

## EVERYDAY ETHICS

## Legal and Ethical Issues in Technical Content Marketing

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### ABSTRACT

Writers working in industry and contracting are often involved in the writing of technical content marketing for products, services, and personal freelance businesses. In this article, writers in technical industries are introduced to the legal and ethical issues of technical content marketing and advertising, which covers intellectual property, truth in advertising, comparative and competitive advertising, and customer reach. The goal of this article is to provide writers with a better understanding of these legal terms and concepts as well as ethical issues that influence technical content marketing strategy and practice.

Marketing copywriters in technical industries create technical content marketing for the commercialization of technology and for promoting personal freelance businesses. As Rebecca Geier states, “Content is the heart of your inbound marketing program. It’s how new people find your company from searches, it educates prospects and...ultimately it builds trust between your business and your prospects and customers.”<sup>1</sup> Although the writing of marketing copy, marketing genres, tactics, and communication technologies are familiar to copywriters in technical industries, many of the legal and ethical issues and restrictions that influence the decision process are less familiar and often based on word-of-mouth advice from others in these fields. Technical content marketing writers and strategists often encounter internally and externally written marketing copy that may cause liability for the writer or organization and may be considered unethical practice.

This article examines 4 categories of legal and ethical issues in technical content marketing—with many issues also of concern to freelance writers managing their own business. The 4 categories of legal and ethical issues in technical content marketing, which encompasses content creation and distribution include

- intellectual property,
- truth in advertising,

- comparative and competitive advertising, and
- customer reach.

The goal of this article is to examine these 4 categories of legal and ethical issues that influence content marketing practice in the commercialization of technical products and services.

### INTELLECTUAL PROPERTY

One of the pivotal cultural differences between business executives and medical/technical (or scientific) experts is the practice and attitudes associated with information sharing about technology. Specifically, science and technology have a 350-year-old philosophical and ethical tradition of “open science,” which is the free exchange of information for the improvement of society.<sup>2-5</sup> Notably, Robert Merton describes the culture by stating, “The pursuit of science is culturally defined as being primarily a disinterested search for truth and only secondarily, a means of earning a livelihood.”<sup>6</sup> However in the context of marketing copywriting, the technology becomes the product rather than medical, scientific, or technical knowledge and this shift transforms the cultural norms associated with the sharing of information and protection of intellectual property.<sup>7</sup>

Often the scientific and technical information is concealed or selectively disclosed by companies in order to maintain a competitive advantage over competing organizations.<sup>4,7-10</sup> Organizations protect their technology or intellectual property through use of patents and trade secrets. A technology *patent* allows commercial organizations to be the sole commercial provider of an innovative technology (a monopoly) for a period of time in the jurisdiction covered by the granting office. For example, in the United States and Europe, most patents are granted for 20 years, which is considered sufficient time for organizations to recoup the costs of research, development, and commercialization.<sup>11,12</sup> For many medical, scientific, and technical fields, 20 years is generally longer than the market lifetime of most new products. The intent of patent protection is to enable companies to disclose detailed information about a

technology for customer use while protecting sales of novel technologies. Although technical content marketing writers often avoid revealing detailed information about novel technology, much of this technical information is publicly available in US patents, which are typically published and available 18 months after the filing date. Thus, withholding technical information in technical content marketing generally imposes a greater hinderance and annoyance to technical consumers (for example, physicians or patients) than competitors who are familiar with researching patents as well as the scientific literature to understand patented or researched innovations.

The second form of protection, *trade secret*, is information about a technology or manufacturing process that has been developed by an organization and is protected through withholding proprietary information from individuals outside of an organization. In general, trade secrets worth protecting are those that have some commercial value, which may include an innovative process manufacturing process a technical product rather than the technical product itself. Many trade secrets are not eligible for patent protection, so, in contrast to patented technologies, trade secrets inadvertently divulged technical content marketing would undermine this competitive advantage. Many organizations require employees and contractors to sign a nondisclosure agreement (NDA) or a confidentiality agreement that places an individual personally liable for information divulged.

Aside from trade secrets, marketing copywriters in technical fields may find that sharing technical product information in technical content marketing helps construct the ethos of an organization and create a positive brand image. In particular, this sharing of information is most important to technical consumers in the early market, who have a strong curiosity and interest to understand technical innovations.<sup>13</sup> This sharing of technical information is often a concern for marketing copywriters in technical industries who typically provide relevant details, such as detailed understanding of molecular actions and results from clinical trials in patient communication. Apart from Aristotelian persuasion strategies and consumer needs for information, copywriters of technical content marketing also need to consider the legal obligations of providing information that is necessary for the safe use of a product.

## TRUTH IN ADVERTISING

In the United States, as well as the European Union and many other regions, advertising (as well as all forms of marketing or advertising) is legally required to<sup>14-16</sup>

- Be truthful and nondeceptive (in any part or as a whole) and
- Have evidence to support objective statements of fact (using appropriate and widely accepted methods of collecting such evidence).

Any marketing content that is inaccurate, misleading, or unproven is considered false (or deceptive) advertising and is subject to legal action against an organization or freelancer.

In technical content marketing, the most relevant considerations are to ensure the truth and accuracy of all content. As mentioned previously, both the expressed and implied claims (or factual, objective statements) in marketing must be accurate and supported by evidence. Furthermore, the overall context of the text and document (including visuals) must not be misleading to a “reasonable consumer” as interpreted by regulators.<sup>15</sup>

At the simplest level, any expressed claim, or one that is explicitly stated, must be accurate and truthful. For example, the United States Federal Trade Commission (FTC), the governmental organization that monitors most forms of advertising in the United States, provides the following example of expressed claim, “ABC Refrigerators will reduce your energy costs by 25%.”<sup>15</sup>

In contrast, an implied claim is made indirectly or by inference, such as, “ABC Mouthwash kills the germs that cause colds.”<sup>15</sup> According to the FTC, a “reasonable consumer” could make a logical connection between these 2 statements in an implied claim and conclude that the mouthwash will prevent colds.<sup>15</sup> In this example provided by the FTC, the writer’s intent is to mislead readers and imply the use of a particular product (mouthwash) would be a useful product for treating colds. By law, both expressed and implied claims must be verified by scientific evidence using appropriate investigation methods. Another realm of concern is personal experience or customer anecdotes (especially for health-related claims), which are not considered appropriate evidence to support these types of claims.<sup>15,16</sup>

Subjective claims made by a company are more difficult for the FTC to evaluate and often receive less scrutiny.<sup>14,16,17</sup> Thus, overstated subjective claims, or “puffery”, are relatively prominent in consumer advertising.<sup>16</sup> In many cases, simply stating that a product is “the best” is typically ignored by the FTC.<sup>16,17</sup> Yet subjective claims also may be subject to penalty depending on the claim and the impact that such statements have on the overall impression of the communication. For example, a statement would be false advertising if it contains any unsubstantiated, objective element, such as “most consumers prefer XYZ.”<sup>16</sup> Subjective statements are evaluated in context and technical content marketing would

be considered false advertising if such statements contributed to an overall misleading impression in the mind of the consumer.

Another form of subjective claims is those from individuals rather than claims from a commercial organization. Subjective claims from individuals, called endorsements or testimonials, must be an honest opinion and detail the actual experience of the individual. Additionally, endorsements must reflect the typical customer experience rather than unusual cases. The FTC emphasizes that simply stating “results may vary” for an atypical case is not considered sufficient disclosure to avoid legal penalty for misleading advertising.<sup>15,16</sup> Furthermore, an individual providing an expert endorsement must have appropriate qualifications to be considered an expert in an appropriate field and provide a relevant opinion focusing on the key applications of the product. In many regions (including the United States), testimonials must be clearly qualified with a statement of disclosure if provided from any individual that has a personal or financial relationship with an organization. Such disclosure, as well as any disclaimer that qualifies a claim, must be presented in plain language and displayed conspicuously to avoid misleading readers.

Despite these legal requirements, marketing and advertising have long been pushing the boundaries of truthful statements and are generally perceived cynically, fairly or unfairly, as persuasive and deceptive communication with exaggerated claims that are designed to mislead naïve consumers.<sup>18-23</sup> Furthermore, marketing content is prohibited, by law, from deceiving or misleading customers through the omission of relevant (or “material”) information that is important for influencing a “reasonable consumer” to purchase or use a product.<sup>16</sup> Furthermore, ethical technical content marketing includes completeness, so claims are not misrepresented or misinterpreted by the omission of relevant detail.<sup>23</sup> Such perceptions and unethical practice undermine consumer trust and confidence in all forms of marketing communication and organizations. Therefore, to compensate for inherent audience skepticism and distrust, content writers should prioritize direct (explicit), objective, accurate claims and provide complete evidence and description of methods used to collect for the determination of each claim. Ultimately, a detailed and honest independent expert analysis may be particularly persuasive for technical consumers.

## COMPARATIVE AND COMPETITIVE ADVERTISING

In addition to providing accurate and honest information about a product, technical content marketing—particu-

larly for pharmaceuticals and medical products—is often responsive to competitors’ generic drugs or treatments.<sup>24</sup> Comparative advertising is technical content marketing that compares a company’s product to another product—often one from a competitor—either explicitly by stating the brand name of a competing product, or implicitly through reference (such as “Brand X”). Despite common misconceptions about comparative advertising that have arisen from outdated laws and industry norms, both explicit and implicit competitive advertising are legal in the United States, the United Kingdom, and the European Union.<sup>25-27</sup> In fact, the FTC encourages comparative advertising because it provides “important information to consumers” by helping them distinguish between product features and also encourages product improvement and innovation.<sup>25</sup> Comparative advertising is legal as long as it adheres to the following conditions:<sup>25,26,28</sup>

- It provides truthful information that is not misleading in part or in whole.
- It compares equivalent products that meet the same customer need or are intended for the same purpose.
- It objectively compares one or more relevant product performance features that can be scientifically verified with appropriate evidence.
- It excludes any other distortion or misleading information.
- If explicit, it properly identifies competitor(s) by using the exact trade name, trademark, or other distinguishing branding marks so the trademarks (not the products) are not denigrated or discredited.

Under these conditions, comparative advertising is legal and the courts have consistently denied any claims of defamation (or libel) by competitors.<sup>26,29</sup> Comparative advertising is an effective strategy for introducing new products, distinguishing similar products, and establishing a niche in the market.<sup>30-32</sup> Yet some advertisers consider comparative advertising to be unethical and risky, as it may increase the likelihood of complaints about a company’s advertising to the FTC (or other regulatory organizations) as a punitive response by competitors.<sup>29</sup>

## CUSTOMER REACH

Much of marketing strategy is driven by profit rather than the effects that it has on individuals and particular groups. Of particular concern, content writers should be conscious of development and delivery of information to specific, overly narrow target consumers at the exclusion of other consumer groups.<sup>33-35</sup> Particularly in business-to-consumer (B2C) advertising, a historical bias has been writing,

designing, and delivering marketing communication disproportionately toward affluent target markets in industrialized Western countries.<sup>34-36</sup> However, a contrasting situation may also be the case as some B2C advertising has been criticized for specifically targeting economically disadvantaged groups and developing nations with advertisements for harmful products such as cigarettes or infant formula instead of breastmilk.<sup>37-39</sup> Aside from the numerous examples and case studies of biased B2C marketing practices that tend to reduce the market and prevent a product from achieving full market potential, the focus of this discussion is to identify ethical marketing practices so writers can avoid such problems and maximize connection with customers within legal and ethical customer reach.

The most effective strategy for identifying target consumer audiences or a specific market is to characterize potential consumers by providing technical marketing communication focusing on the relevant needs or wants that are addressed by the product.<sup>40</sup> Such an audience analysis should downplay or exclude personal attributes that are unrelated to the product need, which would create a distorted or biased characterization of a target audience that would unnecessarily influence marketing communication strategy. In technical content marketing, different groups of audiences (or buyer personas) are identified and served through a collection of content that is targeted to their specific (often differing) needs or wants.<sup>41</sup> Buyer personas may not specifically be a direct “buyer” or purchaser of a product or service, but each group contributes to the business model of the organization. A common example are company

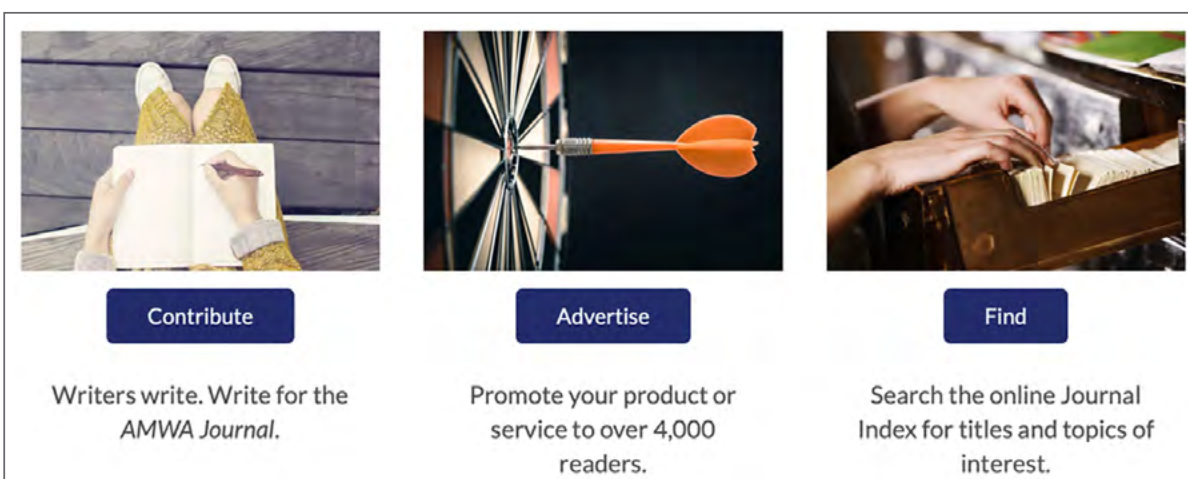
websites, which are organized into sections around the needs of different groups providing resources to address their specific need for information. With a buyer persona strategy, the first layer for organizing a website is to direct individuals from different groups into the proper section of resources. In particular, consider the *American Medical Writers Association (AMWA) Journal’s* homepage (Figure), which provides links to buyer personas to

- “Contribute,” for writers to prepare manuscripts for the journal,
- “Advertise,” for advertisers to promote a product or service to the readers, or
- “Find,” for readers to search a database of articles within the journal.

In this example, specific content of each section of the website provides relevant information that supports the informational needs of these different groups in order to support the publication of the journal.

Additionally, technical markets are international—both as global markets as well as domestic markets with many customers originally from other nations. From a writing and accessibility perspective, the most effective technical content marketing is designed for global audiences. From a communication lens apart from country-specific content regulation, technical content marketing writers can improve communication effectiveness with non-native English speakers by adhering to the following guidelines<sup>42-44</sup>

- Use deductive organization with topic sentences and important information at the beginning of each document, section, and paragraph,



**Figure.** Example of buyer personas (or target audiences) of common visitor categories to the *AMWA Journal’s* home page. Sections of the Journal website are targeted to specific audiences, such as “Contribute” for individuals interested in writing an article for the journal, “Advertise,” for individuals seeking to advertise within the journal, and “Find,” for individuals seeking to find and read an article published by the journal. Collectively, these buyer personas represent the major constituents of the publication. This figure has been reprinted with permission from AMWA.

- Use plain language, concise phrases, short sentences, and the active voice; limit the use of long, complex sentences and avoid negative constructions,
- Use international measurements (the metric system),
- Use a consistent (or controlled) and precise vocabulary based on word denotation and concrete language rather than colloquial words and phrases with embedded connotations (eg, change the colloquial verb phrase “looking into” to the single verb “investigate,” which expresses the intended concept clearly and translates directly), and
- Use clear and specific statements rather than using culturally specific metaphors or figurative language (eg, change the US-centric baseball reference “home run” to “success”).

Not only will these strategies increase the effectiveness of communication to global audiences in English, but these techniques will also facilitate accurate translation into other languages.

Finally, although customer reach is also achieved through the use of technology to deliver technical content marketing, the latest technology may impose communication barriers to some audiences, particularly individuals with disabilities as well as those with older technology or low-bandwidth connections.<sup>45-48</sup> For many technologies, using the latest communication platforms to communicate with affluent, able-bodied, mainstream consumers may prevent communication to a target audience and individuals from other groups. Particularly in regards to accessibility, or inclusion of alternative communication formats for individuals set apart by the digital divide, such communication may be a legal consideration in the United States, Europe, and many other countries.<sup>49</sup> Yet, technology does not always prevent access but, in many cases, also facilitates communication to these groups (for example, YouTube will close caption videos by default for the hearing impaired). The challenge with using the latest communication technology is that the barriers and adaptations are technology specific and constantly shifting. The important point for marketing writers is to provide content in appropriate formats for the widest coverage of potential customers.

## CONCLUSION

In this literature review, the goal has been to introduce medical writers to the legal and ethical issues of marketing in which additional caution is needed. As a review, this article is designed to serve as a foundational resource with reference to sources for further information and clarification of individual issues. The importance of further

researching additional issues depends on the nature of each situation. In particular, the ethical practices of technical content marketing writing and the commercialization of technology are developed from legal and academic sources, which advocate for communicating content rather than rhetorically persuasive strategies. Much of this discussion touches on legal issues and interpretations, which are constantly in flux. In regard to issues with legal implications, specific laws and regulations vary by geographic region and change as new technologies enable novel marketing practices and lawmakers make changes to prior regulations. Thus, specific marketing and advertising copywriting encroaching on legal issues presented within this article require consultation of the latest legal postings and review by attorneys familiar with the jurisdiction in order to evaluate the appropriateness of decisions made by the technical content marketing writer or strategist.

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