5 Answers to the Questions Every Advertising Lawyer Gets Asked

Law Department Management

Advertising is a fast-paced and exciting industry. Lawyers who work for brands and advertising agencies get an early look at the creative and cutting-edge campaigns to sell a company's products. Despite the fascinating and ever-changing work, the same basic legal issues often reappear, thanks in part to the large production of advertising collateral and the US Federal Trade Commission's regulatory focus on business education. Below are five questions every advertising lawyer gets — and the answers that their marketing colleagues need in order to execute their campaign.

Question 1: Can we just put in a disclaimer to fix this incomplete (or inaccurate, or outdated) information in my ad?

Answer: No.

Every advertising lawyer will be asked whether a disclaimer can be used to fix some potential insufficiency in the company's advertising. The insufficiency could have several different causes. Perhaps the marketers want to highlight an aspect of the product in a way that might confuse some consumers. Perhaps there was not time or money available during the creative process to update old claims or other information in the advertising. Maybe the marketers want to provide a partial description of the product in a banner advertisement or other limited space context.

Faced with creative that has potentially incomplete, inaccurate, or outdated information, the

advertising lawyer must recommend additions to the core-marketing message to ensure the information is complete. These additions may dilute the creative impact of the marketing. Thus, the marketers may ask if the additional information required to complete the advertisement can be relegated to a disclaimer to preserve the core-marketing message.

For advertising law novices, a disclaimer is a statement that gives the reader, viewer, or listener additional information about a claim or offer made elsewhere in the advertising; or is required to limit a claim or offer to its proper scope or to avoid any possible misinterpretations. Disclaimers are incredibly prevalent in all forms of advertising today.

> *However, according to the Federal Trade Commission and state laws, disclaimers should never be used to directly contradict or unreasonably limit the statements made elsewhere in the advertising.*

Often, the best way to handle this tension is to work out a compromise position, where the advertising copy is modified to mitigate the advertising lawyer's concern within the advertisement and a disclaimer is added that does not contradict the modified copy.

For example, a product may have a safety feature that only functions during good weather conditions. The marketers might want to create a television advertisement that mentions the safety feature but only have video footage of the product in inclement weather. A disclaimer that the safety feature will not function in the way depicted in the television spot is ineffective and likely to mislead consumers. A better option might be to bifurcate the television spot in a way that highlights the safety feature but does not suggest that it operates in inclement weather.

Question 2: Do I need permission to use this other brand's name (or image, or song, or logo) in my advertisement?

Answer: Yes.

The most common complaint, by far, about a company's advertising, will not come from a competitor, a consumer, the Better Business Bureau, or state and federal regulators. Rather, it will come from a third party whose intellectual property the brand or advertising agency did not get permission to use. Generally, the complaint will come in the form of a cease and desist letter, demanding an immediate takedown of the advertisement, a demand to repay "damages" caused by the allege misuse, and a threat that a lawsuit will be filed immediately if the demands are not met.

Those lawyers directly representing companies can often rely on the company's advertising agency to obtain clearances. Advertising agencies often agree in their contract to obtain clearances on behalf of the company. However, certain advertisements may be created directly by the company's employees, who may be unfamiliar with the need for third party clearance.

> *Thus, always counsel the marketers, whether at the company or advertising agency, to obtain clearance in writing to use all third party-owned copyright or trademark protected elements in every advertisement the company creates.*

Clearance should be sought for names, logos, images, music, song titles, artist names, photos, hashtags, products, brands, landmarks, and artwork. Further, releases should be obtained for all

names, likenesses, or images of all persons shown or referenced in the advertisement. Finally, clearance should be obtained for any quotes or attributions used in the advertisement. The company should also create and maintain a uniform, searchable database of permissions for third party intellectual property.

For example, a common advertising battleground is musical challenges to television marketing. Musical rights holders will often challenge snippets of music as infringing their intellectual property. In reality, the music is almost always produced uniquely for each advertisement by a music house or purchased by the advertising agency from a rights holder. Having a tender process in place with the music house and advertising agency in advance will save time when permissions are missing. One might even consider “practicing” tendering a ceases and desist demand to the music house or advertising agency, given the speed with which takedown requests can proceed.

Question 3: Our competitors do this in their advertisements. Can we?

Answer: Maybe.

When it comes to advertising, very rarely does a brand use a wholly original marketing tactic. Much more commonly, marketers survey their product category and tailor competitor tactics and messages to fit their product and brand. Thus, a common defense to a questionable advertising tactic is that a competitor is using a particular tactic and to remain competitive the company must use a similar tactic.

Advertising lawyers should undertake competitor-advertising research as well. Advertising law is not a highly litigated area in the United States. In fact, much of the legal guidance to marketers will be based on Federal Trade Commission or Better Business Bureau business education guidance documents. In the absence of regulatory or judicial authority, the advertising lawyer spends much of their time doing rule of reason analyses. While competitor brands are never exactly the same, they do provide good guidance into reasonability and staying within the pack is a great way to ensure that your advertising is compliant. In short, the advertising lawyers and marketers will both be looking at competitor advertisements to understand what the edge of reasonability is.

> *The key piece of advice is that every industry has common practices, but every company is different.*

Always ask for and review competitive examples to discover what other companies have found to be reasonable. Even when a tactic appears unreasonable on its face, a trend may exist that provides a reasonable basis for the brand to use a similar tactic. Alternatively, one may discover competitor advertising that is clearly unlawful, creating opportunities to challenge the competitor or inform the regulator.

For example, a company may include a large amount of diverse rebates on its products, limited by geographic location, while a competitor has one key rebate available nationally. Those distinctions in pricing tactics will carry through into the price advertising. When the marketers ask to show net prices after rebates in order to compete with the competitor who also shows net price, the advertising lawyer will have to evaluate whether the different pricing structure and the diversity of rebates makes the advertisement unfair to consumers.

Question 4: What is the worst thing that could happen if we run my

advertisement as is?

Answer: Usually nothing, possibly something cataclysmic.

Advertising law deals with low probability, high impact issues. Most advertising, even “risky” advertising, will not result in a negative outcome for the company. This dynamic is caused by the regulatory focus of the Federal Trade Commission on business education and by the sheer volume of advertising in the United States. As such, usually nothing will happen after a company runs an advertisement.

However, in some cases, incredibly high impact results could occur. In California, for example, a violation in a single piece of advertising can result in statutory damages per advertising impression (which could run into the tens of thousands of dollars for television or internet advertising), loss of business licenses to operate in the state, restrictions on future advertising, and even misdemeanor criminal penalties. Further, national advertising reaches thousands or millions of consumers, which create the conditions for eight-figure class action exposure.

> *For most advertising law issues, the company or advertising agency’s compliance program is the key defense rather than defenses to a particular piece of advertising.*

Therefore, maintenance of a robust advertising pre-clearance process and continuous business education about the need for pre-clearance is key. The Federal Trade Commission is more likely to contact a brand over repeated violations stemming from the lack of a pre-clearance process than over one particular advertisement. Additionally, a quality pre-clearance program will catch most issues that might create friction with consumers, competitors, the Better Business Bureau, or state regulators.

For example, having a standard process to validate advertising claims will avoid inconsistent statements from different parts of the brand, which could raise red flags with consumer groups or regulators.

Question 5: Wait, how does our product work?

Answer: I don’t know. Have you talked to the experts?

Lawyers are experts in legal issues, but often their role includes making sure their clients’ ideas succeed. Marketers may look to the advertising lawyer as a one-stop shop for all the answers about a company’s product. However, most advertising lawyers are not in charge of creating the pricing or options for a product, and are not the software engineers or technicians who designed or assembled it. Knowing what not to give an opinion about is just as important as knowing what to give an opinion about.

> *With that in mind, the advertising lawyer must clearly define roles and responsibilities in the advertising pre-clearance process.*

First, one must ensure that the legal team does not have a practice of opining on non-legal issues, such as whether the product’s options are depicted correctly or whether the brand’s advertising standards are being followed. Second, one must ensure that the appropriate parties are being

consulted.

A good catch-all to ensure the appropriate parties have reviewed the advertisement is to ask the marketers to verify that the information in the advertisement is accurate and to provide the marketers with a list of roles within the company or advertising agency that need to sign off on the advertisement.

For example, one can ask the marketers to mark on a submission email that all safety and risk groups, finance groups, and product experts have reviewed a piece of creative before the legal team reviews it. This ensures that those who actually know how a product should work get to weigh in early in the creative process.

Bonus question: Can you review it today?

Bonus answer: Of course!

Advertisers have quick turnarounds, and advertising lawyers have to stay up to speed. Learning to respond quickly, accurately, and with as little impact as possible on the creative process are the keys to success. With reasoned answers prepared, advertising lawyers can help the company's creative team shape their voice in the market.

The opinions of this author are his own.

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