Mine is Better Than Yours! The Risks and Rewards of Conducting Comparative Advertising

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Overview

• Evolution of the law of comparative advertising

• Substantiating—and challenging—comparative advertising claims

• “Fair use” and “nominative fair use” defenses

• Remedies for false and misleading advertising claims
Evolution of Comparative Advertising Law
Common law unfair competition

• “Fair play,” “morals of the marketplace,” “scales of conscience and fair dealing,” “decent thing to do in the trade,” “rules of honesty and fair dealing”

• Acts “contrary to good conscience,” “means which shock judicial sensibilities,” “a level of rascality that would raise an eyebrow,” “conduct which is immoral, unethical, oppressive, or unscrupulous”
Common law unfair competition

- Limited to “passing off” or “palming off” until the Supreme Court decided *Int’l News Service v. AP* in 1918
- Federal patent and copyright law preempt state law—but peaceful co-existence for state and federal unfair competition law
Federal and state regulation today

- Lanham Act Section 43(a)
- FTC Act Section 5
- FDA regulations
- State statutory provisions/common law
- Common law fraud
- Restatement (Third) of Unfair Competition
Lanham Act Section 43(a)

• Enacted in 1947 to ease burden of proof in common law false advertising cases
• 1989 amendment provided cause of action for product disparagement and trade libel

• Elements of claim:
  • False/misleading statement of fact
  • Interstate commerce
  • In connection with goods/services
  • Misrepresents “nature, characteristics, qualities, or geographic origin” of defendant’s or another’s goods or services
  • Causes or is likely to cause damage
Lanham Act Section 43(a)

- Fed. R. Civ. P. 9(b)’s requirement to plead fraud with particularity has been applied to Section 43(a) false advertising claims
- “Materiality,” i.e., likely to affect consumers’ purchasing decisions
  - Judicially imposed requirement
- What is “material”?
  - Misrepresentation of an “inherent quality or characteristic” (2nd Cir.)
  - Creates presumption that representation “material” (1st Cir.)
  - If literally false, creates presumption of materiality—whereas misleading statements require actual evidence of materiality (5th Cir.)
Substantiating and Challenging Claims
Substantiating and Challenging Claims

- “Materiality” requirement
- False or misleading statements of fact vs. mere “puffing” and statements of opinion
- Actionable advertising claims that are not “literally false”
- Required substantiation for comparative advertising claims
Actionable or defensible?

- Quiznos v. “Wrong Way”
- “Subway v. Quiznos”
  - *Doctor’s Assocs., Inc. v. QIP Holder LLC*, 2010 WL 669870, at *24 (D. Conn. Feb. 19, 2010) (Quiznos’ commercials submitted by consumers to win contest)
- “Sirloin Rules”
Quiznos v. “Wrong Way”
Subway v. Quiznos
False or misleading claims

• Equivalent to competing product
• Superior to competing product or has quality that named competing product does not
• Superior to unnamed competitors’ products
  • e.g., “outperforms,” “longer” life, provides “better” protection
False or misleading claims

• “Pain-killer battles”
  • “Materiality” of claims proven by consumer surveys
  • “Falsity” of claims proven by medical/scientific evidence

• Even if claims not literally false, may succeed by showing that innuendo or ambiguity has tendency to deceive buyers
False if no pre-existing data?

• Lanham Act § 43(a)
  • At least one court: yes
  • Most courts: no
  • Third Circuit: yes and no

• FTC Act § 5
  • Inadequately substantiated claim inherently misleading, violative even without proof of actual falsity
Burden of proving falsity

• “Better than” claims
  • Must affirmatively prove that defendant’s product equal or inferior

• “Tests prove” claims
  • Can show that tests unreliable or that tests do not support claim
Substantiation

- Requires that marketing claims be objectively verifiable
- Applies to both express and implied marketing claims
• Duncan Hines claimed that its mix had 50% more chocolate chips than Betty Crocker’s double chocolate muffin mix
• General Mills complained that claim created false impression that Duncan Hines’ muffin mix contained more chocolate
Substantiation

- DUNCAN HINES muffin mix had more chips, but smaller chips, than BETTY CROCKER muffin mix.

- Difference in size of chips so significant that—based on total weight—amount of chocolate in DUNCAN HINES muffin mix much less than BETTY CROCKER mix.

- **NAD finding**: DUNCAN HINES claim "textbook" example of comparative advertising claim that, although literally true, was misleading.
“Puffery”

• Grossly exaggerated claims that no reasonable buyer would believe (e.g., IMPERIAL MARGARINE crown)

• General claims of superiority so vague and indeterminate that would be understood as mere opinion, not statement of fact
“Puffery”

- Puffery actionable because advertising compared specific ingredients with those of competitors

- Case dismissed because plaintiff failed to prove that claims were “material”

- *Pizza Hut, Inc. v. Papa John’s Int’l, Inc.*, 227 F.3d 489 (5th Cir. 2000)
“Puffery”

- NOT “puffery” if
  - Influences consumer buying decisions
  - Contains definite and measurable claims
“Puffery”

• Examples of puffery:
  • “Redesigned and improved”
  • “AMERICA’S FAVORITE PASTA”

• BLUE CROSS/BLUE SHIELD coverage “better than” HMO
• POWERADE: “The Complete Sports Drink”
• HUGGIES: “natural fit” and “fit more naturally”
• Computerized chess game: “new technology,” “like having Karpov as your opponent”
“Puffery” or false comparative advertising?
But some say it’s just a shopping aisle
Defensible or problematic?

- "Clinical tests demonstrate that users will see a decrease in wrinkles in 5 days"
- "We’re better than the competition"
- "Debbie’s is the best Italian restaurant in Ohio"

- Objective statements of material fact requiring substantiation?
- Or mere “puffery”?
“Fair use” and “nominative fair use”

- “Trademarks of a rival company can be used in competitive advertising, so long as the advertising ‘does not contain misrepresentations or create a reasonable likelihood that purchasers will be confused as to the source, identity, or sponsorship of the advertiser’s product.’

- *Weight Watchers Int’l, Inc. v. Stouffer Corp.*, 744 F. Supp. 1259, 1269 (S.D.N.Y. 1990) (advertisements violated Lanham Act because they were misleading—not because they used Weight Watchers trademark)
“Fair use” and “nominative fair use”

- Party may nominatively use third party’s trademark if:
  - Good or service not readily identifiable without use
  - Use only so much of the mark(s) as is reasonably necessary to identify the product or service
  - No suggestion of sponsorship or endorsement by trademark owner
    - *Playboy Enter v. Wells*, 279 F.3d 796, 801 (9th Cir. 2001)
Is this nominative fair use?
Defensible? Or fatally flawed?

• Is this statement puffery?
• Does this statement require substantiation?
Defensible? Or fatally flawed?

• Does the footnote satisfy the substantiation requirement?

FOOTNOTE: “Data are for all franchise centers open in 2014, except for Kumon, which is for centers open for three or more years. Huntington, Sylvan, and Mathnasium revenues are as reported in Item 19 of their Franchise Disclosure Documents (FDD). We estimated Club21 from its FDD-reported financial statement as total franchisor revenue, less purchase of trademarked material and software fees, divided by the average royalty rate, then divided by number of franchise centers. We estimated Kumon revenue using data from its FDD Item 19 and a survey of its centers as average center enrollment multiplied by an average monthly enrollment charge of $120, plus registration fees of $50 and materials fees of $30 for half of its enrollments. We also evaluated Eye Level, Grade Power, and JEL but could not estimate their revenue.”
Defensible? Or fatally flawed?

- Is this comparative claim false or misleading?
- Is the use of data about other competitors permissible?
- Is the use of competitors’ trademarks “fair” use?
Remedies for False Advertising Claims

- Lanham Act Section 43(a)
- Food, Drug, & Cosmetic Act
- FTC Act Section 5
- State “little FTC” Acts
- State unfair competition law
Lanham Act remedies

- Injunctive relief if advertising claim has tendency to deceive and threatens irreparable harm
- Unlike injunctions, damages require proving actual deception
- Defendant’s profits or damages
- Costs and attorneys’ fees
Other federal statutes

- Lanham Act does not preempt claims for false and misleading food and beverage labels that violate FDCA
- No private FDCA cause of action
  - But FDA Food Labeling Guide may provide basis for Lanham Act claim

- No private right of action for violation of FTC Act Section 5
  - But FTC deceptive advertising guidelines may provide basis for Lanham Act claim
  - 7th Circuit: court should defer to FTC’s assessment of what is “deceptive”
FDA Food Labeling Guide

- Permissible content of and substantiation required for:
  - Nutrient Content Claims
  - Health Claims and Qualified Health Claims
  - Structure/Function Claims
FTC Act Section 5

• Prohibits unfair methods of competition and unfair or deceptive acts or practices

• FTC power to define and prohibit false and misleading advertising

• FTC Statement of Policy Regarding Comparative Advertising

• 3-step inquiry:
  • What claims conveyed?
  • False, misleading, or unsubstantiated?
  • Material to consumers?

• Types of claims scrutinized
  • “Efficacy” claims (≈ “better than” claims)
  • “Establishment” claims (≈ “tests prove” claims)
FTC Act Section 5

• Deceptive testimonials and endorsements

• FTC “Green Guides” for environmental marketing claims

• No private right of action but may be actionable under
  • “Little FTC” Acts, e.g., North Carolina (treble damages)
  • State unfair competition statutes, e.g., California
Questions & Answers