

# Media Risk Consultants LLC

INDEPENDENT ADVISORS

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## **Super Bowl Advertisements Draw Viewers – and Litigants**

For consultants like us who care about media content liability issues, this week is prime time. It's Super Bowl Week with lots of new high profile Super Bowl advertisements, drawing penalty flags for advertisers and advertising agencies. What makes a Super Bowl ad memorable, provocative and widely successful may also make it susceptible to defamation, right of publicity, copyright and trademark infringement claims. Because of the enhanced exposure, it is important that those stepping out on advertising's biggest stage be aware of their risks and have adequate insurance coverage.

Super Bowl 2010, for instance, gave rise to a significant amount of post-game litigation. Lindsay Lohan sued E\*Trade over its "milkaholic Lindsay" ad claiming \$100 million in damages from the use of the name, "Lindsay". Louis Vuitton sued Hyundai over its Sonata spot claiming that the automaker diluted the distinctiveness of Louis Vuitton's image by associating the vehicle with the luxury retailer. Kia, its ad agency, CBS, the NFL and others were sued by Drive-In Music Company for copyright infringement arising from a song used in their Super Bowl ad. Even when the lawsuits fail to score, the successful defense costs will be in the six figure range.

Because of this enhanced chance of things going wrong, both advertisers (those who advertise their own products and services) and advertising agencies (those who advertise the products and services of others), really need coverage for right of publicity, copyright and trademark infringement claims. The comprehensive general liability policy ("CGL") is typically the "go to" policy for most business litigation. However, this form, which provides coverage for "advertising injury" and "personal injury" liability claims, specifically excludes coverage for those in the business of publishing, broadcasting, advertising or Internet activities. Additionally, trademark infringement, which is a significant risk in advertising, is not a named peril under the CGL form and is often specifically excluded. As a result of these and other shortcomings in the CGL form, advertising agencies must seek coverage from specialty insurance markets to be covered for advertising services, and prolific advertisers would be well-advised to seek additional coverage from these markets, too. Other advantages of specialty policies include broad coverage for punitive damages, flexibility regarding the selection of counsel and worldwide coverage for claims arising anywhere in the world. Since so much advertising, including those for the Super Bowl, involves social media tie-ins, advertisers and their advertising agencies should also confirm that their insurance policies specifically extend coverage to online social networking activities. Finally, specialty underwriters are also more likely to manuscript coverage endorsements to extend coverage to unique exposures.

For advertising agencies that create advertisements and are making media buys for the Super Bowl, adequate insurance limits are a must. In the event a litigant crashes the Super Bowl party and sues an

advertiser for the content of an advertisement, the advertiser will look to the advertising agency for defense and indemnity. Most advertising agencies carry liability limits of \$1M to \$2M, which are inadequate for high profile advertisements. Those playing in the spotlight should consider carrying minimum limits of \$10M with possible excess coverage to be adequately insured. In addition to the procurement of adequate insurance, advertisers and ad agencies should protect themselves by using experienced counsel to closely review advertisements. Unoriginal content, such as the use of music, images or text, must be licensed. Likewise the use of a public figure's name or likeness must also be negotiated for use. Super Bowl ads are often made edgy by poking fun at competitors. Comparative advertising and the use of a competitor's product, mark or name must be carefully scrutinized to protect against claims for trademark infringement, dilution, defamation and unfair competition.

Super Bowl advertising (like any advertising really) is a lot like the football game itself. It requires careful preparation, good coaching and expert execution. One difference: the advertiser can buy insurance to protect against a fumble.

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