

Issues behind the ads

In a scene that unfolds every day, the marketing team of a consumer goods company engages an advertising agency to create a campaign to promote a product. The product manager briefs the agency, identifies media channels and provides general direction on the scope and look and feel of the campaign.

Weeks later, the agency comes back with a campaign proposal and mock-up. The management and the product manager like the idea and decide to proceed. Storyboards and artwork of brochures, magazine ads and billboards are later forwarded to the product manager for approval, and ultimately to senior management, who sign off on the production. The whole process seems complete, but is it?

There is one step missing that is crucial in mitigating unnecessary trouble and expense for the company: legal clearance. The issues relevant to attractive and effective advertising materials go beyond marketing strategy. Critically important legal issues such as intellectual property (IP) clearance and regulatory compliance must also be considered.

In terms of IP, clearance of photos or ad soundtracks, presenters' rights and trademarks must be given adequate thought. Often, advertising will rely on a celebrity presenter. The agency usually has the responsibility of hiring and entering into a contract with the presenter (though in many cases in Thailand, a contract may not exist at all).

The agreement with the presenter serves to protect the interests of both presenter and company. Ideally, it should identify who the actual hirer is and who is entitled to the final rights of production. The scope of work performed must be clear. To avoid a dispute that could lead to negative publicity, this is a good time to agree whether adaptation of the work (for example, from a TV commercial to a still shot for a subsequent magazine ad) is permissible and what the compensation is for that additional use.

If the advertising piece must borrow photos, graphics or songs from other authors, a licensing agreement or permission from those creators must be sought. It is imperative that the creator grant authorisation to the agency or the hiring company for multiple use of the work, while confirming that the creator understands that the work will be published or broadcast several times.

Alternatively, if artists (e.g., photogra-

phers, composers, singers) are hired to create new copyrighted work, a written agreement must ensure that the hirer is identified as the proper rights owner and copyright has been assigned.

Certain catchy slogans or other wording used in the advertising material could potentially be a registered trademark of another party. Current law in Thailand provides that use of a trademark does not necessarily need to be an exact duplication to result in an infringement. Other factors that need to be taken into account include the degree of similarity in appearance and pronunciation, types of goods and likelihood of public confusion. To ensure that the advertising material does not unintentionally infringe someone's right, legal clearance is strongly recommended.

Regulatory compliance is also important. As a general rule, language used in advertising material in Thailand must not lead to a misunderstanding and should not be false, deceitful or contrary to Thai culture. It is not permissible to use words that exaggerate product quality such as excellent, exceptional, perfect, effective, magic, or best. Any claims of effectiveness or quality must carry scientific proof to substantiate such statements.

Some industries are required to comply with specific rules and regulations. Examples of industries that must exercise caution before issuing communications to the public include tobacco, alcohol, pharmaceutical, food, medical devices, and cosmetics. Advertising material for certain products must receive approval from the Food and Drug Administration before use in the marketplace.

Violation of advertising rules and regulations runs the risk of fines from the FDA. If the Office of the Consumer Protection Board is responsible, an order to amend the material or make a restatement may be issued. Complete removal of the material is often seen as the appropriate action. Needless to say, this results in significant expense that could have been avoided if the proper preventive measures to confirm regulatory compliance had been undertaken.

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