ADVERTISING LAW
SPOTTING AND AVOIDING ISSUES
IN TRADITIONAL AND NEW MEDIA

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TRADITIONAL ADVERTISING

Truth in Advertising or Substantiation
LANHAM ACT ON TRUTH IN ADVERTISING

• Unfair or deceptive acts or practices
• Who enforces? The Federal Trade Commission
• Bulk of prosecutions relate to deception: Contains a misrepresentation or an omission of information likely to mislead a consumer acting reasonably under the circumstances to their detriment
• But also unfair acts or practices: under a cost-benefit analysis
• Express and implied claims can be the source of consumer injury
SUBSTANTIATION

What do we need and when do we need it?

• “Competent and objective evidence” to support all objective claims
• Plus “scientific evidence” with respect to claims re: health, safety or efficacy
• Depictions matter! Looking at a script alone is insufficient. See the ad as a consumer would see it.
• FTC does not look at products by categories, standards apply across the board

*POM Wonderful v. FTC, 777 F.3d 478 (D.C. Cir. 2015)*

Reinforced the “competent and reliable scientific evidence” standard.
FINE PRINT PROBLEMS

Clear and conspicuous disclaimers

• A fact can be technically true, but still subject to regulatory enforcement if it is misleading
• Prices that require multiple discounts
• Money-back guarantees encumbered by material terms and conditions
• “If the disclosure of information is necessary to prevent deception, it must be clear and conspicuous”
CREDENTIALING CONSIDERATIONS

We test you, but we can’t say we know you.

Consider the following potential statements:

• We are the most ethical people in the entire world.
• Our people adhere to the highest ethics.
• Our people observe the highest ethical standards.
• Our ethical standards are the highest possible and our people observe them.
COPYRIGHT BASICS

And as applied to Advertising
WHAT IS COPYRIGHT?

• Protects “creative works of authorship”
  - literature, movies, music
• Protects the “expression” of an idea, not the idea itself
• Facts are not protectable, but their creative selection and arrangement can be (ex. Charts)
WHEN DOES COPYRIGHT PROTECTION BEGIN?

• As soon as work is fixed in a tangible medium of expression
• Copyright does not apply until you write it down, draw it, record it, etc.
• The following are not required for protection:
  • Registration with the Copyright Office
  • A copyright notice (but: better remedies)
• Duration: life of the author plus 70 years
• works made for hire: 95 years from first publication or 120 years from creation, whichever comes first.
FIVE EXCLUSIVE RIGHTS OF COPYRIGHT OWNERSHIP

• Owning a copyright gives you the exclusive right to:
  - Reproduce/copy
  - Distribute – exception is First Sale Doctrine, the owner of a copy can sell it
  - Publicly perform
  - Publicly display
  - Create “derivative works”/adapt
COPYRIGHT NOTIFICATION:
©2017 JANE SMITH ALL RIGHTS RESERVED.

• Not, but important to obtain the best remedies for infringement.
• Use copyright notice to inform public that the work is subject to copyright protection
• Name of copyright owner
• Date of first publication
• Copyright symbol © or the word “Copyright”

• Registration is not required for copyright notice.
WHAT IS COPYRIGHT INFRINGEMENT?

• Elements of a claim:
  - Ownership of a valid copyright
  - Copying by the defendant (rather than independent creation)
  - Access
  - Probative similarity
  - That the defendant’s copying constitutes improper appropriation.
    - i.e. Did he take too much?
  - Fair use: a defense to copyright infringement
CONSEQUENCES OF INFRINGEMENT

• Injunction
• Lost profits
• License fees they would have charged
• Statutory damages (if registered)
  • $750-$30,000 *per incident* for negligent infringement
  • $150,000 *per incident* for willful infringement
• Attorneys fees and court costs
• Negative publicity/embarrassment

• Lowry’s Reports v. Legg Mason $20 MILLION IN CIVIL DAMAGES
• American Geophysical Union v. Texaco (1995) Texaco settled for over $1 million in damages
WORKS MADE FOR HIRE

• YOUR EMPLOYER owns the work outright if:

• Employees: A work created by an employee within the scope of their employment

• Independent contractors: “A work specially commissioned for use as a contribution to a collective work, as part of a motion picture, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test or as an atlas, if the parties agree in a signed writing that the work shall be a work made for hire.”
ASSIGNMENT VS. LICENSING

• Assignment is the complete transfer of all rights (owner retains nothing)
  - Must have a signed writing
• An exclusive license gives a third party one or more rights that he can exercise at the exclusion of the owner
  - Must have a signed writing
• A non-exclusive license gives a third party one or more rights (to copy, distribute, etc.), but the owner retains his rights to do the same
  - Can be verbal -> revocable at will
  - If written but not signed -> revocable at will
FAIR USE  TRUE OR FALSE?

• If I use only one minute of a film, it is FAIR USE.
• As long as I am teaching something, it is fine to use a work without permission.
• As long as I am not charging a fee, it is allowed.
• All videos on YouTube are in the public domain and free for use.
FAIR USE – A DEFENSE TO INFRINGEMENT CLAIM, NOT AN EXCUSE OR PERMISSION

• “Fair use” for purposes of criticism, comment, news reporting, teaching, scholarship or research is not infringement.
• Not an exception to copyright infringement
  - You can still be sued for infringement, and would have to prove fair use as a defense
• Fair use is not straightforward: when in doubt – ask permission.
FAIR USE – THE FOUR FACTOR TEST

1. The purpose and character of the use
   - commercial versus non-profit educational, but:
     - Display of work must be in the course of face-to-face teaching activities of a non-profit educational institution which is primarily and directly engaged in instruction
     - Designed for “spontaneous” use that affords no time to seek permission
   • Example. Third grade teacher shows a slide during class that relates to a lesson

2. The nature of the copyrighted work
   - Factual versus creative work
   - More leeway for using facts than flowery language
FAIR USE – FOUR FACTORS CONTINUED

3. The amount used in relation to the work as a whole
   - No set guidelines/percentages – reasonableness approach
   - Even a small portion will not favor fair use if taken from the heart of the work

4. The effect of the use upon the potential market for or value of the copyrighted work
   - Does the work compete with or diminish the value of the original?
   - “Harm” is not just your use, but what if everyone engaged on the same practice?

   - Fair Use is subjective, fact-specific, no bright lines – when in doubt, get permission to use the content
FINDING AND USING CONTENT ON THE INTERNET: TRAPS FOR THE UNWAREY

• “Public Domain” myth

• If I found it online, isn’t it in the public domain?
  - No. The duration of copyright determines whether a work is in the public domain, not:
    - whether it is publicly available
    - whether others are infringing it
FREE-SHARING WEBSITES

• Advertised as “free for all”
  - Fine print: no warranties of ownership
  - Use is at your own risk – this may not be sufficient for your client’s highly public materials
    - *Moral of the story*: do not use without securing permission directly from the owner
• YouTube and similar “sharing” sites make content more accessible, BUT
  - Beware: poster is not necessarily the copyright owner!
    - *Moral of the story*: using another’s pirated content is not a defense – seek permission from the original source.
BLANKET LICENSES

- MOTION PICTURE LICENSING CORPORATION – copyright licensing agency for films - consider a blanket license if you get a lot of movie requests

- COPYRIGHT CLEARANCE CENTER LICENSE - Annual License allows employees to share articles internally
  - Email articles to colleagues
  - Include items in internal presentations
  - Searchable database on www.copyright.com lets you check which publications are included for Annual License holders
WHAT IS RIGHT OF PUBLICITY?

Commercial appropriation of an individual’s identity or identifiable aspects

• An individual’s right to control or prevent the unauthorized use or commercial exploitation of their name, likeness, voice, or personality.
• Not surprisingly, California was the first state to make right of publicity law in 1971
RIGHT OF PUBLICITY AND TRADEMARKS

• Section 43(a) of the Lanham Act creates a civil cause of action against anyone who identifies their product in a way that is likely to cause consumer confusion regarding the product.

• Common to couple allegations of violation of the right of publicity with claims for trademark infringement under the Lanham Act.
  - General rule that a person’s image or likeness cannot function as a trademark.
  - Some US courts have found that a celebrity's generalized “persona” qualifies as a trademark or can form the basis of an unfair claim even if it does not qualify as a trademark.
ESSENTIAL CLAUSES WHEN ACQUIRING RIGHT TO USE LIKENESS

1. Living or dead? Check your jurisdiction since rights will vary
2. All offers should be in writing and contingent upon negotiation and execution of a full written agreement.
3. Grant of rights – determine what form of the person’s name and likeness you want to use
4. Term, option periods, and run-off
5. Scope of services – kind of services and the media for broadcast or use
6. Availability
7. Territory
8. Exclusivity
9. Compensation
   - Annual base compensation
   - Bonus compensation
   - In-kind compensation
   - Signature products
10. Morals clause
11. Other termination rights
12. Reductions/prorations
13. Quality control
14. Infringement
15. Death/Insurance
16. Warranty/indemnification
17. Right of First Refusal
18. Merger Clause
19. Unions
20. FTC Clause in the US
SOCIAL MEDIA

New Issues and Challenges
THE LINE BETWEEN CLEVER AND STUPID IS THIN

Prince was the don of Minneapolis. Respect to the home team. A glove can only take so much sadness.

Baby, that was much too fast.
1958 - 2016
INFLUENCERS (NATIVE ADVERTISING)

“Online Advertisers need to ensure any disclosures fit into the context in which the advertising appears. They also need to be placed in close proximity with the ad”

Really getting into knitting!!! Helps me relax after high-pressure world of the Premiership
— Rio Ferdinand (@rioferdy5) January 24, 2012

You’re not you when you’re hungry @snickersUk#hungry#spon lockerz.com/s/177408824
— Rio Ferdinand (@rioferdy5) January 24, 2012
HOW TO MANAGE SOCIAL MEDIA

Rig the system
• Training
• Guidelines help, but cannot do all the lifting

And keep an eye on it
• Provide a list of approved posts
• Review posts on a regular basis before publication/posting