

BREAKOUT 3A: LAUNCHING NEW CONSUMER  
PRODUCTS AND BRAND CHARACTERS: STRATEGIES  
FOR MANAGING GLOBAL AD CAMPAIGNS AND  
NAVIGATING INCREASED REGULATORY RISKS

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Panelists: Rafi Azim-Khan, David Ervin and Ramiz Rafeedie



# Introductions

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# Agenda

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- Why Global Product Launches and Ad Campaigns are Different
- Claims & Substantiation
- Brand Ambassadors and Characters
- Other Key Principles that Require Integrated Coordination:
  - Content & Rights Clearance
  - Digital Rights & Risks
  - Regulatory Compliance Across Borders
- Compliance Risks Increasing in the UK and EU
- Key Takeaways & Best Practices



# Why Global Product Launches and Ad Campaigns are Different

Multiple Jurisdictions and Stakeholders



# Rafi Azim-Khan

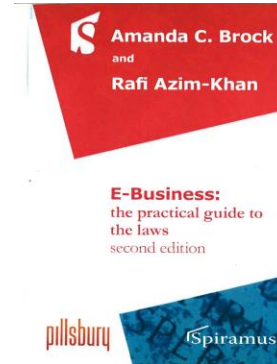
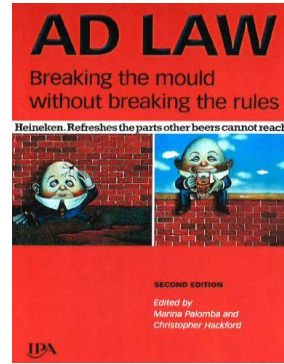


Ad Law/Data/AI/IP  
Hall of Fame (Legal 500)  
Chair Ad Law Group

*"Rafi is an extraordinary lawyer who brings **expertise** along with **excellent communication** to make complex topics and regulations easier to understand."*  
Chambers Directory client feedback

25+ years ranked Chambers/Legal 500

5 published books



# International Campaigns/Product Launches – Lessons Learned

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- U.S. approach often does not translate easily
- Need experienced team (in-house and law firm) to navigate the unexpected
- Joined up, experience led, strategy is crucial (see case studies)
- Examples, comparative advertising/claims (“knocking copy”) & substantiation
- U.S. historic position of allowing more direct and aggressive ads
- Europe is quite different (CAD)
- UK has its own quirks (ASA, new huge fines from CMA, etc.)
- Trademark law has evolved but has been inconsistent, German unfair competition
- Overlay of EU law has added to complications (e.g. ECJ O2 case)
- Passing Off and Malicious Falsehood risks
- Digital is a huge new area of risk (AdTech under fire, GDPR, ePrivacy, DMCC, AI etc.)





*Delta ad... makes 'gentle' fun of its competitors*



# Key questions for trade mark infringement

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- Honest practices?
- Taking unfair advantage?
- Detrimental to?
- Barclays v RBS Advanta
- Vodaphone v Orange







# British Airways Plc v Ryanair (2001)

- Ryanair press advertisements :

**EXPENSIVE**  
**BA**

	Ryanair from*	BA from*	SAVE!
<b>FRANKFURT</b>	£ <b>45</b>	£374	£329
<b>GENOA</b>	£ <b>45</b>	£565	£520
<b>TURIN</b>	£ <b>45</b>	£493 (i)	£448
<b>ANCONA</b>	£ <b>45</b>	£575 (ii)	£530
<b>BIARRITZ</b>	£ <b>69</b>	£504 (iii)	£435
<b>DINARD</b>	£ <b>52</b>	£328	£276

\* Midweek return fares. BA fares to (i) Milan, (ii) Bologna, (iii) Bordeaux

 **RYANAIR**  
THE LOW FARES AIRLINE

Contact your local travel agent or book at [www.ryanair.com](http://www.ryanair.com) or call 0870 333 1236

Subject to availability and conditions. Airfare valid until 31/12/01. See the Sunday Express magazine (1/12/01) for full details. Ryanair's base is at Luton, Bedfordshire. Ryanair's head office is at Luton, Bedfordshire. Ryanair's base is at Luton, Bedfordshire. Ryanair's head office is at Luton, Bedfordshire.

# British Airways Plc v Ryanair (2001)

- Ryanair press advertisements

**EXPENSIVE  
BA \_ \_ \_ \_ DS!**

	Ryanair from*	BA from*
<b>FRANKFURT</b>	£ <b>69</b>	£ <b>374</b>
<b>GENOA</b>	£ <b>129</b>	£ <b>560</b>
<b>TURIN</b>	£ <b>119</b>	£ <b>462</b> (i)
<b>ANCONA</b>	£ <b>129</b>	£ <b>562</b> (ii)
<b>BIARRITZ</b>	£ <b>99</b>	£ <b>534</b> (iii)
<b>DINARD</b>	£ <b>99</b>	£ <b>315</b>

\*Weekend fares. £1 fare to 20 May. £1 airport fee excluded.

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THE LOW FARES AIRLINE

0870 333 1236 www.ryanair.ie or contact your local travel agent

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# British Airways Plc v Ryanair (2001)

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- “Bastards” is just “vulgar abuse”
- Held – no trade mark infringement and no malicious falsehood
- ASA held – Breach of the CAP – different view

# The Comparative Advertising Directive

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- Comparative Advertising Directive

Definition of “comparative advertising”:

*“any advertising which explicitly **or by implication** identifies a competitor or goods or services offered by a competitor”*



# The Comparative Advertising Directive

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- Comparative Advertising Directive

Conditions:

- *“it is **not misleading** according to Articles 2(2), 3 and 7(1);*
- *it compares goods or services meeting the **same needs** or intended for the **same purpose**;*
- *it **objectively compares** one or more **material, relevant, verifiable** and **representative features** of those goods and services, which may include price;*
- *it does **not create confusion** in the market place between the advertiser and a competitor **or** between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor;*



# The Comparative Advertising Directive

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- Comparative Advertising Directive

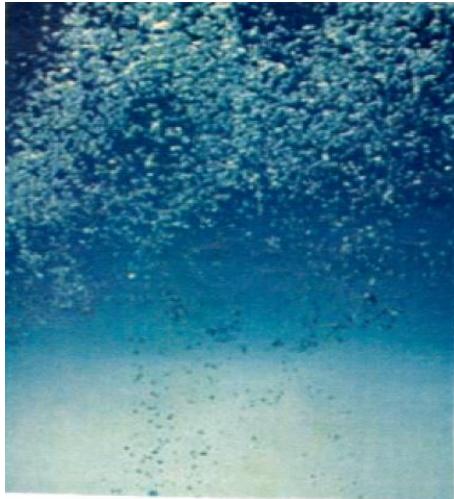
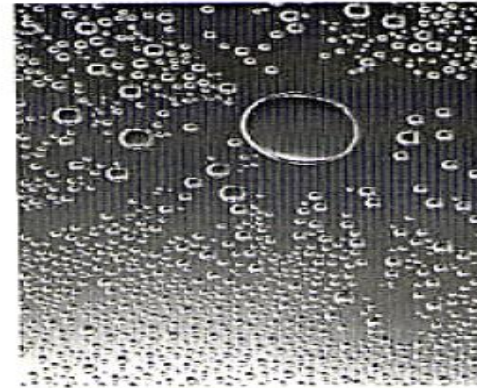
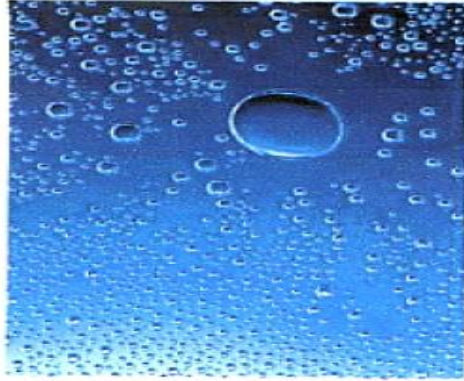
Conditions #2:

- *it does **not discredit or denigrate** the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor;*
- *for products with designation of origin, it relates in each case to products with the **same designation**;*
- *it does **not take unfair advantage of the reputation** of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;*
- *it does **not present goods or services as imitations** or replicas of goods or services bearing a protected trade mark or trade name.”*



# O2 v H3G (2007)

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## O2 v H3G (2007)

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- Apply average consumer test:
  - *“Average consumer who is reasonably well-informed and reasonably observant and circumspect”*
- Lewison J held:
  - 4 bubble marks valid
  - moving images assessed as a whole, including voice and sound track
  - prima facie infringement, but descriptive use defence available s.11(2)(b)
- Court of Appeal – is this use within s.10(2) confusion?

## O2 v H3G (2007)

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- Lewison J held – s.10(3) not made out (without due cause, takes unfair advantage of the repute of the mark); 10(2) argument over “likelihood of confusion”
- Court of Appeal overruled *Ryanair*
- ECJ - Comparative Advertising Directive does apply to TM Directive and is a shield to override TM infringement claim – in short, it is a defence
- Was a surprise to some IP lawyers who thought IP rights would trump the CAD arguments

# Wilkinson Sword/Schick v Gillette - “Razor Wars”

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- Global battle
- Dominant player – first challenge in many years
- “Bet the company” issues – “Best” a man can get?
- Quattro latest thing – no ready replacement for Mach 3 Turbo
- Rabid response!
- Rushed through gimmick – doesn’t do what it says on the tin!
- All with the help of .....



## David Beckham and Gillette: The Best a Man Can Get

David Beckham is teaming up with Gillette  
to bring you exclusive photos, trivia,  
grooming tips, and more.



**Gillette** The Best a Man Can Get™

# Claims & Substantiation



# Claim Substantiation Standards Vary Across Borders

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- Critical area often overlooked or glossed over
- Product claims or performance/price/value claims are landmines
- Can delay or block a launch
- Can result in regulator prosecution (criminal) and competitor or consumer suits (civil)
- Some countries now have significantly increased fines risk (e.g. 10% global revenue)
- Huge financial impact if a product recall is required (in excess of fine/damages)
- Huge brand and reputational damage risk
- Examples, Red Bull, Starbucks, Energizer etc.



# Substantiation – Valuable Case Studies

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# Standard Setting Regimes Vary - Protocols Key Takeaways

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- It is essential to anticipate what substantiation data will be needed to back up the claims
- That may well vary internationally
- In some cases you will need the test data BEFORE you launch or run the campaign
- In some cases you CANNOT subsequently justify/prove the claim
- If a standard or protocol does not exist you may need to create one
- In some regions DO NOT rely on in-house labs or testing
- Must work with counsel to develop protocol and protect testing *with legal privilege*
- Must stress test results and conclusions as a court or regulator or competitor would
- Involve expert counsel who have done this before (war game with them)





# Brand Ambassadors & Characters



# Iconic Brand Mascots: With No Talent Complications

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# Successful & Innovative Campaigns With Talent

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# Key Rights & Obligations to Consider for Advertisers

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- Ownership and Control of IP Rights to Character
- Talent Non-exclusivity
- Restrictions on media appearances and interviews
- Personal appearances
- Use of talent beyond commercials – merchandise, TV shows, etc.
- Geographic sensitivities for talent
- Professional schedule challenges for some talent
- Morals clause



# Some Considerations



# With Success Comes Risks

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# Brand Characters & Ambassadors in Global Campaigns

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- Global IP Rights Clearance and Protection - \$\$
  - Talent and Content Licenses are Territory Restricted
  - Additional Rightsholders
- Cultural Differences Can Matter
  - More than Language Translation
- Separate Budgets and Operations at Brand Make it Challenging



# Other Key Principles That Require Integrated Coordination

## Content & Rights Clearance





# Global Content Clearance Considerations

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- Trademark infringement is just one of many areas to consider regarding content that is to be used in a global campaign
- Copyright issues can vary
- AI use in content generation, countries grappling with it
- Passing off
- Malicious Falsehood
- Defamation
- The different court approaches require careful consideration
- Contractual complexities with overlapping rights internationally
- Make sure the entity you are dealing with has the rights to grant (e.g. Olympics host city v IOC)



# Sleeping with Rainn: Navigating IP Rights

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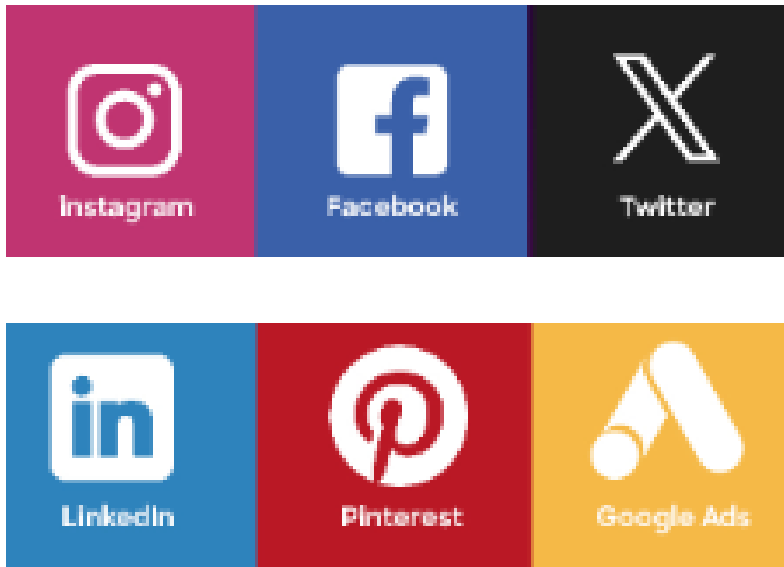
# Other Key Principles that Require Integrated Coordination

## Digital Rights & Risks

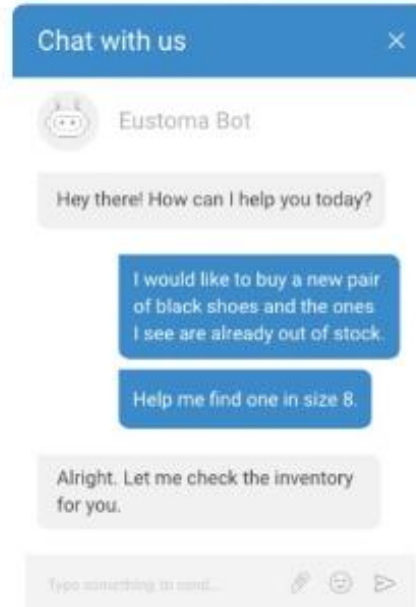


# Regulated Digital Technology

## Pixels!



## Chatbots!



## Cookies, OH MY!



# Class Actions on the Rise

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- Over the past 2-3 years, plaintiffs' counsel across the country have focused on the collecting and sharing of personal data through those various technical tools in website interactions
- Whether pixels, chatbots, or cookies, plaintiffs will bring consumer privacy claims due to alleged improper:
  - 1) monitoring and collection of data
  - 2) usage and sharing of the collected data



**Address these concerns in the Terms of Use!**



# California Invasion of Privacy Act

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- CIPA is California's 1967 wiretapping law, codified at Section 630 of the Cal. Penal Code, to protect the rights of Californians to have private conversations free from eavesdropping devices.
  - The statute prohibits the intentional tapping or unauthorized use of the contents of a telephonic communication.
  - The statute allows any person to bring a private right of action for an injunction and plaintiffs are entitled to damages, the greater of \$5,000 per violation or trebled damages.
- Cases are brought under § 631(a) and/or § 632.7.
  - **§ 631(a)**: proscribes three independent patterns of conduct, (1) “intentional wiretapping;” (2) “attempting to learn the contents or meaning of a communication in transit over a wire;” and (3) “attempting to use or communicate information obtained as a result of engaging in either of the previous two activities.” The final clause of § 631(a) makes liable any person who aids another in carrying out conduct prohibited by the other three clauses. *Tavernetti v. Superior Ct.*, 22 Cal. 3d 187, 192 (1978)
  - **§ 632.7**: Prohibits the “intentional interception or recording of a communication involving a cellular phone or a cordless phone.” *Flanagan v. Flanagan*, 27 Cal. 4th 766, 776 (2002).



# California Invasion of Privacy Act: State Laws

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- Lawsuits attempt to extend the breadth of CIPA provisions to sue website owners who use data-metrics or collection technologies on their websites, including pixels, chatbots, and cookies.
  - How? Users access and 'converse' with websites on smartphones!
- Similar wiretapping laws, requiring the consent of all parties to a recorded communication, include Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington.

## **Key Takeaway – Different State Courts = Different Conclusions**



# Look who is coming to visit....Not just GDPR....

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# ePrivacy now a real risk & fines going up

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- ePrivacy Directive 2002/58/EC often in GDPR's shadow but not now
- Can a US based business be caught? Yes and shows aggressive new enforcement trend
- Also shows use of different tools in the regulator toolbox
- In Dec 2020, French regulator CNIL fined Google US (€60 Million), Google Ireland (€40 Million) and Amazon Europe (€35 Million) regarding cookie practices and breaches of ePD.
- Jan 2022, CNIL announces further record fines (€210 Million) (Google US fined €90 Million, Google Ireland €60 Million and Facebook €60 Million)
- Enforced via injunction and €100,000 penalty (per day) until comply
- Key Point – bypassed GDPR one stop shop and company corporate structuring!
- Ignored Ireland and claimed jurisdiction directly over Google US
- Reminder of the inter-connected nature of data privacy laws and enforcement
- Also, back to GDPR and trend of increased fines, note \$425 Million Microsoft potential fine announced over LinkedIn targeted ads.
- Also, \$1.2 Billion fine for Meta over EU/US data transfers in breach of GDPR.



# Cookies also key in recent U.S. enforcement

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- First fine under CCPA related cookies being placed by a website
- Sephora, Inc fined \$1.2m as part of a settlement
- Did not disclose to users that it “sold” personal data by allowing third parties to place tracking cookies on the Sephora website
- Did not respect consumer choices (i.e., “do not sell my information”)
- Sephora failed to acknowledge the Global Privacy Control – browser-based opt-out
- Failed to cure the violations in the cure period (which is sunseting with CPRA)



# Digital Rights & Risks in the UK and EU

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- Digital Markets, Competition and Consumers Act 2024
- DMCC phased into effect – consumer law enforced April 2025
- Impacts if you sell into UK – up to 10% global revenue fines for breach of Schedule 16 consumer laws
- “Interconnected bodies corporate” of infringing business also can be fined - So, US HQ can be jointly and severally liable for fines imposed on UK subsidiary
- Websites & Chatbots - Online Choice Architecture CMA
- ePrivacy – Cookies risk spike – AdTech under attack by Authorities
- GDPR – Behavioural Marketing, Tracking
- Social Media / Influencers / User Generated Content/AI
- Data Transfers



# Other Key Principles that Require Integrated Coordination

## Regulatory Compliance Across Borders



# Strategies for Navigating Global Consumer Protection Laws

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- As mentioned above re DMCC, consumer laws can be complex and can often change materially
- EU, UK, other international laws on what you can say in advertising and product claims can often differ from the U.S. position
- How you induce a consumer to respond to your advertising/buy a product can be a materially different (e.g. in the UK and EU what you say and what you do NOT say or what you imply can all be caught)
- Certain product sectors and categories will attract different laws and regulations (e.g. Red Bull Medicines Control Regs)
- It is essential to consider with counsel what laws may apply and anticipate challenges
- Also it is important to reassess any substantiation data you believe you can rely upon
- Often there will be local law or regulator variances that may mean you need to re-test and/or delay launch



# Compliance Risks Increasing in the UK and EU

New Laws, Higher Fines, Regulator Action



# Why Are Regulatory Risks Increasing?

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- Combination of multiple factors
- New laws aimed at protecting consumers
- Extra-territoriality (many new laws can apply to U.S. and other non-EU/UK businesses e.g. GDPR, DMCC)
- Perceived “harms” derived from shift to online, web, mobile, emarketing, ecommerce, AdTech
- Regulators now targeting ways consumers are being influenced/targeted
- Regulators and competitors scrutinizing claims more than ever
- Substantiation and standards requirements are evolving in different directions in different countries
- Competitors can use this to stop a rival without needing to sue directly (e.g. report to a regulator)
- Consumers are now more aware of their new rights and can also file a complaint to a regulator



# Key Takeaways & Best Practices





# Key Takeaways/Best Practices for Global Product Launches

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- **More complex** and **higher risk** than ever before - additional landmines to navigate
- Some jurisdictions now have **new laws/fines** that pose major risk
- **DMCC** - 10% global revenue fines **and** extra-territorial reach for a wide range of consumer and marketing law breaches
- **Digital marketing** is much higher risk than before, cookies and website compliance attracting huge fines that were not the case just a couple of years ago
- **GDPR** is having a domino effect around the world so not just an EU/UK issue
- Many aspects of the campaign re prospects, lead generation, **e-marketing** at risk re data
- New product claims will require **independent substantiation** to reduce risk
- Consider using external counsel to provide **legal privilege** to testing and substantiation issues
- Be aware of **contractual, IP rights best practices** to employ to reduce risks with human characters
- Use counsel that can deliver **joined up international advice based on experience of prior global launches**



# Questions?



# Thank you

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