continues to reflect their opinion.

If an advertisement represents an endorser is an expert with respect to the endorsement message, they must actually have the expertise they are representing and must have actually used this expertise in evaluating the product and supporting their endorsement. The product testing should be similar to what other experts in the field would need to conduct in order to support their endorsement.

Endorsements by organizations are viewed as representing the judgment of the group, whose judgments collectively are generally free of subjective individual factors. Consequently, the organization must then reach its endorsement by a process which allows the endorsement to fairly reflect the collective judgment of the organization. If an endorser is associated with a well-known organization, but is speaking in a personal capacity and not on behalf of the organization, the ad must disclose this fact.

In addition, the FTC Policy Statement on Deception requires advertisements not be deceptive or misleading in any material respect. Testimonials can be deceptive by either including a lie or other false statement in the testimonial itself, or by omitting relevant information that a reasonable consumer, in the class to whom the advertiser is marketing his product, would deem important in making a purchasing decision.

General considerations for endorsements and testimonials:

- The endorsement message does not need to be the endorser's exact language, unless the endorsement says it is, but it shouldn't be distorted.
- Any material connection between the endorser and the seller of the advertised product which might affect the weight or the credibility of the endorsement must be clearly and conspicuously disclosed. This would include disclosing if the endorser has a pecuniary interest in the company, received a payment for their endorsement, or if there is an association between the endorser and the seller (e.g., employee/employer; family relationship).
- Endorsements must not contain any representations that would be deceptive or misleading. In other words, while the fact that someone said something may itself be true, an advertiser cannot use the statement in its advertising unless the statement itself is true.
- If an ad represents that an endorser uses the product, the endorser must use the product at the time of the endorsement and during the period of time the advertisement is available.
- An advertiser is required to have substantiation for an endorser's statements.

Resources:

16 C.F.R. 255 - FTC's *Guide Concerning Use of Endorsements and Testimonials in Advertising*
http://www.ftc.gov/bcp/guides/endorse.htm
FTC's *Policy Statement on Deception* – http://www.ftc.gov/bcp/policystmt/ad-decept.htm

http://www.adlaw.com/rc/handbk/rf_testimonial.html

Right of Publicity and Releases

When do we need to obtain a release to use a person's image or name?

The use of the name, photograph, likeness or voice of any person, living or dead, should be approached with care so as not to violate the person's right to privacy or publicity. Even the use of sound-alikes or look-alikes of famous persons can give rise to problems. See, e.g., Waits v. Frito-Lay, 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 1047 (1993)

You should always obtain a release from a person before using that person's name, photograph, likeness, or voice in advertising. Sample Release Forms are included at the end of the materials. Also, make sure that any contract for the use of stock photographs includes the right to use the photograph in advertising.

Resources:

Recent Developments in the Right of Publicity, by Jeffrey W. Tayon
http://www.utexas.edu/law/journals/tiplj/volumes/vol1iss2/tayon1.html.

Privacy and Publicity http://www.adlaw.com/rc/handbk/rf_useofnames.html

The Expanding Law of Publicity Could Constrain Advertisers
By: John P. Feldman, Gonzalo E. Mon, Collier Shannon Scott, PLLC
http://www.privacylawplaybook.com/documents/Expanding%20Law%20of%20Publicity.pdf

Sales and Advertised Pricing

What are the standards governing the advertising of prices?

The FTC's Guide Against Deceptive Pricing requires advertisers to be truthful when making claims about price comparisons. Advertisers may offer a price reduction by comparing the selling price of their merchandise to

- the former selling price of their own merchandise;
- the current selling price of an identical merchandise sold by others in the same market area; or
- the current selling price of comparable merchandise sold by others or the advertiser in the same market area.

If the advertiser compares the selling price and the former selling price of the same merchandise sold by the advertiser, the merchandise must have offered at the former selling price, on a regular basis and for a reasonably substantial period, immediately preceding the sale. The advertiser should make sure that the higher former selling price does not exceed the advertiser's usual and customary retail markup for similar merchandise and that the merchandise was openly and actively offered for sale, for a reasonably substantial period of time and in the regular course of business, at the former selling price. This is to prevent the advertiser from establishing a fictitious higher price on which a deceptive comparison might be based.

If the advertisement includes terms such as "regularly", "was", "originally" to reference the former selling price, the advertiser should make certain that the former selling price is not fictitious. In addition, the advertiser should make certain that if the terms "sale" or other similar terms are used, the amount of reduction between the selling price and the former selling price are not insignificant and are sufficiently large that the customer would believe a genuine bargain had been offered.

Example: "Regularly", "Was", "You save $_____"

If the advertiser compares the selling price with the selling price of identical merchandise sold by others, the comparative price should not exceed the price at which the merchandise had been sold at retail outlets in the market area immediately preceding the advertiser's offer, on a regular basis and for a reasonably substantial period.

Example: "Selling elsewhere at $____"

If the advertiser compares the selling price with the selling price of comparable merchandise, sold either by it or others, the comparative price should not exceed the price at which the merchandise had been sold at retail outlets in the market area immediately preceding the advertiser's offer, on a regular basis and for a reasonably substantial period. The comparable merchandise must be similar in all respects to the advertised merchandise and of at least like grade and quality.

Example: "Compares with merchandise selling at $ ____"

If an advertiser uses terms such as "List Price", "manufacturer's list price", "reference price", "suggested retail price" or similar terms, these terms may only be used if they reference the actual selling price concurrently charged by the advertiser or by the representative principal retailers in the market area where the claim is made.

When an advertiser uses the term "Free", "2-For- 1 Sale", "Half Price" or similar terms and the receipt of the "free" merchandise or service is conditional on the purchase of something, the advertiser must clearly and conspicuously set forth the conditions (i.e. purchase of another product). The conditions must be disclosed clearly and conspicuously and not by placing an asterisk or symbol next to "free" and referring to the condition(s) in a footnote. The advertiser may not increase the selling price of the merchandise or service, or decrease the quantity or quality of the merchandise or service, to compensate for the "free" merchandise or service.

The advertiser should only advertise a "free" offer, temporarily; otherwise it will become a continuous combination offer. An advertiser must intend to discontinue the offer within a reasonable period and the offer should not be available in the same market for more than 6 months in any 12-month period, with at least 30 days between each offer. The advertiser must structure the offer so that it produces no more than 50% of the sales volume of the merchandise in the 12-month period.

Example: Tackle box is sold with a BONUS bait card. (The advertiser cannot increase the tackle box cost to cover the cost of the bait card. If the product begins shipping April 1, the shipment of the packaging listing "BONUS" must be discontinued by October 1.)

When an advertiser uses the "free" offer in connection with the introduction of a new product, the advertiser must intend to discontinue the offer after a limited time and to begin to sell the product separately, at the same price at which it was promoted with the "free" offer.

Resources:

16 C.F.R. 233 FTC's *Guide Against Deceptive Pricing* - http://www.ftc.gov/bcp/guides/decptprc.htm
16 C.F.R. 251 FTC's Guide Covering Use of the Word "Free" and Similar Representations - http://www.ftc.gov/bcp/guides/free.htm

http://www.bbb.org/membership/codeofad.asp

Attorneys General's Offices in states you plan to advertise

Use of the Word "New"

When can something be advertised as "New"?

It depends upon the type of product and how the word "new" is used, and each case will be considered in the context of its own advertisement. At least one FTC advisory opinion has suggested a six-month limit on the use of the word "new" in association with a product which has not previously been on the market. This means a product, which may have been "new" at one point in time, should not continue to be advertised and/or shipped to market in packaging with the claim "new" on it beyond the permissible six-month time period. In addition, in order for a product to be described as "new" the product must be legitimately new or reformulated in a material respect related to product performance. A slight cosmetic change in the product is not sufficient to justify the word "new".

There are a few products for which rules exist in which "new" should not be used.

- The Rules governing the identification of textiles preclude the word "new" from being used if the fabric has been reclaimed or respun. 16 C.F.R. 303.35

- The rules governing advertising for tires prohibit the use of the word "new" in connection with retreads.

Warranties and Guarantees

Are there standards regarding the use of the terms "warranty" or "guarantee" in connection with product advertising?

The FTC prohibits the deceptive advertisement of a warranty.

When the terms "warranty" or "guarantee" are used in consumer product advertising, the following information must be clearly and prominently available to the prospective customer:

- Statement that the complete details of the warranty or guarantee is available to read prior to the sale at the place where the product is sold; or
- If the product can be purchased through the mail or by telephone, a statement that the warranty or guarantee is available free on written request.

Example: The ABC television is backed by our limited 1-year warranty. For complete details, see the warranty at your local dealer.

Example: The ABC exercise machine is backed by our limited 10-year warranty. A free copy of the warranty can be obtained at [address].

When the terms "satisfaction guarantee", "money back guarantee", "free trial offer" or similar representations are used, the seller or manufacturer is required to refund the full purchase price of the advertised product at the customer's request. The advertisement should clearly and prominently disclose any material limitations or conditions that apply to the guarantee (i.e. requirement customer return the product).

Example: We guarantee your satisfaction. Just return the cutlery in its original packaging and we will refund your money.

When the terms "lifetime", "life" or similar representations are used in advertising to describe the duration of a warranty or guarantee, the advertisement should clearly and prominently disclose whose life measures the period of coverage.

Example: Our bed is backed by a lifetime guarantee that is good for as long as you own the bed.

In reviewing advertising, you should take care to ensure that the ad does not inadvertently create any implied warranties (either in the text or in images). Consider this drawing caption from an ad that Microsoft reportedly ran briefly in South Africa: "Microsoft software is carefully designed to keep your company's valuable information in, and unauthorised people and viruses out. Which means that your data couldn't really be safer, even if you kept it in a safe. Which is great news for the survival of your company. But tragic news for hackers."

References:

16 C.F.R. 239 FTC's Guides For the Advertising of Warranties and Guarantees

15 U.S.C. 2301 et seq. Magnuson-Moss Warranty Act
16 C.F.R. 701 FTC's Disclosure of Written Consumer Product Warranty Terms and Conditions
16 C.F.R. 702 FTC's Pre-Sale Availability Rule

A Businessperson's Guide to Federal Warranty Law
www.ftc.gov/bcp/conline/pubs/buspubs/warranty.htm

Coupons

What information should be included in a coupon?

A coupon is an agreement between the advertiser and the consumer and the advertiser and the merchant who redeems the coupon.

Basic information that should be included on coupons includes:

- Specific details of the offer –amount off of product, product to be purchased (brand & size);
  - Example: 50¢ off 1 8 oz. Can XYZ Green Beans;
  - Expiration date of the offer. If there is no expiration date, the coupon should state "no expiration date" ;
  - Cash Value—required by some states;
  - Redemption terms for the merchant along with the coupon issuer's coupon redemption policy;
  - Customer pays all sales tax;
  - Not valid with any other offer;
  - Any other use constitutes fraud.

- **Restrictions on Use**

  - Geographical Limitations—Example: Good only in the United States;
  - Limit one coupon per purchase;
  - Do Not Double
  - Industry Specific Restrictions --Laws and regulations in the alcohol and the dairy industries restrict the use of coupons. Consult specific state laws.

Resources:

Advertising & Marketing Law, Blackwell Sanders Peper Martin LLP,
http://www.blackwellsanders.com/admarketingIntro.aspx (Download)

An Introduction to Consumer Promotions and Direct Marketing: Legal Issues, © 2002 By Jacob P. Bryniczka, http://www.wsdb.com/vol_06f.html

Coupon-Related Articles
http://www.santella.com/coupon.htm#HOW%20TO%20DESIGN%20A%20COUPON

Coupon Checklist by Barry P. Hoffman, http://www.promotionwatch.com/downloads/InternetForm.doc

Contests and Sweepstakes

What rules apply to contests and sweepstakes?

Contests and sweepstakes are commonly used by businesses to promote their products and services and/or to collect personal information for marketing or research purposes. The primary issues to be concerned with are:

- Making sure that the contest or sweepstakes is not an illegal lottery
- Complying with state and federal laws regarding required disclosures, registration, the posting of a bond, and the disclosures of winners' names
- Complying with laws regarding privacy and the use of personal information, including laws governing children's advertising
- Establishing rules to govern the contest or sweepstakes

Avoiding a Lottery.

A lottery is a contest that involves (i) consideration, (ii) chance, and (iii) a prize. Lotteries are illegal, except under limited circumstances that don't apply to most of our companies. The most common way of avoiding an illegal lottery is to eliminate any requirement of consideration. In other words, as long as someone doesn't have to pay something or buy something to enter, and as long as a purchase doesn't increase the odds of winning, you will have a sweepstakes and not an illegal lottery. You should be aware that in some states non-monetary consideration (e.g., an expenditure of considerable time or effort by a consumer that benefits the sponsor) may be sufficient to make a sweepstakes a lottery. A common way of eliminating a purchase requirement is to provide for an alternate means of entering – for example, by sending in a card with the relevant information printed on it. At one time there was a question about whether taking entries only through the Internet itself constitutes consideration, since the participant might need to pay for Internet access. With the availability of computers and Internet access at public libraries, that no longer is a significant concern.

A "lottery" involves chance or luck. Another way to avoid a lottery is to base the selection of winners on skill, talent, or knowledge rather than chance. A bona fide contest involving skill, talent, or knowledge does not constitute a lottery, even if a payment or purchase is required to enter. Care must be taken to design a contest that is truly based on skill, talent, or knowledge and not luck. For example, choosing the outcome of a sporting event includes a substantial element of luck, and would normally not be considered a bona fide contest of skill.

Complying with the Laws

More and more states seem to be enacting laws regulating sweepstakes. Colorado, Florida, Illinois, New York, Rhode Island, and Texas have laws governing some aspects of sweepstakes. Two states – Florida and New York – require registration of sweepstakes and the posting of a bond. Florida's statute requires every sponsor of a game with prizes totaling more than $5,000 to submit a certified list of the names and addresses of every person who wins a prize worth more than $25, a description and the value of all prizes over $25, and the dates when the prizes were won. Sponsors must submit this information within 60 days after the winners have been determined.

There are also laws regulating the promotion of certain types of products and the manner in which sweepstakes are promoted. In 1999, the federal Deceptive Mail Prevention and Enforcement Act, an act that regulates sweepstakes advertised through the mail, became law. That act requires certain disclosures, prohibits certain practices, and requires that mailers maintain a system for removing people's names from their mailing lists.

Privacy Laws

Because one of the primary purposes of many sweepstakes is to gather personal information, it is important to ensure that all applicable laws and regulations regarding the privacy of personal information are followed. In the case of online sweepstakes, there should be a link to a privacy policy disclosing to participants how any information, submitted with their sweepstakes application could be used. Because a consumer could argue that the furnishing of personal information is something that has value, a prudent approach would be to allow participants to "opt out" of having their personal information used for marketing purposes or shared with other companies. The myriad of state and federal laws make designing a sweepstakes promotion to satisfy all of them a challenging task.

Contest Rules

It is important to have clear and well-drafted contest rules – both to comply with legal requirements and to avoid disputes. These rules must be made readily available to all participants. There is a good checklist of common elements of rules in the ACCA Virtual Library at http://www.acca.com/education2000/am/cm00/html/contestguide.html. The Web sites of large companies that often run sweepstakes (e.g., the Coca Cola Company) are good sources of rules designed to comply with the latest laws.

Resources:

Overviews, outlines, and articles on the legal complexities of promotional programs
http://www.adlaw.com/rc/rf_sweeps.html

Sweepstakes Articles: http://www.santella.com/sweepsta.htm

Official Rules Checklist for Sweepstakes, Games, and Contests of Skill

Online Issues

In Dot.Com Disclosures[1], the FTC reiterated that the same consumer protection laws and principles that apply to traditional advertising apply to online advertising: (1) Advertising must be truthful and not misleading; (2) Advertisers must have evidence to support claims made in advertisement; (3) Advertising cannot be unfair to consumers.

The first step for an advertiser is to identify all claims (express and implied) made in the advertisement. If any of the claims are likely to be misleading without the provision of certain qualifying information, then that information must be disclosed. Also, if there is material information about the terms of the transaction that the consumer should know, then a disclosure must be provided. A disclosure must be clear and conspicuous to the consumer. Disclosures cannot be used to make an otherwise false claim truthful. It is the responsibility of the advertiser to provide disclosures to the consumer. See Disclaimers and Disclosures above.

There is no specific formula as to how one makes a disclosure "clear and conspicuous." However, to determine if a disclosure is clear and conspicuous the advertiser should consider:

- the **placement** of the disclosure in an advertisement and its **proximity** to the claim it is qualifying;
- the **prominence** of the disclosure;

- whether items in other parts of the advertisement **distract attention** from the disclosure;
- whether the advertisement is so lengthy that the disclosure needs to be **repeated**;
- whether disclosures in audio messages are presented in an adequate **volume and cadence** and visual disclosures appear for a sufficient **duration**; and
- whether the language of the disclosure is **understandable** to the intended audience. 1

To be most effective, a disclosure should be placed nearby the claim, ideally on the same screen. If the disclosure is an "integral part of the claim or inseparable from the claim, it should be placed adjacent to the claim so that the claim and the disclosure can be read contemporaneously. Many times a disclosure can be a word or phrase incorporated into the claim itself. Disclosure information should be placed so that it is provided to the consumer at the earliest point possible in the transaction, especially prior to the consumer making a purchase or incurring a financial obligation. Disclosures should avoid the use of legalese, technical jargon and use understandable language. Disclosures may be repeated on web sites as needed. Disclosures should be noticeable to the consumer. The size, color and graphics of the disclosure affect its prominence.

If the disclosure is lengthy, scrolling and hyperlink disclosures are helpful techniques to provide disclosures. If you choose to provide disclosures via either of these methods, it is a good idea to provide the disclosure in such a manner that the consumer has to take some affirmative action to proceed past the disclosure information.

If you choose to provide your disclosure by scrolling, make sure that your web page is designed with text prompts or visual cues to encourage consumers to scroll. The scroll bar on the computer screen alone is not a sufficiently effective cue.

The primary considerations for hyperlinks are: (1) The labeling of the hyperlink; (2) The consistency in the use of the hyperlink styles; (3) The placement and prominence of the hyperlink on the web page and (4) the handling of the disclosure on the click-through page. Basically, hyperlinks should be presented in a manner to the consumer so that it will be obvious to the consumer that he will be able to obtain additional information by clicking on the hyperlink.

If the online advertisement contains audio messages, video clips or other animated segments with claims that require qualification, the disclosure should also accompany the claim. If the claim is an audio claim, the audio disclosures should be made in addition to text disclosures. If video disclosures are used, they should be displayed for a period of time long enough for the consumer to notice, read and understand them.

Due to the lack of attention generally paid to banner ads by consumers, it is a good idea to place the disclosure information in the banner ad as well as on the website to which the banner links.

Lastly, existing FTC rules and guidelines applicable to "written or printed advertisements" also apply to visual text displayed on the internet.

Notes:

1. Dot Dom Disclosures: Information About Online Advertising, http://www.ftc.gov/bcp/conline/pubs/buspubs/dotcom/index.html

Resources:

GigaLaw.com: *Legal Guidelines for Advertising on the Internet,* http://www.gigalaw.com/articles/2000-all/ftc-2000-07-all.html

Web Site Content and Other Online Advertising Must Comply With Traditional Advertising Rules, http://www.crmxchange.com/sessions/legal/march01.html

Email and fax advertising, telephone solicitations

What are the rules with respect to Unsolicited Commercial E-Mail?

Many states have enacted legislation regarding unsolicited commercial email (UCE). Since requirements vary by state, it is a good idea to abide by the strictest state law.

The strictest state law calls for advertisers to:

- Use "ADV:" as the first characters in the subject line of the email
- Use "ADV:ADLT" as the first characters in the subject line of the email, when the solicitation involves goods and services that may only be purchased by someone 18 or older;
- Provide full contact information, including street address and phone number;
- Provide consumers with a valid and free means of declining further emails;
- Clearly identify the date/time the email is sent;
- Never falsify point of origin or transmission path information;
- Never use a third-party's email address or domain name in spam without their permission; and
- Never have false or misleading information in the subject line.1

Resources:

Collier Shannon Scott: Rules of the Road: Following Unsolicited Commercial E-mail Requirements, http://www.advertisinglawplaybook.com/documents/Rules%20of%20the%20Road.pdf

What are the rules regarding Unsolicited Fax Advertisements?

Unsolicited faxed advertisement are addressed in the Telephone Consumer Protection Act (TCPA) 47 U.S.C. §§ 227 et seq. The TCPA makes it illegal for anyone to send via facsimile an unsolicited advertisement to another individual or business if there is no prior business relationship. An unsolicited advertisement is "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."

The TCPA can be enforced by private citizens in small claims court. The penalty for each violation is $500. Damage awards can be tripled if the court finds a willful or knowing violation.

Unsolicited faxes are also regulated by the Federal Communications Commission pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. §503(b) which allows the FCC to impose civil penalties upon individuals who repeatedly violate the TCPA.

Resources:

Federal Communications Commission: *Unwanted Faxes: What You Can Do*, http://ftp.fcc.gov/cgb/consumerfacts/unwantedfaxes.html

Advertising Property, Goods or Services by Fax Machine May Place Your Company at Risk for Class Actions and Significant FCC Fines, by Helen Kirsh and Robert H. Jackson. http://www.reedsmith.com/library/publicationView.cfm?itemid=3731 (Registration required)

What are the rules regarding Telemarketing?

Telemarketing activities are governed by the Telephone Consumer Protection Act of 1991 (TCPA) 47 U.S.C. § 227 and the Telemarketing and Consumer Fraud and Abuse Protection Act of 1994, 15 U.S.C. §6101. In addition, there are also state specific rules that govern telemarketers. These rules are not pre-empted by the Federal laws.

The TCPA:

A. Requires companies that initiate telephone solicitations to:
- Maintain a Do Not Call List (DNC);
- Develop a written policy regarding the maintenance of DNC List;
- Develop a clear training program for personnel making telephone solicitations;

B. Limits the use of Automatic Dialing Systems and Artificial or Prerecorded Voice Calls
- Autodialers and Artificial or Prerecorded Voice messages must not be used to hospitals or similar facilities, emergency numbers or any service, such as cell phones, in which the person called would be charged for the call.
- Artificial or Prerecorded Voice Calls may not be made to residential numbers unless the call falls under one of the exceptions listed below:

    - Non-commercial calls;
    - The consumer has given prior express consent to receive such calls;
    - Emergency situations in which the call is necessary for the health or safety of a consumer;
    - The call is from or on behalf of a tax-exempt non-profit agency;
    - The call does not include unsolicited advertisements; or
    - The call is from a business with which the consumer has an existing relationship.

C. Establishes Hours for Calls
- Telemarketing calls may only be made to a residence between the hours of 8:00 am and 9:00 pm as determined by the called party's location.

The Telemarketing Sales Rule (TSR) implements the Telemarketing and Consumer Fraud and Abuse Protection Act of 1994. The TSR prohibits misrepresentations and abusive conduct by telemarketers, requires telemarketers to provide certain disclosures to consumers {See 16 C.F.R. §§ 310.4 (d) & 310.3(a)(1)} and to maintain records of their activity {See 16 C.F.R. §§ 310.5(a)(n). In addition, the TSR expands the scope of the coverage of the DNC list under the TCPA to require that sellers as well as telemarketers maintain DNC lists. A seller or telemarketer can be penalized up to $10,000 each time a call is placed to a consumer on the DNC list.

On January 29, 2003, the FTC amended the TSR to create a National Do-Not-Call (DNC) Registry. {See 16 C.F.R. § 310.4(b)(1)(iii)(b)} The National Do-Not Call Registry will be accessible to telemarketers and other sellers in September 2003. In October 2003, the FTC and the States will commence enforcement of the National DNC Registry provisions. Violators are subject to a fine of up to $11,000 per violation.

A number of states also have laws regulating telemarketing. See Resources below.

Resources:

Links to state telemarketing laws:
http://www.usautodialer.com/AutodialerTelemarketingStateLaws.html

30-day rule

Are there any other rules that apply when products are sold through a catalog, telephone or the Internet?

The FTC's Mail or Telephone Order Merchandise Rule makes it an unfair method of competition to solicit any order for the sale of merchandise to be ordered via mail, telephone, fax or the Internet unless the merchant has a "reasonable basis" to expect that the merchandise can be shipped

- within a certain time period which is clearly and conspicuously stated in the solicitation; or
- if no time period is stated within 30 days after receipt of the "properly completed order" from the buyer.

The 30-day clock begins to run upon the receipt of the information comprising a "properly completed order" – sufficient information to process and ship the merchandise including name, address, payment or credit account information sufficient to charge the account.

If the merchant later determines the merchandise can't be shipped within the time period stated or within 30 days, the merchant must seek and obtain the customer's consent to the delayed shipment. The merchant must advise the customer of their right to cancel and the merchant's obligation to provide a prompt refund, and advise the customer either of the definite revised shipping date or that the merchant is unable to determine a definitive revised shipping date. The merchant must have a "reasonable basis" for determining the new shipping date or any representation that the new shipping date is not definite, and the delay is indefinite.

For the first delay notice of 30 days or less, it is presumed the customer consents to the delay and is willing to wait for the merchandise, unless the customer notifies the merchant prior to the expiration of the revised shipping date and prior to the merchant shipping the merchandise. An example of a first delay notice of 30 days or less:

> Example: We will be unable to ship the above merchandise until [date 30 days or less later than original promised time]. If you don't want to wait, you may cancel your order and receive a prompt refund by calling toll free customer service 1-800-888-8888. If we do not hear from you before we ship the merchandise, we will assume you have agreed to this shipment delay.

For the first delay notice of more than 30 days or subsequent delay notices, it is presumed that the customer wants to cancel their order unless the customer consents to the shipping delay. The merchant must notify the customer of the revised shipping date or that there is an indefinite delay and that the customer has a continuing right to cancel their order. An example of a first delay notice of more than 30 days:

> Example: We are unable ship the merchandise listed above [until date 30 days or more than the original promised time] or [and we don't know when we will be able to ship it and the reason for our delay is _____].
> If you don't want to wait, you may cancel your order and receive a prompt refund by calling 1-800-888-8888. If we do not hear from you and we haven't shipped your merchandise within [30 days later than the original shipment date] your order will be canceled automatically and your money will be refunded.
> If you do not want your order canceled you may request that we keep your order. If you do request that we keep your order and fill it, you still have the right to cancel the order at any time before we ship it by contacting our toll free number.

If a merchant informs a customer during an initial telephone call that some but not all of the merchandise is available for shipment, this disclosure is considered a newly negotiated shipment date and does not constitute a delay notice under the Rule. Therefore, in the event a merchant has another delay in shipping, the merchant will be eligible to distribute a first delay notice, which includes a presumption that the customer consents to the delay as opposed to a second delay notice which includes a presumption that the customer wants to cancel their order.

Any required refund must be "promptly made" in the same form as the customer's initial payment (i.e. cash, check, money order, credit). If the payment was made in cash, check or money order, the refund must be sent to the customer within seven (7) working days. If the payment was made by credit, the customer must be reimbursed within one billing cycle.

The merchant may use any effective means of communicating delay notices.

This Rule is not applicable to:

- magazine subscriptions (and similar serial deliveries) except for the first shipment
- sales of seeds and growing plants
- orders made on a collect on delivery basis (C.O.D.) and
- transactions covered by FTC's Negative Option Rule (such as book and music clubs)

Resources:

16 C.F.R. 435 *Mail or Telephone Order Merchandise Rule*

Regulatory Enforcement of your Website: Who Will be Watching? Remarks of Roscoe B. Starek, III, Commissioner Federal Trade Commission http://www.ftc.gov/speeches/starek/onlinweb.htm

A Business Guide to the Federal Trade Commission's Mail or Telephone Order Merchandise Rule http://www.ftc.gov/bcp/conline/pubs/buspubs/mailorder.htm

Privacy Policies and Issues

Privacy is a major part of the FTC's consumer protection mission. Advances in computer technology have made it very simple for detailed information about individuals to be compiled and shared. As personal information has become more accessible, it has become imperative that consumers are knowledgeable regarding the information sharing and security practices of the businesses to which they have provided their personal information. This information is generally provided to the consumer in the form of a privacy policy.

A privacy policy is a business' statement of its collection, use and sharing policies with respect to personally identifiable information. If a policy is posted, the failure to adhere to its terms could be construed as an "unfair and deceptive" trade practice. Using the authority granted pursuant to Section 5 of the FTC Act, 15 U.S.C. §§ 41-58, which prohibits unfair or deceptive practices, the FTC has initiated a number of cases to enforce the promises in privacy statements, including promises about the security of consumers' personal information. See *FTC v. Toysmart.com*, No. 00-11341-RGS (D. Mass. filed July 10, 2000) & *In the Matter of* Guess?, Inc., and Guess.com, Inc File No. 022 3260.

In the FTC's Report, "*Public Workshop on Consumer Privacy on the Global Information Infrastructure"*, (http://www.ftc.gov/reports/privacy/privacy1.htm) the FTC outlined four basic issues that businesses should address with respect to the collection and retention of a consumer's private information. The Report suggests that a business should: (1) Give consumers **notice** of a website's information practices; (2) Offer consumers **choice** as to how their personally identifying information is used; (3) Provide consumers with **access** to the information collected about them; and (4) Ensure the **security** of the information collected.

Notice

Notice provided to consumers should be clear, conspicuous and written in easily understandable language. The notice should be provided to consumers before collecting any personal information and should inform consumers as to what personal identifiable information is being collected by the advertiser and how it will be used. Notices provided online should be easily accessible throughout the website and allow the consumer to print the policy.

Consumer Choice

Any privacy policy should offer the consumer choices as to how their personal information collected may be used for purposes beyond those for which the consumer initially provided the information. Most entities employ the use of an "opt in" or "opt out" policy to accomplish this task. Under an "opt in" policy, the company must obtain a consumer's affirmative consent prior to sharing any of the information collected. The "opt out" approach allows a business to use consumer information unless that consumer expressly notifies the business that it may not use such information.

Access

A privacy policy should permit consumers to view the data collected for accuracy and outline procedures for correcting any inaccurate information.

Security

Companies which collect consumer personal data should take reasonable steps to protect the information from theft, misuse loss or unauthorized access. A good source for information to aid businesses in

addressing common security issues is the FTC fact sheet, "*Security Check: Reducing Risks to your Computer Systems*." http://www.ftc.gov/bcp/conline/pubs/buspubs/security.htm

Children's Advertising

Are there special rules regarding advertising to children?

The FTC pays particular attention to ads aimed at children because children may be more vulnerable to certain kinds of deception. Advertising directed to children is evaluated from a child's point of view, not an adult's point of view. The FTC also works with the Children's Advertising Review Unit (CARU) of the Council of Better Business Bureaus. CARU is a private, self-regulatory group affiliated with the BBB that publishes self-regulatory guides for children's advertising.

The Children's Online Privacy Protection Act is a federal law that requires websites to obtain verifiable parental consent before collecting, using, or disclosing personal information from children, including their names, home addresses, email addresses, or hobbies. The FTC has issued a *rule* outlining the procedures for commercial websites to use in obtaining parental consent. The rule applies to operators of commercial websites and online services directed to children under 13, and general audience sites that know that they are collecting personal information from a child. For more information, see How to Comply with the Children's Online Privacy Protection Rule. Visit the FTC's website (www.ftc.gov/kidzprivacy) for more information about how to protect kids' privacy online.

This information is from the FTC's Web site at http://www.ftc.gov/bcp/conline/pubs/buspubs/ad-faqs.htm

Dispute Resolution and the NAD

What is the NAD?

When advertising disputes arise, one option that should always be considered is taking the dispute to the National Advertising Division or NAD. The NAD is part of the Counsel of Better Business Bureaus. http://www.nadreview.org The NAD is the primary non-judicial dispute resolution forum for the advertising industry. The NAD is often a cost-effective and relatively quick way for companies to challenge false or misleading national advertising by their competitors.

In contrast to the option of judicial resolution of disputes, the NAD process is quick and relatively inexpensive. The NAD charges no fees for its services, and its Procedures (available on its Web site) are designed to allow for a decision within 60 days after the filing of a challenge. Although the process is voluntary, the NAD has been extremely successful in getting advertisers to comply with its decisions.

If your company is on the receiving end of a false advertising claim or an unfair competition claim based on its advertising, be sure to check your general liability insurance policies for possible coverage. The "advertising injury" provisions of general liability insurance polices will often cover such, in addition to trademark infringement claims.

Resources:

NAD Procedures For Resolving Advertising Disputes: Simple, Swift And Effective
Metropolitan Corporate Counsel http://www.wrf.com/db30/cgi-bin/pubs/0701WileyLatimer.pdf

To Sue Or Not To Sue - National Advertising Division — An Alternative to Litigation in the Advertising Industry. by Jefferey S. Edelstein http://www.adlaw.com/images/NADread.pdf

Selected Topics in Advertising Law – materials from an ACCA AM 2000 program titled Selected Topics on Advertising Law features materials presented by an NAD representative who appeared on the panel. http://www.acca.com/education2000/am/cm00/309.pdf

From Arent Fox: http://www.arentfox.com/publications/alerts/alerts2001/alert2001-06-01kaminski/alert2001-06-01kaminski.html

ADDITIONAL MATERIALS

HALL DICKLER KENT GOLDSTEIN & WOOD LLP

Contract Between an Advertising Agency and Advertiser

(Straight Commission)

[Client]
Date:
[Address]
Gentlemen:

You have retained us and we hereby agree to serve as your advertising agency in accordance with and subject to the following terms and conditions:

1. Assignment

   Our assignment shall relate to the following product(s) or service(s):
   [insert products and services assigned]
   During the term of this agreement, we shall be the sole company charged with the responsibility of preparing and placing advertising with respect to such product(s) or service(s). You may assign additional products or services to us from time to time, subject to our ability to handle same. If additional products or services are assigned to us and we agree to handle same, all terms and conditions hereof shall apply in the same manner as with respect to the originally assigned product(s) or service(s), unless otherwise mutually agreed to in writing. We are authorized to act as your agent in purchasing materials and services required to produce advertising on your behalf. During the term of this agreement, we shall not accept any assignment with respect to products or services competitive to those assigned by you to us.

2. Nature of Services

3. We shall perform the following services for you in connection with the planning, preparing and placing of advertising for your product(s) or service(s):

   a. Study your products or services;

   b. Analyze your present and potential markets;

   c. Create, prepare and submit to you, for approval, advertising ideas and programs;

   d. Employ on your behalf our knowledge of available media and means that can be profitably used to advertise your product(s) or service(s);

e. Prepare and submit to you, for approval, estimates of costs of these recommended advertising programs;

f. Write, design, illustrate or otherwise prepare your advertisements, including commercials to be broadcast, or other appropriate forms of your message;

g. Order the space, time, or other means to be used for your advertising, endeavoring to secure the most advantageous rates available;

h. Properly incorporate the message in mechanical or other form, and forward it with proper instructions for the fulfillment of the order;

i. Check and verify insertions, displays, broadcasts or other means used, to such degree as is usually performed by advertising agencies; and

j. Audit invoices for space, time, material preparation and services.

4. Compensation

The basis of our compensation shall be as follows:

a. On all media purchased by us on your behalf, we shall bill you at the published card rates, or negotiated rates, as may be applicable. If no agency commission is granted or allowed on any such purchases, you agree that we may invoice you a gross amount which, after deduction of our cost, will yield us fifteen (15%) percent of such gross amount as agency commission.

b. With respect to the engagement of talent, we shall bill you the authorized engagement rate, plus any taxes, insurance, pension and health fund contributions, talent payment service fees, etc. applicable thereto, plus a gross amount which, after deduction of our cost, will yield us fifteen (15%) percent of such gross amount as agency commission. You recognize that we are a signatory to collective bargaining agreements with Screen Actors Guild and American Federation of Television and Radio Artists, and that the hiring of talent by us on your behalf will be subject to the terms of such agreements.

c. On broadcast production, artwork, engravings, type compositions and any and all art and mechanical expenses incurred by us, pursuant to your authorization, we shall invoice you a gross amount which, after deduction of our cost, will yield us fifteen (15%) percent of such gross amount as agency commission.

d. If we undertake, at your request, special assignments such as market, product or distribution research, or other research (with the exception of research for copy development testing purposes), or special assignments such as market counseling or sales meeting presentations, the charges made by us will be agreed upon in advance whenever possible. If no agreement was made, we shall charge you at our standard rates for the work performed by us. In addition, for materials or services purchased from outside

sources under your authorization, we shall invoice you a gross amount which, after deduction of our cost, will yield us fifteen (15%) percent of such gross amount as agency commission.

e. You agree to reimburse us for such cash outlays as we may incur, such as forwarding and mailing, telephoning, telegraphing and travel, in connection with services rendered in relation to your account.

5. Billing and Payment Procedures

a. We shall invoice you for all media costs sufficiently in advance of our payment date to media to permit payment by you to enable us to take advantage of all available cash discounts.

b. The cost of production materials and services shall be billed by us upon completion of the production job or upon receipt of supplier invoice prior thereto.

c. On all outside purchases other than for media, we shall attach to the invoice proof of billed charges from suppliers.

d. All cash discounts on agency purchases including, but not limited to, media, art, printing and mechanical work, shall be passed on to you, provided our billing terms are complied with, and there is no overdue indebtedness to us at the time of payment to the vendor.

e. Rate or billing adjustments shall be credited or charged to you on the first billing date after we have been invoiced or as soon thereafter as otherwise practical.

f. All invoices shall be rendered on or about the first day of each month and will be payable the tenth day of the month.

g. Invoices shall be submitted in an itemized format. Interest will be charged on overdue invoices at a rate of twelve (12%) per annum or the maximum permitted by law, whichever is less. In the event we are required to use legal process to recover any fees due us, you agree to reimburse us for any costs associated therewith, including reasonable attorneys fees.

6. Commitments to Third Parties

a. All purchase of space and facilities and all engagement of talent with respect to the advertising of your products shall be subject to your prior approval.

b. If you should direct us to cancel or terminate any previously authorized purchase or project, we shall promptly take all appropriate action, provided that you will hold us harmless with respect to any costs incurred by us as a result thereof.

c. We warrant and represent to you that in purchasing any materials or services for your account, we shall exercise due care in selecting suppliers and make every effort to obtain

the lowest price for the desired quality of materials or services. Wherever possible, we shall obtain competitive bids. In no event shall we purchase any materials or services from any supplier which is a subsidiary or affiliated company or which is known to us to be owned or controlled by any of the directors or officers of this company, without making full disclosure to you of any such relationship.

d. We warrant and represent that if at any time we shall obtain discounts or rebates from any supplier, whether based on volume or work given to such supplier by us or otherwise, then and in such event, we shall remit to you, within a reasonable time after our receipt of such discount or rebate, such proportion thereof as the volume of work given by us to such supplier on your behalf bears to the total volume of work given by us to such supplier from all of our clients during the pertinent period to which the discount or rebate is applicable.

7. Inspection of Books

We agree that any and all contracts, correspondence, books, accounts and other sources of information relating to your business shall, upon reasonable prior notice, be available for inspection at our office by your authorized representatives during ordinary business hours.

8. Safeguarding of Property

a. We shall take all reasonable precautions to safeguard any of your property entrusted to our custody or control, but in the absence of negligence on our part or willful disregard by us for your property rights, we shall not be responsible for any loss, damage, destruction, or unauthorized use by others of any such property.

b. We shall not be responsible for the return of engravings after their use in publications, unless you specifically request their return before they are sent to the publications.

9. Indemnities

a. We shall indemnify and hold you harmless with respect to any claims or actions against you, based upon material prepared by us, involving any claim for libel, slander, piracy, plagiarism, invasion of privacy or infringement of copyright.

We agree to obtain and maintain in force during the term hereof, at our sole expense, an Advertising Agency Liability Policy having a minimum limit of liability of [insert policy limit]. If requested by you, we agree to furnish a copy of such policy to you.

b. You will indemnify and hold us harmless with respect to any claims or actions instituted by third parties which result from the use by us of material furnished by you or where material created by us is substantially changed by you. Information or data obtained by us from you to substantiate claims made in advertising shall be deemed to be "materials furnished by you."

c. In the event of any proceeding against you by any regulatory agency or in the event of any court action or self-regulatory action challenging any advertising prepared by us, we shall assist in the preparation of the defense of such action or proceeding and cooperate with you and your attorneys. You will reimburse us any out-of-pocket costs we may incur in connection with any such action or proceeding, unless same is our responsibility pursuant to (a) above.

d. You agree to indemnify us and hold us harmless with respect to any death, personal injury or property damage claims or actions arising from the use of your products or services. If you secure Product Liability Insurance with respect to the use of any products assigned to us, you will cause us to be named as a co-insured and maintain such policy at your cost and expense.

10. Term of Agreement

a. The term of this agreement will commence on [insert starting date] and will continue in full force and effect until terminated by either party upon written notice of such intention given to the other party not less than [insert number of days of notice] days in advance, provided that in no event may this agreement be terminated effective prior to the expiration of [insert minimum term] months from the commencement of the term. Notice shall be deemed given on the day of mailing or in case of notice by telegram, on the day it is deposited with the telegraph company for transmission.

b. The rights, duties and responsibilities of this agency shall continue in full force during the period of notice, including the ordering and billing of advertising in print media whose published closing dates fall within such period and the ordering and billing of advertising in broadcast media where the air dates fall within such period.

11. Ownership

a. As between you and us, all advertising materials prepared by us and accepted and paid for by you for use in advertising hereunder shall become your property. It is understood that there may be limitations on the use and ownership of materials by virtue of the rights of third parties. Whenever possible, we shall advise you of the existence of such limitations.

b. At termination of this agreement, you agree that any advertising, merchandising, packaging and similar plans and ideas prepared by us and submitted to you (whether submitted separately or in conjunction with or as part of other material) but not used by you, shall remain our property unless it was either mutually agreed in writing that any such plan or idea became your property, or specific payment of the cost of its development was agreed upon and made by you. You agree to return to us any copy, artwork, plates, or other physical embodiment of the creative work relating to any such ideas or plans, which may be in your possession upon termination.

12. Rights Upon Termination

a. Upon termination of this contract, we shall transfer, assign and make available to you or your representative, all property and materials in our possession or control belonging to

and paid for by you, subject, however, to any rights of third parties of which we have informed you.

b. We also agree to give all reasonable cooperation toward transferring, with approval of third parties in interest, all contracts and other arrangements with advertising media or others for advertising space, facilities and talent, and other materials yet to be used, and all rights and claims thereto and therein, upon being duly released from the obligation thereof. You recognize that talent contracts with members of certain labor unions or guilds generally cannot be assigned except to signatories to the collective bargaining agreements governing the services rendered by such talent.

c. Upon termination, no rights or liabilities shall arise out of this relationship, regardless of any plans which may have been made for future advertising, except that any noncancelable contracts made on your authorization and still existing at termination hereof, which contracts were not or could not be assigned by us to you or someone designated by you, shall be carried to completion by us and paid for by you in the manner described in Paragraph 3 above.

13. Arbitration of Disputes

The sole remedy for the resolution of disputes between the parties to this agreement shall be arbitration before one arbitrator, in accordance with the Commercial Arbitration Rules of [insert name of arbitration association], such arbitration to be held in the City of _____, State of _____.

14. Notices

15. Any notice pursuant to this contract shall be deemed given on the day of mailing or, in case of notice by telegram, on the day it is deposited with the telegraph company for transmission.

16. Governing Law

17. This agreement shall be interpreted in accordance with the laws of the State of _____. If the above accords with your understanding and agreement, kindly indicate your consent hereto by signing in the place provided below.

Very truly yours,
[Agency]

By: _____

Accepted and Agreed:
[Client]

By: _____

HALL DICKLER KENT GOLDSTEIN & WOOD LLP

General Release - Personal

In consideration of the payment to me of the sum of $ _____ and other valuable consideration, receipt whereof is hereby acknowledged, I hereby agree as follows:

1. I give and grant for a period of _____ years (hereinafter referred to as the "Term") to _____ ("Client") and _____ ("Agency/Advertiser"), its and their respective licensees, successors and assigns (herein collectively called the "licensed parties"), the right to use, publish and copyright my name, voice, picture, portrait and likeness in any and all media and types of advertising and promotion, without limitation, of _____, a product or service of Client.

2. I agree that all photographs of me used and taken by the licensed parties are owned by them and that they may copyright material containing same. If I should receive any print, negative or other copy thereof, I shall not authorize its use by anyone else.

3. I agree that no advertisement or other material need be submitted to me for any further approval and the licensed parties shall be without liability to me for any distortion or illusionary effect or adverse result to me on account of the publication of my picture, portrait or likeness.

4. I warrant and represent that this license does not in any way conflict with any existing commitment on my part. I have not heretofore authorized (which authority is still in effect), nor will I authorize or permit for the Term hereunder, the use of my name, picture, portrait, likeness or testimonial statement in connection with the advertising or promotion of any product or service competitive to or incompatible with _____.

5. Nothing herein will constitute any obligation on the licensed parties to make any use of any of the rights set forth herein.

_____ Signature

Sworn to before me this _____ day of _____, 19___

Notary Public

If releasor is not yet 21 years old, complete the following form:

I, the undersigned, hereby warrant that I am the _____ [insert the word "parent" or "guardian," as appropriate] of _____, a minor, and have full authority to authorize the above Release which I have read and approved. I hereby release and agree to indemnify the licensed parties and their respective successors and assigns, from and against any and all liability arising out of the exercise of the rights granted by the above Release.

_____

Signature of Parent or Guardian_____

Address

_____

Date _____

RELEASE

For full and valuable consideration receipt of which is hereby acknowledged, I _____ "Participant" hereby forever give my consent to _____ whose principal place of business is _____ and its direct and indirect subsidiaries and those representatives and agents acting under or pursuant to the authority of _____ or such subsidiary (collectively "Company") to publish and otherwise use the Participant's name and likeness and any reproductions, modifications or alternations thereof in _____("Materials).

Participant and my respective heirs, assigns, executors, administrators, and any others who may take by or through me, does waive and release, and agree to hold harmless Company from any and all rights, claims and causes of action whatsoever I may have, or which may arise, against Company including equitable or at law and including but not limited to those based on libel, invasion of privacy or violation of any right of publicity, copyright or trademark infringement.

This consent shall be irrevocable and unconditional, and is entered into with my full knowledge and understanding of the consequences of granting this consent.

In Witness whereof and intending to be legally bound under the laws of the State of Minnesota, I execute this Agreement this ___ day of _____ 2003.

Signed: _____

Attest:_____
Notary Public

ACKNOWLEDGEMENT AND CONSENT FORM

The undersigned (the "Employee"), as an employee of _____or one or more of its wholly owned subsidiaries (collectively, the "Company"), hereby acknowledges and agrees with the Company as follows:

(a) The Company periodically produces video, audio, printed material, photographs or other similar items or recordings (each of the foregoing and any similar item is referred to herein as a "Recording" or collectively as "Recordings"). These Recordings are used for general training, advertising or other business purposes.

(b) As a part of the Employee's regular employment duties with the Company, the Employee agrees to participate in the preparation of such Recordings and to contribute the Employee's likeness, image, name, signature and voice to such Recordings.

(c) The Employee agrees to allow the Company to use any and all such Recordings, and any and all reproductions, modification and alterations of such Recordings, including any likeness, image, name, signature and voice of the Employee for general training, advertising or other business purposes on a royalty-free basis.

(d) The Company shall be the exclusive owner of all copyrights and other rights of ownership in and to the Recordings.

(e) Employee, and his/her respective heirs, successors or assigns or any others who may take by or through Employee, do hereby forever waive, release and discharge and agree to hold Company and Company's successors or assigns harmless, from any and all rights, claims and causes of action including equitable or at law and including but not limited to those based on libel, slander, right of privacy, right of publicity, copyright or trademark infringement, in connection with the use of the Recordings.

EMPLOYEE

_____ _____

Signature Print Name

_____, 20__

Date

LIABILITY and PUBLICITY RELEASE

I, _____, am _____ years of age and my Social Security Number is ____ - ___ - ____. I reside at _____ _____, and my telephone number is (____) _____.

I hereby give my consent to _____ ("Sponsor"), and those acting under or pursuant to its authority, for the use of my name, address, picture, portrait, likeness, voice, or other indicia of my person in any and all advertising and promotional materials relating to the ("Promotion") in which I have won a prize.

I understand and acknowledge and hereby, for myself, my heirs, assigns, executors, administrators, and any others who may take by or through me, do waive and release, and agree to hold harmless against any and all rights, claims and causes of action whatsoever I may have, or which may arise, against Sponsor or any of its affiliated companies, or their advertising and promotion agencies, or any of their officers, directors, employees, representatives and agents, for any liability for any matter, cause or thing whatsoever, including but not limited to any injury, loss or damage to person, including death, and property, arising in whole or in part, directly or indirectly, from my acceptance, possession, use or misuse of the prize in the Promotion, or my participation in the Promotion. I also acknowledge that the Sponsor has not arranged for, nor carries, any insurance of any kind for my benefit or that of my heirs, executors and administrators relative to my use of the prize; and that I am solely responsible for obtaining and paying for any life, travel, accident, property or other insurance relative to my use of the prize.

I understand that the approximate value of my prize is $ _____. The prize consists of:

I acknowledge that: (a) Sponsor agrees to pay the lower of the actual value for each of the above identified expenditures or the stated maximum value for each of the above identified expenditures within the prize; (b) I must use the prize by no later than _____ ; (c) the value of the prize will be included in my Form W-2 provided to me by Sponsor and Sponsor will deduct the appropriate Social Security and Medicare taxes from my next check which I receive from Sponsor, no federal or state income tax will be withheld from my next check to cover the applicable federal and state income taxes relating to the prize; (d) all applicable taxes and assessments levied against the prize are solely my responsibility and that I shall indemnify and hold the Sponsor harmless from any liability for taxes or other assessments imposed on me as a result of the acceptance of the prize; (e) all expenses, if any, not specified above or which exceed the maximum value for any of the specified expenditures within the prize are my responsibility, including but not limited to meals, beverages, gratuities, taxes, hotel services, ground transportation, retail purchases and incidental expenses; (f) the prize is nontransferable; (g) I must make arrangements acceptable to the Sponsor for payment of any applicable taxes and fees prior to delivery or use of the prize; (h) the Sponsor has not arranged for and does not carry any insurance of any kind for my benefit or the benefit of my heirs, executors and administrators in connection with my acceptance or use of the prize; and (i) no cash or other substitutions for the prize will be allowed or otherwise granted except in the sole discretion of Sponsor.

I acknowledge that I must execute and return this Release, Waiver and Statement of Eligibility for receipt by Sponsor by _____, ____, the failure of which will result in the forfeiture of the prize. I also acknowledge that my travel companion must execute and return a liability and publicity release for receipt by Sponsor by _____, _____ in order to accompany me on the trip.

_____
Winner's Name Printed

_____
Winner's Signature

Date Signed _____

Sworn to before me this _____ day of
_____, _____.

_____
Notary Public

Property Release Agreement

The Property:
_____

Grant

For consideration which I acknowledge, I irrevocably grant to _____ ("Company") and Company's assigns, licensees and successors the right to enter onto the property listed above and to photograph, copy, publish, display and use images of the property in all forms and media including composite or modified representations throughout the world and in perpetuity for the following purposes:
_____

I waive the right to inspect or approve the manner in which the images of the property are used and waive the right to inspect any text that is used in connection with the images of the property.

Dates of Use

Company shall enter onto the property on the following dates and times:
_____

In consideration for the rights granted under this Agreement, Company shall pay me $_____ upon execution of this Agreement.

Company is not obligated to utilize any of the rights granted in this Agreement.

Warranty, Indemnity & Release I warrant that I am the owner of the property and have the authority to grant the rights under this agreement and agree to indemnify Company from any claims regarding my ownership of the property. I release Company and Company's assigns, licensees and successors from any claims that may arise regarding the use of the images of the property.

I have read and understood this agreement. This Agreement expresses the complete understanding of the parties.

Owner's Signature:
_____

Owner's Name:
_____

Owner's Address:
_____

Date: _____

CHECKLIST FOR ADVERTISING REVIEW

- Are all trademarks properly noted with ®, ™, or SM (at least the first time they appear)?

  (References to the company name or other trade names usually do not use a trademark symbol.)
- Are all trademarks properly used as adjectives and not nouns, verbs, or as possessives or plurals?
- Review the overall impression created by the ad. Is the overall impression (as seen by a typical consumer for your products) truthful and not misleading?
- Are any disclaimers required? Can the ad be changed to eliminate the need for a disclaimer? If not are disclaimers prominent, easy to understand, easy to find, and close to the claim they qualify?
- Review all statements and images. Use only truthful, non-deceptive and non-misleading, statements and images in your advertisements.
- Make sure your advertising doesn't create any implied warranties that you don't intend.
- Review the ad for both express and implied claims. Are all objectively measurable claims made in the ad supported by adequate substantiation? Document the substantiation and file it so it can be produced if necessary.
- Does the ad make claims about competitors or their products? Make only truthful, substantiated and non-deceptive claims about competitors, and make sure all such claims are supported by adequate substantiation.
- Does the ad mention any trademarks of competitors? If so, is the use of the marks legitimate non-trademark use?
- Avoid copying or imitating key elements of a third party's advertisement.
- Only use images of people, products, and trademarks in an advertisement if you have received written permission. Do you have proper releases from individuals quoted, mentioned, or depicted?
    - Don't use the image, name, voice of a famous person (or their likeness) without obtaining their written permission.
    - Do you have rights to use any photographs used?
    - Don't assume if you purchased a license for a stock photo that the people within the photo have agreed to allow the use of them. Rather it may just be the rights of the photographer that you have purchased.
- Only use legitimate testimonials and don't include endorsements that make false claims about your product or are deceptive or misleading. Make sure you have substantiation for all claims made in testimonials.
- Have a trademark search done on any proposed brand, logo or slogan which will be used in the advertisement and use the trademarks properly. Make sure any trademark chosen does not create an express or implied claim – or if it does, make sure you have adequate substantiation for the claim.

OFFICIAL RULES CHECKLIST FOR SWEEPSTAKES, GAMES, AND CONTESTS OF SKILL

Hall Dickler Kent Goldstein & Wood, LLP

Official rules serve as the contract between the sponsor and the consumer and are the most critical element of the promotion.

Avoid ambiguities in the rules as they may create administrative nightmares.

For virtually all promotions, the following should be included in the official rules:

___ No Purchase Necessary

___ Entry instructions

___ Limit on number of entries

___ Specify per person, per household, per e-mail address

___ Odds of winning

- For seeded games, probability games and preselected numbers games must give numerical odds
- Beware with "Collect and Win" games to calculate cumulative odds of receiving all game pieces

___ Prohibition on facsimile entries

___ Prize description/number available/approximate retail value

- Special provisions for travel, automobiles (or any vehicle which requires licensing) and events

___ Eligibility

- Age
- Residence
- Occupation
- Exclusion of Sponsor related parties
- Employees
- Agents
- Suppliers
- Family Members (Immediate or all)

___ Duration

- Commencement date
- Termination date

- Winner selection date

___ Limitation on sponsor's liability

___ Disclaimer of liability for lost, late, misdirected mail

___ Voiding clause

___ Taxes on prizes

___ Affidavit of eligibility

___ Compliance with rules

___ Winner's list

___ Reservation of publicity rights

___ Entries property of sponsor

___ Judges decisions final

___ Minors clause

___ Releases (publicity, liability, travel)

___ Sponsor name and address

For On-line Games Add:

___ Internet Liability

- Fraud clause (virus or other system malfunction)
- Faulty transmission

___ Entry deemed made by holder of e-mail account

___ Times and time zones

___ Right to amend, modify or terminate promotion

___ Privacy Policy (reference and hyperlink to privacy policy)

- Parental consent required if site is targeted to children under 13

For Instant Win/In-Pack Games Add:

___ Duration

- For requests for free game pieces

___ Unclaimed prizes not awarded

___ "Kraft" clause - Printing, typographical other entries

For Contests Of Skill Add:

___ Format for entries

___ How and what to submit (e.g. Essay, 8 x 10 photo, etc.)

___ Detailed description of judging criteria

___ Qualification of judges

___ Non-return of entries

___ Notification that entries become property of the sponsor

- Ownership of rights (copyright)

___ Warranty as to originality or ownership of entry

Warning: never change the rules in the middle of a promotion

Some states have special disclosures requirements which may impact on what must be included in the rules and where the rules must be distributed (e.g., Connecticut, Colorado, Florida, Maryland, Massachusetts, Minnesota, New Mexico, New York, Rhode Island, Tennessee, Texas)

Additional Resources and Web Sites

Hall Dickler Kent Goldstein & Wood, LLP's ADLAW® site: http://www.adlaw.com/index.html

ACCA Virtual Library:

Advertising Law Primer, James B. Astrachan, Esquire -
http://www.acca.com/protected/article/intelprop/advertiselaw.pdf
Selected Topics in Advertising Law AM 2000 Materials
http://www.acca.com/education2000/am/cm00/309.html

Advertising & Marketing Book, Blackwell Sanders Peper Martin LLP,
http://www.blackwellsanders.com/admarketingIntro.aspx (Download)

Books:

Advertising Compliance Handbook
by Kenneth A. Plevan, Miriam L. Siroky

"This reference provides expert and practical answers to the complex compliance problems faced by attorneys who review and approve clients & advertising claims, are involved in advertising litigation and participate in regulatory investigations and challenges. The authors address and analyze the tough legal questions and business practices affecting advertisers, such as trademark and copyright infringement, product disparagement and corporate defamation and First Amendment issues."

Please Be Ad-Vised: The Legal Reference Guide For The Advertising Executive (2000)
by Douglas J. Wood
"Please Be Ad-vised (Third Edition) Most advertising and marketing executives cannot claim a mastery of advertising and marketing law; yet it is an area we deal in almost every day. Please Be Ad-vised is considered the industry's legal reference guide for advertising and marketing professionals. It is a comprehensive and practical tool for avoiding legal blunders. In addition to summaries of dozens of legal issues, the book provides sample legal forms for everything from ownership and protection of creative work to agency-client relationships. It also includes a standard contract for developing Web sites and FAST standards for interactive media. Other topics included are copyright and trademark infringement, working with production companies, contracts and employment agreements, rules of comparative advertising, government regulation, talent unions and negotiating with employees."

The Advertising Law Guide (2000) http://www.allworth.com/Catalog/BL176.htm
by Lee Wilson
"All the daily legal issues that confront anyone working in the advertising industry are explained in this reader-friendly reference that makes complex laws readily accessible to lay readers. In concise but thorough text the author covers trademarks, privacy and publicity issues, libel, advertising on the Internet guidelines for marketing to children and the elderly, and complying with FTC regulations. Detailed checklists are also provided to help advertisers assess the legality of their designs. Several legal forms are included to guide copywriters, graphic designers, photographers, illustrators, and other advertising pros involved in mounting and promoting campaigns."

