

Lost In Translation: Legal Issues Raised When a Company Markets to the Hispanic Consumer



By Martín Arias, Esq

In the United States, product advertising in Spanish has increased significantly in recent years. Companies and advertising agencies spent over two billion dollars for the first six months of 2006 in advertising directed at the Spanish-speaking domestic population, representing a twenty percent (20%) increase over the same period last year.¹ This development is not surprising given that the Hispanic population in the United States has surpassed forty (40) million, with a purchasing power in the hundreds of billions of dollars.² Significantly, a company's decision to target this market by advertising in Spanish--while it may appear simple at first blush--can raise a host of legal issues.

A. Federal Regulations Governing Advertising in Spanish

First, there are specific regulations governing advertising in Spanish of which a company may not even be aware. In the typical scenario, a company or its lawyers will review an advertisement and related materials to ensure they (i) are not "unfair or deceptive" in violation of the Federal Trade Commission Act,³ and (ii) comply with legal requirements imposed by state consumer protection laws, intellectual property laws and general contract law. If a product or service is advertised in Spanish, however, the Federal Trade Commission ("FTC") requires that all disclosures related to such product or service, which are otherwise subject to the FTC's "clear and conspicuous" requirement, be in Spanish too. Specifically, 16 C.F.R. § 14.9 contains the following enforcement policy statement:

The Federal Trade Commission has noted that, with increasing intensity, advertisers are making special efforts to reach foreign language-speaking consumers. As part of this special effort, advertisements, brochures and sales documents are being printed in foreign languages. In recent years the Commission has issued various cease-and-desist orders as well as rules, guides and other statements, which require affirmative disclosures in connection with certain kinds of representations and business activities. Generally, these disclosures are required to be "clear and conspicuous." Because questions have arisen as to the meaning and

¹ Marketing y Medios (MyM) Staff Report, *Hispanic Media Leads Ad Spend Growth*, (September 06, 2006).

² U.S. Census Report (2005)

³ Section 5(a)(1) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. § 45(a)(1), provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

application of the phrase “clear and conspicuous” with respect to foreign language advertisements and sales materials, the Commission deems it appropriate to set forth the following enforcement policy statement:

(a) Where cease-and-desist orders as well as rules, guides and other statements require “clear and conspicuous” disclosure of certain information in an advertisement or sales material in a newspaper, magazine, periodical, or other publication that is not in English, the disclosure shall appear in the predominant language of the publication in which the advertisement or sales material appears. In the case of any other advertisement or sales material, the disclosure shall appear in the language of the target audience (ordinarily the language principally used in the advertisement or sales material).

A failure to follow this regulation may lead to prosecution, fines and penalties.⁴

Moreover, the FTC has ruled that it is “unfair and deceptive” to Spanish-speaking consumers, and a violation of Section 5 of the Federal Trade Commission Act, when a company partially discloses the contractual terms and conditions for a service in Spanish to customers who understand only Spanish, without a full translation of all the terms and conditions into Spanish. In *J. Kurtz & Sons* (C-2822, May 24, 1976), the FTC issued a consent order requiring a Brooklyn furniture and appliance retailer to cease advertising falsely and misleadingly by failing to provide customers with contracts, booklets, credit cost disclosures and other mandated written disclosures printed in English and in Spanish when the sales presentation was made substantially in Spanish. Specifically, the FTC stated:

the practice by respondents of providing customers, who understand only Spanish, with a partial disclosure in Spanish of the terms and conditions of the contract, without translating all the terms and conditions of the contract into Spanish, is deceptive, misleading and confusing to Spanish speaking customers and constitutes an unfair and deceptive act and practice in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

Id. *Accord Weil & Co., Inc.* (C-2804, March 8, 1976) (Consent order requiring a New York City seller and distributor of furniture and home appliances, among other things where sales presentations have been made in whole or in part in Spanish, to cease failing to furnish buyers with Spanish language translations of contracts, agreements or other documents used in connection with retail credit sales. Further, respondents were required to prominently display in-store notices of customers' right to receive all necessary documents in both Spanish and English.). *See also* Commission's Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992 (Advertising of pay-per-call services) (“900 Number Rule”), 16 C.F.R. § 303.3(a)(1) (stating that the disclosures required in advertisements governed by this section “shall be made in the same language as that principally used in the advertisement.”).

B. State Regulations

Second, some states require a company advertising in Spanish to provide material relevant to the product or service in Spanish as well. For example, in Maryland it is

⁴ 16 C.F.R. § 14.9. (“Any respondent who fails to comply with this requirement may be the subject of a civil penalty or other law enforcement proceeding for violating the terms of a Commission cease-and-desist order or rule.”)

considered an “unfair or deceptive trade practice” for a seller to fail to furnish the buyer with a fully completed receipt or copy of any contract which pertains to a door-to-door sale at the time of its execution, which is in the same language as that principally used in the oral sales presentation.⁵ Similarly, in connection with any door-to-door sale in Idaho, it is an “unfair and deceptive act or practice” for a seller to fail to furnish the consumer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation.⁶ In Texas, an automobile insurance company must provide the insured a Texas Liability card with text in both English and in Spanish, or a least notify the insured of the availability of such text in Spanish.⁷ In Connecticut, telephone service companies must provide service termination notices in English and in Spanish if such company has a “substantial” number of non-English speaking Spanish surnamed customers.⁸

In California, Cal. Civ Code § 1632 requires any person in trade or business to furnish a Spanish translation of certain types of contracts when oral negotiations are conducted in same language.⁹ *See also Gutierrez v. PCH Roulette*, No. HO24243, 2003 WL 22422431 (Cal.App. 6 Dist. 2003) (unreported) (A California automobile dealer violated a Cal. Civ. Code § 1632, which requires written contracts to be in Spanish if they were negotiated in Spanish). Furthermore, telephone service providers in California that sell their services in any of the following languages- Spanish, Cantonese, Vietnamese, Mandarin, Korean, or Japanese- are required to comply with numerous requirements,

⁵ MD Code Ann., Com. Law, § 14-302 (2006).

⁶ IDAPA 04.02.01.170 (Idaho Rules of Consumer Protection, Office of Attorney General).

⁷ Tex. Admin. Code tit. 7, § 84.209

⁸ Connecticut DPUC Rule §16-3-101(C).

⁹ Specifically, Cal. Civ Code § 1632(b) provides:

(b) Any person engaged in a trade or business who negotiates primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean, orally or in writing, in the course of entering into any of the following, shall deliver to the other party to the contract or agreement and prior to the execution thereof, a translation of the contract or agreement in the language in which the contract or agreement was negotiated, which includes a translation of every term and condition in that contract or agreement:

(1) A contract or agreement subject to the provisions of Title 2 (commencing with Section 1801) of, and Chapter 2b (commencing with Section 2981) and Chapter 2d (commencing with Section 2985.7) of Title 14 of, Part 4 of Division 3.

(2) A loan or extension of credit secured other than by real property, or unsecured, for use primarily for personal, family or household purposes.

(3) A lease, sublease, rental contract or agreement, or other term of tenancy contract or agreement, for a period of longer than one month, covering a dwelling, an apartment, or mobilehome, or other dwelling unit normally occupied as a residence.

(4) Notwithstanding paragraph (2), a loan or extension of credit for use primarily for personal, family or household purposes where the loan or extension of credit is subject to the provisions of Article 7 (commencing with Section 10240) of Chapter 3 of Part 1 of Division 4 of the Business and Professions Code, or Division 7 (commencing with Section 18000), or Division 9 (commencing with Section 22000) of the Financial Code.

(5) Notwithstanding paragraph (2), a reverse mortgage as described in Chapter 8 (commencing with Section 1923) of Title 4 of Part 4 of Division 3.

(6) A contract or agreement, containing a statement of fees or charges, entered into for the purpose of obtaining legal services, when the person who is engaged in business is currently licensed to practice law pursuant to Chapter 4 (commencing with Section 6000) of Division 3 of the Business and Professions Code.

including the identification and storage in a database of the language preference specified by their customers, and the provision of a service confirmation letter to the customer in the preferred language.¹⁰

C. Products Liability Issues

The decision to advertise in Spanish, if not executed properly, also can raise potential products liability issues.

(1) Cases Finding that a Failure to Warn in English Could Give Rise to Liability

The Restatement (Third) of Torts: Products Liability (“Restatement”) requires that product sellers provide “reasonable warnings and instructions” about risks that exist in their products. Restatement § 2(c), cmt. i. A warning must be understandable to the reasonably anticipated users of the product. Thus, warnings in a language other than English may be required where it is reasonably foreseeable that likely users of the product do not speak English.

Consistent with these general principles, some courts have found that a failure to warn of a potential product danger in Spanish, especially if the target customer is Spanish-speaking, could be a factor in determining a manufacturer’s liability on a products liability theory. The decision of the United States District Court for the Southern District of Florida in *Stanley Industries, Inc v. W.M. Barr & Co., Inc.*, 784 F.Supp. 1570 (S.D. Fla. 1992), is illustrative. There, two Spanish-speaking brothers from Nicaragua accidentally started a fire in the plaintiff’s factory where they were employed after they had soaked rags in linseed oil manufactured by defendant W.M. Barr & Co. (“Barr”), and the rags later caught fire. The label attached to the can of linseed oil had warned of the danger of spontaneous combustion in English only.

The property owner sued manufacturer Barr and retailer Home Depot, Inc. (“Home Depot”) on several products liability theories. Barr moved for summary judgment on the issue of causation, and plaintiff opposed that motion, arguing that defendants “assumed a duty to fairly and adequately warn . . . Spanish-speaking product users because they, *inter alia*, jointly advertised and promoted products, including Kleenstrip boiled linseed oil, in various Hispanic media in Miami.” *Stanley Indus.*, 784 F. Supp. at 1574. Due to this extensive advertising in the Hispanic media, plaintiff argued, defendants reasonably should have foreseen that Spanish-speaking employees would have used the linseed oil product. After considering these arguments, the court denied Barr’s motion for summary judgment, holding that “[g]iven the advertising of defendants’ product in the Hispanic media and the pervasive presence of foreign-tongued individuals in the Miami workforce, it is for the jury to decide whether a warning, to be adequate, must contain language other than English or pictorial warning symbols.” *Id.* at 1576 (relying on *Hubbard-Hall Chemical Co. v. Silverman*, 340 F.2d 402 (1st Cir. 1965)).

¹⁰ D.96-02-072.

Another federal case - *Arbaiza v. Delta International Machinery Corp*, CV 96-1224, 1998 WL 846773 (E.D.N.Y. October 5, 1998) – similarly suggests that the adequacy of an English-only warning label is a question for the jury. In that case, the plaintiff, who had been born in El Salvador and spoke very little English, lost parts of two fingers while cutting a piece of aluminum on a table saw manufactured by defendant Delta International Machinery Corporation (“Delta”). At the time of the accident, the blade guard had been removed, exposing the blade. Plaintiff brought suit asserting, among other things, strict liability claims, and Delta moved for summary judgment on those claims. In refusing Delta’s summary judgment motion, the court noted that “the plaintiff has raised an issue of fact that the warning was inadequate when it was placed at knee height, was in small print and English only.” *Arbaiza*, 1998 WL 846773, at *7.

As these cases demonstrate, some potential products liability issues may be avoided if warnings or disclaimers are translated into Spanish, especially when a company targets Hispanic customers through the use of Spanish media.

(2) Cases Finding No Liability Where Applicable Statutes And Regulations Do Not Require Warnings in Any Language Other Than English

By contrast, other courts have held that a manufacturer may be under no duty to warn in a foreign language where specific regulations prescribe the warnings and do not require warnings in a language other than English.

The seminal case on this point is the decision of the California Supreme Court in *Ramirez v. Plough, Inc.*, 6 Cal. 4th 539, 863 P.2d 167 (1994). There, the infant plaintiff developed Reye’s Syndrome after his Spanish-speaking mother gave him aspirin manufactured by the defendant. Plaintiff brought suit, asserting claims of fraud, negligence and products liability premised on a theory of failure to adequately warn in Spanish about the dangers of Reye’s Syndrome. After the trial court granted summary judgment to Plough, the California appellate court reversed, holding that Plough’s knowledge that Hispanics were using its product combined with its use of Spanish-language media to target these consumers, created a triable issue of fact making summary judgment inappropriate on the issue of the adequacy of the warnings. On further appeal, the California Supreme Court reversed again, holding that FDA regulations – which preempted the field of warning labels for non-prescription drugs – required labeling only in English (except for products marketed solely in Puerto Rico or a territory where the predominant language is not English). In so holding, the court noted that legislative and administrative bodies were better suited to decide whether non-English labeling should be required in this context. *See also Cruz-Vargas v. R.J. Reynolds Tobacco Co.*, 348 F.3d 271, 280 n.11 (1st Cir. 2003) (“we suggest that the argument regarding the language of warnings is best entertained by Congress and not the courts.”), *cert. denied*, 543 U.S. 959 (2004).

D. Practical and Ethical Issues

In addition to the legal issues that may arise when a company uses the Hispanic media to target Spanish-speaking consumers, there are practical issues the company should consider in the execution of its marketing strategy. Most notable is the decision to hire a qualified attorney to advise the company in this context.

In a typical marketing situation, a company may hire a lawyer to review a proposed advertisement and related materials to ensure that they comply with relevant legal requirements. When the company wishes to target the Hispanic market by advertising in Spanish, however, it should seriously consider whether the attorney conducting such review is fully literate in Spanish. If the attorney reviewing the advertisement and related materials does not speak and read the language, she will not be able to catch and correct potential legal issues. In some situations the attorney may hire a translator to translate the proposed materials to English so that the attorney can review it. Such a scenario poses its own risks because legal translation errors may occur when the translator is not an attorney and does not understand technical legal terms.

Ethical issues may confront an attorney in this context as well. Specifically, the Model Rules of Professional Conduct require an attorney to provide her client with competent representation.¹¹ An attorney reviewing or providing legal advice regarding material written in a foreign language, the nuances of which she does not fully comprehend, may not be providing competent legal representation.

E. Cultural Sensitivity

Finally, sensitivity to Hispanic culture and language when naming products or services can go a long way. A few companies in the past have named products that, when translated to Spanish, have had rather comic results. The infamous Chevy Nova ® is the prime example. Nova in Spanish means “it doesn’t go” or “it doesn’t work.” Colgate ® toothpaste, in South American slang, sounds very similar to the expression “hang yourself.” The Mitsubishi “Pajero,” ® in Argentine slang, is suggestive of a lewd act.

F. Conclusion

In sum, if a company is specifically targeting the Hispanic market in Spanish for sales of its products and services, it, or its lawyers, should make sure that the company is compliant with all laws and regulations governing such a marketing and advertising strategy. And, out of an abundance of caution, the company should consider translating all material documents into Spanish. In addition, the company should consider hiring an attorney who is qualified both in terms of language and legal skills to ensure that the proposed Spanish advertising and marketing materials comply with all relevant state and

¹¹ Model Rules of Professional Conduct R. 1.1 (2003)

federal laws, and that such materials do not risk offending the target customer from a cultural perspective.