

The logo for Astrachan Gunst Thomas features a stylized, swirling graphic in shades of blue and grey behind the company name. The name is written in a clean, sans-serif font, with 'astrachan' in a lighter blue and 'gunst thomas' in a darker blue.

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HOW TO CREATE ADVERTISING WITHOUT CREATING LAWSUITS

By: Jim Astrachan

Recently, I dusted off a column I wrote for ADWEEK more than ten years ago. To my surprise, every point is just as valid today, and a few new hot spots have surfaced. Over twenty-five years of representing agencies and advertisers I've seen different clients suffer from the same recurring mistakes that could have been easily avoided. Because agencies and advertisers should spend their time creating ads and not defending them in court, here are some of the most frequent legal errors, tips on how to avoid them and a few new wrinkles that are causing industry headaches.

Who owns art? Agencies always acquire art and photos for their clients. Sometimes the client believes it acquired outright ownership, but the agency only gets a license. Check carefully your client and vendor contracts for this costly inconsistency.

Tip: Copyright ownership can only be transferred in writing, and without effective transfer of copyright, chances are the vendor owns all rights; all you give your client is a license.

Who owns speculative creative – agency or prospect? A pre-presentation contract will clarify ownership and right of use. But sometimes your spec creative finds its way into the prospect's ads, although you haven't been hired. You might consider a thank you letter to prospective client reminding it that all rights are reserved and that the ad has been registered with the copyright office.

Problem: Today, many advertisers are demanding that agencies agree to release all rights before participating, sometimes for a nominal fee. Agencies need to stand up for themselves, but advertisers are fearful that a one presentation may be similar to another and lead to accusations.

Indemnification. An agency often takes its client's product claims at face value and includes them in copy. Then a competitor or the government charges deceptive advertising. A careful review of client's claims is a must and sometimes independent substantiation is a must. An agency should require a written contract with a client providing for indemnification of the agency if it gets into trouble because of something the client has supplied but this is often another source of litigation.

Tip: Indemnification is a two way street. The advertiser should warrant that it is solely responsible for all information it provides concerning its service and products and the agency should warrant that it has not violated anyone's rights in creating the ads.

Why can't I use her face in my ad? Years ago, Herbal Concepts got into trouble when it used the naked posteriors of a mother and her daughter in a shampoo ad. The faces weren't shown, but the husband's friends swore under oath they recognized the wife. The rule is that everyone has the right to exploit or preserve the value of his or her identity. Any possibility of recognition in an ad, whether by nickname or posterior, creates a cause of action. In New York violation is a crime.

Tip: Always get and retain written consent to use the likeness and only use them in ways consistent with the permission.

Who's liable for media payment? Is the agency an independent contractor or an agent for its principal (the advertiser). If an independent contractor, the agency will always be liable for the media it places because it's a party to the contract. If an agent, the agency contracts with the media on behalf of its client. For an agency relationship to exist, the client must be able to control the agency and approve or disapprove its acts. In on New York case, the court recognized the client's liability to the media as a general rule but refused to find the client liable because the media was aware of the agency's financial woes but hid them from the advertiser who continued to pay the agency.

Tip: An agency should always express the agent and principal relationship in its contract, and let the vendors know in writing. The client needs to be careful who it appoints as its agent.

Can your ad use their trademark? Trademark rights are zealously guarded, but an owner of a trademark does not have a monopoly over its use. Fair comparisons between two products are good reasons to use the competitor's mark in an ad. Sometimes an advertiser will use another's mark to boost the image of its product by association. That use creates a serious risk because the other owner may claim that there is an appearance of sponsorship, affiliation or endorsement. An advertiser should never rely on a disclaimer to eliminate what is organized confusion over sponsorship, endorsement or affiliation.

Tip: When engaging in comparative advertising, dust off your liability insurance. An agency's general comprehensive liability policy provides no "malpractice" coverage. Even if a specific advertising insurance policy exists, comparative advertising may be excluded.

Click fraud: A magazine was indicted for lying about its circulation to boost ad ratings. The new version of this is click fraud and it can come from many sources. Advertisers pay search engines every time a prospect clicks on its ad or website. 10% to 20% of these clicks, at 40 cents to \$3.00 .per are not legit. They come from competitors and organized groups, some located in China who employ automated devices.

Tip: Monitor activity and be suspicious of pattern. For example, every click is 1.8 seconds apart. Employ technology to monitor activity, and complain to the search engine if you suspect fraud.

This list is not comprehensive but it is ironic that many of the same problems that existed ten years ago exist today.

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