

KTS Advertising Law Guides

Advertising Claim Substantiation Requirements and Legal Clearance Process

Selling. It's the lifeblood of capitalism and is ultimately a company's primary goal. To sell, a company must distinguish itself in the marketplace, and the way to do that is often by making claims. However, the law requires that advertising claims that a product or service has a particular quality or attribute, or that it can do something better or different than its competitor, must be substantiated and truthful (not deceptive). Claim substantiation is a necessary and crucial part of the advertising legal compliance process.

When creating an advertisement, one of the first things to do as part of the legal clearance process is to determine exactly what claims the ad conveys to the consumer. Ad claims may be express or implied - while express claims directly state a proposition, an implied claim conveys the claim implicitly. Remember too, that images and not just words can convey an express or an implied claim. All claims conveyed to the consumer, whether express or implied, should be identified and substantiated. Do not assume that humor avoids the claim substantiation requirement. Context is important, and while humor may be disarming, it does not justify stretching the truth.

Puffery is different than humor, though. Many ads contain puffery, which are obvious hyperbole or non-objectively measurable statements or claims about a product. Puffery does not require substantiation. An example of puffery is simply "We're the best." That kind of statement does not require any substantiation, as it is not an objective, measurable claim.

The standard of review for determining what express or implied claims an ad makes is the **overall net impression** conveyed to **reasonable consumers**. An integral part of the legal review process of an advertisement, however, is often viewing things from a distance to understand the overall net impression, because even literally true claims may have to be treated as false advertising if the overall net impression conveyed to reasonable consumers is false. For example, where a cookie maker expressly claims in an ad that its cookies have more chocolate chips than its competitor's cookies, that may be literally true. But, if the advertiser's chocolate chips were half the size of the competitor's, and each cookie contained less chocolate than the competitor's cookies, then the overall net impression of the "more chips" claim - that the cookie contains more overall chocolate - is false and deceptive.

Claim substantiation is rooted in the concept of an advertiser having a **reasonable basis** for its claims at the time it makes the claim. What type and level evidence or proof is needed to rise to the level of a reasonable basis for making a claim is often the subject of dispute. The nature of the claim itself drives what type of substantiation - the type and level of evidence or proof - is ultimately necessary, and thus substantiation can take many forms. The most basic legal requirement is to have reliable, objective, unbiased evidence of the truth of the claim. Factors to consider include (a) the type of product, (b) the type of claim, (c) the benefit to the consumer from a truthful claim, (d) the ease of developing substantiation, (e) the harm or consequences of a false claim, and (f) the amount of substantiation that experts in the industry believe is reasonable under the circumstances.

The following process may assist with the legal clearance process for advertising review.

A. Advertising Claims Review Process

- 1 Identify claims:** Review all materials, messaging, and other content to identify all express and implied claims reasonably communicated. Confirm that all claims are true and not misleading.
- 2 Identify substantiation testing, evidence, before publication:** Specify internally the well-documented, credible evidence supporting all express and implied claims before publication. Be prepared to provide such documentation upon request. Tests and surveys must be credible and meet relevant scientific and industry standards, which will vary depending on the nature of the claims.
- 3 Disclaimers if necessary:** If claims require qualification or explanation, ensure disclaimers are included in advertising content in a clear and conspicuous manner. “Clear and conspicuous” varies depending on the nature of the media, the content, and the claims. Disclaimers may not contradict the main claim – design disclaimers to explain or qualify the main claim.
- 4 Citing substantiation:** Advertisements need not cite the substantiation for the claim, but may be desirable to explain to consumers and limit competitor demands for proof.
- 5 Claims must track support:** If advertising materials refer to specific claim support (“studies show” or “consumers prefer”), ensure that the claims actually track the study.
- 6 Sensitive or high risk claims:** Certain claims require stronger substantiation, such as health claims, food and beverage claims, eco-friendly claims, comparative claims, price claims and claims directed to children.

B. Comparative Claims – Additional Concerns

- 1 Direct comparisons only:** Ensure that all comparisons are “apples to apples,” including product, feature, or service comparisons.
- 2 Naming competitor/head to head comparison:** Naming competitors in advertising is legally permissible, but higher risk because the named competitor will scrutinize claims about their products more closely.
- 3 Limit use of competitor’s intellectual property:** Use no more of the competitor’s mark, work, or product than necessary to communicate the comparison or point of the claim.
- 4 Do not imply affiliation:** If confusion may be possible from the context of the advertisement, include a clear and conspicuous no-affiliation disclaimer.
- 5 Big picture:** Claims can be both truthful yet misleading. Confirm that an isolated compared feature that may be truthful, does not nevertheless mislead as to the overall big picture comparison.
- 6 Team effort:** Make sure comparative advertisements are signed off on by all internal parties – marketing, legal, high level executives. Comparative ads bring higher scrutiny in the media, which enjoy highlighting advertising disputes between competitors.

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