

**MARKETING FEATURE:**  
Five Steps That Protect Your Ads

# Advertising And the Law

By Steven A. Meyerowitz

The author is a lawyer and freelance writer based in East Norwich, New York. He writes regularly about marketing and other legal and business issues.

**In Brief:** Advertising can be a "Catch-22" for any company. Without strong and effective advertising campaigns that set you apart from the competition, you can't maximize sales. Yet, the same high-impact advertising that attracts customers may also attract legal trouble for your firm. By following the legal principles set forth in this article, you can make sure advertising works for your company without subjecting you to potential litigation. (Then turn to the Executive Forum on page 70 for interviews detailing other real-life corporate brushes with advertising law.)

**T**he label on the can of chicken read, "No bones." But a customer disagreed, saying that the can of chicken that he purchased did contain a bone. The customer insisted that the bone became lodged in his throat and that, as a result, he had to undergo surgical treatment. The customer filed a lawsuit against the manufacturer of the canned chicken, seeking damages, contending that the label on the can, as well as newspaper advertisements featuring the product (that also promised boneless chicken), constituted an "express warranty" that the product was, indeed, boneless. The court agreed with him.

As this case indicates, advertising can be risky. It requires more than creativity and knowledge of the sales process. An understanding of the law is also necessary. Here are five legal guidelines to keep in mind

when preparing advertising or promotional materials.

## PRODUCT CLAIMS

### ***Rule 1. Watch what you say about your product.***

Basically, there are two kinds of product claims that are potentially troublesome for advertisers: express warranties and false or misleading statements.

***Express warranties.*** For an advertiser's claim to be regarded as an express warranty, it must promise more than "the best" or a "great buy." (Such vague, superlative statements are usually considered by the courts as "harmless puffery" or "company opinion"; potential purchasers are expected to place little credence in them.)

Express warranties, on the other hand, affirm a specific fact about a product to that product's purchaser. For example, one manufacturer's claim that its windshield was made so that "it will not fly or shatter under the hardest impact" and a builder's promise that its towers "could safely withstand the maximum wind velocities and ice loads to which they are likely to be subjected" were judged to be express warranties.

While it is possible for you to disclaim any express warranties made in your product's advertisements, it is difficult to do so. The best strategy, therefore, is to avoid the problem altogether by carefully reviewing ads, as well as brochures, labels, catalogs, direct mail letters, and other written materials used to promote your products. Make sure they contain only statements that you can *prove*.

***False or misleading statements.*** The federal Lanham Act prohibits advertisers from falsely describing their products and allows competitors—but not consumers—to sue. Recent amendments to the Lanham Act also make it unlawful for a company to describe a competitor's product falsely. (See Rule 3.)

For example, the Coca Cola Company successfully sued Tropicana Products several years ago under the Lanham Act. A television commercial for Tropicana showed Bruce Jenner squeezing an orange while saying, "It's pure, pasteurized juice as it comes from the orange." He then poured the fresh-squeezed juice into a Tropicana carton while the audio stated, "It's the only leading brand not made with concentrate and water."

Coca Cola, which makes Minute Maid orange juice, complained that the commercial was misleading because it incorrectly represented that Tropicana's juice was unprocessed fresh-squeezed juice when in

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In appropriate instances, and after a careful legal review, fair use can be a valuable exception to the copyright laws. But, because fair use has been called one of, if not the most, difficult areas of copyright law, and because it—at most—grants companies a limited ability to use a small amount of copyrighted material in their ads, it is not a good idea to rely on this exception.

**Trademarks.** Federal trademark law should be kept in mind when choosing advertising slogans to identify your products. Slogans must not infringe on trademarks held by others.

A manufacturer of floor wax that contained insecticide once attempted to use the slogan “Where There’s Life...There’s Bugs.” But Anheuser-Busch, which owns the trademarked slogan “Where There’s Life...There’s Bud,” was able to block the floor wax company’s use of that slogan. A court ruled that Anheuser-Busch has the exclusive right to use that slogan and to bar the use of similar slogans when detrimental to Anheuser-Busch.

A company may be able to use another firm’s slogan if that slogan is merely descriptive. For example, one underarm deodorant manufacturer was able to use the slogan “Be Sure With Sure” because its competitor’s slogan, “Use Arrid To Be Sure,” was found to be descriptive only.

A company may also lose the exclusive right to a trademark if that trademark becomes the term generally used to describe the product, rather than the source. The former trademarks aspirin, shredded wheat, pocket books, and cellophane have all been found to be generic terms, available for use by all manufacturers of those products. (See this month’s *Executive Forum*, page 70.)

**Rights to privacy and publicity.** When developing company ad campaigns, you must respect the rights of private individuals. Virtually every state prohibits the use of a person’s photograph in an ad without consent (“right to privacy”). In one case, an insurance company used a man’s name and photograph in its ads without his consent and the man filed a successful lawsuit as a result.

## COMPARATIVE ADS

**Rule 3. Speak of competitors with care.** Last year, Congress amended the federal Lanham Act to permit a competitor to sue companies whose ads contain false statements about that competitor’s product. This new provision plays a particularly important role in comparative advertising.

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U.S. Pat. & Tm. Off.” is appropriate.

- Consider adopting a trademark protection program. For example, use educational or informational advertising to stress that your trademarked words or phrases are in fact trademarks and should not be used improperly. (The Xerox Corporation occasionally runs ads noting that the word “Xerox” is a trademark.) Make sure they are not misused in competitors’ ads or brochures.

## DISPUTE RESOLUTION

**Rule 5. Resolve all disputes with competitors, consumers, and the government quickly.** If your company does become embroiled in an advertising dispute, try convincing your opposition to resolve the matter through arbitration. Litigation is expensive and time consuming. It may take years before a case is scheduled for trial, and there is always the possibility that appeals will take up even more time and resources.

Arbitration avoids many of these problems. It is usually considerably less costly and time consuming than litigation. There is limited pre-trial discovery and almost no right of appeal. The dispute is decided by one arbitrator or a panel of three arbitrators after a presentation by both sides. The arbitrators are often business people with knowledge of and experience in the parties’ industry. They can resolve whatever issues the parties present before them, including Lanham Act claims, comparative advertising disputes, and even trademark and copyright issues. Arbitration can be a major money saver to most businesses.

**The National Advertising Division (NAD)** of the Council of Better Business Bureaus is another forum that can be used to settle disputes. NAD is a voluntary organization that tries to resolve controversies between competitors or between a company and a consumer. It reviews advertisements to determine whether companies have sufficient support for claims made in ads. If NAD finds that ad claims are unsupported, it may negotiate with companies to withdraw or modify the offending ads.

**C ONCLUSION.** Advertising is not merely a sales tool, it is a responsibility. Failure to live up to this responsibility could cost your company time, money—and its very existence. By following the aforementioned legal guidelines, you should be able to sell your company’s products and fulfill your legal responsibilities to consumers and competitors. ◉

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