

Marketing Communications Legal Clearance Checklist

Michael C. Lasky, Partner | mlasky@dglaw.com, 212 468 4849

Samantha Rothaus, Partner | srothaus@dglaw.com, 212 468 4868

Here are key questions and issues for marketing communications firms and all companies to consider in their day-to-day process of creating content.

Copyright

Concept

- Is the underlying idea or theme of the work independently conceived?
- Where, when, how and by whom was the creative concept for this work created?
- Does the work use, copy, derive from or evoke any known third-party elements?

Music

- Is the music entirely original and independently created (composition, lyrics and arrangement)?
- If so, where, when, how and by whom was the music created?
- Does the music include any samples?
- Who owns the composition (music, lyrics and arrangement)?
- Who owns the sound recording?
- Has written permission been secured from all performers (vocals and instrumentals)?
- Does the music derive from or evoke any known third-party elements?
- Does the performance copy, derive from or evoke any recognized person (vocals or instrumentals)?
- If licensing music, are the licensor's rights subject to any third-party restrictions?

Text

- Is the text entirely original and independently created?
- If so, where, when, how and by whom was the text created?
- Does the text incorporate quotes or excerpts from any third-party authored material?
- Does the text derive from or evoke any known third-party elements?
- Was any third-party material (including stock art and software) used (incorporated or used as a reference) in creating the text font? Has a font license been obtained?

Illustrations, Photographs and Film Footage

- Are the visual elements of the work entirely original and independently created?
- If so, where, when, how and by whom were the visual elements created?
- Was any third-party material (including stock art) used (incorporated or used as a reference) in creating a comp for the work? Was that third-party material licensed?
- If so, what are the terms of that license?
- Was any third-party material (including stock art) used (incorporated or used as a reference) in creating the final version of the work? Was that third-party material licensed?
- If so, what are the terms of that license?
- Do the visual elements derive from or evoke any known third-party elements?
- Does anything appear in the visual elements of the work that may have independent legal protection or in which a third-party may claim rights (e.g., brand-name props, artwork, images of identifiable persons)?

Trademarks

- Are there any fictitious brand names, logos, taglines, product designs, landmarks or architectural works, business names etc. (“marks”) used in the work?
- Have trademark searches been conducted to determine if the foregoing fictitious marks are available for use?
- Are there any real, existing third-party marks (brand names, logos, taglines, product designs, landmarks or architectural works, business names etc.) being used in the work (other than the client’s trademarks)?
- Are these real third-party marks being used for comparative marketing purposes?
 - If so, how does the third-party mark appear (e.g., ordinary typeface, the brand owner’s distinctive stylized typeface, the brand name and typeface)?
- How prominent are the third-party marks in the work?
- Does the work make any express or implicit suggestion that the marketed product or service is associated with the third-party or its brand?

Publicity and Privacy Rights

- Are the names or nicknames of any real or fictitious persons (living or dead) used in the work?
- For fictitious names, have searches been conducted to determine whether any real persons exist with that name and the traits described in the work?
- Are any photographs, footage or illustrations of real or fictitious persons (living or dead) used in the work?
 - If so, how identifiable are those persons from the depictions (e.g., headshot, crowd shot)?
 - If so, where did the image or depiction of the person originate?
- Are any voices, signatures, catch phrases, uniform numbers, social media handles or other traits or indicia that identify a unique individual (real or fictitious, living or dead) used in the work?

- Has written permission been secured for all real persons (living or dead) whose identities are either explicitly featured or else conjured up by the work?
- For avoidance of doubt, note: a real person does not have to be explicitly featured or named in order for their “likeness” to have been used. Ask yourself whether they are identifiable from whatever indicia are included in the message or the marketing materials.

General Marketing Communications Guidelines

Support/Claim Substantiation and Comparative Claims

When making a statement about a marketer’s products or services:

- Is the statement a representation of fact, or an opinion that implies knowledge of facts (for which prior substantiation is required)?
- Does the statement state or imply that a test, survey or other scientific measurement was conducted?
 - If so, was the test in fact conducted, and did it comport with official or accepted testing standards for the relevant product or industry?
- Does the statement make explicit or implicit reference to one or more competitors?
 - If an implicit reference, then is the statement true with respect to all leading competitors in the market?
- Are restrictions on any claims or offers adequately disclosed in the message?

Endorsements and Testimonials

(See: <https://www.ftc.gov/business-guidance/advertising-marketing/endorsements-influencers-reviews>)

- Does the work contain a statement from a consumer (actual or implied), celebrity, expert (actual or implied), influencer (real or virtual) or organization attesting to the characteristics or benefits of the client’s product or service?

- Is this statement in the exact words of the endorser or is it paraphrased or reworded?
 - If the latter, does the statement accurately reflect the endorser’s opinion and experience with the product?
- Does the statement falsely suggest (e.g., via quote marks) that it is the exact words of the endorser?
- Does the endorser continue to believe and subscribe to the statements attributed to him or her?
- Will the featured endorser be making any claims about the marketer’s products or services?
 - If so, please refer to the “Support/Claim Substantiation and Comparative Claims” Section above.
- Does the statement represent that the endorser uses the endorsed product or service?
 - If so, did the endorser in fact use the product or service at the time the endorsement was given and continue to do so in the present?
- Is the endorser’s experience with the product or service typical of what consumers generally will experience?
 - If not, does the work disclose what consumers generally can expect, or disclose the limited applicability of the endorser’s experience (e.g., “Results not typical.”)?
- Does the work disclose to consumers that the endorser was paid in exchange for his or her endorsement, or has a material connection to the product or service being endorsed (e.g., employee of manufacturer of endorsed product or service)?
 - If such disclosures are made by an influencer, are such disclosures:
 - Featured clearly and conspicuously?
 - Appropriately made for space-constrained media (e.g. #ad, #sponsored)?
 - “Above the fold” (before the expand button on Instagram, or pre-scrolling on YouTube for example)?
 - Please consult the FTC’s Endorsement & Testimonial Guides and FAQs to the Endorsement & Testimonial Guides for further guidance on appropriate disclosures.