

New media marketing **Legal issues for online communicators**

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16 March 2010

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Outline of today's presentation

- Misleading and deceptive communications
 - the law
 - the regulators
 - consequences of breach
 - new media marketing legal risks
- Brand protection online
 - proactive steps for protecting your brand
 - the risk of enforcement
- Achieving effective advertising in new media

Misleading and deceptive communications

- **All communications** made online can amount to a representation subject to consumer protection laws

Section 52, *Trade Practices Act 1974 (Cth)*

A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive

Who will be misled?

The Court must determine

- The **class of persons** who must be misled
- The standard of intelligence, astuteness or gullibility of this class (the **reasonable person** test)

Other relevant factors

- New media formats
- Different publications encounter different audiences

Remember

- Not everyone is savvy
- Intention is irrelevant

Impact of section 52 on communicators

- Section 52 has consequences for all commercial dealings and online communications
 - advertisements (traditional and viral)
 - blogs
 - testimonials
 - product descriptions
 - all other consumer-facing online material (eg public webpages)

The Regulators

The ACCC

- ACCC's role
 - enforces the law
 - investigates all alleged breaches of the Trade Practices Act (eg section 52)
- Main area of operation
 - misleading and deceptive conduct
- Areas of interest
 - advertising on the internet and new forms of content
 - paid advertisements on search engines

The Regulators

- ACCC has strong investigative powers
 - compel access to all documents
 - conduct examinations under oath
 - can intervene in proceedings
- ACCC can reach administrative resolutions
 - enforceable undertakings
 - press releases and adverse publicity
- Proposed powers
 - substantiation notices
 - public warning notices

Consequences of contravening section 52

- The Court can make a range of orders against a defendant, including
 - damages
 - fines
 - injunctions (and urgent interlocutory injunctions)
 - declarations
 - corrective advertising
 - compliance programs

Consequences of contravening section 52

- Who can be liable?
- Corporations
 - eg advertisers and their agencies
- Individuals
 - persons who aid and abet, induce, conspire or are directly or knowingly concerned in, or party to, the contravention
 - eg directors and employees, the talent



Edited screenshot from www.youtube.com
video obtained on 9 March 2010 from user
'RoveOnline'

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Benefits of compliance

- Integrity of the brand
- Corporate image and individual reputation
- Reputation with regulators



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New media marketing risks

- Failure to disclose
 - viral marketing
 - **legal risk** – section 52
 - **commercial risk** – bad will (eg WitcheryMan)
 - paid internet referencing services (ACCC v Google; ACCC v Trading Post)
 - testimonials (ACCC v AMI)



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New media marketing risks

- Comparative advertising
 - making claims about one product or service against another (eg Duracell and Energizer)
 - **high risk** – specific challenge to a competitor



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New media marketing risks

- Overall impression
 - transitory confusion
 - ACCC v CBA – the ‘marketing web’
- Disclaimers and fine print
 - can the dominant message be effectively qualified?
 - ACCC v Target

Protecting your brand

- What are your legal enforcement options?
 - Section 52
 - trade mark
 - copyright
- Remedies
 - damages
 - injunctions
 - declarations

Protecting your brand

- Ensure you have trade mark protection
- Legal options
 - Trade mark enforcement
 - Section 52
- Non-legal options
 - Tools available on social media sites that may assist in protecting names and trade marks
 - Eg Twitter's verified account option and Facebook's user-name complaint system

Protecting your brand

Misuse of online content

- Content placed online is susceptible to being copied, modified and used by others
 - eg Spoofs using copyright material (Westpac banana smoothie spoofs, Cadbury Gorilla campaign)



Edited screenshot from www.youtube.com video obtained on 10 March 2010 from user 'ofInterestNZ'

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Protecting your brand

- Legal options
 - copyright
 - Section 52
- Non-legal options
 - commercial agreements
 - mechanisms provided by social media sites (eg YouTube's Content Verification Program, eBay's VeRO (Verified Rights Owner) Program)

Protecting your brand

The risk of enforcement?

- Traditional enforcement actions may backfire in an internet environment
- Is the infringing activity **acceptable** or **unacceptable**
 - who posted the content, and for what purpose
 - how damaging is the content to the business
 - is there a non-legal mechanism available
 - will enforcement cause adverse public/online reaction
- Options for harmless infringement
 - Consider how to take advantage of the infringing conduct (eg Coca-Cola)

Achieving effective online communications

- Clear disclosure where material is advertising
- Claims must be based on reliable and current information
- Take care that the overall impression is not misleading
- If engaging in comparative advertising
 - identify the scope of comparison
 - undertake due diligence on the competitor's product
- Make sure relevant brands are protected

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