

astrachan gunst thomas

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www.agtlawyers.com

RULES FOR AN INDUSTRY CLAIMING TO HAVE NONE

By: Jim Astrachan

We talk to many agency and advertiser trade groups; we're lawyers so the most asked for topic is *legal problems*. "It's fairly simple," we say. "Remember that there are rules of the road. Learn and obey them." In no order of importance, here are rules to keep you safe and some other thoughts about our industry.

False Claims. Never make a false claim about your product or your customer's if consumers will rely on the claim in making a buying decision. Even if what you claim is true as far as it goes, don't leave out the facts necessary to complete the story. For example, the car rental company that advertises at airports and in in-flight magazines that "it has the largest fleet of rental cars". True, it did, but prospective renters thought that meant *at airports*. It didn't and the claim was implicitly false.

TIP: Always have independent support for your claims before the ad runs.

Use of a Competitor's Trademark. There are times when a competitor can legally use another's mark. For example, in comparative advertising when the virtues of two products are compared. There are also occasions when a competitor's mark is used descriptively, and not as an indicator of source, to describe an attribute of the product. For example, the dress shoe manufacturer who trademarked "FEELS LIKE A SNEAKER" and lost a suit against a competitor who described its shoe as "feeling like a sneaker". Feeling like a sneaker was merely a description of how the shoe felt.

Parodical Use of Trademarks. Companies don't generally parody their competitor's marks, but I do remember a fast food chain parodying ROY ROGER'S trademark, *Slow down*, by using Roy's slogan to describe how long it took to get food after the order was placed. That's what parody is – valid social commentary. Still, another's mark can't be used if a significant number of people will be confused into believing that the real owner is the source of the ad or product.

TIP: Show your proposed use to a cross section of your employees. Ask them whose ad it is. If they say “the competitors”, re-do the ad.

Who Owes the Media. The advertiser pays the agency and the agency goes out of business before it pays the media. Or the agency contracts with the media and the advertiser shuts its doors before it pays the agency, but after the ad ran. Who owes the media? Is the agency an agent for a disclosed principal or an independent contractor? If the latter, the agency is the debtor because it contracts on its own account. But in most cases, the agency avoids liability by being appointed its client's agent and making the media aware. If the advertiser doesn't pay, the agency should not have to. Unfortunately if the agency folds before it pays the media, after the advertiser has paid it, the advertiser may have to pay a second time. One court held that the media's acquiescence to late payments by the agency, where the media knew the agency was in financial trouble and didn't tell the advertiser, barred collection from the advertiser if the advertiser.

TIP: If you are an agency, the contract must appoint you as agent. Let the media know. If you are an advertiser, be cautious who you appoint as your agent.

Indemnification. Indemnification is nice; E&O insurance is nicer. The indemnification is a contract between two unhappy parties and, contracts are written to be broken. Fingers will point in both directions and two suits often follow: the underlying tort claim (e.g. false advertising) and the contract claim for indemnification. An advertiser should be responsible for all materials and claims it provides to its agency; the agency should fess up for its mistakes made in materials it creates and for infringement of third parties' rights.

TIP: Have a written contract. Indemnification should be included and it should be a two-way street.

Ownership of Creative. Custom in the ad industry dictates that once paid for, the advertiser owns the agency's creative. Even if the contract doesn't so provide, a license is likely created for the client's use following termination. A trend that a leading agency trade association would like to see develop is agency retention of ownership and ongoing licensing of creative – like the licensing of photos or the payment for SAG/AFTRA talent. Rights can be bought-out for a fee.

TIP: Agencies have to ask for this, and advertisers, if they agree, have to become comfortable that they have rights of use.

Click Fraud. A few years back, the New York Attorney General indicted a magazine for lying about its circulation. Claimed it was mail fraud because ad rates

were based on circulation. The electronic version, click-fraud, of the scam affects pay per click advertising. Sources report that 10% to 20% of ad clicks are false, defrauding advertisers of \$1 billion per year. This is huge considering that advertisers now pay an average of 45 cents per click with legal, travel and gaming paying much more. Some blame dishonest competitors; others blame search engines. Some search engines refund money where click fraud is detected.

TIP: Advertisers should expose their ads only to the target market, be suspicious, employ anti-click fraud technology and complain when they suspect fraud.

All in all, the ad industry has gotten tougher – business and legal wise. It will get even tougher. It's a smart advertiser and agency that does not give up profits to mistakes that are easily avoided.

James B. Astrachan is the author of The Law of Advertising, published by Matthew Bender-Lexis/Nexis.