

Advertising & Marketing

in 19 jurisdictions worldwide

2014

Contributing editor: Rick Kurnit



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Getting the Deal Through is delighted to publish the first edition of *Advertising & Marketing*, a new volume in our series of annual reports, which provide international analysis in key areas of law and policy.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 19 jurisdictions featured.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are always referring to the latest print edition or to the online version at www.GettingTheDealThrough.com.

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Introduction

Rick Kurnit

Frankfurt Kurnit Klein & Selz, PC

Advertising may be virtually any communication that affects consumers' impressions about a marketer's products or services, or even policies and practices. Traditional media did not have much difficulty distinguishing editorial content from the paid insertions that were authored by an advertiser, but today the integration of brand messages into the content stream is exploding. This puts the burden on brands to oversee a wealth of content being generated by many different sources. Public relations professionals who have grown up in a world where their communications were mediated through independent media and therefore not viewed as advertising are now facing the need to review their materials against the stricter tests of advertising. Press releases, letters to newspapers, content that is placed or even made available in the stream of digital media may be deemed to be advertising. The question of what constitutes 'advertising' in the online and social media arena is a moving target. Digital media afford an instant opportunity to move from editorial to purchase, perhaps with a revenue share for the content provider, and this too may cause the content to be viewed as advertising.

Truth in advertising is largely a matter of the techniques that salespeople have always used to overcome consumers' tendency to doubt the seller's claims. Grandiose claims couched in extraordinary superlatives, incapable of any kind of verification and not addressing any specific or absolute characteristic of the product are mere 'puffery'. They get the consumer's attention, but they are just 'hot air'. They are not likely to convince the consumer to purchase the product on any basis that the consumer cannot evaluate. Apparently objective or independent evidence that supports the advertiser's claims, particularly those the consumer cannot independently assess, provide the consumer with a reason to purchase.

The crucial issue is whether the advertising makes an actual, objectively provable claim about the product that is likely to influence consumers' purchasing decisions or whether the claim is an obviously exaggerated representation that 'ordinary consumers do not take seriously'. Is there some aspect of the advertising that serves to enhance the credibility of the advertiser? Is there some message that serves to overcome consumers' natural tendency to discount the claims because they are made by the seller of the product? These messages of enhanced credibility will often be the distinction between puffery and a factual claim requiring substantiation. The analysis of the advertising in this way helps to focus on whether or not there are in fact claims that must be substantiated.

A product demonstration or test of product performance permits the consumer to rely upon his or her own eyes. A consumer stating his or her own personal experience with the product provides 'independent, unbiased' verification of the seller's claims. Expert testimony and scientific explanations from professors or doctors make

extraordinary claims believable. Reliable reports of many satisfied customers similarly provide a substitute for having to take the seller's word for the truth of his claims. And finally, a money-back guarantee suggests that performance is measurable and real. In short, facts, demonstrations, tests, endorsements, surveys, guarantees and other means to overcome consumers' natural cynicism about claims made by advertisers and enhance the credibility of the advertiser's message must be supported by hard data and controlled proof.

It is not a question of what was intended. Advertising is judged based on what is communicated and understood by the consumer. Thus we must define the relevant consumers who are likely to be influenced by the advertising in making purchasing decisions. This raises the question of what these consumers understand before seeing the advertising and what they take away from the advertising. Regulators may view the communication from the perspective of the reasonable consumer to whom the advertising is directed acting reasonably in the circumstances. Or they may seek to protect the 'village idiot': 'the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyze but are governed by appearances and general impressions'. Thus regulators may allow for a portion of the audience being confused, but in most jurisdictions advertising must meet the test with respect to any substantial portion of the audience.

In the digital world in which the current generation has grown up, the consumer is likely to become more sophisticated and experienced in perceiving communications and discerning what is authentic and unbiased. The content that is now being created and displayed on the world wide web is sponsored, supported, encouraged and disseminated by advertisers in new ways and with new technologies. Advertisers' greatest asset is the brand equity of a trusted brand. A misstep in communications that tarnishes that brand or damages the brand's relationship with consumers can be catastrophic. And in a global ecosystem a misstep in one part of the world can reverberate worldwide. Attorneys responsible for guiding advertisers on compliance with best practices and avoiding liability face an increasingly difficult task as different jurisdictions must be considered in reviewing global communications and training communications professionals to understand the universal principles that we call 'truth in advertising'.

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