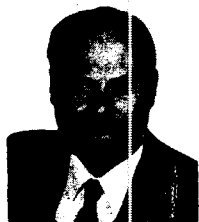


ADVERTISING & THE LAW



# A Disclaimer to Fame

Outside Counsel™ with Roy S. Gordet

In last month's column, we noted that the judge was reluctant to force the Woody Allen look-alike to discontinue his Woody masquerade. The judge stated that it appeared possible that by means of a disclaimer, the Woody look-alike SHOULD BE ENTITLED to continue earning a livelihood by virtue of his Woody "imitations." A typical disclaimer could be: "The real Woody Allen does not endorse our products. The person appearing in this advertisement is only a celebrity look-alike."

*...a disclaimer should be used and the company using the commercial speech should be permitted to say what it wants to say.*

As the court in the Woody Allen case noted, disclaimers are favored over any outright bans on free speech. This is true even when the speech is "commercial," as in business literature or advertising. The United States Supreme Court has held in several recent cases that commercial speech is entitled to significant free speech protection, even if the scope of protection is not as broad as it would be for non-commercial speech. Rather than determine that any aspect of the company's "commercial" speech is misleading and therefore to be completely precluded, the court in the Woody Allen case stated the law that the "scope of injunctions against misleading commercial speech should be limited to that necessary to avoid confusion. For these reasons, disclaimers are favored over outright bans." In other words, when it is possible to alleviate the misleading aspects of the commercial speech by means of a disclaimer, a disclaimer should be used and the company using the commercial speech should be permitted to say what it wants to say.

In the Woody Allen case, however, the court found that the disclaimer used by the Woody look-alike was in "tiny print at the bottom of the page" and therefore it was unlikely that most readers would notice the disclaimer as they were "leafing through the magazine." The court also found that the disclaimer was inadequate because it only stated that a celebrity double was being used, and did not clearly dispell the impression that Woody Allen

was not really involved with the video company's products or services. The judge further held that in order for the disclaimer to be effective, it would need to be bolder and it would need to make clearer that Woody in no way endorsed the video company's products. The judge found that the video company had an obligation to avoid confusion.

The point is that a disclaimer can assist an advertiser in avoiding litigation and subsequent liability and yet permit the advertiser to accomplish its goals.

*Regina people took steps to avoid confusion. This was crucial.*

In another case entitled *Consumer's Union of the United States, Inc., v. General Signal Corp. and Grey Advertising, Inc.*, decided in 1983 in New York, the court found that the Regina vacuum cleaner company could be entitled to refer to a favorable report published in the consumer reports if the Regina people used a disclaimer which would clearly indicate that the *Consumer Reports* magazine "is not affiliated with Regina, and does not endorse Regina products or any other products." *Consumer Reports* argued that such a disclaimer cannot cure the false public perception of an association between Consumer's Union and Regina. The court disagreed.

*(Continued on page 18)*

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# VIDEO ARTS



Video Arts partners Ed Rudolph (front), Steve Calou (left) and Kim Salyer in the component post suite.

POST PRODUCTION  
 Component Betacam On-Line Editing  
 with CMX, Abekas DVE, Grass Valley...

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action unfold on the video screen, chances are you are involved with the subject.

a disk drive, or hydraulic pumps or a software there enough motivation for us to create visual are copy or stick with a cut and dry video

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*become the familiar, easy and to receive information.*

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communications point of view, if the customer has to dial in the first 30 seconds, you'll lose him way features and benefits. You must entertain him, make him want to know more.

the product or service you're selling doesn't affect. For example, a purchasing agent is not likely with your state-of-the-art disk drive or energy inputs to make the right decision for the company, involved with the decision. So he'll scan your offering it, but the odds are excellent that he'll watch it the same subject. That's because video has preferred way to receive information.

It has achieved power, impact and credibility, and of employee and consumer, age 40 and under. television and they are accustomed to reception. Their comfort level with video doesn't depend on ability or intelligence, but with an habituation

marketing communications tool is well understood often have in-house facilities to produce their own. On the other hand, mistakenly believe that video is considered as an element in their marketing com-

A five minute marketing video for a small company expanding its customer base in the U.S. and wanted to show the company's capacity to handle shipping requirements for expensive electronic products. As year, the company had published a four color brochure twice the cost of the video.

It moved to larger facilities and plans to update the brochure. An inexpensive reshoot and edit procedure. The brochure, cannot be updated without the expense of

(over \$20 million) uses video to show dealers that it is to change the supplies in the printer. This is the longest selling points.

Applied with each printer, end users continually number with questions that are answered in the brochure. It gives that including a video with the manual will not like to read a greater comfort level with the

of using video as part of your marketing communications. It is wondered just where it fits in.

too large to carry and demonstrate comfortably; a box that doesn't do anything unless it is hooked

education 1001.

your newest salesperson can present the material clearly and consistently.

A video also takes your show on the road. It presents your company and product in action on the trade show floor where thousands of people can see it. It adds muscle to testimonials because it shows your product in action for other customers. In fact, you can send a video to any customer, anywhere in the world.

The business world hasn't even begun to explore the potential of video as a marketing, training, sales and education tool. But savvy companies are recognizing that it doesn't hurt to be a little bit ahead of your time. By the time everyone else jumps on the bandwagon, you'll already be a household word. ■■

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## DISCLAIM TO FAME....Continued From Page Eighteen

Indeed, it should be noted that the original disclaimer used by Regina was the following:

**Consumer Reports is not affiliated with Regina and does not endorse products.**

This was superimposed on the screen the entire time that the *Consumer Reports* quotation was mentioned. There was a voice-over announcer who stated during one of the visual portions of the television commercial that the Regina Powerteam "is the only lightweight that *Consumer Reports* says, Quote, was an adequate substitute for a full-sized vacuum." The court found that the print size used for the disclaimer was comparable with normal television advertising practice for required disclosures, and remained on the screen for a longer period of time than is normal for such disclosures. Apparently, that fact influenced the court in holding in favor of Regina. Also, upon learning of *Consumer Reports'* objections to certain aspects of the disclaimer, Regina attempted to more clearly indicate in its disclaimer that a Regina product was not being specifically endorsed by *Consumer Reports* and was not in any way affiliated with *Consumer Reports*. There was no question that the Regina people took steps to avoid confusion. This was crucial.

An appropriate disclaimer can be very effective in permitting you to accomplish your advertising goals and at the same time enable you and your client to avoid an expensive lawsuit. Ideally, you should obtain consent from any persons who may have a potential claim against you or your client for the use of some trademark or material which they think you should not have used. Third parties may be reluctant to grant such consent. However, there is an alternative to merely running the ad without consent and exposing yourself to a lawsuit and potential money damages. You can seek a declaration from a judge as to the legality of your use prior to actually running the ads. This will minimize your exposure.

You would be surprised at what you can accomplish with the proper disclaimer. You would also be surprised to see how much trouble you can get into without one. ■■

*Roy S. Gordet specializes in trademarks and copyrights and related aspects of advertising law at the Palo Alto firm of Wilson, Sonsini, Goodrich & Rosati. Any suggestions for topics to be treated in this column could be directed to him in care of the newspaper.*

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