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Global Advertising  
Lawyers Alliance

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## ADVERTISING LAW: *A Global Legal Perspective*





## ABOUT GALA

The Global Advertising Lawyers Alliance (GALA) is the leading network of advertising lawyers in the world. With firms representing more than 80 countries, each member has the local expertise and experience in advertising, marketing and promotion law that will help your campaign achieve its objectives, and navigate the legal minefield successfully.

GALA is a uniquely sensitive global resource whose members maintain frequent contact with each other to maximize the effectiveness of their collaborative efforts for their shared clients.

GALA provides the premier worldwide resource to advertisers and agencies seeking solutions to problems involving the complex legal issues affecting today's marketplace.

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SWITZERLAND

## **1 ADVERTISING FRAMEWORK**

### **1.1 How is advertising regulated in Switzerland?**

Rules regulating advertising are spread through a number of different statutes. Basic legal and regulatory conditions for advertising are set by laws that regulate commerce in general. Most relevant are laws protecting trademarks, works of authorship, privacy, and fair competition. Further, some statutes contain specific rules on advertising to address risks associated with the advertising of products such as alcohol, tobacco, pharmaceuticals, and certain foodstuffs; or advertising in media that have traditionally been seen as being particularly pervasive – namely, TV and radio. In addition, advertisers and the press are subject to industry-specific self-regulation (see question 2).

### **1.2 What types of communications are considered to be “advertising”? How is this determined?**

Each of the industry-specific statutes, the laws regulating advertising in TV and radio, and self-regulatory codes of conduct provide their own distinct definition of advertising. For example, the Federal Act on Radio and Television treats as advertising any communication that is publicly broadcast as part of a TV or radio program, the purpose of which is to encourage the conclusion of transactions concerning goods or services. Communications aimed at promoting the brand or image of the advertiser are considered sponsorship and are subject to different rules (see question 6).

### **1.3 What is the basic regulatory framework for advertising regulation?**

Advertising is protected by the constitutional rights of the freedom of expression and the freedom to engage in commerce. Several statutes, however, limit these constitutional rights and freedoms. Some of the most important ones are the Federal Act on Unfair Competition, the Federal Act on the Protection of Trademarks and Indications of Source, the Federal Act on Radio and Television, and the Federal Act on Data Protection. See also the self-regulatory framework discussed at question 2.

### **1.4 Are there certain types of advertising practices that are specifically regulated (e.g., text message advertising)?**

Advertising on TV and radio is specifically regulated, some of the most important rules being the following:

- (a) generally, advertising must be clearly separated from the actual TV or radio program and must be clearly identifiable as such. Sponsorships and product placements (considered a form of sponsorship), however, may be inserted into programs. The sponsor must be clearly identified; sponsorship and product placements must not encourage the conclusion of transactions concerning goods and services, but must instead be aimed at promoting the image or brand of the sponsor;
- (b) advertising of tobacco products, certain alcoholic beverages and certain therapeutic products is prohibited;
- (c) programs for children and religious programs must not be interrupted by advertising. Further, advertising which is aimed at minors or in which minors appear must neither exploit their lack of life experience nor harm them in their physical or mental development; and
- (d) Swiss broadcasting law distinguishes licensed broadcasters/channels from broadcasters/channels which are merely required to register with the Swiss Federal Office of Communications. Licensed channels benefit from financial contributions (a form of state

aid) and preferred access to signal distribution networks. Licensed broadcasters/channels are, however, subject to stricter rules on advertising. For example, licensed broadcasters/channels are subject to restrictions on the amount and duration of advertising. For such broadcasters/channels as well as for non-licensed channels that can be received abroad, advertising must not occupy more than 15 per cent of the daily programming or 20 per cent of any particular hour of programming.

**1.5 Are there certain industries whose advertising practices are specifically regulated (e.g., drug advertising)?**

There are several industries whose advertising practices are specifically regulated, in particular the food, pharmaceuticals, alcohol and tobacco industries.

Advertising for foodstuffs is regulated mainly by the Federal Act on Foodstuffs and Utility Articles and the related Ordinance setting out implementing regulations for this statute. The Act prohibits deceptive or misleading advertising or presentation of foodstuffs, while goods that are not foodstuffs must not be named or advertised in a manner that leads to confusion with foodstuffs. The rules also provide, for example, that all information relating to a food product, in particular the characteristics that it is claimed to have, must be true and that the advertising, presentation and packaging of foodstuffs must not mislead the consumer.

The Federal Act on Medicinal Products and Medical Devices ('Therapeutic Products Act') and the Federal Ordinance on Advertising of Pharmaceuticals regulate advertising practices in the pharmaceuticals industry as well as in the medical device and supplies industries. The Therapeutic Products Act prohibits, for example, misleading advertising, advertising that is contrary to public order and morality, advertising that may encourage consumers to make excessive, abusive or inappropriate use of medicinal products or advertising of medicinal products which are not approved for the Swiss market.

The Federal Alcohol Act, the Ordinance on the Federal Act on Foodstuffs and Utility Articles, and the Federal Act and the Ordinance on Radio and Television contain specific rules on advertising for alcoholic beverages. For example, the advertising on TV and radio of spirits is prohibited; TV and radio advertisements of beer and wine are allowed but subject, in particular, to the following rules:

- (a) the advertisement must not be addressed specifically to minors;
- (b) no person who is or appears to be a minor must be shown in the advertisement consuming or appearing to consume alcoholic beverages;
- (c) no person must be shown in the advertisement consuming alcoholic beverages whilst driving a vehicle;
- (d) it must not be claimed that alcohol has any therapeutic qualities or is a means of solving personal problems; and
- (e) advertising of alcoholic beverages must not encourage excessive consumption of alcohol.

The Federal Tobacco Ordinance contains specific rules on tobacco advertising. In particular, this Ordinance prohibits advertising of tobacco products if the advertisement is specifically directed at minors, notably if shown in places which are frequented mainly by minors or in publications addressed to minors (see also question 5.1). Further, as mentioned above (question 1.4), the Federal Act on Radio and Television prohibits advertisements for tobacco products on TV and radio.

**1.6 Are any government pre-approvals required?**

Federal law does not require any government pre-approvals for advertising or promotional activities. Some Cantonal and municipal laws, however, require a pre-approval for some types of outdoor advertising, in particular for advertising and promotional activities on public property.

The Federal Alcohol Administration ('FAA') allows advertisements for alcoholic beverages to be voluntarily submitted for clearance. The FAA's approval or rejection is binding upon the advertiser, but decisions denying clearance can be appealed to the Federal Administrative Court and ultimately to the Federal Supreme Court.

Some authorities, for example the Swiss Federal Office of Communications (which enforces TV and radio advertising laws), give non-binding, non-prejudicial advice in voluntary, informal consultations if asked to do so by publishers or external lawyers.

**1.7 Does the media pre-clear advertising?**

Media or media agencies must pre-clear advertising themselves, or through their external lawyers. There is no industry-wide joint pre-clearing body.

**1.8 How does the government enforce advertising laws? What are the potential remedies?**

The industry-specific laws mentioned above, for example the Federal Act on Foodstuffs and Utility Articles and the laws regulating advertising in radio and TV, do not provide for a private cause of action. They are enforced by government agencies on their own initiative or upon notice by private parties.

Other laws, for example the Federal Law on Data Protection and the Federal Law on Unfair Competition, provide both for private causes of action and for government (administrative or criminal) enforcement.

In the case of trademark or copyright infringement, only the owner or exclusive licensee of the respective exclusive right has a right of action.

Each applicable statute provides for different remedies. Typical remedies in government enforcement of, for example, advertising on radio and TV, would be the disgorgement of profits stemming from the illegal advertising or the implementation of compliance programs going forward. Some statutes also provide for criminal sanctions.

For example, some violations of the Federal Act on Foodstuffs and Utility Articles or the Federal Act on Unfair Competition are criminal offences. The competent prosecutors will take criminal enforcement measures if so demanded by the competent regulatory agency, the injured individual or, in some circumstances, on their own initiative. Potential sanctions are monetary fines (in case of violations of the Federal Act on Foodstuffs and Utility Articles, for example, up to CHF 40,000), disgorgement of profits, or imprisonment (in the case of the Federal Act on Unfair Competition, for up to three years).

**1.9 When does a competitor have a right of action? What are the potential remedies?**

Most relevant are the private causes of action provided in the Trademark Act, the Copyright Act, and the Federal Act on Unfair Competition.

To the extent that the competitor is the owner or exclusive licensee of the trademark or work of authorship that the competitor asserts is infringed by the advertisement, the competitor has standing

in a trademark or copyright infringement action. Further, competitors have standing to claim infringements of the Federal Act on Unfair Competition if the advertisement is false or misleading and threatens the business or the economic interests of the competitor.

In actions for trademark or copyright infringement or for unfair competition, potential remedies are preliminary or permanent injunctions, money damages (including the disgorgement of profits), and impoundment of infringing articles, as well as costs and attorney fees. Typical injunctions would prohibit a threatened infringement or order the defendant to cease and desist from an ongoing infringement.

### **1.10 When do consumers have a right of action? What are the potential remedies?**

If the advertisement infringes the Federal Act on Unfair Competition, a consumer has a right of action if his or her economic interests are threatened. Further, a consumer has standing if he or she is the owner or exclusive licensee of the trademark or work of authorship that the advertisement infringes. The same remedies as those available to competitors are available to consumers, thus preliminary or permanent injunctions, money damages (including the disgorgement of profits), impoundment, as well as costs and attorney fees.

A right of action also exists if advertising practices violate the personality rights of consumers, in particular in connection with data protection laws. If data processing violates their personality rights, consumers may in particular request that data processing be stopped, that no data be disclosed to third parties, and/or that the personal data be corrected or destroyed.

## **2 SELF-REGULATORY FRAMEWORK**

### **2.1 Does Switzerland have a primary advertising self-regulation system?**

The primary self-regulatory organization for the advertising industry is the Swiss Commission of Fairness (Lauterkeitskommission: 'Commission'). The Commission is a neutral and independent institution of the communication industry, in which consumers, representatives of the media and advertisers are equally represented.

Anyone (including competitors) may file a complaint with the Commission if he or she thinks that a commercial communication is unfair and infringes the Commission's Basic Principles on Fairness in Commercial Communication ('Basic Principles', see question 2.2) or the ICC Consolidated Code of Advertising and Marketing Communications Practice ('ICC Code'). The only available remedy, however, is a declaration by the Commission that the commercial communication in question infringed the Basic Principles or the ICC Code, and the publication of the respective decision.

### **2.2 Is there a self-regulatory advertising code? What are the key principles?**

The Basic Principles that the Commission publishes and enforces (see question 2.1) set out rules regarding the protection of personality rights, data protection, comparative advertising, reproduction of the advertisements of others, lotteries, guaranteed acceptance of returned products, gender discrimination, separation of editorial material from commercial communications, and direct marketing. In addition, the Commission applies the ICC Code.

### **2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?**

Complaints filed with the Commission (see question 2.1), other than those brought by competitors, are free of charge. The complaint must state the reasons why a certain advertisement is unfair,

preferably indicating also the article of the Basic Principles or the ICC Code that the advertisement is claimed to infringe.

The Commission will notify the person responsible for the advertisement and allow that person to respond to the complaint within a period set by the Commission. Subsequently, one of the three chambers of the Commission will render its decision. Each party may request a rehearing by the Commission en banc, which will then affirm or reverse the decision.

#### **2.4 Is the self-regulation system effective? Is it widely used and followed?**

In 2013 the Commission rendered 82 decisions. In around 60% of the cases the Commission decided in favor of the complainant. Only two complainants requested a rehearing by the Commission en banc. This is a fair indicator of the wide acceptance of the Basic Principles and of the Commission's work.

#### **2.5 Are the self-regulatory system's decisions reported?**

In earlier days, the Commission only published decisions that it deemed to be of public interest or where the purpose of publication was to sanction the infringer. Nowadays the Commission publishes on its webpage ([www.lauterkeit.ch](http://www.lauterkeit.ch)), after expiration of the period for a request for rehearing en banc, all decisions rendered by one of its three chambers. However, the names of the parties are not published, except where the Commission's purpose in publishing the decision is to sanction the infringer.

#### **2.6 Are there any key areas of focus, or key principles, that companies should be aware of?**

Most of the complaints in 2013 dealt with the violation of the rules regarding aggressive selling methods, gender discrimination, tobacco, comparative advertising and lotteries.

An advertisement is considered aggressive and therefore unfair if it is addressed to consumers who have previously opted out from receiving commercial communications.

An advertisement infringes the article of the Basic Principles that prohibits gender discrimination if it builds on gender stereotypes or otherwise questions the equality of men and women.

The rules regarding tobacco are substantially the same as those set out in the Federal Tobacco Ordinance (see question 1.5 above).

Comparative advertising must be true and must not mislead or unnecessarily disparage the competitor or competing product.

The Basic Principles also limit the ability of marketers or publishers to use lotteries, games of chance or other forms of competition as part of promotional activities. For example, there must always be a non-purchase route to participate, with the same chances of success.

#### **2.7 Are there any other self-regulatory systems that govern advertising practices in Switzerland?**

Not applicable.

### 3 ADVERTISING LAW BASICS

#### 3.1 What are the basic laws governing advertising claims in Switzerland (e.g., consumer protection laws; IP laws; unfair competition laws)?

One of the basic statutes governing advertising in Switzerland is the Federal Act on Unfair Competition. According to this statute, advertising claims must not be false, misleading or violate by other means the basic principles of good faith in business relationships. The statute specifically prohibits false or misleading statements about the essential characteristics, benefits, risks, composition, method or date of manufacture, fitness for a particular purpose, quantity, specification or geographical origin of the goods or services in question.

Other relevant basic laws applicable to advertising are the Trademark Act, the Copyright Act, the Data Protection Act, the Federal Law on Lotteries and Commercial Betting, and the Penal Code.

#### 3.2 Is substantiation required for advertising claims?

The Federal Act on Unfair Competition prohibits false, misleading or unnecessarily disparaging statements.

In actions for unfair competition the claimant will have to prove all necessary elements of the cause of action, in particular showing that the advertisement makes false claims or that it creates an overall impression that misleads the consumer. The court may, however, require the advertiser (defendant) to prove statements of facts contained in the advertisement if it deems such burden-shifting fair and reasonable, considering the legitimate interests of the advertiser (defendant) and the claimant.

In the (self-regulatory) complaints procedure before the Swiss Commission of Fairness (see question 2) the burden to substantiate the advertising claims rests solely on the defendant.

To mitigate the risk of competitor actions advertisers should, where appropriate (depending on the level of the risk) add a disclaimer to an advertising claim.

#### 3.3 Are there certain types of advertising messages that do not require substantiation (i.e., puffery)?

Only statements of facts can be proved false or true, if challenged. Therefore, non-factual statements and obvious exaggerations (puffery) do not need substantiation.

It should be noted, however, that non-factual statements can still infringe the Federal Act on Unfair Competition. Depending on the overall impression created by the advertisement, they may be deemed misleading or unnecessarily degrading (as indeed may factual statements).

#### 3.4 What are the rules governing the use of disclosures in advertising?

Disclosures such as the use of "small print" and on-screen disclaimers must be true and clear (i.e. not misleading). No specific rules apply with regard to the size of such disclosures. However, the principle of clarity, as set out in the Federal Act on Unfair Competition, may require that, for example, an on-screen disclaimer is displayed in a manner that allows consumers to read and understand the disclaimer.

Also, size requirements will apply for information about a non-purchase route to participate in competitions. The disclosures must be in such size and format that make it clear to consumers that

the non-purchase route is an equivalent method of participation (i.e. offers the same chances of success).

Further, the existence of sponsorship (including product placements) of TV and radio programs must be disclosed, and specific rules apply to the insertion of the identification of a sponsor (see questions 1.4 and 7.2).

### **3.5 What are the rules governing the use of endorsements and testimonials in advertising?**

Endorsements and testimonials must be true and justified by the experience of their authors. Furthermore, a testimonial may only be used if the author agrees with such use. Further restrictions apply in particular in the food and pharmaceuticals industries. Testimonials that say, for example, that a pharmaceutical product has a guaranteed effect are prohibited. In addition, health-related information on food packages must not be presented as recommendations from doctors or other medical professionals.

### **3.6 What are the rules governing the use of product demonstrations in advertising?**

There are no specific rules governing the use of product demonstrations in advertising. It is noteworthy that if a product demonstration is part of a teleshopping or similar program that lasts longer than 60 seconds, it must be clearly identified throughout the program as "Advertisement".

### **3.7 Is comparative advertising permitted? If so, are there any special rules that apply?**

Comparative advertising is permitted but some restrictions apply. The Federal Act on Unfair Competition prohibits comparisons of products, works, achievements or prices in an incorrect, misleading, unnecessarily disparaging or imitating way. The meaning of "incorrect" and "misleading" are fairly obvious. The other two concepts require further explanation.

A comparison can be disparaging if it is incorrect or misleading, or if it uses degrading value judgments. The question whether the advertisement is unnecessarily disparaging can only be decided based on the facts of the particular case.

The purpose of the prohibition on "imitating" in comparative advertising is to avoid the exploitation of a competitor's reputation, either by creating a likelihood of confusion between products or by creating an image transfer (for the notion of "image transfer", see also question 10.2.).

### **3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (e.g., whether the use of a competitor's trade mark or products may be used)?**

The Copyright Act provides for the protection of the rights of authors of literary and artistic works and the protection of the rights of performers, producers of phonograms and audiovisual fixations and broadcasting organizations. The unauthorized reproduction or distribution of copyrighted pictures as part of comparative advertisements may provoke copyright litigation, in particular where the owner or exclusive licensee of the asserted copyright is a competitor.

Trademark law gives the trademark owner the exclusive right to use the trademark as a source identifier for his or her goods or services. It is noteworthy that Swiss trademark law only prohibits confusion as to origin, and not as to sponsorship or endorsement. Confusion as to sponsorship or endorsement, however, may be actionable as unfair trade practices under the Federal Act on Unfair Competition.

The use of a competitor's trademark in comparative advertising is generally permitted, as the competitor's mark is not used to identify the source of the advertised products or services. The unfair

competition law restrictions described under question 3.1 and 3.7 must, however, be respected in any case.

## **4 PRICE ADVERTISING**

### **4.1 What are Switzerland's rules regarding price advertising?**

If prices or price ranges are used in advertisements, companies have to disclose the prices that effectively have to be paid. Price comparisons are allowed if the advertised and the competitive goods or services were or will be offered at this price immediately before or after the dissemination of the advertisement. Price comparison is prohibited if the comparison is incorrect, misleading or unnecessarily disparaging.

### **4.2 What are Switzerland's rules regarding advertising "free" products?**

Products must not be advertised as "free" if in fact they are not. This follows from the basic principle that advertisements must not be false or misleading (see question 3.1). In addition, the Federal Act on Unfair Competition prohibits the use of samples that confuse or deceive customers as to the real value of an offer; for example, if the overall price of the package has been raised to cover the cost of including the "free" component.

The use of "free" products in promotional campaigns is generally permitted. However, it is prohibited to advertise alcoholic beverages and tobacco products by giving free samples to minors. Also, the use of samples of pharmaceutical products in promotional campaigns is subject to specific regulation.

### **4.3 What are Switzerland's rules regarding sales and special offers?**

Sales and special offers must never be misleading, i.e. they must clearly and unambiguously state the conditions under which consumers are eligible for price reductions, premiums or gifts.

The Federal Act on Unfair Competition provides that it is prohibited to repeatedly offer products below cost price, or to stress such offers in advertisements and thereby mislead customers about the productivity of their own company or of a competitor.

### **4.4 What are Switzerland's rules regarding rebates?**

The general rules of the Federal Act on Unfair Competition apply. In particular, this means that advertising with rebates must not be misleading.

### **4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?**

Not applicable

## **5 PROHIBITED PRACTICES**

### **5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (e.g., guns, medicines etc.)?**

Yes, there are products that may not be advertised in certain circumstances. For example, the advertising of alcoholic spirits is prohibited in areas surrounding public buildings, on public transport, at sport events, and at events or in places frequented mainly by minors. Advertising of

tobacco products is prohibited at sports events, in places frequented mainly by minors, on teaching materials or other publications addressed to minors, and on toys.

On radio and TV, advertising of the following products is prohibited:

- (a) tobacco products;
- (b) alcoholic spirits;
- (c) certain medicinal products and medical devices; and
- (d) sales offerings for all therapeutic products and medical treatments.

**5.2 Are there any types of advertising practices that are specifically prohibited (e.g., telemarketing to mobile phones)?**

Sales methods that are considered particularly aggressive are generally prohibited for all products. Sales-promotion trips or door-to-door selling are considered aggressive sales methods if the customer is limited in or deprived of his freedom to choose whether or not to buy; for example, where customers are hassled or insulted.

Furthermore, consumers appearing in a directory are entitled to state clearly therein that they do not wish to receive advertisements from third parties and that their data may not be used for advertising. Companies infringe the Federal Act on Unfair Competition if they ignore such opting-out by a consumer.

The same statute also prohibits the unsolicited sending of mass emails and other commercial communication disseminated via electronic communication networks. Generally, prior consent by the consumer is needed in relation to such "mass advertising." Further, a company sending such communications needs to indicate its name and contact information and provide a free-of-charge and simple opt-out (unsubscribe) option in each communication. Consent is deemed given if the consumer provided his or her contact information in connection with a prior transaction, did not opt-out from receiving commercial communications from that company, and the commercial communication informs the customer about similar products and services that may also be of interest to the consumer.

**5.3 Are there any laws or regulations governing indecency or obscenity that apply?**

All radio and television programs (including any advertisements broadcast alongside them) must respect fundamental rights. In particular, all broadcast material must respect human dignity and not be discriminatory, contribute to racial hatred, endanger public morals, nor glorify or trivialize violence.

Further, the Federal Act on Radio and Television provides that broadcasters must ensure that minors are not confronted with programs which jeopardize their physical, mental, moral or social development. Broadcasters have to take measures to mitigate these risks, in particular through the choice of the time of the day at which the program is broadcast or by informing the public (e.g. by a signal displayed before the program starts or throughout the program) that the program is not suitable for minors.

Advertising of medicinal products and medical devices is unlawful if it is contrary to public order and morality or if it may incite consumers to an excessive, abusive or inappropriate use of those medicinal products.

## **6 SPONSOR/ADVERTISER IDENTIFICATION**

### **6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?**

If radio or TV programs are sponsored in whole or in part, the sponsors must be named at the beginning or the end of each program. Sponsored programs must be identified as such. In particular, the sponsor's name, company logo or other symbols, products and services may be used for this purpose. Each mention of the sponsor must establish a clear relationship between the sponsor and the program. During the transmission of a television program, the sponsorship may be briefly mentioned again (as an insert). One insert per sponsor is permitted every ten minutes, but inserts are not permitted in children's programs.

## **7 BRANDED CONTENT**

### **7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?**

Radio and TV advertising must generally be inserted in blocks (commercial breaks) and clearly separated from the editorial part of the program by a special acoustic or optical identification signal. In television, the term "advertising" in the relevant national language must be used as part of the optical identification signal. Teleshopping and similar programs which last longer than 60 seconds must be clearly and recognizably identified as "Advertisement". Unless teleshopping and similar programs on the radio are clearly identifiable as such, they must not last longer than 60 seconds.

Product placements, sponsorships and the integration of branded content are permissible under the rules applying to sponsorship and product placements (see question 7.2.).

No specific rules apply to native advertising in online media.

### **7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?**

In contrast to advertisements, product placements and sponsorships must not directly encourage the conclusion of transactions relating to products or services. Products and services must be naturally integrated into the program and must not be given undue prominence.

Clear reference must be made to product placements at the start and end of the broadcast and after each commercial break. A single reference suffices for product placements, production aids (prop placement) and prizes of a low value of up to CHF 5000.

Product placement is not permitted in children's programs, documentary films or religious broadcasts, unless the sponsor merely provides goods or services of low value free of charge, in particular as production aids (props) or prizes, and does not provide any additional remuneration.

## **8 SOCIAL MEDIA**

### **8.1 Are there any special rules governing the use of social media for advertising purposes?**

There is no statute that specifically governs advertising in social media. The legal and regulatory conditions for advertising described elsewhere in this chapter also apply to social media advertising.

Since social media advertising typically involves the collection and use of personal data relating to the network's users, privacy laws will apply. Of relevance are the Federal Act on Data Protection and the Ordinance relating to this statute. Personal data (data about an identified or identifiable person) may be collected, stored or otherwise used or processed only according to certain basic principles. Most relevant are the following:

- (a) principle of lawfulness –personal data must not be collected or used in unlawful ways (e.g. no collection by illegal hacking);
- (b) principle of purpose specification – the purpose for which the personal data is collected and used must be specified at the time of collection, evident from the circumstances, or provided for by law;
- (c) principle of transparency – the collection and the purpose of the collection and use of the personal data must be recognizable for the person concerned; and
- (d) principle of fairness and proportionality – personal data must be processed in good faith and only as long as and to the extent necessary for the specified purpose.

**8.2 Is an advertiser responsible for advertising claims made in user generated content (e.g., statements that a consumer makes on an advertiser's Facebook page)?**

Advertisers may be responsible and liable for user generated content if they offer a platform for such content and actively control the content. If the advertiser does not or cannot actively control the hosted user generated content, a court can still grant injunctive relief, forcing the advertiser to remove illegal content (see for further details question 8.3.).

Also, if companies pay somebody to disseminate – as user generated content – positive or misleading information about the products of the company (e.g. payment for a favorable product review), such behavior can constitute an unfair trade practice actionable under the Federal Act on Unfair Competition.

**8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?**

On 14 January 2013 the Federal Supreme Court rendered a judgment concerning libelous statements made by a blogger. The blog was hosted by a newspaper on a blog platform that allowed third parties to post user generated content. The court held that the author of the blog and the newspaper had to remove the blog article as it infringed personality rights. The court further required the blogger and the newspaper to pay costs and attorneys' fees.

Although a hosting provider does not and typically cannot actively control the dissemination of user generated content, it is likely that a court will order hosting providers to take down libelous or otherwise illegal user generated content hosted by the provider. At the same time, the Supreme Court made it clear that this only applies to injunctive relief (takedown) and does not concern the question of whether the hosting provider is in any way responsible or liable for the dissemination of the libelous content.

## **9 RIGHTS OF PRIVACY/PUBLICITY**

### **9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?**

All aspects of the personality, such as an individual's name, picture, likeness, voice or identity, are protected by law. As a general rule, people must always be asked for their consent to the use of their name, voice, likeness or other parts of their personality in commercial communication.

It is noteworthy, however, that the personality right is not in any way a property right, but rather protects a person's dignity, honor and right to self-determination. Unlike some common law jurisdictions, Swiss law does not provide a right of publicity.

### **9.2 Are there situations when permission is not required?**

Not every use of an individual's picture is prohibited. As long as a person is not identifiable, permission will not be required. For example, generally no permission is required from persons that are captured as part of the scene or background in pictures taken on the street or on public property and who are therefore not the main focus of the picture (i.e. not the most prominent subject matter). But even in such cases advertisers must be careful, in particular where persons may still be identifiable and are shown in an unfavorable context.

## **10 SPECIAL CLEARANCE**

### **10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (e.g., historic places)?**

Not applicable.

### **10.2 Is it permissible to use other companies' recognizable products in advertising (e.g., an actor wearing branded training shoes)?**

The use of other companies' recognizable products in advertisements is generally permitted. Some restrictions apply.

The use of another company's products must not infringe trademark laws. It is therefore generally not recommended to use protected trademarks of other companies' products. However, not every use of another company's trademark in advertising is prohibited. If a trademark is merely used as a design element and not as a source identifier for the advertised products, such purely decorative use will often be permitted.

The use of another company's product may, furthermore, be prohibited under the Federal Act on Unfair Competition. This statute prohibits the exploitation of the reputation of another company's products. Exploitation of reputation takes place when a customer transfers his appreciation for product A of manufacturer A to product B of manufacturer B ('image transfer'). The use of other companies' products in advertisements should therefore always be discreet and not be aimed at transferring an image. If a competitor's product is merely in the background of the advertisement, such a use will normally be permitted.

## **11 CULTURAL CONCERNS**

### **11.1 Are there any rules that are particular to the culture of Switzerland which affect advertising (e.g. Swedish gender equality law)?**

It is worth mentioning that the Basic Principles on Fairness in Commercial Communication of the Swiss Commission of Fairness (see question 2) state that advertising must not be discriminatory. Advertisers should therefore not use gender stereotypes or claims that discriminate on the basis of race or religion.

Otherwise, no special concerns need to be pointed out.

### **11.2 Are there any other cultural norms that should be considered (e.g. religious concerns)?**

No special concerns need to be mentioned.

## **12 MISCELLANEOUS**

### **12.1 Is there any other general advice or cautions you would give to advertisers operating in Switzerland?**

Not applicable.