



POTENTIAL AREAS OF LIABILITY FOR ADVERTISERS

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- **Mattel's Advertising Review Process**
- **Products Liability and Advertising**
- **Lanham Act Section 43(a) and False Advertising**
- **Self Regulatory Organizations in Advertising**
 - **National Advertising Division (NAD)**
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MATTEL'S ADVERTISING REVIEW PROCESS

- **Mattel utilizes an Advertising Review team composed of legal and product safety experts to review all advertising.**
- **The review process for TV advertising covers every phase of development: storyboard, rough cut and final commercial. The review team works closely with the advertising agency and the marketing department at all stages of production.**
- **Advertisements are reviewed for compliance with Mattel's Code of Conduct, internal guidelines such as trademark usage rules and style guides and compliance with legal requirements and the self regulatory guidelines of CARU.**
- **From a safety perspective ads are reviewed to determine if they include unsafe acts, unsafe environments, inappropriate products for the age grade, and the need for adult supervision.**



PRODUCTS LIABILITY AND ADVERTISING

- Products liability law permits an injured person to recover money damages from a seller and anyone else involved in placing a defective or unsafe product into the stream of commerce. Product liability can arise from advertising where a false or exaggerated claim is made that a person justifiably relies on and is injured.
- Advertising claims are deemed to create an express or implied warranty to the consumer and the advertiser will be held liable for breaches of that warranty.
- Levey v. Yamaha Motor Corp, Inc. (June 24, 2003) What otherwise would be an adequate warning can be undermined and made ineffective by contrary advertising claims:
 - Claims or representations made in the course of a product demonstration negate the warning labels and disclaimers affixed to the product and contained in the owner's manual.



Lanham Act Section 43(a) and False Advertising

- Any person who uses a false designation of origin or false or misleading facts that misrepresent the nature, characteristics or qualities of its own product or service, or about another person's product or service, i.e. a competitive product, will be liable for damages caused.
- Cases for false advertising under the Lanham Act arise where an advertiser makes a false or misleading claim about its own product or about a competitive product in a comparative advertisement.
- *Playskool, Inc. v. Product Development Group, Inc.* (November 17, 1988) The Lanham Act not only prohibits literally false advertising statements but also those that tend to mislead or deceive.
 - Unlike advertising statements that are false on their face, a plaintiff who claims that a true statement is misleading in the context in which it is made must present evidence that consumers will be deceived by the statement.
- *McNeilab, Inc. v. American Home Products Corporation* (May 26, 1988) Where safety claims are involved, courts will look very carefully at the advertising claims made, particularly where confusion could result in physical harm to the public.
 - In comparative advertising cases, injury to the falsely disparaged competitive product in the minds of consumers will be presumed and actual injury to the brand does not have to be proved.



Advertising Self Regulatory Organizations

- **National Advertising Division (NAD) – Serves as a third party arbiter of complaints from the public or competitors about the content of national advertising.**
- **National Advertising Review Board (NARB) is an appellate appeals forum. If an advertiser or a challenger is not satisfied with the NAD decision, it may appeal to the NARB for further review.**
- **Decisions of the NAD and NARB are non-binding but advertisers almost always abide by and accept the decision of the self regulatory organization. If an advertiser refuses to modify or withdraw an ad that has been successfully challenged, the matter will be referred to the appropriate law enforcement agency.**
- **Children’s Advertising Review Unit (CARU) is charged with responsibility for investigating and evaluating compliance with CARU Guidelines for children’s advertising.**



Advertising Self Regulatory Organizations

BASIC PRINCIPLES OF CARU GUIDELINES

- 1. Protect children from their own susceptibilities – keep in mind the level of knowledge, sophistication and maturity of the audience.**
- 2. Exercise care not to exploit the imaginative qualities of children and avoid unreasonable expectations of product quality or performance.**
- 3. Products that are inappropriate for use by children must not be advertised or promoted directly to children.**
- 4. Communicate information in a truthful, accurate and understandable manner.**
- 5. Encourage positive and beneficial social behavior.**
- 6. Present positive and pro-social roles and role models and avoid social stereotyping.**
- 7. Contribute, in a constructive manner, to parents' guidance of their children.**



Advertising Self Regulatory Organizations

- The CARU Guidelines define substantive areas of potential deception for advertising directed to children under the age of 12. There are six CARU Guidelines that relate directly to safety issues.
- Product Presentations
 - Products should be shown used in safe ways, safe environments and safe situations.
- Safety
 - Products inappropriate for use by children (including medications, drugs and supplemental vitamins) should not be advertised directly to children.
 - Advertisements for children’s products should show them being used only by children in the appropriate age range.
 - Adults should be shown supervising children when products or activities might involve a safety risk (e.g., swimming pools, bathtubs, etc.).
 - Advertisements should not portray adults or children in unsafe situations or in potentially dangerous acts. Appropriate safety equipment should be used in connection with certain activities (e.g., helmets for bicycle riding).
 - Advertisements should not show products being used in a dangerous or inappropriate manner.



Advertising Self Regulatory Organizations

- **Trendmasters, Inc.** (June 15, 2002) – Case involving unsafe acts and unsafe environments.
 - The commercial shows children performing potentially dangerous, unsafe stunts on wet tile floors while firing water guns. Children viewing the ad are reasonably likely to try to duplicate these stunts while playing with their own water toys.

- **Skechers USA, Inc.** (March 29, 2002) – Case involving unsafe acts and lack of safety equipment.
 - In commercials portraying unsafe acts, the fact that the performers were teenagers rather than children is of no significance. The ad was aimed at a child audience and younger children often seek to model their behavior on older children and adolescents.

 - The fact that no law requires safety gear is irrelevant in determining whether an act may be unsafe. Even though no law may require the wearing of safety equipment while roller-skating, safety experts agree that protective gear should be worn by skaters of all ages, particularly when performing stunts. Failure to wear such safety equipment is unsafe.

 - An advertiser will not be permitted to show an unsafe act in a commercial simply because it includes safety instructions inside the product packaging that advise against such unsafe acts.



Advertising Self Regulatory Organizations

- **General Mills, Inc.** (February 19, 2003) – Case involved unsafe acts. Appropriate safety gear is shown but the conduct is “inherently reckless.”
 - A stunt performed in a reckless manner, even while wearing protective equipment, may still be unsafe.
 - One can engage in reckless, unsafe behavior that constitutes a danger to both the performers and others without the intent to put oneself or others at risk.

- **Tactica International, Inc.** (January 29, 2003) & **Conair Corporation** (February 25, 2003)
 - Cases involving electrical toys shown used in unsafe situations without appropriate adult supervision.
 - Difficult to read visual disclosures that “parental supervision required” will not be sufficient without a similar voiceover disclosure and actual adults supervising the children’s play.
 - Acceptance of an ad by a television network for broadcast does not signify compliance with CARU Guidelines.