

ADLAW INTERNATIONAL

COUNTRY	REGIME	LINKS
UK	<p>There is no general rule in the UK regarding liability for advertisements. There are many different types of liability, civil and criminal; the parties' liability depends on which type of legal liability one is dealing with. The Advertising Standards Authority (ASA), which in practice is very significant there, generally holds the advertiser responsible for breaches of its advertising codes, but that is a matter of self-regulation rather than law and the ASA does not issue fines or award damages.</p>	<p>https://www.cap.org.uk/Advertising-Codes/Non-Broadcast/Codeltem.aspx?cscid={150f46ec-6177-4783-ad69-ffa9b9b5fb07}#.VZQ4P2fbLIU</p>
Australia	<p>In Australia a business or person is liable for making, or being knowingly concerned with the creation or publication of, advertising claims that are misleading and deceptive. For example, an Ad Agency, Media Agency, the Media itself and the Advertiser could all be liable in such a case, or only some could be liable for such conduct, this depends on the circumstances in each case and the level of their involvement and their knowledge of the conduct. The ultimate Advertiser will almost always be liable unless they can prove that the conduct was a mistake made by others in the contractual chain and out of their reasonable control. However, the Advertiser will nearly be always liable if the conduct was engaged in by its advertising agency. The Advertiser will on most occasions have a contractual remedy (generally via an indemnity provision) against the advertising agency for breach of warranty or in negligence unless the deceptive conduct was solely the result of the Advertiser.</p> <p>For a more in-depth consideration of some of the rules and regulations in Australia regarding advertising and promotions see our "A Hitchhikers Guide to Advertising Law in Australia" at http://anisimoff.com.au/publication/al14/, and on the requirement for government permits and other requirements relating to promotions go to http://anisimoff.com.au/publication/amjan16/ For many more publications on related topics go to http://anisimoff.com.au/publication/</p>	<p>The relevant provisions are contained in the Australian Consumer Law (ACL) which is Schedule 2 of the Australian Competition and Consumer Act (CCA) see http://www.austlii.edu.au/au/legis/cth/consol_act/caca2010265/sch2.html In particular see sections 18, 29, 151, 224 and 226 of the ACL found in the link above to give a general understanding of the prohibitions.</p>
Germany	<p>In Germany there is no specific rule regarding the liability for advertisements. There are various types of liability (one can be liable through civil law, criminal law, or a specific regime such as competition law). In general, the advertising agency has to act "with the diligence of a prudent advertising-businessman". This quite ancient rule means that the advertising agency must not create advertisements if it is obvious that legal issues will arise. The agency is generally obliged to conduct a comprehensive legal check for compliance of the work that they submit to their clients so that it can be used in the market. If an ad creation cannot be used because it is not in compliance with German competition law or if the corporate identity that the agency developed for a client violates the registered trademark of a third party, the agency could be liable for damages if they did not check its legal compliance beforehand. However, the question of liability always depends on the actual situation. For instance, the more the agency gets paid by its client, the stronger is their duty to conduct a legal check. There is a recent court decision according to which a client that assigned the advertising agency with the development of a trademark against a payment of only 700 EUR cannot expect the agency to conduct a trademark search (the client could not use the logo as it violated trademark rights of another company and the court rejected his damage claims against the agency as there was no liability of the agency due to the low remuneration). There are liability chains along the contractual relations but no joint liability. This means that the advertising agency, as a contractual partner of the client, is responsible towards its client for the creative work it has developed itself and for the work that it has received from third parties such as freelancers and stock-photo services, seeing as they usually offer these third-party services as their own service. Even if it assigns an independent media agency, the advertising agency will also be liable for services relating to media agency functions when it offers to take care of this for its clients. For example, in the event that the media agency accidentally submits the wrong TV-Spot to the media, the client's contractual partner is the advertising agency, and so the client's claim can only be made against the latter. As to the advertising agency, it can in turn make a claim against the media agency. There would only be joint liability in relation to the client if all members of the chain jointly caused the damage (i.e. each member of the chain violated the "diligence of a prudent advertising-businessman" standard) which in practice is quite unlikely. For violations of competition law – which in Germany can only be claimed by competitors and certain associations such as the consumer protection associations – the advertiser is generally responsible. A</p>	<p>http://www.werberat.de/keyfacts</p> <p>https://www.wettbewerbszentrale.de/media/getlivedoc.aspx?id=33612</p>

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	<p>cease and desist letter regarding misleading advertising can be directed against the advertiser, the ad agency and/or the media agency. However, in practice claims based on violations of competition law are usually directed against the advertiser.</p>	
Sweden	<p>A trader may be ordered to pay a special fine (fine for disruptive marketing practices) where the trader, has intentionally or negligently breached prohibitions against, inter alia, misleading and aggressive marketing practices. Such a fine may also be imposed on a trader who has intentionally or negligently <i>materially contributed</i> to the violation. This means that advertising agencies and media companies (newspapers, television and radio) may be contributorily liable for infringement of marketing rules. Thus, all ad agents are responsible for following the marketing rules (29§).</p> <p>It may also be mentioned that a trader whose marketing practices are unfair may be enjoined from continuing the practice. Such an injunction may also be issued against <i>anyone who has substantially contributed to the marketing practice</i>, e.g. an advertising agency that has helped the trader to create the advertisement (23 §).</p>	<p>http://www.wipo.int/wipolex/en/text.jsp?file_id=236789#LinkTarget_363</p> <p>http://www.wipo.int/wipolex/en/text.jsp?file_id=236789#LinkTarget_324</p> <p>http://reklamombudsmannen.org/eng/</p>
Switzerland	<p>Switzerland has different rules which lead to the liability of different parties depending on the subject matter and therefore on the applicable field of law (competition law, trademark law, copyright law, civil law, criminal law). Essentially, every person who violates a law may be held liable for the infringement. In most cases, every member of an Ad Chain is seen as having contributed to the violation and may be held liable for the infringement.</p> <p>Hence, the legal situation in Switzerland is similar to the current situation in Portugal. The Swiss legislation foresees joint and several liability from every participant in the Ad chain, be it the Ad agency, the media agency, the advertiser and there is no special limitation of liability for Ad agents or anyone else in the chain.</p>	<p>http://www.gala-marketlaw.com/pdf/may2008/Switzerland.pdf</p>
USA	<p>The law in the United States is similar to that in Germany and the UK. There is no specific law which addresses agency liability for deceptive advertising. The Federal Trade Commission (FTC) has authority to charge anyone who disseminates advertising with deceptive advertising under Section 5(a) of the FTC Act. In general, the FTC will only charge the advertiser, and not the advertising agency, but it will charge the agency when the agency “knew or should have known” that the representation in the advertising was false or misleading.</p>	<p>A recent example of the FTC charging an agency is described in the press release found here: https://www.ftc.gov/news-events/press-releases/2014/01/nissan-north-america-inc-advertising-agency-tbwa-worldwide-inc The complaint charging the agency can be found here: https://www.ftc.gov/system/files/documents/cases/140509tbwacmpt.pdf</p>
Italy	<p>There is no general rule in Italy regarding liability cases for advertisements. In the event of a claim, there are many different types of liability which could be applicable, regulated by civil law, competition law and criminal law. In such cases, the parties’ liability depends on what type of legal liability one is dealing with, although the advertiser is most often responsible towards a third party.</p> <p>The only law that identifies the liable party is the Code of Consumers, which expressly states that the liable party for misleading and aggressive commercial practices is the trader. According to article 18 of the Italian Code of Consumers, “trader” means “<i>any natural or legal person who, in commercial practices covered by this Title, is acting for purposes relating to their trade, business, craft or profession and</i></p>	<p>http://www.iap.it/wp-content/uploads/2015/01/Code-of-Marketing-Self-Regulation-Italy-59th-edition.pdf</p>

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	<p><i>anyone acting in the name of or on behalf of a trader</i>". The cease and desist order is addressed to the trader as well as all the relative pecuniary administrative sanctions.</p>	
Belgium	<p>There is no general rule regarding liability for advertisements. There are many different types of liability (competition law, trademark law, copyright law, image rights, civil law, criminal law...) and the parties' liability depends on what type of legal liability one is dealing with but generally the advertiser is held responsible if he did not comply with the applicable legislation. Such responsibility may also be held by every member of the advertisement chain who has materially contributed to the infringement, intentionally or negligently. Thus, advertising agencies may be held severally liable for infringement of the marketing rules when it has substantially contributed to the unlawful marketing practice.</p> <p>The Belgian authority which mainly regulates the advertisement is the Jury for Ethical Publicity (JEP). The JEP does not issue fines or award damages but rather issues recommendations, advice and/or injunctions to stop or modify the advertisement. Any dispute which is not solved by the JEP may alternatively or later be brought to the court.</p> <p>Firstly, article 1382 of the Civil Code ("<i>anyone's act which causes damage to another obliges the one by whose fault it occurred to make reparation</i>"), which sets out the general principles of the tort regime, may apply. Secondly, the main provisions of the Economic Code regulating advertisement and trade practices (mainly articles VI.17, VI.93 to VI.106 which generally require the advertisement to be fair, not misleading nor aggressive) as well as any other legislation regulating advertisements regarding specific categories of products and services are to be enforced. Finally, in addition to such legislation, self-regulation advertising codes issued by the JEP are also to be complied with.</p>	<p>http://www.jep.be/fr/codes-regles/</p>
Argentina	<p>There is no law specifically addressing agencies' or advertisers' liability. In practice, the advertiser -who is the one that uses the ads and benefits from them- is liable. However, the agency could be liable if the advertiser manages to prove that the fact giving rise to the claim or sanction was caused by the agency's exclusive gross negligence or wilful misconduct. In that sense, it is essential to know what the advertiser and the agency agreed upon (their obligations, liability...) in the relevant contract. When sanctions are imposed as a consequence of formal aspects (such as size or content of legal notices on information to consumers in ads), in general, only advertisers are sanctioned but there are cases in which both the advertiser and the agency are sanctioned, it is alleged that the agency must know the laws applicable to their business and "prevent" its advertisers from such infringements.</p>	<p>http://galalaw.com/archives-52004/85-americas/79-argentina-new-code-for-self-regulation-of-advertising-of-foods-and-beverages</p>
Czech Republic	<p>In regards to public law, Act No. 40/1995 Coll., as later amended, on Regulation of Advertising, foresees the joint and several liability of the ad agent and the advertiser for the ad content. The advertiser can release himself provided he proves that the ad agent did not follow his directions. Generally, the ad agent cannot avoid liability. The Media agency is responsible for the broadcast process only.</p> <p>In the field of private law, the responsibility varies from case to case, depending on the applicable law (i.e. competition, copyright, trademarks, civil or criminal law...). As a general rule, any subject that violates the law can be held responsible.</p>	<p>http://webcache.googleusercontent.com/search?q=cache:6s9ieHlfecYJ:world.moleg.go.kr/fl/download/13611/8DK7RJ_D2KGEOJWOZM3S7+&cd=3&hl=pt-PT&ct=clnk&gl=fr</p> <p>http://www.rpr.cz/cz/en.php</p>
Netherlands	<p>In the Netherlands, specific legislation for advertisements is divided into two parts; the first part dealing with unfair commercial practices by businesses to consumers and the second part dealing with misleading and otherwise unfair advertising to protect parties other than consumers.</p> <p>The legislation protecting consumers is only directed at traders, so there is liability on this basis only for the traders who have commissioned</p>	<p>Civil Code ("BW") 6:193a – 6:193g for the unfair business to consumer practices (implementation of Directive EC/2005/29)</p>

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	<p>the ad.</p> <p>The legislation protecting other businesses stipulates that the advertiser is liable for the content of the ad. The advertiser is the person who communicates the advertisement to the public, or who has arranged for others to do so. The person who determines the content of the ad has the burden of proving that what is being said in the ad is correct. Usually, the advertiser is held to be the company who commissioned the ad. Media agencies are not expected to check every ad they print, but as in all tort law, the circumstances are important. Apart from the specific statutory rules, there is the general law of tort which again introduces the importance of factual circumstances. For example, if an agency played a very large part in determining the ad message, it could be liable. If legal screening was part of the offer to the advertiser, the agency could be liable.</p> <p>Apart from statute law, there is a self-regulatory code of conduct ("Reclamecode"). This code is directed at "the advertiser", which in general would be the person/company determining the contents of the ad. The code applies to advertising industry representatives and member agencies are expected to adhere to it. In practice, many larger advertisers are contracting liability away towards the agencies.</p>	<p>Civil Code ("BW") 6:194 – 6:196 for the articles protecting non-consumers.</p> <p>https://www.reclamecode.nl/bijlagen/RCNRCEngels2015jul.pdf</p>
Hong Kong	<p>Hong Kong does not have any general rule regarding liability; it depends on the type of rights infringed (e.g. copyright infringement, trade mark infringement, passing off, defamation, breach of the Trades Description Ordinance, and liability will also differ between civil or criminal acts). Parties' liability may also depend on their level of involvement on the particular infringing act. Normally, the ad agency who created the ad and the advertiser who authorized or on whose behalf the ad agency created the ad will be liable. The media agency and the media's liability will be more remote and will often depend on their knowledge and the extent of their involvement.</p> <p>The basic general rules are that the party that actually created the ad and committed the act in question and the person who authorized the acts of infringement, or acted as a "joint tortfeasor" with the aforesaid persons will be liable. This is mostly based on a combination of specific laws that are being breached as well as common law principles. However, every case would depend on the facts of the case as well as the specific act of breach and law involved.</p>	<p>http://www.ibls.com/internet_law_new_s_portal_view.aspx?id=2087&s=latestnews</p>
France	<p>In France there is also no specific rule regarding liability for advertisements.</p> <p>Liability will differ between civil or criminal acts and will depend on the nature of the facts alleged.</p> <p>Nevertheless, it is important to note that most of the time in the civil area the agency and the advertiser will be held liable severally in order to facilitate the recovery by the claimant of the damages awarded; and that the agency will be condemned to guarantee the advertiser. The provisions of the contract concluded between agency and advertiser will be taken into account to determine the respective liability of the agency and of the advertiser. Moreover, the media agency and the media will be cleared more easily depending on their knowledge and the extent of their involvement.</p>	<p>http://www.arpp-pub.org/Droit-de-la-publicite.html#Ancre1</p> <p>http://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006438819&cidTexte=LEGITEXT000006070721</p>
Poland	<p>There are various provisions of the law pertaining liability of various entities for illegal or unfair advertising. I omit here numerous laws regarding specific products (e.g. medicinal products, beer etc.) or media (press, broadcasting). Those laws provide for administrative or penal liability of particular entities. Such liability is always individual.</p> <p>There are more general pieces of legislation as well, which apply to any type of advertising of any product and in any media:</p> <p>1) the Act of 16 April 1993 on Combatting Unfair Competition which implements, inter alia, Misleading and Comparative</p>	<p>Polish Journal of Laws of 2003, No. 153, Item 1503, as amended.</p> <p>Polish Journal of Laws of 2007, No. 171, Item 1206, as amended.</p>

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	<p>Advertising Directive (“Unfair Competition Act”); and 2) the Act of 23 August 2007 on Counteracting the Unfair Commercial Practices which implements the Unfair Commercial Practices Directive (“Unfair Commercial Practices Act”).</p> <p>The Unfair Competition Act names directly both the advertiser and the “advertising agency or any entrepreneur who developed the advertising” as the ones potentially liable for the act of unfair competition.</p> <p>In the Unfair Competition Act and in the Unfair Commercial Practices Act there is a similar set of claims against the perpetrator of illegal practices/acts which includes the liability for damages “under general rules”.</p> <p>By “general rules” one should understand the rules stipulated in the Polish Civil Code regarding torts (delinquency or “forbidden acts”). Under those rules if more than one person/entity is liable, their liability is joint and several.</p> <p>Please also note that under the same rules the liability for damage applies not only to the actual perpetrator of an offense but also to the one who has induced or helped another person to cause the damage, including the ones who consciously obtained benefit from the damage caused.</p> <p>In summary, the advertiser, the media house, the creative agency and also some other persons could be held liable for damage caused by illegal advertising.</p>	
<p>Portugal</p>	<p>In Portugal the current legislation foresees a joint and several liability from every participant in the advertising chain, from the advertiser to the advertising agency, the media agency, media and the advertiser are all jointly and severally liable (civilly and criminally) for the advertising</p>	<p>http://www.wipo.int/wipolex/en/details.jsp?id=5539</p>
<p>Spain</p>	<p>In Spain the liability for spreading illegal advertising, has in principle four possible areas:</p> <ol style="list-style-type: none"> 1) Civil: competition law and the General Advertising Act will apply. Anyone who has committed or ordered the unfair conduct or has cooperated in its implementation may be sanctioned. Therefore, one could sue the advertiser, the creative agency and/or media agency and the media. 2) Criminal: article 282 of the Criminal Code, entitled "Commercial crime", although it is almost without application. Only the advertiser may be held liable. 3) Administrative: all state and regional legislation on Protection of Consumers will apply. Only the advertiser may be held liable, but in certain cases the liability of the creative agency, media agency and the media can be sought passively. 4) Ethics: as a matter of self-regulation, legal action and complaints to the Jury of Advertising can be made. Only the advertiser may be held liable. <p>The general principle is that issues arising from the unlawful dissemination by a particular advertising organ are posed in terms of performance of the contract and the possible responsibility for the unlawful act. It is alleged that the broadcasting comes to fruition of the contract. The agency faces responsibility as a professional organ and may be liable for causes of unlawful marketing/communication which</p>	<p>http://www.ibls.com/internet_law_news_portal_view.aspx?id=2087&s=latestnews</p>

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fall in its supposed scope of knowledge.

Publicity work is to be disseminated. The creative agency cannot ignore this reality and therefore amid art rules that are enforceable are those relating to the lawfulness of the dissemination of the work under the terms required to be disclosed in order to achieve the advertising that the work is intended for. This means that the agency must apply to their advertising creations, the relevant legal and ethical rules. Therefore, it can be assumed from the beginning that all the publicity created by the agency and submitted to the advertiser for approval must comply with legal and ethical standards.

Almost all contracts between an advertiser and an agency, either media or creative, include a liability clause. This type of clause usually makes the agency liable in case of a claim received by the advertiser about the advertising content. The advertising content must comply with all legal regulations and/or ethical standards and should not violate the rights of third parties. Normally there is an exception that is the content or product information provided by the advertiser to the agency. In such case the burden is on the advertiser. It is possible that in certain cases both the advertiser and the agency can establish specific agreements on third party liability. Currently advertising agencies are trying to put limits on accepting their responsibility, but with little success so far.