

Advertising, Copyright, Trademark and Avoiding Trouble

Leslie Pedernales, Media Law Attorney

Ellen Andelman, Trademark Attorney

Moore & Van Allen

Advertising, Copyright, Trademark and Avoiding Trouble

- **Leslie Pedernales**
 - Practices Media Law and Public Affairs Law
- **Ellen Andelman**
 - Practices Intellectual Property Law



LESLIE PEDERNALES

Counsel

Media Law & Public Affairs

t 704.331.2461

leseliepedernales@mvalaw.com



ELLEN A. ANDELMAN

Senior Counsel

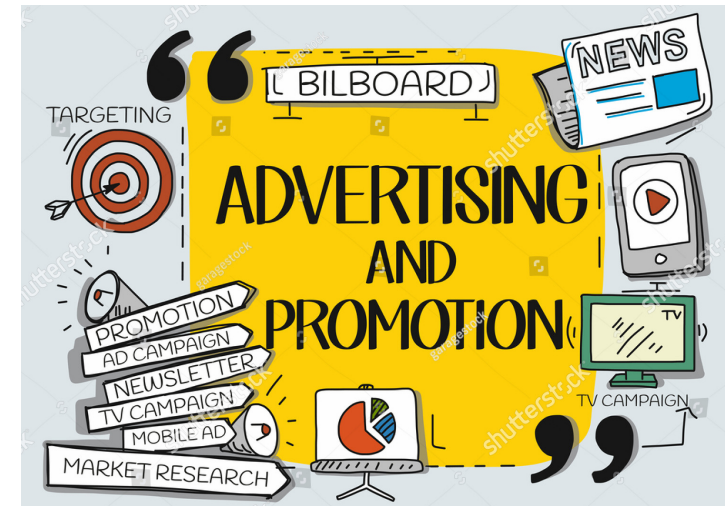
Intellectual Property

t 919.286.8041

ellenandelman@mvalaw.com

Advertising, Copyright, Trademark and Avoiding Trouble

- Who Enforces Truth in Advertising?
- Express & Implied Claims
- Testimonials & Social Media Influencers
- Puffery
- Copyright & Right of Publicity
- Trademark Basics



WHO ENFORCES TRUTH IN ADVERTISING?

Who Enforces Truth in Advertising? The FTC

- The Federal Trade Commission (FTC)

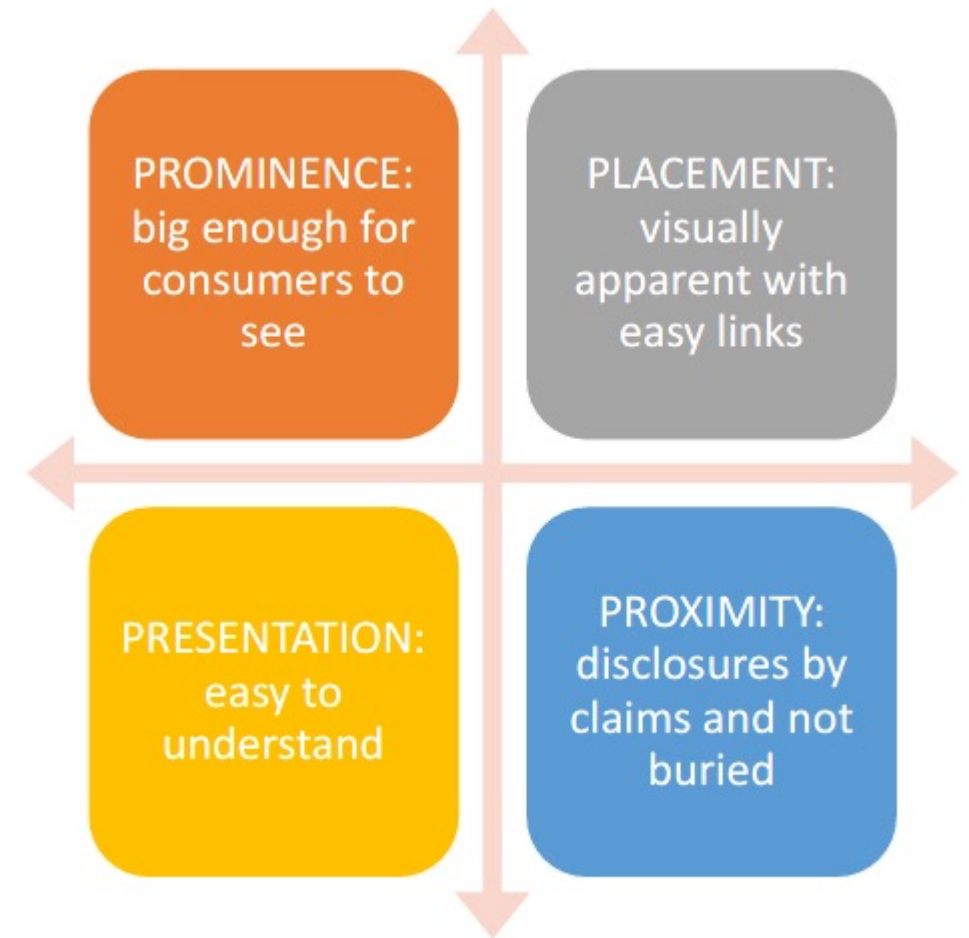
- Mission: “Protecting America’s Consumers”
- FTC Act prohibits unfair or deceptive ads
- FTC requires advertisers support all claims
- [Advertising & Marketing Basics](#) Resource
- FTC has online guidance on:
 - Business Guidance During Corona Virus
 - COPA – Children’s Online Privacy Act
 - Disclosures 101 for Social Media Influencers



Who Enforces Truth in Advertising? The FTC

- **Disclaimers**

- Cannot contradict other messages in the ad – only modify
 - *What the headline giveth, the footnote cannot taketh away!*
- Cannot be buried in an ad or appear in small/hard to read font
- Must appear close in relation to the claim being qualified
- Should be against a contrasting background
- Must be communicated to consumer BEFORE purchase/billing information is provided
- AVOID distracting graphics/copy



Who Enforces Truth in Advertising? The FTC

- If the consumer has to scroll to read important information, there must be an indication
- Disclaimer should be “as close as possible” to the claim (AKA “clear and conspicuous”)
- If you can’t fit the disclaimer in the medium, you can’t use the medium
- If your content is optimized for a device, so must your disclaimer be
- The ad will be interpreted by the intended audience “acting reasonably under the circumstances” not the “reasonable person.”

THE
TAKEAWAYS
(NO
MATTER
THE
MEDIUM)

Who Enforces Truth in Advertising? NAD



Who Enforces Truth in Advertising? NAD

- National Advertising Division of the Better Business Bureau
 - Division of BBB National Programs
 - Provides independent self-regulation and dispute resolution services, *guiding the truthfulness of advertising across the United States*
 - *NAD reviews national advertising in all media and its decisions set consistent standards for advertising truth and accuracy, delivering meaningful protection to consumers and leveling the playing field for business.*

Who Enforces Truth in Advertising? NAD

- National Advertising Division & National Advertising Review Board
 - Self Regulating
 - Anyone can file a challenge
 - NAD decisions = single largest body of advertising law in the country
 - Case decisions available by subscription: www.bbbtnp.org
 - Legally Binding?
 - No, but voluntary participation of nearly 90% of advertisers
 - Can recommend for advertiser to discontinue claim (Most comply)
 - Can forward to The FTC



Who Enforces Truth in Advertising? NAD

- NAD Basic Videos

- [Who Makes the Rules](#)
- [The Reasonable Basis Standard](#)
- [Clear & Conspicuous Disclosures](#)
- [Express & Implied Claims](#)
- [Puffery](#)
- [Endorsements & Testimonials](#)
- [Health Claims in Advertising](#)

- NAD Reviews: SWIFT and COMPLEX Tracks

- SWIFT: 20 Business Days for single issue cases; Express claims – no complex legal issues
- COMPLEX: multiple claims, unique legal theories
- A SWIFT Example: Spectrum



Who Enforces Truth in Advertising? NAD

Charter Communications (Spectrum) NAD #7093 (April, 2022)

- Claim: Some sports programming not available on DirectTV
- Commercial Aired on Super Bowl
 - “The Biggest Game of the Year” = Super Bowl
- Support: Some regional sports programming not available
 - Not clear that the message is only about regional sports programming
 - Commercial overstated the extent to which certain sports programming may not be available on DirectTV Stream.
- NAD recommended advertiser discontinue the claim



EXPRESS & IMPLIED CLAIMS

Express Claims

- **Express Claims – Require Support**
 - Comparative – Better, Best, Most, We're #1!
 - Performance
 - Product Specs
 - Product Descriptions
 - Made in USA (FTC Guidelines)
 - *Final assembly AND all components must be Made in USA.*
 - *Example: Lions Not Sheep*
 - *Tore out "Made in China" tags and stamped in Made in USA*
 - *ECO Friendly, Sustainable, FTC Green Guides*



Express Claims: We're #1!

- Perrigo Co. (Plackers) NAD #7065 (Dec. 2021)
 - Claim: “#1 brand in flossers”
 - Support: Could only support #1 over small sampling of flossers
 - Product category not clearly distinct, and claim may be reasonably interpreted to include products outside the advertiser’s definition
 - NAD recommended advertiser discontinue claim



Express Claims: Consumer Ratings & Reviews

- **Advertisers May Not Distort Reviews**
 - Okay to NEUTRALLY screen reviews for language, controversy, relevance to product
 - May not screen only bad, not good reviews
 - Can't incentivize good reviews, punish bad
- **Example: Fashion Nova (FTC Case)**
 - Used a 3rd party to filter reviews
 - 4/5 Star reviews on site as is; less than 4 stars trapped in filter
 - FTC found “harm to consumers” and issued an order resulting in settlement:
 - Prohibiting Fashion Nova from misrepresenting reviews – must show all, and
 - **\$4.2 million in consumer redress.**



Express Claims: Consumer Ratings & Reviews

- **BestCompany.com**

- NAD #6999 (Jan. 2022)
- Promotional materials are advertising
- *Independent, impartial ranking of products, even when based on consumer reviews, should be based on reviews that represent the universe of reviews for all companies reviewed and ranked.*
- Business relationships which solicited reviews “skewed” rankings in those brand’s favor over others who did not have relationship
- NAD recommended site cease the claims: *“cannot be bought,” rankings are “honest and unbiased.”*

We Promise Accurate Rankings and Honest Reviews

Rankings cannot be bought. We have been offered seven figures—multiple times—to alter our rankings to unfairly favor one company over another, not based on merit, but to “buy” a top spot. We love when this happens because we have an opportunity to share our vision with that company. We explain what the company will need to improve in order to earn a higher ranking.

Implied Claims

- **Implied Claims** – Also Require Support

- May need support based on overall advertising

- Visuals can change the meaning of the advertising

- Support even unintended claims

- Disclaimers

- Can clarify but **MAY NOT** contradict
- **MUST** be clear and conspicuous



- OLAY Body Wash, NAD #7013 (March, 2022)

- Claim: “Improves Skin 3Xs Better”
- Support: Testing for moisture retention and moisturization did not support overall claim – Only 4/6 skin tones tested
- NAD found that the product must be tested on all consumers who are part of the target audience and requested claim be revised.



TESTIMONIALS & SOCIAL MEDIA INFLUENCERS

Testimonials

- Customers or employees expressing their opinions
 - Should reflect a typical product experience
 - Still need support for any claims they make
 - NEED signed affidavits & releases from subjects
 - Affidavits verifying what they say is their correct belief
 - Releases for right to use name, likeness, image, logo, etc.



Testimonials

Brightland, Inc. NAD SWIFT #7061 (2021)

- Founder told “her” story of getting sick and developing alternative olive oil
- No evidence that standard olive oil caused her illness or was a typical experience to enjoying standard olive oil
- Claims require support, even when:
 - in editorial context
 - In promotional materials
- Testimonials should reflect a typical product experience

When my husband and I started to get into cooking, we expected to improve our well being and boost our confidence in the kitchen.

Instead, we got a little nauseous. After eliminating likely culprits like cheese and bread, we discovered - much to our surprise - that the cause was actually our olive oil.

A bit of research uncovered that the olive oil Americans consume is not what we think it is. And no

Social Media Influencers

- Who are they?
 - Compensated social media personalities expressing their opinions in social media posts/videos, etc.



Social Media Influencers

- **Must Disclose any/all material connections**
 - Any relationships
 - Cash or Product (Even early access to product)
 - Anything influencer is receiving as a benefit
- **Disclosures must be Clear and Conspicuous**
 - Should be no need to click, expand or scroll down to read
 - #ad
 - #sponsored
- **Influencers cannot say anything you cannot**



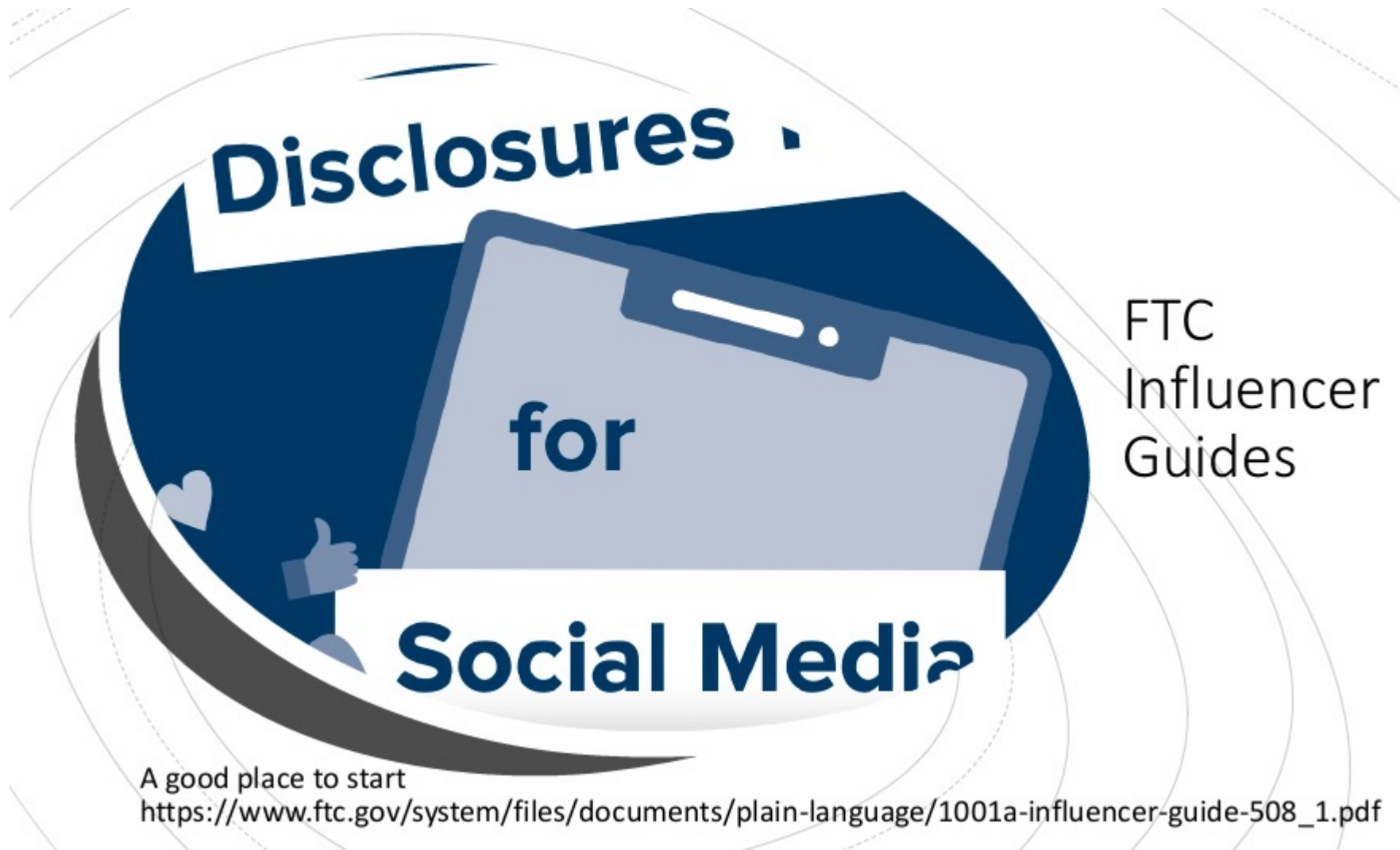
Social Media Influencers

- **Must have a contract**

- Influencer needs to understand responsibilities
 - Require they watch FTC Influencer video (visual people!)
- For your protection – a morality clause
 - Retain absolute/immediate right to terminate contract for any reason
 - Brand has ability to make influencer take down content
 - No time-line – past bad acts may resurface
 - Stage payments as you go – you won't get anything back
 - DO NOT WANT TO SUE. Brand will not want to continue relationship through a trial/press.



Social Media Influencers



Social Media Influencers

- If an entity/person has a paid/sponsored connection to the brand, that connection **MUST** be disclosed – AND – Don't Bury the Disclaimer
- **DON'T** use ambiguous or confusing language like “thank you,” or “spon”
- **DON'T** use influencers to say, without a disclaimer, something for which you'd have to have one (e.g. pharma side effects)
- **DON'T** think the FTC won't bother your influencer
- **DO** understand your medium

THE
TAKEAWAYS
(NO
MATTER
THE
MEDIUM)

Demonstrations

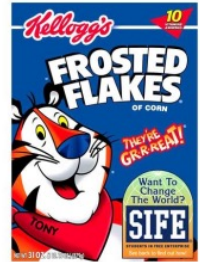
- When there is a demonstration ...
 - Footage **MUST** show the product accurately performing
 - NEED a signed affidavit from video/art director to attest to accuracy
 - **MAY NOT** appear as if the product performs in a way inconsistent with its actual performance
 - Disclaimers cannot contradict the visual representation and cannot cure a misstatement
 - **NEED** backup support for demonstration
 - **MUST** show the product performing according to labeling instructions.
 - **DISCLAIMERS** may be necessary to explain creative
 - *“Professional stunt person. Do not attempt.”*
 - **MUST** be prominent and visible on the screen



PUFFERY

Puffery – Doesn't (Can't) Require Support

- **Puffery** – Opinion, Exaggeration, Hyperbole
 - Cannot be proven or disproven? Capable of measurement? Couched in terms of opinion?
 - “Mikey likes it!”
 - “King of Beers.”
 - No reasonable person would believe or consider the statement material to the purchase
 - *Is BMW really the ULTIMATE driving machine?*
 - Puffery is NOT:
 - A statement likely to influence a consumer’s decision (i.e., a material statement); and
 - A statement that can be proved or disproved with objective data.
 - “#1 Selling brand in America.”



Puffery – Doesn't (Can't) Require Support

- NAD Cliff Bar, #7069 (March, 2022)
 - Claim: The Ultimate Energy Bar
 - Could be puffery – but
 - The juxtaposition of “*The Ultimate Energy Bar*” with “*an optimal blend of protein, fat, and carbs,*” took the claims out of the realm of PUFFERY and made them objective measurable claims requiring substantiation.
 - Support showed the product “helped” with performance but did not make performance any better than with others.
 - NAD recommended advertiser discontinue claim.



SWEEPSTAKES & PROMOTIONS

Sweepstakes & Promotions

- Raffles/Lotteries
 - Can only be run by charities (raffles) or the State (lotteries) and must be registered with the State's AG's Office.
 - May require purchase – consideration – for entry.
- Sweepstakes – game of chance.
- Contests – game of skill.
- State Laws – free entry, registration, privacy, etc.
 - Some states require registration of promotions when total value of prizes are in excess of \$5,000. (NY, FL, AZ, RI)
 - Disclaimers in CA: NO PURCHASE NECESSARY, etc.
- Use a sweepstakes company.
- Check with Legal!



COPYRIGHT & RIGHT OF PUBLICITY

Copyright

- Copyright Defenses

- Fair Use (News Reporting)
- de Minimis Use (?????)
 - Harder and harder to justify in digital era
 - Sampling is NOT protected
- Digital Millennium Copyright Act (DMCA Safe Harbor for “Information Location Tools” (17 U.S.C. 512(d))
 - For Online Service Provider’s Use
 - The DMCA’s “safe harbor” regime offers immunity to claims of copyright infringement if (among other requirements) online service providers promptly remove or block access to infringing materials after copyright holders give appropriate notice

- Contract Defenses:

- 3rd party content posted with a “share” icon may be “Licensed by the content owner”
- Content owner granted a license (through the TOS) to the image host server/platform, which may be sub-licensable to the defendant news outlets.

Copyright

- Publisher Embedding & Linking

- *Robert Barbera v. CBS Interactive, Inc.* (S.D.N.Y.2019)
- Article on “Top Retweets of the Year”
- Court relied on Instagram (3rd party) license to rule in favor of news org.
- Instagram issues statement – NOT granting a license to all to use content.
 - Instagram announced they are allowing the option for users to prevent the embedding of images on third party articles and blog posts.
- Revised decision in favor of photographer
- Barbera has also sued:
 - Arianna Grande
 - Versace
 - Jordache



Right of Publicity

- Right of Publicity

- Prevents unauthorized commercial use of an individual's name, likeness, or other recognizable aspects of one's persona
- Gives an individual the exclusive right to license the use of their identity for commercial promotion. distribute, modify, run, copy, publicly

- *Heigl v. Duane Reade*:

- Actress claimed Duane Reade violated the false advertising provision of the Lanham Act as well as New York civil rights statutes protecting use of likenesses for purpose of trade
- Ended in quick, confidential, settlement (\$\$\$\$\$)
- Public relations disaster



Best Practices

- **Enforcement** – FTC, NAD, competitors, consumers are watching
- **Express & Implied Claims**
 - Clear all advertising and promotional materials through legal team
 - Collect support for all express and implied claims
 - Issue spot for level of support needed
 - If puffery? No support generally required – “*You’re Great!*”
 - If express claims, implied claims? Need support
 - Demonstrations? Support and affidavits
- **Testimonials & Influencers**
 - Get signed releases, contracts from legal team
- **Sweepstakes & Promotions**
 - Check state and federal laws with legal team
- **Copyright & Right of Publicity**
 - Need approval from photographer and subject



TRADEMARK BASICS

What is a Trademark And Why Should You Care?

- Trademarks are “source identifiers” intended to identify your company’s products/services and distinguish them from your competitors.
- They guarantee a consistent level of quality.
- Trademarks build brand loyalty.
- Trademarks are an important corporate asset that can change in value over time.

As a result, considerable resources are often invested in the selection, development, maintenance and protection of trademarks.

What Do Trademarks Look Like?

Most often trademarks are:

- Words: GOOGLE® APPLE® WALMART®
- Names: COLONEL SANDERS® KATE SPADE®
- Letters: AT&T® CPI®
- Numbers: 501® (jeans) **747** (airplanes)
- Slogans: JUST DO IT® AMERICAN RUNS ON DUNKIN®
- Designs: 



Trademarks can also be:

- Colors: Tiffany blue, red sole of Louboutin shoes
- Sounds: The NBC chimes
- Scents: “Flowery musk scent” in Verizon stores, the smell of Play-doh (sweet, musky, vanilla fragrance..)
- Shapes: The Coca-Cola bottle shape, the layout of an Apple store

Some Things Trademarks Are Not...

- **Patents:** inventions/ideas that are novel, useful and non-obvious
- **Copyrights:** original expressions of an idea in written or artistic works
- **Domain Names:** an Internet address for a website
- **Corporate Names (Trade Names):** the approved “legal” name of an entity

Registering your domain name or your corporate name does not mean that you have any corresponding rights in the trademark.

What Makes A Good Trademark

- It is easy to read and pronounce
- It does not have any adverse meaning
- It is not the generic name for the goods/services
- It does not infringe some other party's rights
- It is registrable and protectable
- It is not merely a surname
- It is not merely geographically descriptive or misdescriptive

All Marks Are NOT Created Equal: The Trademark Spectrum

Fanciful/Coined Marks: Invented words 

Arbitrary Marks: Definable words that are unrelated to the goods/services



Suggestive Marks: Words that have *some* arguable meaning in relation to the goods/services



Descriptive Marks: Words that *immediately* describe a function, feature or characteristic of the goods/services



Generic Terms: Words that are the accepted name of a product or service

Keep in mind, images can also have a suggestive, descriptive and generic meaning.

The Trademark Graveyard



Are Trademark Rights Really Exclusive?

Trademark rights are specific to a **particular Mark** in relation to **specific types of goods and/or services** - so it is possible for multiple parties to have rights in the identical Mark, provided there is sufficient disparity in the nature of the associated goods/services, the relevant consumer base, the industry of use, etc.

DELTA[®] faucets
DELTA[®] airlines

UNITED[®] airlines
UNITED[®] bank

YALE[®] university
YALE[®] locks

DOVE[®] soap
DOVE[®] ice cream

Creating Trademark Rights: U.S. is a First to Use Jurisdiction

Common Law Provides

Rights in a Mark as soon as you start using the mark in commerce

Rights are restricted to the nature and scope of your use

Rights are restricted to the geographic area of use

Registration Provides

Rights may date back to the application filing date, even if there wasn't use at the time

Nationwide rights and constructive notice

Consideration by the Trademark Office in assessing subsequently filed third-party applications

Right to use the ®

Registration ALSO Provides

Access to federal court for claims of infringement

Possibility for enhanced remedies

Can register your Mark with Customs and Border Control and Amazon Brand Registry

Provides a basis for international applications

How Can You Know If You Can Use/Register a Trademark?

Searching serves offensive & defensive purposes

Avoid disputes with third parties

Determine availability for use

Determine availability for registration

Gauge strength and scope of protection

There are different types of searches that can be conducted?



Knockout



Preliminary



Comprehensive

Consider your budget, timeline, risk tolerance, willingness to change your mark

A Primary Consideration in Clearance Searches

Likelihood of confusion: Is the Mark sufficiently similar to another party's Mark such that consumers are likely to be confused as to the source of the goods/services or believe there is an affiliation between the owners?

It's a balancing act:



Similarity of the Marks and Similarity of the Goods/Services

Sight
Sound
Meaning

utility/purpose
consumer base
channels of trade

Let's Get the Registration Process Started

To file the application we need:

- EXACT Mark (for design Marks an image is needed)
- Associated goods/services
- Status of use
 - If actual use is claimed, we will need evidence of use and dates of first use at the time of filing
 - If intent-to-use is claimed, we only need a statement of bona fide intention BUT evidence of actual use will be needed before registration

Prosecution timetables:

- For an actual use application where NO issues are raised by the Trademark Office, a registration certificate may issue in approximately 12 months
- For intent-to-use applications, much depends on when we file proof of use. It is possible to keep the application “alive” for approximately 4 years following filing

In both instances, there is an opposition period during which third-parties can seek to interfere with the registration of your Mark.

PROTECTING YOUR TRADEMARKS – The Dos

- ALWAYS use a trademark as an adjective, not a noun or a verb. “I performed a GOOGLE search” NOT “GOOGLE that!”
- Use proper markings: ® for registered trademarks TM/SM for unregistered trademarks
- ALWAYS follow the trademark with the accurate product denomination (generic term).
STARBUCKS® coffee Kleenex® tissue
- ALWAYS distinguish your trademarks and service marks from the rest of the text by use of CAPITAL LETTERS, **bold type**, larger typeface, *italics*, **stylized script**, quotations marks, or **color**.

PROTECTING YOUR TRADEMARKS – The Don'ts

AVOID variations of the trademark:

- Do not change the spelling
- Do not add or delete words
- Do not pluralize or singularize the mark
- Do not add or delete punctuation
- Do not alter change proportions or elements of design marks

Trademark Rights Can Last Forever If...

Use is ongoing

Use is proper

And, if registered, your registrations are maintained

- Between the 5th & 6th year after registration -- file a Declaration of Use
- Between the 8th & 9th year anniversary of registration or previous renewal – file an Application for Renewal and Declaration of Use

For both of these filings, evidence of current use will be needed.

QUESTIONS?

Thank you!

Leslie Pedernales

LesliePedernales@MVALaw.com

Ellen Andelman

EllenAndelman@MVALaw.com