



& Liability
& Loss Prevention
for Ad Agencies

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Tips and Advice on
How to Keep You and Your Clients
Out of Hot Water

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Introduction: Minimizing Agency Risks and Losses

No one wants to bog down the process of delivering great ideas and business-building campaigns for clients with a lot of legal parameters. But the fact is that a few simple tips such as the ones in this guide can be the proverbial “ounce of prevention” to avoid legal action against agencies and their clients.

This guide, put together by the American Association of Advertising Agencies and its professional liability insurance partner, Media/Professional Insurance, outlines tips for avoiding potential risks in these areas:

- Consents & Releases
- Celebrities & Look-a-likes
- Using Creative Material of Others
- Political Ads
- Product Disparagement
- Intrusive Advertising Techniques
- Cyber Liability
- Other Loss Prevention Basics



Consents & Releases

- To avoid claims of misappropriation, obtain necessary consents and releases from any individual whose name or likeness is to appear in your ads.
- Such releases should be in writing and signed and dated by the individual appearing, with the original copy being retained by the agency.
- Be sure that your releases are written broadly and specifically enough to cover all contemplated uses and distributions of the material.
- Be careful of making comments to the individual providing consent that could later be construed to contradict and limit the scope of the intended uses and distributions.
- Minors and incapacitated individuals lack the ability under the law to provide binding consent, so obtain releases from their parents or guardians.
- Remember that a release can also be challenged if obtained from someone under the influence of alcohol or drugs or in some other temporarily impaired state.

Celebrities & Look-a-likes

- Celebrities are very protective of their rights of publicity, so exercise special care when including them in advertising to be sure that all necessary consents and releases have been obtained.
- At death, rights of publicity pass to one's estate; the estates of some celebrities, such as Elvis Presley's, have been especially vigilant in enforcing their rights. When using the name, likeness or persona of decedents, be sure to obtain permission from their estates.
- Use of celebrity look-a-likes or sound-a-likes in advertising have generated substantial misappropriation claims, so be sure to clear such advertising with legal counsel.
- If a celebrity declines to perform for an ad, avoid copying the celebrity's style of performance as this practice has led to severe claims of misappropriation.



Using Creative Material of Others

- To avoid intellectual property claims, be sure that all necessary clearances and licenses have been obtained when using artwork, photos, film footage, music, writings and other materials created by those outside your agency.
- When using works of others, permission should always be obtained regardless of whether a copyright notice is displayed. Copyright protection attaches at the time the work is created and registration is not a prerequisite for the owner to have a claim.
- Avoid over-reliance on “fair use” when using copyrighted material. This doctrine allows uses of small portions of another’s work without permission for criticism, parody, editorial or educational purposes, but this defense is applied more narrowly by courts than commonly thought. When in doubt, consult legal counsel.
- Similarly, avoid over-reliance on “public domain.” Just because material has been out in the public for some time doesn’t mean that it is free for anyone to use.
- Remember that copyrights in works created by independent contractors belong to them, not to the ad agency or company that commissioned the work, absent a specific written agreement to the contrary.
- Keep in mind that non-traditional works, such as distinctive furniture or creative arrangements of every day items can be copyrighted as sculptures or other works of art.
- Watch out for photographs that show artwork or other copyrightable material as permissions from multiple rights owners may be required.
- Music often requires several licenses for the permissible use of a single work. Be sure you have all necessary licenses.
- Be wary of trademarks. Use of distinctive names or logos may well require permission from the owner.



Political Ads

- During election season, be careful of advertisements that you develop for political candidates or interest groups, as unflattering and false statements of fact about opponents can lead to libel and slander claims.
- Remember that as the ad agency involved, you can be named as a co-defendant for producing such ads.
- If an allegation appears damaging, check out the facts. Public records are the best source of support as they don’t change their stories.
- Beware of advertisements for products that are the subject of public controversy or high profile litigation, such as tobacco, as there have been attempts to attach liability onto the manufacturer’s ad agency.



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Product Disparagement

- False and disparaging statements of fact about a competing product can lead to claims for product disparagement.
- These claims can be especially severe as loss of sales or market share can lead to substantial damage awards.
- This exposure is especially high in comparative advertising.
- Be sure that your client has sufficient documentation to support any disparaging statements about a competing product.
- Also, be sure that your client contracts provide your agency with indemnification for all product-related assertions emanating from your clients.

Intrusive Advertising Techniques

- Advertising techniques that employ the Internet or new cyber technology in gathering information from or disseminating information to consumers may expose your agency to claims of invasion of privacy.
- Such advertising activities done on a mass basis have lead to severe class action claims.
 - Be aware of state and federal statutes designed to protect consumers from unwanted commercial intrusions, such as anti-spam laws and the Telephone Consumer Protection Act, which sharply regulates unsolicited faxes.
 - Before using a new advertising technique consult legal counsel knowledgeable in such laws.



Cyber Liability

- Keep in mind that just because information is on the Internet, it is not necessarily in the public domain and free to use. Just as with printed materials, obtain the necessary clearances and releases for Internet information.
- Beware of using a competitor's trademark as a metatag for your website. Such practices have lead to lawsuits for trademark infringement and unfair competition.
- If you are helping a client develop a company sponsored blog, also assist the client in instituting the appropriate protocols and procedures for its use as blogs can be a source of defamation claims.
- If erroneous or otherwise actionable material appears on a website and needs to be taken down, be sure that it is completely deleted. Not effectively removing such material can lead to embarrassing and expensive reappearing acts. Good communication between legal and IT departments is critical to corrections in cyberspace.
- Although web masters might be wizards in site design and technology, they are not legal experts. Rely on legal counsel to vet the site, develop proper procedures, and provide the necessary training.
- When agreeing to design a website for a client, specify carefully in a written contract what you are going to do and then do it. Agencies that have designed websites that have architectural and performance issues have faced multimillion dollar claims.
- Exercise care in domain name selection as this activity has lead to a number of claims for trademark infringement.

Other Loss Prevention Basics

- Be sure to have written contracts with your agency's clients that specify the services that you are to provide.
- Such agreements should also contain cross indemnity provisions requiring the agency and client to defend and hold harmless one another for claims arising from the material they develop and contribute to the ad.
- Written agreements containing indemnity provisions should also be used with photo houses, model agencies, independent contractors and others who supply material or talent for ads.
- Any indemnity agreement should be backed by insurance. When in doubt, request evidence of insurance.
- Maintain a document retention system for releases, clearances, licenses, contracts and other documents related to the development of advertising. Failure to find such materials when a claim comes up can be more than embarrassing.
- Be careful of emails, memoranda and other internal documents written during the development process. Statements about copying the style of a popular person or item have become damaging evidence in lawsuits against ad agencies.
- Develop a relationship with an attorney knowledgeable in advertising law who can be consulted regularly during the development process.
- Conduct periodic loss prevention training on advertising liability issues for your staff in order to create and maintain awareness of this area.
- Partner with an insurer that has expertise in advertising liability and intellectual property law in both its claims and underwriting departments.



In the Event of a Claim

- Notify your media liability insurer immediately of any litigation, demand letters or threatened claims.
- Consult your insurer before retaining counsel to respond to such complaints.
- Obtain proper authorization from your insurer before making settlement offers or entering into settlement agreements, especially if they will involve the policy.
- Remember there is no charge for keeping your insurer advised and consulted on claims issues and that failure to do so may limit or prejudice the coverage available.
- Seek to partner with your insurer to work toward a favorable claim resolution. Remember that the claimant is the adversary.



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