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Avoiding Lawsuits over False Advertising on the Internet

By Gary Beaver on February 10, 2012

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As the economy continues to stagger, businesses are becoming more aggressive in seeking customers through advertising, which often includes an Internet component. Businesses have become more sophisticated in scrutinizing competitors' Internet advertising and seem less reticent to challenge such advertising. Attorneys specializing in consumer-protection class actions are filing creative pleadings attacking companies for ads that, even if false in insignificant ways, may, in the context of a class action, cost the company posting the ad millions of dollars. Likewise, the Federal Trade Commission (FTC) appears to be taking a more aggressive stance in examining and challenging Internet advertising as it updates its 11-year-old Rules of the Road for Internet advertising.

Recent cases in which either private plaintiffs or the FTC made false-advertising claims in which at least part of the challenged advertising was published on the Internet provide some clues about what not to do. Please note that some of the examples of infringement are of unproven claims; they are provided to show what led to the filing of the lawsuits or what has to be shown to defend the lawsuits.

Don't Just Make Things Up

Boldness is no substitute for good judgment. For example, on April 19, 2011, the FTC announced efforts in federal court to stop 10 operators from using fake news websites to market acai berry weight-loss products. The FTC alleges that the websites are set up to look like legitimate news organizations, make false statements about investigations and weight loss examples, include phony consumer testimonials, and fail to disclose the financial relationship between the site operators and the acai product sellers. Apparently, some even claim the reports on the website come from named, well-known, legitimate news organizations when they were not. It is not hard to guess how this turns out.

Don't Make Claims Without Adequate Substantiation Evidence

This is where most of the friction occurs. Competitors are going to review ads for accuracy. It does not matter if advertisers are deluded true believers or people who have evidence that does not quite make the grade. They must substantiate the claimed wonders of their products and services.

How good is the evidence backing up the claims? Is the advertiser puffing or making actionable fact statements? Are there medical or scientific studies or customer surveys that properly support the claim? Are the studies objective? Not surprisingly, many studies provide results favorable to the companies/industries that pay for them. Your adversary will attack their credibility. Here are some recent lawsuits in this area:

- Class actions have been filed against athletic shoe companies New Balance and Reebok for claims that just wearing and walking around in their shoes tones leg muscles.
- In March 2011, Power Balance, LLC, agreed to pay more than $57 million to settle a class-action claim that it falsely advertised on websites that its products improve customers' balance, strength, and flexibility through holograms embedded in bracelets and other products that react to the body's natural energy field.
- General Mills and Yoplait USA, Inc., were denied summary judgment in a consumer class action alleging false advertising about the health benefits of probiotic bacteria in YoPlus yogurt. The case may have been triggered when competitor Dannon filed a complaint with the Better Business Bureau, which then chastised General Mills for the claims. A similar lawsuit is pending against Procter & Gamble regarding its probiotic supplement Align.

The substantiation problem causes special concern with respect to health claims, as those will draw the close scrutiny of competitors, the Food and Drug Administration (FDA), the FTC, and the consumer class-action bar. For example, in December 2010, consumers filed a class action against a Kansas winery for claiming its elderberry juice was a medicinal product with curative properties. The FDA sent a warning letter to the winery four years earlier that its website claims meant the juice was a drug, was misbranded, and could not be sold without FDA approval. The winery apparently ignored the FDA.

Be Cautious and Conservative in Comparative Advertising

Competitors will sue if an ad attacks their products or services, so advertisers need to be able to substantiate the comparison. They may be sued even if they have the substantiation, so they need to budget for legal costs. Lawsuits in this area include the following:

- In January 2011, Jackson Hewitt, Inc., sued H&R Block, Inc., for claiming in a nationwide advertising campaign, including statements on H&R Block websites, that it found errors on two out of three tax returns done by other preparers.
- Even advertising comparing two of a company's own products can lead to a lawsuit. P&G's Gillette was sued for advertising that its Fusion Power razors were superior to its cheaper Fusion manual razor cartridges. However, the lawsuit was dismissed with leave to amend on May 17, 2011.

Don't Throw Mud

In May 2011, a PR firm hired by Facebook tried to plant negative stories about Google with newspapers. When one reporter published the effort and the email evidence, the black eye was worn by Facebook, not Google.

Comply with the FTC Endorsements Guidelines

The FTC's guidelines governing endorsements and testimonials in advertisements are not binding law, but they are administrative interpretations that hold great weight in enforcing the FTC Act against deceptive advertising. The guidelines were modified on December 1, 2009. The most significant change is the removal of the 29-year-old safe harbor that allowed a testimonial to describe unusual results from the use of a product or service so long as the testimonial included a disclaimer such as "results not typical." Now, advertisers must have proof that the experience or results described advertising is "representative of what consumers will generally achieve," or the ad must "disclose the generally expected performance in the depicted circumstances."

The guidelines now make it explicit that the FTC can prosecute both advertiser and endorser for making false statements or for failing to disclose material connections between the advertiser and the endorser. Advertisers need to be careful not to publish endorsements from friends, families, or compensated endorsers without full disclosure. An endorser must be a "bona fide" user of the product endorsed and must continue to be a bona fide user of the product for as long as the ad runs. If the celebrity stops using the product, the advertiser must stop using the endorsement.

The FTC is not the only one acting against false endorsements. In 2002, Sony entered into a settlement with the State of Connecticut for using fake "person on the street" interviews in which Sony employees pretended to be moviegoers praising Sony movies that they claimed to have just viewed.

An expert endorsement must be supported by an actual exercise of the expert's expertise in evaluating the product and must include an examination or test of the product at least as extensive as someone with the same level of expertise would normally need to conduct to support the conclusion in the endorsement. The FTC has not added a requirement for peer-reviewed evidence or studies to support a conclusion, but an example the FTC recently added to the guidelines certainly pushes the standard for acceptable expert advertising in that direction.

Advertisers should not manufacture phony endorsements. Posting phony endorsements in online bulletin boards or elsewhere online shows the poster is willing to deliberately mislead the public to enhance sales and, therefore, is not credible with respect to any aspect of its challenged business practices. This is great evidence for a plaintiff.

Don't Trade on a Competitor's Good Will

Trademark and copyright infringements are often a form of false advertising as a company tries to use the good will and reputation earned by a competitor's product to either draw consumer attention to its own product or to confuse consumers into thinking its product is somehow associated with the product that is already well regarded. On the Internet, trademarks are used to falsely advertise in many ways, including use of another's trademarks or of slightly misspelled trademarks in domain names or using another's trademarks in keywords or metatags where there is no appropriate use of the trademark in website text. (It is often a fair use to use another's trademark in a comparative ad.) Similarly, copying another's famous products and advertising them as your own can lead to a copyright infringement. Some cases involve both types of infringement;

in April 2011, Disney and Hanna-Barbera sued Costume World, Inc., for both types of infringement for selling through Internet websites allegedly infringing costumes based on cartoon characters.

A company should carefully consider how best to protect its products and services through the use of registered trademarks and then regularly search the Internet for any infringing uses of those trademarks. Even if a company's common-law trademarks are not yet registered, it should monitor the Internet for possible infringements. Use cease-and-desist notices to try to stop such abuses. If necessary, escalate to proceedings in federal or state courts or proceedings before the National Advertising Division (NAD), National Arbitration Forum, or World Intellectual Property Organization.

Other Internet Advertising Issues

Survey Evidence
Proving customer confusion if you are challenging a competitor's actions or proving substantiation of consumer preferences stated in your client's advertising are often done by survey. Internet surveys are usually cheaper and faster than other forms of surveys, but there are many inherent weaknesses in their accuracy. You should not compound those weaknesses with skewed questions designed to get the result you want. At some point, you may have to prove in court that it was reasonable to rely on your survey.

Personal Jurisdiction
Not every ad on the Internet can be the basis of a lawsuit in every jurisdiction in which the Internet reaches—that is, all of them. You should understand in which jurisdictions your client can be dragged to court and why. Generally, if a company targets someone or some group in a particular state with advertising or if it does a substantial amount of business of any kind in that state, then it may be subject to jurisdiction in that state.

Use of False-Advertising Claims as Means of Competition
MGA Entertainment, Inc., filed suit in a California federal court against electronic toy competitor Innovation First, Inc., alleging Innovation made false and misleading statements to the public and to retailers that its competitors, including MGA, had stolen design components related to a popular toy made by Innovation. MGA's lawsuit was dismissed for lack of personal jurisdiction. Innovation already has a lawsuit pending in Texas state court against MGA for patent infringement. We should expect to see more allegations like these from companies represented by creative attorneys making close examinations of statements made by their clients' business competitors on the Internet or elsewhere.

To avoid a lawsuit over false advertising, a company would be well advised to do the following:

- Use a system to review in advance all public statements, including Internet advertising, to identify claims needing substantiation and gather sufficiently reliable substantiation;
- Where appropriate, work with scientists, engineers, and other technical personnel to ensure that they understand the legal standards for substantiation and that marketing personnel understand whether the technical information meets those standards;
- Develop proper survey evidence if it is to be used in advertising; and

- Obtain a legal review of any advertising that makes claims requiring substantiation or that directly criticizes or compares to competitors' products.

Even if a company does everything right, it may be sued by a competitor who simply does not believe that the company can substantiate its claims or is using litigation as a means of hurting the company's pocketbook or reputation. All a company can do is try its best to be accurate and be prepared to fight back swiftly and effectively.