

Overview of Advertising Law



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- False, Misleading or Deceptive Advertising
- Types of Advertising Claims
- Disclaimers
- Puffery
- Comparative Advertising
- Endorsements and Testimonials
- Packaging and Labeling
- Social Media
- Email Marketing

Overview

- Special Issues in Advertising Law
 - Environmental Claims
 - Advertising to Children
 - Sector-Specific Regulations
 - Contests and Sweepstakes
 - Trademark Notices in Advertising
- Advertising Checklist

Advertising Law

- Protects consumers (by enabling them to make informed decisions) and businesses (by ensuring a level playing field).
- Most countries regulate advertising through legislation and regulations.
- Self-regulatory bodies in some jurisdictions (e.g., NAD in the US, Advertising Standards Canada).
- Check with local counsel for clearance of advertising in foreign countries.

False, Misleading or Deceptive Advertising

- Generally, untrue, misleading or deceptive statements in advertising are prohibited when the statement is “material,” meaning that it could influence a purchasing decision.
- Visual representations may be as misleading as words.
- An advertisement may be misleading as a result of the omission of material facts.

False, Misleading or Deceptive Advertising

- Common examples of misleading advertisements include:
 - Hidden fees
 - Inaccurate or misleading claims
 - Inaccurate comparisons with other products
 - Prominent claims that are contradicted by fine-print disclaimers

Types of Advertising Claims

- Express Claim: A statement that is likely to influence a consumer's decision and that can be objectively proven.
- Implied Claim: An indirect claim or inference about a product's characteristics or performance.

Example: "Made of 100% cashmere" or "Delivered within 2 days."

Example: "X blocks rays that cause sunburns" (contains an implied claim that the product will prevent sunburns). Also, "Milk is a good source of calcium, which helps prevent osteoporosis."

Types of Advertising Claims

- Visual Demonstration: A product demonstration that depicts how the product will perform under normal consumer use.

Example: Toy flying through the air (should be depicted in typical use and not enhanced performance).

- Data- or Survey-Based Claim: Claim that implies a scientific or survey basis; requires appropriate and adequate prior substantiation.

Example: “30% thicker than...” or “4 out of 5 dentists recommend...”

Disclaimers

- Clear and conspicuous disclaimers may be useful or required to clarify statements made in advertising.

Example: “Based on survey of 1,000 dentists conducted in March 2011.” or “Additional shipping and handling fees may apply.” or “Second item must be of equal or lesser value.”

- Disclaimers and other fine print cannot contradict more prominent aspects of the advertisement.

Example: Ad claims “Lose 10 pounds per week without dieting” but disclaimer states “Based on diet and exercise.”

- Required disclosures should be displayed in such a way that they are legible and likely to be read. Online disclaimers should appear on the same screen and close to the relevant claim.

Puffery

- Puffery: General, favorable statements of exaggeration that cannot be proven and are not likely to be relied upon by consumers. Includes general claims of superiority that are understood by consumers as merely an expression of opinion.

*Examples: “The most comfortable shoes ever made!”
“Best Coffee in the World”
“Ultimate Fresh Breath”*

- Some countries may permit puffery without any substantiation.

Comparative Advertising

- Comparative claims are statements comparing one product or service to another by name.
Example: “Battery X lasts 30% longer than Battery Y.”
- In many countries, comparative claims are not allowed, or may not be allowed if the competitor’s mark or other identifying material is used.
- Where permitted, comparative claims generally must be truthful, not misleading and adequately substantiated.
- Use of third-party trademarks may be permitted in comparative advertising, but check with local counsel to determine local laws and guidelines with respect to such use.

Endorsements and Testimonials

- Endorsements or testimonials by consumers, celebrities or experts may be specifically regulated. As a general rule, third parties may not make false statements about a product or service even if those statements reflect their honest opinion.
- In the US, endorsements and testimonials must be truthful and substantiated. Consumer experiences must be representative of all consumers. Advertisers are no longer allowed to disclaim claims with “Results not typical.” *Example: “I lost 60 pounds with this program. Results not typical.”*
- New rules in the US regarding “word of mouth marketing” require bloggers and other product endorsers to disclose “material connections” (sometimes payments or free products) with the advertiser.

Packaging and Labeling

- Most countries regulate packaging and labeling.
- Requirements may vary widely for different industries/products.
- Information may be required regarding product composition/identity, product net quantity, origin of manufacture and hazards associated with the product or its packaging.
- Regulations may require standardized package sizes.
- Bilingual or multilingual requirements in some jurisdictions.

Social Media Advertising

- Social media are becoming a major component of customer relationship management (CRM).
- Accumulation of personal information must be in accordance with applicable privacy laws.
- Privacy laws may restrict how personal information may be collected, stored, used and shared.

Email Marketing

- Many countries have laws that restrict and/or regulate unsolicited commercial email messages.
- Some countries require that consumers opt in to receive marketing messages.
- Transactional messages (e.g., order confirmations) usually are not as restricted, if restricted at all.

Special Issues in Advertising Law

- Environmental Claims
- Advertising to Children
- Sector-Specific Regulation
- Contests and Sweepstakes
- Trademark Notices in Advertising

Environmental Claims

- Many governments, including Canada, the US, Australia, New Zealand, and the EU, have published guidelines for companies that make environmental claims about their products or services or that use environmental symbols.
- Generally, environmental rules require claims to be accurate, specific and substantiated, and often require the basis for the claim to be stated.
- Exaggerated claims of environmental practices or benefits are considered misleading and prohibited. Rules may require that the product/practice involve a net environmental benefit.

Environmental Claims

- Generally, it is not sufficient to make vague claims such as “green” or “environmentally friendly.”
- A claim must detail the environmental benefit in a way that can be verified.

Advertising to Children

- Many countries have specific laws restricting or prohibiting advertising to children. The degree of protection varies by jurisdiction and type of media. Different restrictions may apply based on the age of the child.
- Types of advertising restrictions:
 - Ad may not lead a child to covet a product through an exaggerated demo.
 - Ad may not show minors in dangerous situations.
 - Ad may not exploit the special trust minors place in teachers and parents.

Sector-Specific Regulation

- Advertisement for certain industries may be regulated by the government or self-regulating industry bodies.
 - Alcohol
 - Tobacco
 - Food
 - Drugs and Health Products
 - Cosmetics
 - Financial Products and Services

Contests and Sweepstakes

- Contests and sweepstakes are highly regulated in many countries.
- Consult counsel before launching contests or sweepstakes.
- For sweepstakes, provide alternative method of entry that does not require purchase.

Trademark Notices in Advertising

- TM Trademark of XYZ Co. Inc. (for unregistered trademarks).
- [®] Registered trademark of XYZ Co. (for trademarks registered in that country). Consider not using for advertisements that will appear globally, including in jurisdictions where the mark is not registered. Alternatively, you can state: “TM Trademark of XYZ Co. registered in certain jurisdictions.”
- Use of third-party trademarks may require permission.

Advertisement Checklist

- What claims are made in the advertisement?
- Does adequate and proper substantiation exist for all claims made?
- Should disclaimers be used to define, clarify or substantiate claims?
- Are comparative claims involved?
- Are testimonials or endorsements involved?
- Any special issues in the advertisement:
 - Environmental claim or symbol?
 - Directed to children?
 - Sector-specific regulations applicable?