Top 5 Advertising Law Consideration for General Counsel

Craig C. Carpenter, BakerHostetler, Dallas

If your business sells products or services, it probably engages in advertising. Depending on your business, industry, and consumers, advertising may be a mild annoyance or a bet-the-company gambit. For the in-house counsel, advertising is usually a mix of familiar legal issues inherent in contracting, intellectual property, and litigation, with issues novel to advertising such as clearance, substantiation, and agency.

For the in-house attorney that doesn't specialize in advertising or media, the agreements, compliance requirements, lexicon, and speed that comes with advertising can be daunting. In this article, we will break down some of the major legal considerations in advertising and how these issues fit into this important business function.

1. Truth in Advertising

One of the basic tenets of advertising law is that businesses that communicate with consumers are responsible for those communications. Accordingly, advertisements must be truthful in order to be lawful. The Federal Trade Commission ("FTC") is one of the primary enforcers of "truth-in-advertising" laws. States also have authority under state consumer protection acts (the "mini-FTC Acts") and will sometimes partner with the FTC on enforcement of advertising. As the primary regulatory, the FTC policies this space by bringing law enforcement actions in federal and administrative courts, issuing warning letters, developing rules and guidance to businesses, advocating for the advertising industry's self-regulation, and preparing consumer education materials. The FTC's authority is derived from Section 5 of the Federal Trade Commission Act ("FTC Act"), which prohibits "unfair or deceptive acts or practices in or affecting commerce." According to the FTC, there are two pillars of advertising: (1) advertising must be truthful and not misleading, and (2) advertisers must have adequate evidence to back up all product claims before circulating their advertising.

The FTC may choose to litigate claims through the federal court system or through an internal administrative proceeding. When the FTC begins an action in federal court, it has the same burden of proof as any other plaintiff, however, when it begins with an FTC administrative action, a federal court reviewing such action must affirm the FTC's findings of fact if they are supported by "substantial evidence" and must give "substantial deference" to the FTC's constructions of the FTC Act.

Other federal agencies also may share jurisdiction with the FTC over products or services in specific industries. For example, the Food and Drug Administration ("FDA") shares jurisdiction with the FTC over the promotion of food, drugs, dietary supplements, medical devices, and cosmetics. Companies that sell products or services in those industries must do so subject to the FTC Act as well as FDA regulations. Similarly, additional restrictions may apply on how financial services businesses can use consumer data in advertising and marketing, whether under the Gramm-Leach-Bliley Act or IRS code. Other agencies whose jurisdiction may overlap with the FTC's include the Environmental Protection Agency, the Consumer Financial Protection Bureau, and the United States Department of Agriculture.

As one of the primary regulators of advertising, the FTC has published many informative guidelines for the benefit of advertisers regarding various aspects of truth-in-advertising. These guidelines and other FTC publications can often give insight as to what is most important to the Commission now. Several of these hot-button issues for the FTC are highlighted below.

a. Influencers and Endorsements

Endorsements and testimonials have been and continue to be a popular tool used in advertising campaigns. Basically, anything anyone says about your business or product could be considered an "endorsement" for advertising purposes. The FTC has prepared guidelines to provide advice regarding advertisers' use of endorsements by consumers, celebrities, and experts. Below is an excerpt of the FTC's summary of its guidelines for the use of endorsements and testimonials:

- All endorsements must reflect the honest experience or opinion of the endorser. Endorsements may not contain representations that would be deceptive, or could not be substantiated, if the advertiser made them directly.

- Endorsements by consumers must reflect the typical experience of consumers who use the product, not the experience of just a few satisfied customers. If an endorsement doesn't reflect users' typical experience, the ad must clearly disclose either what consumers can expect their results to be or the limited applicability of the endorser's experience. Saying "Not all consumers will get these results" or "Your results may vary" is not enough.

- Endorsements by celebrities must reflect the celebrity's honest experience or opinion. If the endorsement represents that the celebrity uses the product, that celebrity actually must use the product. Once a celebrity (or expert) has endorsed a product, the advertiser has an obligation to make sure the endorsement continues to reflect the endorser's opinion.

- To give an expert endorsement, a person must have sufficient qualifications to be considered an expert in the field. But just being an expert isn't enough. Expert endorsements must be supported by an actual evaluation, examination, or testing of the product that other experts in the field normally would conduct to support the conclusions in the endorsement.

- Advertisers also must disclose any material connection between a person endorsing a product and the company selling the product. A "material connection" is defined as a relationship that might affect the weight or credibility of the endorsement. For example, if an endorser is an employee or relative of the advertiser, that fact must be disclosed because it is relevant to how much weight a consumer would give to the endorsement. Similarly, an advertiser must disclose if a consumer has been paid for giving an endorsement.

Additionally, the FTC announced on August 23, 2022 that it is seeking additional public comment on how children are affected by digital advertising that may "blur the line between ads and entertainment" and specifically identifies influencer and celebrity posts on social media as an area of interest. As such, regulating influencer testimonials directed toward children may soon become an FTC priority.

b. Sweepstakes/Contests

Advertisers are frequently looking for ways to entice and incentivize customers. Increasingly, advertisers look to sweepstakes, contests, and other promotions to engage more customers. This is particularly easy on social media where, with one post, brands can introduce a promotion to drive significant engagement with their target demographic. One way they cannot lawfully do this, however, is by holding an illegal lottery.

A lottery is a promotion that contains each of the following three elements: (1) prize, (2) chance, and (3) consideration. Lotteries are regulated and can only be conducted by the government. To avoid violating lottery laws, one of the three required elements must be eliminated.

In contrast, a sweepstakes is a promotion that eliminates consideration by allowing people to participate without payment. Consideration is either removed entirely from the promotion or a free alternative method of entry is provided in addition to a payment-based method of entry.

On the other hand, a contest is a promotion that eliminates chance. If consideration is required, then in order to keep the content from violating regulation regarding lotteries, the winner must be chosen based on skill rather than selected at random or by chance. Skill must be evaluated based on objective criteria.

Advertisers must be careful to avoid the risk of conducting an illegal lottery and violating state lottery laws and other applicable laws relating to lottery and gambling operations, which could result in regulatory action that could include civil and criminal liability.

c. Advertising to Children

When advertising is directed at children, the FTC pays particular attention to the claims because children are more vulnerable to certain types of deception. The advertising claims are evaluated from a child's perspective rather than an adult's perspective. Additionally, advertisers marketing to children need to consider the implications of the Children's Online Privacy Protection Act ("COPPA"), a federal law that applies to operators of commercial websites and online services directed to children under the age of 13 and websites directed toward general audiences that know they are collecting personal information from a child. COPPA requires verifiable parental consent before websites collect, use, or disclose a child's personal information.

2. Claim Substantiation

An important part of making sure ads are truthful (and thus compliant with FTC rules) is substantiation. The basic premise is that, if you are going to make a claim in your advertisement, it must be substantiated by evidence—you must "back up" that claim. Substantiation for advertising claims must exist before the advertising is disseminated and must continue to be checked and verified as long as the advertising is live. All reasonable interpretations of a claim must be supported, and if a claim is ambiguous, all interpretations made by a reasonable consumer must be supported. One practical challenge for advertisers is managing the logistics of tracking the various claims that are in live advertising and maintaining corresponding evidence. Before a campaign is launched, all advertising claims that the business plans to make again should be identified and the corresponding evidence substantiating those claims can be updated if necessary.

There are two types of claims: express and implied. Both express and implied claims must be supported by evidence. Express claims are literal statements contained in the advertisement. They are clear and easy to identify. Generally, the question is if the express claim is true or false; not whether something is an express claim.

On the other hand, implied claims are made directly or indirectly by inference. The context of the claim is key, and the overall net impression of the ad, including the text and graphics incorporated into the advertising, is taken into consideration to determine what it conveys to consumers.

Intent is not a requirement in determining whether an advertisement has made an implied claim. As such, implied claims are the source of most legal challenges. It is particularly difficult for an advertiser to substantiate an implied claim that it didn't intend to make, as it is unlikely that the advertiser would have adequate evidence on hand to support the claim.

However, puffery is an exception to the claim substantiation requirement. It is defined as a statement or opinion that is so hyperbolic or vague that no reasonable person would take it seriously or a statement of opinion incapable of being objectively proven. For example, "World's best mouthwash," would be a claim that is so vague and difficult to measure that a reasonable consumer would recognize it as hyperbole. As stated above, the analysis of whether a claim would rise to the level of puffery would center upon the context of the advertisement.

3. Intellectual Property Clearance

Advertising is a content-driven exercise. Whether its commercials, social media posts, billboards, or podcast ads, advertisements almost always require some form of content in order to get the message to consumers. As a content-heavy medium there are a number of intellectual property considerations top of mind for advertisers and their counsel. These include: (i) trademark clearance and enforcement (especially in connection with comparative advertising), (ii) copyright clearance and enforcement, and (iii) rights of publicity.

a. Trademarks

There is substantial overlap between trademark law and advertising law. Between trademark claims and false advertising claims both being covered in the Lanham Act and the fact that comparative advertising is such a common (and successful) type of marketing, adverting lawyers need to have a strong handle of trademark laws.

Companies use their own trademarks in advertising all the time. Other than understanding the trademark marking rules and seeking registration when appropriate, this is a fairly straightforward exercise. However, when companies want to use third-party trademarks (especially competitor trademarks) it starts to get complicated.

Businesses looking to incorporate competitor trademarks or third-party trademarks into their advertising need to be careful not to run afoul of trademark laws. Comparative advertising can be very powerful and persuasive. It can also open up a company to claims from the competitor, usually starting with a cease-and-desist letter. Comparative advertising involves using a competitor's name or trademarks to reference the competitor or its product and make comparative statements to consumers to show why their product or service is superior to that of their competitor. While "[t]rademark law does not categorically permit the use of third-party trademarks in ad copy for comparative statements," generally comparative advertising can be accomplished in the United States under the doctrine of nominative fair use, provided that the business doing the comparative advertising makes truthful, non-misleading comparisons and does not use more of the competitor's trademarks than necessary to make the comparison.[1] A delicate balance is often achieved through the use of a competitor's mark in plain text or the use of the competitor's logo.

[1] R. Tushnet and E. Goldman, *Advertising & Marketing Law: Cases and Materials*, p.468 (4th ed. 2018).

Using third-party trademarks in advertisements without permission can also lead to Lanham Act claims of false association or affiliation. Accordingly, it is always important for advertisers to clear any third-party trademarks used in advertisements by obtaining permission or otherwise comply with the Lanham Act and comparative advertising rules.

b. Copyrights

Pictures, video, graphics, text, audio, and more—advertising runs on works of authorship—most of which are subject to copyright protection. Advertisers and their advertising agencies are constantly creating new content to display as advertising messages, but advertising content also frequently includes prior works or works of others that are subject to copyright protection. Accordingly, copyright protection and enforcement are important facets of advertising law.

Despite the fact that advertising is comprised of commercial messaging, it can be highly creative and subject to copyright protection. The best advertisements live on in our heads (and now on the Internet) forever. Because of this, companies place a premium on preparing memorable or otherwise impactful advertisements. Depending on the medium, this can include text, audio, visual, or a combination of elements.

Copyright clearance is a critical aspect of advertising and marketing. When preparing advertisements (or any creative work) it is critical for the business to (i) make sure they own the work and (ii) identify third-party works used in the work. This may be music, video clips, or even background visuals. Generally, when the employees of the advertiser create the ad in-house, the advertiser will own any resulting copyright in the ad. However, "[u]nder default copyright law, independent third parties creating the copyrighted work own the copyright—even if the advertiser pays them to do custom work."[2] If a third party is creating the work (e.g., an agency), the advertiser should seek ownership rights to the copyright in such work through the contract between the parties, which should be negotiated at the onset of the engagement.[3]

In order to identify potential third-party claims to copyrights in advertising materials, advertisers must determine who is responsible for copyright clearance. As discussed in the section on third-party agreements below, there are often various parties contributing to advertisements for a business. For brands using an agency, the brand must determine which party is primarily responsible for clearance of creative works. Often the agency is in a good position to know what is included in the work, but ultimately the company is going to be responsible for the message and its content.

This gets especially tricky in social media where businesses have less control over how their messages are delivered or remixed.[4] Adding to this thorny context is the increased use of social media influencers and creative houses, which give the business even less control over the ultimate advertising content. To be successful in this space, the brand must balance authenticity with the need to mitigate copyright infringement risk.

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[2] Id.

[3] *See*, *e.g.*, Mkt. Masters-Legal, Inc. v. Parker Waichman Alonso LLP, 3:10-cv-40119-MAP (D. Mass. 2010) (ad agency got preliminary injunction against client law firm from using ad copy elements in other advertising).

[4] See, e.g., Sony Music Entertainment et al. v. Vital Pharmaceuticals Inc. et al., case number 1:21-cv-22825, in the U.S. District Court for the Southern District of Florida; Atlantic Recording Corp v. Vital Pharmaceuticals Inc d/b/a Bang Energy, U.S. District Court for the Southern District of Florida, No. 1:22-cv-22951.

c. Rights of Publicity

Because advertising content is commercial messaging, any appearances of individuals (especially famous individuals) may be subject to rights of publicity. The right of publicity is primarily a state-law driven aspect of intellectual property, but it is especially relevant in advertising law. The Fifth Circuit has specifically identified three elements a plaintiff must prove to recover for the tort of misappropriation of name and likeness in Texas: (i) the defendant appropriated the plaintiff's name or likeness for the value associated with it, and not in an incidental manner or for a newsworthy purpose; (ii) the plaintiff can be identified from the publication; and (iii) there was some advantage or benefit to the defendant.[5] Even simple social media posts of factual matters, when presented in a commercial context, can be violations of a right of publicity.[6] For this reason, brands and agencies typically build a publicity clearance step (in which permission is obtained or identities are obscured) into the overall advertisement content development process.

4. Privacy

Most of the regulatory institutions that are involved with enforcement of advertising laws also regulate privacy concerns. This includes the federal government agencies (predominantly the FTC), state attorneys' general, and consumer class action lawyers. Enforcement of California privacy law is under the joint purview of the California Attorney General and the newly established California Privacy Protection Agency. Like its authority to enforce "truth-in-advertising" laws, the FTC's authority is derived from its Section 5 "unfair or deceptive acts or practices in or affecting commerce" provision.

Advertisers increasingly use consumer data to target ads to desired audiences to maximize the impact of advertising campaigns. Careful consideration of applicable privacy laws is always required when examining the aggregation of consumer data and targeting the delivery of advertisements using consumers' personal information. This is especially relevant when negotiating the advertising agreements discussed below.

5. Advertising Agreements

The advertising world is much more complicated now than it used to be. In the past, advertisers looking to get their ads to consumers would pay publishers (print, broadcast, etc.) to publish/broadcast ads provided by the advertiser. There was typically a direct deal between the publisher and the advertiser, and the "audience data" was limited and usually confined to the publisher's self-described demographic data. Ads generally reached consumers, but advertisers were limited in the feedback from those ads. Now advertising is a very complicated ecosystem with many players, including agencies, ad exchanges, ad networks, measurement and analytics providers, media planning and attribution providers, and more. In this new ecosystem, data is paramount. This is the world of "Martech" and "Adtech". Martech is the term for technologies that help companies plan, execute, and monitor marketing campaigns. Adtech is technology used to buy, target, deliver, and measure digital advertising campaigns (eyeballs on ads). Innovative, flashy, award-winning ad creative is great, but to move the sales needle, those ads must be seen by the right consumers. Furthermore, producing great ad creative and buying media to place those

[5] See Henley v. Dillard Dep't Stores, 46 F.Supp.2d 587 (N.D. Tex. 1999) ("The tort of misappropriation of one's name or likeness is generally referred to as the 'Right of Publicity.'")

[6] *See generally* Ashley Messenger, *Rethinking the Right of Publicity in the Context of Social Media*, 24 WIDENER L. REV. 259 (2018).

ads are significant investments for advertisers. Adtech provides tools advertisers can use to make sure their ads are reaching the right audience and those investments are paying off. Adtech also powers the digital marketing ecosystem where, among other things, programmatic ad buying allows for ads to instantly be bought for the right place at the right time. The use of data and technology in this way can trigger several complicated legal and regulatory compliance requirements. The ecosystem runs on data. This includes transactional data, such as the time of day an impression fired and the bid price for the impression. And it also includes data related to the consumer viewing the ad, such as the consumer's location and type of device and whether the consumer belongs to a particular demographic or behavioral segment (e.g., age, gender, travel enthusiast, sports enthusiast). The agreements governing transactions in this space must address the collection, ownership, and use of this data. Furthermore, because some of this data meets the definition of "personal information" or "personal data" as defined under various U.S. state privacy laws and international privacy frameworks, it is important to understand and address any compliance obligations under those laws.

In addition to these data-related issues, many other issues you would normally encounter with advertising, media buying, and technology platforms in general come into play as well. These include editorial guidelines and brand safety requirements; fees and payment terms; cancellation and termination terms; issues related to intellectual property ownership, usage, and licensing; compliance with Federal Trade Commission guidelines concerning native advertising, endorsements, testimonials, and social media marketing; platform service-level requirements (e.g., platform availability, uptime and issue response times); and issues related to standard contractual representations, warranties, indemnification, and liability caps, all of which may come into play.

For these reasons, the contractual agreements governing these relationships as well as the terms governing the development of ads, the placement of ads, and the sale, licensing, and use of this data and technology can be quite complicated as well. In this Section, we will review some of the primary contracts and relationships governing these transactions and some of the primary legal considerations.

a. Agency Agreement

There are two primary types of advertising agency engagements: creative and media buy. Brands can have one agency do both or one of the foregoing. A brand with a large internal creative team or a relationship with an outside creative firm, may engage an agency for media buy only. Other times, brands hire an agency to perform creative work and media buy. Creative services include brand strategy and developing brand collateral and campaigns. This usually involves lots of design output. Media buy involves strategy for placement of the brand ads and coordination and tracking of buying inventory for such placements. This could include out-of-home advertising (OOH), television, digital, social, and more.

The Agency agreement (sometimes a master services agreement or media planning and buying) is the primary governing document for the relationship between the advertising agency and the brand. This agreement lays out the relationship between the parties and the respective services and fees. As mentioned above, the scope of the agreement can be for media buy, creative work, or both.

Often a brand will do a search and engage with an agency of record that will set the strategic and communications direction for the brand. Additional or specialty agencies may be added on an as-needed basis. The search for an agency of record can be a time and labor-intensive process, and the negotiation

can be similarly difficult. Agencies and advertisers should have honest upfront conversations about expectations to help build a productive relationship.

With respect to creative services, intellectual property issues are front and center. If the agency is going to be preparing creative works for the client, both parties should be very clear on the following issues: (i) who is responsible for copyright and trademark clearance of creative works; (ii) who is responsible for third-party licensing; (iii) what approvals are needed for incorporation of third-party works; (iv) who is going to own newly created works; (v) Does the agency need to follow existing brand guidelines or are they tasked to create new ones; (vi) who is responsible for releases for individuals appearing in the works; (vii) who is responsible for dealing with actors and other artists represented by collective bargaining or industry requirements; and (viii) who is responsible for hiring the director to produce any filming of ads?

With respect to media buy, the agreement can be sufficiently complicated; however, there is an industry benchmark in the form of the Association of National Advertisers (ANA) Master Media Buying Services Agreement Template. The ANA Template Agreement is a form created by an industry trade group for advertisers when contracting with media buying agencies. The ANA Template "represents what the ANA believes to be in the best interest of advertisers and best practices for the global marketplace." The ANA Template is purely optional, but it is sufficiently well known and respected that it provides a useful benchmark for brands and agencies alike.

In addition to contract terms such as indemnity, representations and warranties, which are important across all agreements, key issues in the media buy agreement whether negotiating from the ANA Template or from an agency form, include: (i) dividing responsibilities and understanding the agency role and the advertiser's approval rights for third party agreements; (ii) scope of services; (iii) agency transparency and clarity on rebates and value benefits as well as setting the parameters for the agency engaging affiliate entities; (iv) data ownership and use; (v) fees; (vi) tracking a reporting of media buy, budget and ROI; and (vii) exclusivity of the services.

Choosing an advertising agency, especially an agency of record, is an important decision for a brand and it is important to start this relationship on the right foot and remove friction in the relationship. The agency agreement is an important document and should be carefully reviewed and negotiated by all parties. Advertising lawyers need to understand the pressure points on both sides and negotiate an agreement that meets the expectations of the parties. To do this, the advertising lawyer must stay abreast of current technologies and industry trends, including, those with respect to intellectual property and advertising compliance.

b. Media Buys Agreements with Publishers and Media Companies

When agencies are buying inventory for digital advertisements on behalf of a brand (or when the brand is doing so itself) it typically engages with inventory providers (supply side) to run the advertisement. These engagements are typically governed by insertion orders (similar to a statement of work concept) that reference terms and conditions. Fortunately, similar to the media buy agency agreement, there is a generally recognized standard template for media buy terms and conditions between an agency and a publisher. IAB and 4A's have published a template called the Standard Terms and Conditions for Internet Advertising for Media Buys One Year of Less. The template is designed to be incorporated into an insertion order to represent a "common understanding for doing business." The current IAB/4A's template is version 3.0, but some agencies/publishers will still incorporate the terms of prior versions.

Agencies will often have a version of terms and conditions for media buys in place with key publishers. These are often based on the IAB/4A's template, but usually with an agency-specific or publisher-specific addendum, amending the template terms to better suit one party or the other.

Key issues in media buy agreements with publishers and media companies include: (i) payment: (cost per thousand (CPM)), clicks (cost per click (CPC)), or conversions (cost per acquisition/action (CPA)); (ii) cancellation; (iii) tracking and Reporting (use of ad servers to track and report on campaign metrics); and (iv) data ownership and use.

c. Platform Terms

Because of the complex advertising ecosystem (especially for digital advertising) discussed above, advertisers may find themselves and their agencies subject to numerous contracts with vendors, intermediaries, and service providers involved in the creation, dissemination, and tracking of advertisements. Examples include social media platform terms, ad tech platform terms, and data platforms. While many of these platforms operate on terms and conditions instead of a negotiated agreement, these terms can have important implications for content rights, data ownership, and liability. Brands and advertising lawyers need to be familiar with the terms and conditions for the various platforms utilized in this ecosystem, particularly with respect to privacy concerns and content representations and warranties.

While traditional service providers contracting considerations apply to the advertising industry, as shown above there are several unique aspects to contractual relationships in this space. Advertising lawyers must understand the relationships between these various parties and what agreements govern the advertisements that we see every day.