



107 Introduction to Advertising Law

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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.

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);

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- 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

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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

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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."

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- 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 work 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

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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: _____

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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 illusory 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
_____, 20__
Date

Print Name

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: _____

Sample Internet Advertising Agreement Terms and Conditions

A. E-mail Marketing. Where [Media Company], either directly or through affiliates, shall be disseminating [Company] creative materials of any kind to e-mail recipients under any agreement or insertion order, [Media Company] warrants that it and each of its affiliates are compliant with all state and federal legislation governing the dissemination of commercial messages via e-mail. All e-mail messages sent on behalf of [Company] shall contain identification of [Media Company] or its affiliate as the Sender, a valid subject line, and conspicuous notice that [Media Company] or affiliate is disseminating the message on behalf of [Company]. [Company's] name, physical address and unsubscribe HTML link shall be conspicuously placed on all e-mails and tested prior to sending. *(In the alternative, the Media Company can agree to provide your company with a list of all recipients who opted out of receiving your company-specific e-mail using its own opt out function.)*

Where the primary purpose of the e-mail is the promotion of [Company] products or services, [Company] shall provide [Media Company] with a current suppression list containing the e-mail addresses of recipients from whom [Company] has received notice not to send further [Company] commercial e-mail. [Media Company] agrees neither it nor its affiliates will send e-mail containing [Company] creative to any of the recipients named on [Company]'s suppression list. [Media Company] agrees it, and its affiliates, will use [Company]'s suppression list solely for the purpose of providing services subject to the agreement or insertion order; will not use, share, sell or otherwise appropriate or disseminate the suppression list data other than to an affiliate, whom [Media Company] shall bind by terms consistent with this addendum; and will immediately destroy any copies of the suppression list in its possession after fulfilling the terms of the agreement or insertion order. [Company] updates its suppression list on a continuous basis. [Media Company] agrees, and will require its affiliates, not to utilize a copy of [Company]'s suppression list to comply with any agreement or insertion order after the close of business on the Friday of the week during which [Media Company] received the list. An updated suppression list will be made available by [Company] whenever necessary.

B. Spyware. [Company] creative of any kind shall never be displayed using any software or networks, direct or affiliate, that employ spyware. Spyware shall be defined as computer code of any kind, including Adware but not including cookies, which has been downloaded to an end user's computer without adequate prior notice to, and consent of, the end user; which does not provide a simple and effective mechanism for removal at any time; and the purpose of which may include, but shall not be limited to, tracking the end user's browsing activity, obtaining personally identifiable information, interfering with or controlling the end user's computer, logging keystrokes or performing any other fraudulent, illegal or inappropriate activity.

C. Search. Where [Media Company] or its affiliates shall buy paid search advertising, the following keywords: _____ may not be purchased without advance prior written consent. [Media Company] and affiliates shall not purchase competitor trademarks on behalf of [Company]. All search listing creative, including paid sponsorship, paid inclusion or organic search (headlines, text reads, title tags, meta tags), must be provided to [Company] for approval prior to publishing, and must adhere to the following additional criteria: _____. [Media Company] and any affiliates shall not engage in click fraud. Any lead generation advertising that contains references to [Company], in whatever form including search keywords and text, must always link to a landing page or web-based form that clearly and conspicuously contains relevant references (either messaging or additional functional links) to [Company].

CONTEST CHECKLIST

D. Domain name purchases. Where [Media Company] or its affiliates propose to purchase a domain name, or use a third level domain, to fulfill its obligations under any insertion order or Agreement, and the domain name contains the actual name or an identifiable reference to [Company], [Media Company] must provide advance written notice. [Company] shall in its sole discretion approve or deny [Media Company]'s use/registration thereof. As an alternative, [Company] may elect to purchase the domain name and allow its use by [Media Company]. Upon termination of the Agreement or insertion order requiring the domain name purchase, [Media Company] shall immediately cease using for any purpose, and not renew, any domain name purchased, and take down and no longer link to any web pages located at any URL using any domain name. This term shall apply to domain names that include misspellings or close variations on any [Company] brands.

E. Cost Per Lead (CPL) Campaigns. Where [Media Company] is providing [Company] with customer data, [Company] shall only pay for qualified leads. A qualified lead is defined as a US-based lead with the following legitimate data: first and last name, e-mail address, physical address, day and evening phone, and _____. To be qualified, a lead must also be delivered to [Company] within three (3) business days of its origination. Unless otherwise agreed, lead information generated using [Company] creative and/or purchased by [Company] shall not be sold or otherwise distributed to, or used for the benefit of, any other third party. The agreement or insertion order shall set forth the reporting terms and conditions. The parties agree to resolve in good faith discrepancies between [Media Company] and [Company] qualified lead counts.

F. Editorial Adjacencies Guidelines: [Company] creative will not be placed on or in conjunction with any website, or included in any form of e-mail distribution, that contain on their face or link to sites that contain or promote sexually explicit or obscene materials; promote violence, hate or discrimination of any type based on race, sex, religion, nationality, disability, sexual orientation, and/or age; constitute or promote illegal activities; and/or are deemed to be offensive in nature, degrading, libelous, profane, or in bad taste.

G. Approval of Media Company Creative. Any graphical or text creative units (banners, pop-ups, e-mails, text reads, forms, landing pages, etc.) created by [Media Company] must be approved in writing by [Company] prior to going live. Solo emails must be sent in advance to [Company] in a test format for approval. Any [Company] creative in use must be re-submitted to [Company] at least every 90 days for approval to ensure brand continuity.

Contest rules must contain the following:

- Contest opening and closing dates and times, including applicable time zone
- Details relating to method of entry, including place of deposit and address for mail-in entry
- How to enter without a purchase (e.g., offline method of entry)
- Any limitations on the number of entries (e.g., per day, per week, per contest period)
- Identity of contest sponsors, including complete corporate name of each sponsor
- Age restriction (it is preferable to require that participants be of the age of majority in the province in which they reside)
- Exclusions with respect to eligible entrants (e.g., employees, agents and representatives of the contest organizers and sponsors, as well as members of their household or immediate family)
- Geographical restrictions relating to entry, if applicable (e.g., residents of Canada, excluding the province of Quebec)
- Detailed description of prize(s), number of prizes and approximate value of each prize
- Regional allocation of prizes, if applicable
- How potential winner will be selected (e.g., selected by a random draw from among all eligible entries received)
- The date, time and place of winner selection
- If skill-based contest, include details relating to judging criteria
- How the selected eligible entrant will be contacted and how the prize will be distributed
- The odds or chances of winning each prize
- How, when and where the winner will be announced
- Reserving the right to terminate or suspend the contest, and modify or amend the contest and/or the contest rules
- If contest involves submission of a copyright-protected work (e.g., original story, photograph, musical work), copyright ownership provision should be included
- Statement that in order to win, a mathematical skill-testing question must be correctly answered and details relating to the method by which the skill-testing question will be administered
- Reference to nature of personal information collected, used and disclosed, and purpose for which personal information is collected, used and disclosed
- Choice of law
- Publicity release and release of liability provisions
- Limitation of liability provisions with respect to administration of contest and online component, if applicable
- How to obtain complete contest rules, both online and offline
- Any other material information regarding the contest

Other matters to consider:

- When naming and developing the contest, ensure that permission to use trade-marks and other intellectual property of sponsors and/or others has been obtained
- Agreements with third party sponsors
- Compliance with Regie requirements if contest is open to residents of Quebec (e.g., filing Publicity Contest Notice, submitting contest rules and advertising to the Regie, paying duty, posting security bond)
- Compliance with French language requirements if contest is open to residents of Quebec (e.g., translation of contest rules and advertising text)
- Ensure winner has complied with the Contest Rules and submitted executed release documentation and affidavit relating to skill testing question prior to declaring a winner and awarding the prize
- Ensure that the prize does not relate to a regulated industry (e.g., alcohol, insurance, tobacco, gasoline, dairy, banking)



Topics Covered

- Regulators and their hot-button issues
- How to run a sweepstakes
- How to challenge a competitor's ad
- Claim substantiation and comparative advertising
- Dealing with emerging mediums such as branded entertainment, blogs, email and web advertising



Regulators and their hot-button issues

- One of principal federal regulators: Competition Bureau
- Administers and enforces the Competition Act, Consumer Packaging and Labelling Act, the Textile Labelling Act and the Precious Metals Marking Act
- But know the laws and regulators that govern your business (e.g. Health Canada for drugs and natural health products; Note: prohibition on advertising of prescription drugs to general public except as to name, price and quantity)



Hot-button Issues

- www.competitionbureau.gc.ca source for hot-button issues;
- Competition Act has criminal and civil regimes to address false or misleading representations and deceptive marketing practices
- Hot-button issues:
 - Price and savings claims, false or misleading ordinary price representations (Grafton-Fraser – fined \$1.2 million dollars; Suzy Shier Inc.- fined \$1 million dollars for inflating “regular” prices;)
 - Deceptive telemarketing (resulting in substantial fines and prison sentences);
 - False or deceptive claims (e.g. false weight loss claims, false or unproven claims regarding indoor tanning)



Hot-button issues

- Price Claims
 - Ads that refer to bargain or sale prices must be reviewed carefully
 - When advertising a sale, products need to be offered at prices less than your business's ordinary selling price (always compare a sale price to "our regular price" instead of "regular price", or comparison is with all competitor's prices)
 - In order to claim a "sale", must comply with time or value test
 - Time Test: must offer the product at the regular price in good faith for a substantial period of time (i.e. 50% of the time or more)
 - Volume Test: at least 50% of the volume of stock must have been sold at the regular price
 - "Free" offers also regulated by Competition Bureau



General Overview Contest-Related Legal Issues

- *Criminal Code*
- *Competition Act*
- Privacy legislation
- Province of Quebec
- Planning a Successful Contest
- Contest Rules Checklist



Criminal Code

- Section 206
- Prohibits lotteries where the following three elements are present:
 - consideration (purchase requirement);
 - a prize; and
 - chance.



Criminal Code

Consideration

- “No purchase” method of entry must be available to contest entrants
- Non-purchase entrants must be treated with “equal dignity”



Criminal Code

Element of Chance

- All contests must have an element of skill
 - Skill-testing question
 - Skill-based contests (i.e., judging of submissions)



Criminal Code

Penalties

- Indictable offence punishable by imprisonment for a period not exceeding two years; or
- Summary conviction offence punishable by a fine not exceeding \$25,000



Competition Act

- Section 74.06(1)(a)
- Prohibits a promotional contest that does not disclose:
 - “Adequate and fair disclosure” of the number and approximate value of prizes;
 - Area or areas to which prizes relate; and
 - Any fact within the knowledge of the person that affects materially the chances of winning.



Competition Act

- Section 74.06(1)(b)
- Prohibits a promotional contest where the distribution of prizes is unduly delayed.



Competition Act

False and Misleading Advertising

- The general impression, as well as the literal meaning, is taken into account in determining whether or not a representation is false or misleading in a material respect.



Competition Act

Penalties

- Corporations
 - Up to \$100,000 for the first conviction
 - Up to \$200,000 for subsequent convictions



Privacy Legislation

- *Personal Information Protection and Electronic Documents Act*
 - Collection, use and disclosure of personal information



Province of Quebec

- *An Act respecting lotteries, racing, publicity contests and amusement machines, R.S.Q., c.L-6*
- *Rules respecting publicity contests (“Rules”) c.L-6, r.3.1*
- Administered by the Régie des alcools, des courses et des jeux



Province of Quebec

● Filing Requirements

- “Notice of Holding of Publicity Contest”
 - 30 days prior to launch if total prize value is greater than \$1,000
 - 5 days prior to launch if total prize value is greater than \$100 and less than \$1,000
- Contest Rules and Advertising Text
 - 10 days prior to launch if total prize value is greater than \$2,000
- Post-contest reporting
 - Final report within 60 days of draw date
 - Entry forms must be kept for 120 days following draw



Province of Quebec

● Duty

- Payable where total prize value exceeds \$100
- 3% of total prize value for a national contest

● Security bond

- Payable where value of a single prize offered is greater than \$5,000 or where value of total prizes offered is greater than \$20,000



Province of Quebec

Miscellaneous Issues

- Specific clause (Section 5 of the *Rules*)
- Amendments to contest rules and termination
- Translation of Contest Rules
 - *Charter of the French Language*



Planning a Successful Contest

Contestant Eligibility

- Quebec
- Minors
- Nature of prize
- Employees/family members of sponsors



Planning a Successful Contest

Sponsors

- External sponsors
- Legal agreement between sponsors
 - Identify responsibilities of parties



Planning a Successful Contest

CONTEST PERIOD

- Start date/time and closing date/time
 - Specify time zone
- Prepare to adhere to the contest period
 - Launch of a website; accepting entries; closing the contest; and selecting and notifying winner(s)



Planning a Successful Contest

HOW TO ENTER

- “No purchase necessary”
- Online and text-message entries
- Contest website
- Submission of materials
 - Method of submission; Acceptable format



Planning a Successful Contest

LIMITS ON ENTRY

- Multiple entries
 - Per person, per e-mail address, per household
- “Authorized account holder” of e-mail address



Planning a Successful Contest

PRIZES

- Nature and number of prizes
 - Beware of regulated industries (i.e., alcohol, insurance, tobacco, gas, dairy, banking)
- Approximate retail value of each prize
- Limitations
 - Availability for particular dates, blackout periods for travel prizes
- Responsibilities of each sponsor
 - Providing/paying for prizes, delivery to winners, insurance



Planning a Successful Contest

SELECTION PROCEDURE

- Skill-based contest
 - Select judges and develop judging criteria
- Random draw(s)
 - Finalist round; Winner selection



Planning a Successful Contest

NOTIFICATION PROCEDURE

- By telephone, by e-mail
 - Provide sufficient time for the winner to respond (i.e., two business days)
- Mathematical skill-testing question
 - Level of difficulty
 - Administered during a pre-arranged telephone call or



Planning a Successful Contest

RELEASE

- Consider when release is required
 - Nature of prize; Guest Release
- Legal contract
 - Confirms compliance with contest rules
 - Grants sponsors the right to use personal information, photograph, etc. in promotion and advertising relating to contest
 - Prevents claims against sponsors, i.e., injuries or losses related to contest or use of prize



Planning a Successful Contest

INDEMNIFICATION

- Entrant agrees to compensate sponsors for any losses or costs related to their involvement in the contest
- Indemnity includes coverage of claims that may be made by third parties (i.e., other entrants)



Planning a Successful Contest

LIMITATION OF LIABILITY

- Sponsors are not liable for any claims or losses of the entrant, related to the contest or the prize
- Sponsors are not responsible for lost, misdirected, incomplete etc. entries
- Issues most likely to arise in connection with online entries



Planning a Successful Contest

CONDUCT OF ENTRANTS

- Agree to abide by contest rules
- Agree not to tamper with the contest website
- Acknowledge that sponsors' decisions are final and binding



Planning a Successful Contest

PRIVACY

- Collection
 - What type of personal information will be collected?
- Use
 - How will the personal information be used?
- Disclosure
 - Will personal information be disclosed to third parties?
- Link to corporate privacy policy in rules



Planning a Successful Contest

INTELLECTUAL PROPERTY

- Unauthorized use of third party trade-marks, logos, product shots
- Consents and trade-mark notices



Planning a Successful Contest

TERMINATION / CHANGES TO RULES

- Sponsor reserves right to cancel, amend or terminate the contest for any reason
- Necessary to deal with “unforeseen circumstances”
- If open to Quebec residents, termination is subject to the consent of the Regie



Planning a Successful Contest

POST-CONTEST PERIOD

- Close contest and select winner(s) according to the rules
- Distribute prize(s) according to the rules
- Ensure that winner/ guest release(s) are signed and retained
- Provide any required reports to the Regie and to co-sponsors
- Evaluate process and learn from experiences



Resources

- Contest Rules Checklist



Overview

- The Language of Advertising in Quebec
- Advertising Directed to Children in Quebec
- Claim Substantiation
- Comparative Advertising – Other Consideration
- Challenging A Competitor's Ad
- A Working Approach to Identifying Advertising Claims



The Language of Advertising in Quebec

Under s. 51 of the *Charter of the French Language* (the “Charter”), every inscription on a product, on its container or on its wrapping, or on a leaflet, brochure or card supplied with it, must be in French. Another language may also be used provided it is not more prominent. English trademarks can appear unless a French version has been registered.

Under s. 58 of the Charter, public signs and commercial advertising must be in French, except for news media that publish in another language. Another language may also be used provided the French is markedly predominant (twice as large or twice as many). English trademarks can appear unless a French version has been registered.

Certain prescribed forms of advertising, most notably billboards and outdoor signs, must be in French exclusively.



The Language of Advertising in Quebec

The Office argues that s. 58 applies to web sites, and has indicated that it will enforce the French language requirement on web sites where the web site owner has established a presence (bricks and mortar) in Quebec.

Implications

All labels and in-store advertising connected to the product must be bilingually English/French in Quebec, with each language given equal prominence.

Promotional materials not attached to the product at the time of sale must be in French, although an equal number of English versions is permitted.

All web sites must be in French, and another language is permitted if the French is markedly predominant.

All English TV scripts must be translated into idiomatic Quebec French.



Advertising to Children in Quebec

Administered by the Quebec Consumer Protection Office (the “Office”)

“Children” means under age 13

Whether or not an ad is “directed to children” depends on these factors:

- The nature and intended purpose of the advertised goods

- The manner of presenting the advertisement

- The time and place it is shown

Advertising directed to children in any medium is prohibited

Notable exclusions:

- Magazines directed at children if sold at least quarterly and meeting all substantive requirements (see below)

- Advertising in a store window, in a display, on a container (or a wrapper or label on the container), if it meets certain substantive requirements

- Advertising announcing a show directed at children if it meets certain substantive requirements



Advertising to Children in Quebec

SUBSTANTIVE REQUIREMENTS

A child-directed ad may not (partial list):

- exaggerate the nature of the goods
- minimize the skill, strength or dexterity needed to use the goods
- use a superlative to describe the goods or a diminutive to describe its cost
- use a comparison to other goods
- directly incite a child to buy or to urge another person to buy goods
- portray reprehensible social or family values
- portray a person or character known to children to promote goods, except characters created expressly to advertise goods if used only for advertising use an animated cartoon (except to advertise a child-directed cartoon show)
- suggest that owning the goods will develop a physical, social, or psychological advantage



Advertising to Children in Quebec

The Office will characterize advertising in terms of the nature of the advertising and the nature of the program on which it will appear.

Children's Programs: programs directed at children under 13 as designated by broadcasters or by their nature and content

All Programs Except Those for Children: not directed to children under 13 and not appealing to the instinctual needs of children

15% Programs: Programs aimed partly at adults and partly at children where the percentage of audience between 2 and 11 is less than 15% (based on the preceding season)

Different types of products can be advertised on each of these programs, as follows . .



Advertising to Children in Quebec

	Products exclusively intended for children	Products with a marked appeal for children	Products with no appeal for children
Examples:	Toys, some sweets, foods	Family products and products for teenagers, some cereals, desserts and games	Products for adults, families, teenagers and children
Children's Programs	NEVER, unless treatment not likely to interest children	NEVER, unless treatment not likely to interest children	ALWAYS, but treated for adults
All Programs except Children's Programs	Advertisements not designed to appeal to the instinctual needs of children so as to arouse their interest	Advertisements not designed to appeal to the instinctual needs of children so as to arouse their interest	ALWAYS, but treated for adults
15% Programs	Advertisements partly directed at children	Advertisements partly directed at children	ALWAYS, but treated for adults



False and Misleading

Criminal provisions of the *Competition Act*:

52(1) No person shall, for the purpose of promoting directly or indirectly the supply or use of a product, or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

52(4) In a prosecution for a contravention of this section, the general impression conveyed by a representation as well as its literal meaning, shall be taken into account in determining whether or not the representation is false or misleading in a material respect.



False and Misleading

Reviewable Conduct (civil regime) under the *Competition Act*:

74.01(1) A person engages in reviewable conduct who, for the purposes of promoting directly or indirectly, the supply or use of a product or for the purpose of promoting directly or indirectly, any business interest, by any means whatever, (a) makes a representation that is false or misleading in a material respect; ...

74.01(6) In proceedings under this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.



False and Misleading

- Must consider general impression and not just literal meaning
- What matters is the meaning of the claim as perceived by consumers, not the meaning that the advertiser intended
- No offense unless the claim is false or misleading in a material respect
 - Capable of influencing the actions of consumers



Use of Disclaimers

- Can be used to disclose additional information relevant to the claim, but which would detract from the flow of the main message
- To help consumers understand the claim or put it in context
- Must be large enough, and on screen long enough, for consumers to have reasonable opportunity to see and understand it
- Disclaimers cannot contradict or change the meaning of the main message
- Can a disclaimer save an otherwise false or misleading claim?



Claim Substantiation

Competition Act:

74.01(1) A person engages in reviewable conduct who, for the purposes of promoting directly or indirectly, the supply or use of a product or for the purpose of promoting directly or indirectly, any business interest, by any means whatever,

(b) makes a representation to the public in the form of a statement, warranty, or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or



Puffery, Hyperbole, Opinion

Substantiation is not required for these kinds of messages

- Puffery – vague, self-congratulatory, humorous
- Not susceptible to proof
 - “Greatest Show on Earth”
 - An aftershave that makes men irresistible to women



Puffery, Hyperbole, Opinion

- Hyperbole and opinion – subsets of puffery
- Hyperbole – a claim so exaggerated consumers will not reasonably expect it to be true
 - “Works faster than a speeding bullet”
 - “Gets clothes whiter than white”
- Opinion – “I think you’ll love our new peanut sauce”
 - Consumers know this is not based on hard data



Puffery, Hyperbole, Opinion

- Puffery is less credible than other claims
 - Consumer likely see it for what it is and discount it
- Temptation is to draft copy that seems more credible – but that may cross the line and cease to be puffery
- Sign in window of local coffee shop:
 - Best Coffee in the World
- Print ad for high-end restaurant:
 - Most Extensive Wine Cellar in Town
- Are they both puffery, or would consumers expect the second to have proof?



Performance Claims

- Claims move from puffery to performance claims requiring substantiation as:
 - They become less vague and more specific about product attributes
 - They explicitly or implicitly state a comparison to an objective standard, or a competitive product
- Consumers reasonably expect these claims to be true and that the advertiser has the back-up to show it



Performance Claims

- These claims can be comparative
 - Pepsi is Preferred Over Coke
- Or reference a technical product attribute
 - 1000 chips in every bag of Chips Ahoy! cookies
- Or a combination
 - Kraft Italian flavour dressing now has more herbs and spices
- All require substantiation, but comparisons to a competitor's products may invite more scrutiny



Implicit Claims

Remember to consider general impressions, and not just the literal claim

Maple Leaf Foods v. Robin Hood Multifoods (1994) 58 C.P.R. (3d) 54 (Ont. Gen. Div.)

Church & Dwight v. Sifto Canada (1994) 58 C.P.R. (3d) 316 (Ont. Gen. Div.)



Adequate and Proper Test

Competition Act:

74.01(1) A person engages in reviewable conduct who, for the purposes of promoting directly or indirectly, the supply or use of a product or for the purpose of promoting directly or indirectly, any business interest, by any means whatever,

(b) makes a representation to the public in the form of a statement, warranty, or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or



Adequate and Proper Test

- Not defined under the *Competition Act*
- A flexible concept that can be applied by courts to fit the circumstances
- Can leave advertisers with uncertainty
- Some claims are much easier to substantiate than others



Adequate and Proper Test

- Must look to
 - Regulatory or industry guidelines and codes
 - Competition Bureau's *Misleading Advertising Guidelines*
 - Canadian Food Inspection Agency's *Guide to Food Labelling and Advertising*
 - Advertising Standards Canada's *Guidelines for the Use of Research and Survey Data to Support Comparative Advertising Claims*
 - Established and accepted testing methods
 - Case law
 - Common sense?



Adequate and Proper Test

The claim must be capable of being tested:

Bristol-Meyers (1979), 45 C.P.R. (2d) 228 (Ont. Co. Ct.)

“Three times more softness” – no recognized test to quantify softness



Adequate and Proper Test

The test must be appropriate to the claim:

Competition Bureau's *Misleading Advertising Guidelines*:

- Repetition of the test should give similar results
- Test design should control conditions in order to eliminate biases due to “test effects”
- Representative samples should be used to avoid biasing results



Adequate and Proper Test

The test must be appropriate to the claim:

UL Canada v. Proctor & Gamble (1996), 65 C.P.R. (3d) 534 (Ont. Ct. Gen. Div.)

Canada (Commissioner of Competition) v. P.V.I. International (2002) 19 C.P.R. (4th) 129, (Comp. Tribunal) aff'd (2004), 31 C.P.R. (4th) 331 (Fed. C.A.)



Adequate and Proper Test

The claim must not exceed or differ from the test results obtained:

Bristol-Meyers (1979), 45 C.P.R. (2d) 228 (Ont. Co. Ct.)

BC Tel Mobility Cellular v. Rogers Cantel (1995), 63 C.P.R. (3d) 464 (B.C.S.C.)



Preference Claims

Claims based on subjective product attributes, or consumer preferences or perceptions, must be substantiated with consumer survey data

“Pepsi is preferred over Coke”

“Kraft Italian dressing now has more Italian flavour”



Preference Claims

- Advertising Standards Canada *Guidelines for the Use of Research and Survey Data to Support Comparative Advertising Claims:*
 - Reliability and validity
 - Research should follow standards of the market research industry, or generally accepted industry practices
 - Tests should be done “blind”
 - Proper scientific control to justify a cause-and-effect inference



Preference Claims

- Advertising Standards Canada *Guidelines for the Use of Research and Survey Data to Support Comparative Advertising Claims:*
 - Data should remain valid when the advertising is run
 - Representative samples
 - Choice of pertinent population
 - Random sampling
 - Recommend 300 sample size, and 95% confidence level
 - Desirable to sample 4 regions for national claims



Reverse Onus

- *Competition Act* requires advertiser to have “adequate and proper test” BEFORE the claim is made
- Advertiser must first show it has done an “adequate and proper test”, then the Bureau can lead evidence to show the opposite
- *Eveready Canada v. Duracell Canada* (1995) 64 C.P.R (3d) 348 (Ont. Gen Div.)



Other Legislation

Be aware of other legislation that may govern certain types of claims, or claims related to certain kinds of products

Ordinary Price claims – subsections 74.01(2) to (5) of the *Competition Act*

Testimonials – subsection 74.02 of the *Competition Act*

Nutrition claims, Health claims – *Food and Drug Regulations*



Comparative Ads – Other Considerations

- Do not be false or misleading, as per general rules above
 - Including being misleading by selective use of data
- Do not unfairly compete by unfairly disparaging competitors
 - Potentially tortious conduct to do so
- Avoid Infringing a competitor's IP rights
 - Using a competitor's logo or TM could violate copyright
 - Using a competitor's TM could breach Section 22 of the *Trade-marks Act* (Canada) for depreciation of goodwill, or could lead to an action for passing off under section 7(b)



Challenging A Competitor's Ad

Possible options:

1. Write to the Competitor
2. Complaint to the Competition Bureau
3. Civil Litigation
4. Advertising Standards Canada – Trade Dispute Procedure
5. Complaint to Industry Specific Regulator



Challenging A Competitor's Ad

1. Write to the competitor

- Can often be effective at ending the conduct.



Challenging a Competitor's Ad

2. Complaint to the Competition Bureau

- Bureau can challenge misleading advertising either criminally (Section 52) or under the Reviewable Trade Practices provisions (Part VII.1)
- Bureau will likely only take up a case where there is sufficient public interest at stake



Challenging A Competitor's Ad

3. Civil Litigation

Possible Causes of Action:

- Section 36 of *Competition Act* (must allege a criminal violation)
- Tort of Injurious Falsehood
- Tort of Wrongful Interference with Economic Relations
- Depreciation of Goodwill - Section 22 *Trade-marks Act*
- Passing Off – Section 7(b) of *Trade-marks Act*
- Violation under the *Copyright Act*



Challenging A Competitor's Ad

4. ASC Trade Dispute Procedure

- Only available for ads on radio, television or print, but not packaging or labeling
- You must allege that the competitor's ad breached the Canadian Code of Advertising Standards



Challenging A Competitor's Ad

5. Complaint to Industry Specific Regulator

- For example - a complaint to the Canadian Food Inspection Agency about a competitor's advertisement that does not comply with the *Food and Drug Act*.
- Can be effective if available. But – regulators may only take up a matter if a pressing public interest is at stake – such as health and safety



A Working Approach to Claim Identification

- 50% of solid Claim Substantiation is sound Ad Interpretation
- 40% of solid Claim Substantiation is involving the right expert(s)
- 10% of solid Claim Substantiation is asking the right questions along the way



A Working Approach to Claim Identification

BEGIN WITH ACCURATE AD INTERPRETATION

Start with the words

What exactly are the words it uses?

- Does the headline differ from the text?
- Do the words have special or defined meanings?
- Is there critical information found in a footnote or super?
- Do the words refer to multiple products, or just a single item?
- Do the words place the claim within a time or place context?
- Do the words refer to consumers generally, or to a subset of them?



A Working Approach to Claim Identification

BEGIN WITH ACCURATE AD INTERPRETATION

Next, ignore the words – Just look at the visuals

- What product/services are you depicting?
- Have you shown *anything* that goes beyond what you're saying?

Now review both words and visuals together

- Do they sync up, or create new meanings?
- Taken together, are there multiple, reasonable meanings?

Finally, what is your intent?

- Do emails, plan documents, etc suggest a particular meaning?



A Working Approach to Claim Identification

WHAT IF YOU ARE NOT SURE OF THE AD'S MEANING?

- Sleep on it – look again later
- Show the ad to other people for reactions
- Find out if your organization has run similar ads before, and what you thought *those* ads said
- Find out if competitors have run similar ads before, and what their ads said and looked like
- Find out if your organization is planning communications research, and consider whether to include any probative questions in it
- Get input/advice from experts in other depts. – i.e. market researchers, if you have them



A Working Approach to Claim Identification

When you find a claim – categorize it

- Puffery / hyperbole / opinion
- Performance claim – technical
- Performance claim – comparative
- Preference claim

Remember – claims can overlap categories

Substantiation varies by category



Resources

Brenda Pritchard and Susan Vogt, Advertising and Marketing Law in Canada (LexisNexis Canada Inc., August 2006)

Young & Fraser, Canadian Advertising & Marketing Law (Thomson Canada Limited, 2006, 2001)

Advertising Standards Canada <http://www.adstandards.com/en/>
- includes the Code of Advertising Standards, the Broadcast Code for Advertising to Children and the Guidelines for the Use of Comparative Ads and Research Data

Competition Bureau <http://www.competitionbureau.gc.ca/>



Resources

Canadian Trademarks Database

<http://strategis.ic.gc.ca/app/cipo/trademarks/search/tmSearch.do?language=eng>

Office de la langue française <http://www.olf.gouv.qc.ca/>

Office de la protection du consommateur
http://www.opc.gouv.qc.ca/e_HotLine/map_Site.asp

Privacy Commissioner (Canada) http://www.privcom.gc.ca/index_e.asp

Canadian Food Inspection Agency
<http://www.inspection.gc.ca/english/toce.shtml>



Dealing with emerging mediums

-
- Branded entertainment
- Blogs
- Email and web advertising

Branded entertainment

- Also known as product placement, product integration or strategic entertainment
- Can be passive or integrated into storyline
- Growth result of advertisers seeking new ways to broadcast message in era of fast-forward technology



Branded Entertainment

Issues:

- Control over image and use of product;
- Possible consumer backlash (e.g. both FCC and FTC have received petitions requesting regulation of branded entertainment)



Blogs

- Can be an innovative and effective marketing tool (e.g. Article in National Post, Sept. 30, 2007, “Ah, the scent of Paris in the blogs, Coco would love Chanel’s latest marketing trick”)
- Largest issue– control e.g. Whole Foods CEO John Mackey’s pseudonymous postings on stock-market chat rooms
- Blogs raise possible issues of libel, disclosure of confidential information, share manipulation, consumer backlash if pseudonym becomes known



Email Advertising

- Email advertising also includes viral marketing (e.g. “Tell-a-friend”)
- Legal issues applicable:
 - compliance with Competition Act and other laws applicable to product;
 - compliance with privacy legislation (sending to opt-in lists, “bcc” do not “cc” mass emails; include opt-out from receiving future emails, privacy issues with obtaining “friend’s’ email address without knowledge or consent of “friend”)
 - compliance with the US federal law, CAN-SPAM Act



Email Advertising

- CAN-SPAM Act requirements re: viral marketing
- “forward to a friend” emails must comply with requirements, particularly if person is provided consideration to forward (e.g. extra sweepstakes entries, coupons)
 - Email must contain a notice that the email is an advertisement or solicitation, a valid physical postal address, a functioning opt-out method; and an accurate e-mail header



Email Advertising

- Note: a simple “Click here to forward” feature that does not provide any encouragement to do so does not require compliance with the CAN-SPAM Act but a message like “Tell-A-Friend – Help spread the word by forwarding this message to friends! To share this message with a friend or colleague, click the “Forward E-Mail Button” does require compliance
- Opt-out requirements under CAN-SPAM require also require that you scrub the email address of the “friend” against your current opt-out list before you send the email



Web Advertising

- Advertising and marketing laws applicable to your product or service and Competition Act apply regardless of medium used
- But some unique considerations with online advertising
- Geographic limitations should be set out to avoid having to comply with laws outside intended scope
- In addition, online disclaimers and representations to which they relate should be in close proximity on a web page
- Privacy issues with targeted marketing technology; need to have ability for individual to turn this off