Advertising Law

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In This Issue

Imitation a Precursor to Litigation, Not a Form of Flattery for Band

The band Beach House is considering legal action against Volkswagen after the car maker repeatedly sought permission to use one of its songs in an ad and then, after the band refused, reportedly commissioned a "soundalike" song for the commercial.

The commercial, which aired in Britain, features moments from a father and daughter's relationship as she grows up, including scenes where the father is changing diapers, applying sunscreen, and revealing the gift of a Volkswagen. Beach House, a Baltimore-based duo, refused Volkswagen's multiple requests to use the band's 2010 song "Take Care" in the ad.

But when the advertisement aired, Beach House was surprised to hear a song that band member Alex Scally told *The New York Times* "feels like something close to what we made." Similarities include lyrics – "I'd take care of you" in Beach House's song and "I'll watch over you" in Volkswagen's ad – and the guitar melodies. "A feeling and a sentiment and an energy has been copied and is being used to sell something we didn't want to sell," Scally complained.

In a statement to *The Wall Street Journal*, Volkswagen said it considered "dozens" of songs in addition to Beach House's before ultimately deciding to commission its own song. "We greatly respect the talent of Beach House and never set out to replicate a specific song of theirs or anyone else's," the car maker said.

A lawyer for the band said the duo is considering legal action in Britain.

To watch Volkswagen's commercial, click here.

Why it matters: Controversy over the use of "soundalikes" in advertisements is nothing new. Bette Midler famously sued – and won – over an imitation of her used in a television commercial, and other artists like Tom Waits have challenged similar versions of their songs as a violation of their publicity rights. Advertisers should be careful when using any element of a celebrity's image or sound in a commercial without his or her permission to avoid litigation or controversy.

back to top

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The Beauty Company's Cosmetics Safety Act & Beauty Product Claims Development Webinar
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Speaker: Ed Glynn
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July 24–27, 2012
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Topic: "NBJ State of the Industry"
Speaker: Ivan Wasserman
Dana Point, CA
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Will the 9th Circuit Reverse Approval for Kellogg's Mini-Wheats Settlement?

Last spring, a federal court judge approved a $10.6 million settlement in a false advertising class action suit against Kellogg, where the plaintiffs alleged that Kellogg deceptively advertised that its Frosted Mini-Wheats could improve children's cognitive function and memory retention.

Earlier this month, an attorney for class members, not class counsel, objected to the settlement and argued to the 9th Circuit that approval should be reversed because the deal is "unfair" and has "obvious flaws."

A class of plaintiffs challenged Kellogg's claims, including that Frosted Mini-Wheats cereal was "clinically shown to improve children's attentiveness by nearly 20%." Under the terms of the settlement, Kellogg agreed to provide $2.75 million for consumer refunds, make a $5.5 million charitable food donation, and promise to stop making similar ad claims.

However, the settlement terms didn't meet the goals of the suit, the challengers' attorneys argued.

Although the litigation involved claims made about children's attentiveness, memory, and other cognitive functions, the charitable donation was slated for adult organizations, which is "inconsistent with the purposes for which the lawsuit was filed, in that they duped children and the parents of children who eat Frosted Mini-Wheats," attorney Janine Menhennet, representing one of the objectors, told the 9th Circuit panel, according to *Courthouse News*.

"Just off the top of my head, it occurs to me perhaps serving school breakfast programs in neighborhoods which are dramatically underfunded would serve the class a lot better than serving high fiber cereal to adults," she told the court.

Menhennet also suggested that Kellogg may have already planned the charitable donation and it was not a new contribution based solely on the case. In addition, she questioned the cost of the class attorneys' fees, which she calculated at $2,100 per hour.

In response, class counsel Timothy Blood described the settlement as an "outstanding result." He also defended the attorneys' fees as reasonable given the amount of work in the case and the ongoing appeal, as the dollar amount was determined even as work remained on the case.

Kellogg's attorney Kenneth Lee argued that the case was really about the "nutritional value" of the cereal. Therefore, the charitable donation was reasonable, he said. When asked whether the donation was part of an existing practice, Lee told the panel that the company would fulfill its promise. Ninth Circuit Judge Stephen Trott expressed skepticism at the answer, noting that "It seems to me you're asking us to trust the same people who told everybody that their kids would get smarter if they ate Frosted Mini-Wheats."

To read the brief objecting to the settlement, click here.

Why it matters: As currently approved, the settlement is not atypical in a false advertising class action. It includes a cash payment to consumers, a charitable donation, and injunctive relief along with attorneys' fees. If the 9th Circuit were to reverse the approval, it could signal to litigants that courts may require a closer nexus between the settlement terms and the intent of the suit.

back to top

New Jersey Alleges App Developer Violated COPPA

Alleging violations of the Children's Online Privacy Protection Act, the Attorney General of New Jersey and the state's Division of Consumer Affairs filed suit against 24x7digital, a mobile app developer.

California-based 24x7 developed a line of "Teach Me" apps targeted to kindergartners and children in first and second grade that were intended to help them learn the alphabet, colors, and counting. Children are encouraged to create "profiles" using their last name, first name, and a picture, and the defendants advertise the apps as "child friendly" and easy enough for "children to play without help from an adult."

COPPA mandates that companies notify consumers and receive parental consent prior to the collection and transmission to third parties of the personal information of children under the age of 13. According to the state's complaint, 24x7 failed to gain consent before compiling the names and unique device identifiers from its underage users and sharing this information with a third-party data analytics company.

The suit seeks to enjoin any future data collection in violation of COPPA, and an order requiring the company to destroy any data collected to date in violation of the Act.

To read the complaint in *Chiesa v. 24x7digital*, click here.

Why it matters: The lawsuit follows a report from the Federal Trade Commission earlier this year highlighting the privacy concerns associated with mobile apps geared toward children, as well as the agency's first action against a children's mobile app developer. That suit settled last year for $50,000. New Jersey's Attorney General, Jeffrey S. Chiesa, noted that the case against 24x7 is the state's first filed pursuant to COPPA – but not its last. "Mobile devices can capture and transmit a wealth of personal information about users, including their identities and even their geographic location. When we find that companies are using this ability to transmit information about children without their parents' knowledge or consent, we will take immediate action," Chiesa said in a press release about the suit. "Due to the broad capabilities of these devices and the potential for abuse, we are proactively investigating mobile apps to ensure their compliance with privacy and consumer protection laws." Given the action on both the federal and state levels, developers of children's apps should ensure their compliance with COPPA or face the potential of regulatory scrutiny.

back to top

Sonic's Burrito Offer Needed Better Disclosures, NAD Says

Sonic restaurants should better disclose the limits of their

promotional offers, the National Advertising Division recommended in a challenge brought by a consumer.

The consumer reported that he visited a Sonic drive-in in March with a sign reading "Wake up! FREE COFFEE WITH ANY BREAKFAST BURRITO." After ordering a junior breakfast burrito, the customer requested his free coffee. But a Sonic employee declined, saying he had to purchase a premium burrito to qualify for the offer. The consumer went to another restaurant and filed a complaint.

When contacted by the NAD, Sonic said the coffee/burrito promotion ended in January and any promotional materials should have been discarded. The company said it was "unsure" if the signage was held over from the promotion or was in fact a local promotion. Sonic directed the restaurant to discard the sign unless it intended to provide free coffee with any breakfast burrito.

The company also apologized to the consumer and offered him a $50 Sonic gift card.

While the NAD said it appreciated Sonic's response, it emphasized that advertisers are responsible for all reasonable interpretations of claims, not simply the message they intended to convey.

"NAD determined that the claim 'FREE COFFEE WITH ANY BREAKFAST BURRITO' could reasonably be interpreted by consumers to include Sonic's Junior Burrito. While the instant promotion has since ended, NAD recommended that, in future advertisements offering 'free coffee,' the advertiser clearly and conspicuously disclose any material limitations on the offer in close proximity to its 'free coffee' claim," the NAD said.

To read the NAD's press release about the decision, click here.

Why it matters: The decision is an important reminder to advertisers to always make clear and conspicuous disclosures of any material limitations for claims, and to keep in mind that advertisers are responsible for *all* reasonable interpretations of their claims, not just the intended message.

back to top

Just Filed: New False Advertising Suits Against Costco, Estee Lauder

Costco and Estee Lauder were the targets of two new false advertising class actions recently filed in California federal court.

In the ad campaign for its Plantscription skincare products, Estee Lauder used images purporting to be the "before" and "after" pictures dramatizing a clinical study of the effects of its anti-aging serum on subjects aged 45 to 60. In the "before" picture, the model's skin appears dark, with visible wrinkles; in the "after" picture, her skin appears smoother, lighter and "younger-looking." Pointing to four different parts of the model's face in the "after" picture, the ads claimed the effects were a result of use of the Plantscription products "In just 4 weeks – 4 signs of again visible repairs."

But the advertisements were deceptive and misleading because the

model in question never used the product and did not participate in the study, according to the complaint.

The model featured in the ad campaign is outside the target age range of the product at 35 years old, the plaintiffs said. She filed her own suit over the ads last year seeking at least $2 million for a violation of her publicity rights, arguing that she never agreed to have her image used in the advertisements.

Alleging violations of California state law, the plaintiffs requested injunctive relief to halt the advertising campaign, restitution, punitive damages, and at least $100 million in compensatory damages.

In a second suit, a putative class plaintiff alleged that Costco misleads consumers about the fat content of its Kirkland Signature Kettle Brand Potato Chips.

Although Kirkland potato chips are labeled "0 grams trans fat," they in fact contain 13 grams of fat per 50 grams, according to the complaint. The plaintiff claimed that this level of fat content triggers FDA and state requirements to make certain nutrient content disclosures on the product label. As Costco failed to make the required disclosure, its product is mislabeled and illegally marketed and sold.

Based on the Kirkland label, plaintiff Karen Thomas had the impression that the potato chips "made only positive contributions to a diet, and did not contain any nutrients at levels that raised the risk of diet-related disease or health-related condition," the complaint alleges.

The suit seeks damages and restitution as well as an order that Costco cease and desist selling its misbranded products and engage in corrective action.

To read the complaint in *Wheeler v. Estee Lauder*, click here.

To read the complaint in *Thomas v. Costco*, click here.

Why it matters: The suits demonstrate that false advertising class actions show no sign of slowing down, as consumers continue to target a broad range of products, from health-related claims like Costco's "0 grams trans fat" label for its potato chips to Estee Lauder's anti-aging claims for its line of skincare products.

back to top