

Advertising & Marketing

In 14 jurisdictions worldwide

Contributing editor
Rick Kurnit



2015

GETTING THE
DEAL THROUGH

GETTING THE
DEAL THROUGH 

Advertising & Marketing 2015

Contributing editor

Rick Kurnit

Frankfurt Kurnit Klein & Selz, PC

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
Alan Lee
alan.lee@lbresearch.com

Adam Sargent
adam.sargent@lbresearch.com

Dan White
dan.white@lbresearch.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2015
No photocopying: copyright licences do not apply.
First published 2014
Second edition
ISSN 2055-6594

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of May 2015, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

| | | | |
|--|-----------|--|-----------|
| Introduction | 5 | India | 49 |
| Rick Kurnit Frankfurt Kurnit Klein & Selz, PC | | Safir Anand and Swati Sharma Anand and Anand | |
| Australia | 6 | Ireland | 55 |
| Peter Le Guay and Josh Simons Thomson Geer | | Duncan Grehan and Conor Griffin Duncan Grehan & Partners Solicitors | |
| Austria | 13 | Japan | 61 |
| Georg Huber, Stefan Kofler and Fabian Bösch Greiter Pegger Kofler & Partners, Attorneys-at-Law | | Chie Kasahara Atsumi & Sakai | |
| Brazil | 18 | South Africa | 65 |
| Rafael Salomão Aguillar and Gabriel Francisco Leonardos Kasznar Leonardos Intellectual Property | | Kelly Thompson and Nicole Smalberger Adams & Adams | |
| Canada | 23 | Spain | 70 |
| Bill Hearn, Chris Bennett and Dave Spratley DLA Piper (Canada) LLP | | Gerhard W Volz and Patricia Ayala Schiller Abogados | |
| Ecuador | 33 | United Kingdom | 78 |
| Carlos Alberto Arroyo Del Río and Juan José Arias Delgado Falconi Puig Abogados | | Stephen Groom and Thomas Spanyol Osborne Clarke | |
| Germany | 37 | United States | 85 |
| Stefan Engels and Beatrice Brunn Bird & Bird | | Rick Kurnit and Hannah Taylor Frankfurt Kurnit Klein & Selz, PC | |
| Greece | 42 | | |
| Asterios Syssilas A & K Metaxopoulos and Partners Law Firm | | | |

Introduction

Rick Kurnit

Frankfurt Kurnit Klein & Selz, PC

Advertising may be virtually any communication that impacts 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 now the integration of brand messages into the content stream is exploding. Today, virtually all content creators, including trusted news sources, are creating content supported in a variety of ways by advertisers. Public relations and corporate communications which earlier were viewed as 'editorial' material now must be reviewed in terms of the stricter tests imposed on 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. 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 still 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 which the consumer cannot evaluate. Truth becomes an issue when apparently, objective or independent evidence which supports the advertiser's claims, particularly those which the consumer cannot independently assess, provide the consumer with a reason to purchase.

However, when a brand makes an actual, objectively provable claim about its product or service, at least where it is likely to influence consumers' purchasing decisions, the brand is likely to be held to a burden of having proof of whatever is communicated, at least to the audience to whom the content is directed. If there is some aspect of the advertising that serves to enhance the credibility of the advertiser or some message that serves to overcome consumers' natural tendency to discount the claims because they are made by the seller of the product, the net communication must be subjected to review. Any factual claim that enhances the credibility of the message or the messenger must be true and be substantiated by appropriate proof.

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. 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'.

Getting the Deal Through

| | | | |
|----------------------------|-----------------------------------|------------------------------|-------------------------------------|
| Acquisition Finance | Distribution & Agency | Life Sciences | Restructuring & Insolvency |
| Advertising & Marketing | Domains & Domain Names | Mediation | Right of Publicity |
| Air Transport | Dominance | Merger Control | Securities Finance |
| Anti-Corruption Regulation | e-Commerce | Mergers & Acquisitions | Securities Litigation |
| Anti-Money Laundering | Electricity Regulation | Mining | Ship Finance |
| Arbitration | Enforcement of Foreign Judgments | Oil Regulation | Shipbuilding |
| Asset Recovery | Environment | Outsourcing | Shipping |
| Aviation Finance & Leasing | Foreign Investment Review | Patents | State Aid |
| Banking Regulation | Franchise | Pensions & Retirement Plans | Structured Finance & Securitisation |
| Cartel Regulation | Fund Management | Pharmaceutical Antitrust | Tax Controversy |
| Climate Regulation | Gas Regulation | Private Antitrust Litigation | Tax on Inbound Investment |
| Construction | Government Investigations | Private Client | Telecoms & Media |
| Copyright | Insurance & Reinsurance | Private Equity | Trade & Customs |
| Corporate Governance | Insurance Litigation | Product Liability | Trademarks |
| Corporate Immigration | Intellectual Property & Antitrust | Product Recall | Transfer Pricing |
| Cybersecurity | Investment Treaty Arbitration | Project Finance | Vertical Agreements |
| Data Protection & Privacy | Islamic Finance & Markets | Public-Private Partnerships | |
| Debt Capital Markets | Labour & Employment | Public Procurement | |
| Dispute Resolution | Licensing | Real Estate | |

Also available digitally



Online

www.gettingthedealthrough.com



iPad app

Available on iTunes



Advertising & Marketing
ISSN 2055-6594



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



Official Partner of the Latin American
Corporate Counsel Association



Strategic Research Sponsor of the
ABA Section of International Law