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Advertising and Marketing Rules of the Road: Avoiding Pitfalls, Protecting Your Brand, and Making Trouble for Your Competitors

By Joseph J. Porcello[1]

From small family-owned businesses to large global corporations, a company's ability to execute an effective advertising and marketing campaign is critical to building a recognizable, durable brand and driving sales. But what if your ads land your company in legal trouble, resulting in a court order enjoining your ad campaign and requiring you to pay substantial fines or monetary damages? Conversely, what if your competitors are playing unfairly in the marketplace, by falsely disparaging your company and products or making inaccurate advertising claims about their own? In either case, a promising product launch or ad campaign can be stopped dead in its tracks, costing your company money and potentially damaging your brand and customer goodwill. Every company should have a firm understanding of advertising and marketing laws and regulations to enable it to avoid pitfalls, police competitors, and, in the right situations, make strategic use of the available legal tools to create advantages in the marketplace.

Several false advertising, unfair competition, and consumer protection regimes may apply to your company's advertising and promotions, including state and federal regulation by the state attorneys general and the Federal Trade Commission ("FTC"), industry self-regulation by the National Advertising Division of the Better Business Bureau, and private litigation under the federal Lanham Act and state unfair and deceptive trade practices statutes. Generally speaking, these regulations prohibit false or misleading statements in advertising and marketing, or other unfair or deceptive practices. Under certain regimes, such as the Lanham Act, your company can sue or be sued by competitors, with no proof of an intent to deceive the public necessary for liability. A violation of advertising and marketing laws can be very serious, and it may result in your company being ordered to pay substantial amounts to private litigants or the government.

In this article, we discuss several rules of the road to help companies and their sales teams navigate around potential legal problems with their own ads and identify improper ads by competitors.

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Rule 1 – Your Ads Must Be Truthful and Accurate

It should go without saying: your company's advertisements should be truthful and not misleading to consumers. The most important reason to take care that advertising and marketing is truthful and accurate is to build and maintain consumer trust in your brand. Secondarily, however, truth and accuracy in your advertising is essential to avoiding the costs and disruption of litigation.

A critical first step in your company's pre-publication clearance process should involve a review of the ad at issue to identify all express and implied claims and to confirm that each of them is true and, even if factually accurate, would not tend to mislead reasonable consumers. The key is to identify and evaluate the overall net impression conveyed by the ad – including any images – to reasonable consumers. As part of this process, your company should consider whether any additional information, disclosures, or disclaimers are needed to avoid misleading consumers. If disclosures or disclaimers are necessary, they should be clear and conspicuous.

Examples where extra care is needed

- "Proof"-type claims – waterproof or fireproof means just that, not water or fire resistant under certain circumstances
- Price comparisons need to be fair – don't use your discounted pricing but your competitor's regular pricing
- "Made in USA" claims should not be made without careful prior consideration because this type of claim is closely regulated by the FTC and is often challenged
- "Green" claims – see the FTC Green Guides

Rule 2 – Ensure Your "Puff" Is Actually Puffery

An important part of your company's pre-publication review should involve an evaluation of whether your advertising claims constitute non-actionable puffery or are instead statements of objective fact that, if false or misleading, may subject your company to legal liability. In contrast to statements of fact, claims that qualify as puffery need not be substantiated.

Courts and the FTC have offered various definitions of puffery. The common thread is that an advertising claim is puffery if no reasonable consumer would rely on it. Generally speaking, a claim may qualify as a puff where it is (1) an exaggerated statement of bluster or boast ("Built Ford-Tough" or "The Most Advanced Home Gaming System in the Universe"), or (2) a vague or highly subjective claim of superiority over competing products ("Better Ingredients. Better Pizza." or "Best Beer in America" or "America's Favorite Pasta"). In other words, a claim is puffery if it cannot be empirically measured or verified to determine whether it is true or false. Whether a claim is puffery is not examined in isolation. The claim must be evaluated within the full context of the ad and advertising campaign at issue. In practice, it can

be difficult to draw the line between whether a claim is properly interpreted as a statement of fact or puffery.

Rule 3 – Have Substantiation for Your Claims

As a general rule, you should not make a claim in your advertising and marketing that could be interpreted by a reasonable consumer as a statement of objective fact unless you have a reasonable basis for that claim. The substantiation for your advertising claims must exist ***before*** the ad is published. The evidence supporting your claims should be carefully vetted during your company's pre-publication review process.

It is particularly important for your company to carefully evaluate the evidence supporting product health, safety, and efficacy claims. These types of claims should be supported by competent and reliable scientific evidence (*e.g.*, tests, analyses, research studies). Anecdotal evidence is not sufficient. If an ad references testing or studies, you must ensure that those materials actually support the specific claims you have made. The failure to do so creates an unnecessary risk of litigation, particularly with respect to comparative advertisements involving competitors and their products.

Examples where extra care is needed

- Statements that imply a level of performance under specific conditions must be supported by evidence relating to those particular conditions; evidence under different conditions is not sufficient

- Statements that make health, safety, or product efficacy claims without including qualifications (it would be unusual for such claims to remain true and not misleading under all circumstances)

- Comparative claims

Rule 4 – Treat Competitors Fairly

Ads that favorably compare your goods or services to those of your competitors can be extremely effective from a business perspective. From a legal perspective, it is common for competitors to sue each other over comparative ads. Given this enhanced risk, when your company's ads contain comparative claims, you should carefully evaluate whether the claims are truthful and supported by competent and reliable evidence during your pre-publication review.

Examples where extra care is needed

- Statements that a competitor's product is not as effective or safe as your product

- Statements about whether or not your competitor's product meets or exceeds industry or government standards

- Statements about the mismanagement of a competitor, the financial instability of a competitor, or anything else that implies a competitor would not be a good business partner

Rule 5 – Take Care Using "Meets or Exceeds" Language

It may be tempting to claim your product meets or exceeds a government or industry standard, but make certain that it does, in fact, do so before the claim is made. This ties back to the need for competent, reliable, and on-point substantiation for your advertising and marketing claims.

Rule 6 – Obtain Permission to Use Third-Party Intellectual Property

Your company's pre-publication review process should include intellectual property rights clearance. If you determine that your ad incorporates a third-party's intellectual property, your company generally should take the safe route and either find alternative content or obtain permission to use that protected material prior to use. If you are unable to obtain copyright licenses, you should consult with legal counsel regarding whether you can still keep the material in the ad as "fair use." With respect to trademarks owned by third-parties, you should not include these trademarks in your ads – particularly, comparative ads using the competitor's marks – without first consulting with counsel about the specific use.

Examples where extra care is needed

- Ads that quote material written by someone outside of your company or its advertising agency; beyond brief quotes from copyrighted material, you should seek permission to use it

- Promotional material that uses the logo or trademark of an industry association or other third-party, particularly where such use implies approval, endorsement, etc. of your products

- Industry reports to which you subscribe that specifically limit public dissemination

Rule 7 – Perform Accurate Product Demos

If you perform product demonstrations as part of your marketing and advertising, those demonstrations must accurately depict how the product will perform under normal consumer use.

Rule 8 – When in Doubt, Speak Up

If you or another employee has concerns that a business communication may expose the company to legal liability, those concerns should be escalated to management and/or counsel, as appropriate.

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The rules of the road discussed in this article are intended to provide generally applicable guidance. The legality of any given ad, however, depends substantially on the specific claims at issue and the broader context of the advertising and marketing. Experienced legal counsel can assist you in addressing these matters, whether as part of a pre-publication review or after a dispute has arisen. In addition, counsel can help you evaluate the ads of your competitors and develop strategies to respond to their false and misleading claims.

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