

Edwards Wildman Palmer LLP

Managing risk in the regulatory environment

Since there is a range of legislation dictating advertising practice, investment in a proper review and clearance process is minimal compared to the potential cost of claims

Advertising, marketing and promotions are governed in the United States by a patchwork of federal, state and local laws and regulations, as well as industry self-regulatory schemes. Additionally, numerous requirements apply to specific regulated industries that are beyond the scope of this article. Failure to understand and follow these requirements can lead to expensive litigation or government enforcement actions and negative publicity that can harm a brand.

The content of advertising, marketing and promotional messages (collectively, an 'ad') requires clearance to avoid infringement with respect to intellectual property and other rights arising out of the materials used, as well as with regard to the substance of claims being made. The materials that comprise the ad are subject to intellectual property and personal rights which, if not owned by the advertiser, usually need to be licensed or acquired. Copyright and trademark clearance should be conducted on all ad materials. The clearance process will ensure that the advertiser either owns all copyright-protected materials or has a licence of sufficient scope to use them as intended, and that any third-party contractual obligations related to the materials are met. Where ads include trademarks, trade names, service marks, logos or slogans (collectively, 'marks') to identify the advertiser's products or services, the advertiser needs to confirm that each such mark is available for such use, and that it is used consistently with the advertiser's trademark guidelines. The US Lanham Act, 15 USC Section 1051 *et seq.*, sets forth a scheme for registering marks and provides registrants with protection against use of similar marks in a manner that causes consumer confusion, and it also prohibits deceptive marketing of goods or services that injures competitors. It is normally a fair use in the United States to use third-party marks in ads to compare the

advertiser's product to that of a competitor, though care needs to be taken to avoid deception with regard to claims and comparisons made or confusion as to source or endorsement. It is advisable to use only so much of a competitor's mark as is reasonably necessary to identify the product being compared and its source; generally, use of a logo or graphic mark is deemed not to be a fair use if calling a third-party product by name would be sufficient to identify it. In addition, individuals depicted or referenced in ads have privacy and publicity rights that oblige the advertiser to obtain their consent for use in connection with advertising, and this also applies for celebrities. In many states the right of publicity is a post-mortem right. The federal Lanham Act also provides potential causes of action by individuals for false endorsements. User-generated content solicited and used by an advertiser also presents a clearance challenge.

Claims substantiation, deception and disclosures

Advertising content frequently includes product claims, which need to be cleared as accurate and not expressly or implicitly misleading. In addition to the potential for claims by competitors under the Lanham Act, Section 5 of the Federal Trade Commission (FTC) Act, 15 USC Section 45, prohibits "unfair or deceptive acts in or affecting commerce" and gives the FTC authority to regulate commercial advertising, including websites, and to bring actions to protect consumers. States and even some local governments have false advertising and unfair business practice laws that are sometimes more expansive in reach than the federal law and are enforced by other regulators such as state attorneys general and county and municipal authorities. Some states provide a private right of action. National advertisers are also

subject to the National Advertising Division of the Better Business Bureau, a self-regulatory system that adjudicates disputes between advertisers and brings actions on its own for false, misleading or deceptive ads. The repercussions of engaging in false, misleading or deceptive advertising, marketing or promotion depend on the type of claims brought and by whom, but can include damages, restitution, fines, required corrective advertising and consumer education, injunctive relief and ongoing auditing and reporting. Accordingly, whether express or implied, any misleading or confusing claims in ads or other public statements – including privacy policies, press releases, email and text messages – could result in claims against the advertiser. These can arise out of improper use of statistics, performance claims that are not measurable and verifiable or are exaggerated, ambiguous suggestions, misleading environmental advertising and marketing practices (proscribed by the so-called FTC Green Guides), failure to give clear, conspicuous and proximate disclosure of material information and misleading implications. Advertisers should have prior substantiation for all objective claims made about products and services, and maintain documentation of the relevant data. Subjective claims are permissible, including puffery – general claims of superiority that a consumer would not reasonably understand from the context to be other than pure opinion. When engaging in puffery it is important not to make a comparison to other products which could suggest that a specific and verifiable claim is being made. Properly conducted, comparative advertising is deemed by the FTC as serving the public interest by promoting product improvements, price competition and consumer knowledge. Advertising may be specifically disparaging of competitors, subject only to the same

standards applicable to other ads – that is, that objective claims be substantiated and the ad not be deceptive or misleading.

The FTC provides guidance on certain specific forms of advertising, such as how advertisers may use the word 'free' in advertising materials; how warranties can be offered, limited and advertised; and how to give clear and conspicuous disclosures in online environments. The FTC recently updated its Guidelines on Testimonials and Endorsements to explain that companies involved in encouraging a message about their products or services in non-traditional media – even if the speaker is a consumer or celebrity – will be responsible for the message and for taking reasonable efforts to ensure that those it activates to spread the word about the company disclose any material connections to the advertiser, such as employment, payment or being the recipient of samples or other things of value.

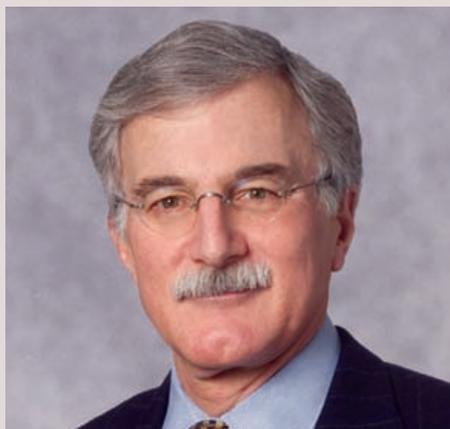
Regulation of methods of advertising

As well as ad content, the methods of advertising are regulated. Federal and state lottery and gambling laws are applicable to sweepstakes and contests. Legal promotions cannot have all three elements of prize, chance and consideration, which includes non-monetary consideration. Sweepstakes eliminate consideration, typically by providing a free alternative to purchase. However, some states prohibit entrants from paying to play, even if they could have entered for free. Contests eliminate chance by selecting the winner based on knowledge or skill. However, the states take a range of approaches as to what degree of chance is permissible, and some prohibit or condition contests where a payment or product purchase is required. In addition, some states require bonding and registration in certain circumstances and specific disclosures in official rules and advertising and recordkeeping. As another example, email, phone, fax and text marketing are heavily regulated, principally through two federal laws and related regulations. The federal CAN SPAM Act, 15 USC Sections 7701-7713, enforced by the government and internet service providers, impacts on all commercial email marketing activities by requiring, among other things, a notice and opt-out system. States can still regulate emails that involve fraud or deception, and many state schemes permit private rights of action for these claims. The more intrusive nature of telephone and text marketing is subject to a more complex scheme that requires prior, express and specific consent pursuant to the terms of the federal Telephone Consumer



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Protection Act, 47 USC Section 27 *et seq.* State laws may also apply. In addition, companies that control private media, from traditional television networks and print publications to Facebook and Twitter, impose their own rules on their venues that advertisers must follow.

Privacy and data security

Digital media allows for a two-way connection with consumers, and advertisers have created ways to collect consumer data online and use that information to target consumers with messages. This implicates the rights of privacy of consumers. There are specific federal and state privacy laws relating to the healthcare, home video entertainment and financial services industries. The FTC regulates general consumer privacy under its Section 5 authority and is active in bringing claims for false or misleading privacy statements. Online behavioural advertising is the practice of tracking consumers' online behaviour across sites and developing profiles that are used to target them with ads based on the interests they appear to have. This form of advertising is under scrutiny by the FTC, Congress and a consortium of business and advertising trade associations. The Digital Advertising Alliance recently rolled out self-regulatory requirements discussed at www.AboutAds.info. In response to concerns over identity theft and an increase in data breach incidents that put consumers at risk of identity theft, most US states have enacted laws that require entities that have experienced data security breaches involving sensitive personal information to notify affected individuals of the breaches. A federal data security scheme is under consideration.

Advertising to children raises additional issues. Given that children lack the same capacity as adults to recognise and evaluate advertising messages, both the government and self-regulatory bodies impose greater burdens on advertisers targeting children. Also, children's privacy is a concern (see the federal Children's Online Privacy Protection Act, 15 USC Section 6501 *et seq.*, requiring online services directed toward children that collect personal information or general audience websites that knowingly collect such information to obtain certain, verified, prior parental consent and conspicuously post a privacy notice for parents).

Those tasked with the development and execution of advertising campaigns need to be educated on the legal landscape and given guidance on what they can and cannot do. The investment in a proper review and clearance process is minimal compared to the potential cost of claims and of damage to a brand arising out of loss of consumer good will. **WTR**