Challenging false and misleading advertising

This text first appeared in the *IAM* magazine supplement
'Brands in the Boardroom 2005' May 2005
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Brands in the Boardroom 2005

Key branding issues for senior executives

A supplement to ***Intellectual Asset Management*** *magazine*
www.iam-magazine.com

Challenging false and misleading advertising

There are a number of avenues open to companies seeking redress against what they consider to be misleading advertising claims

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In the spring of 2005, Atona Motors introduced a new midsize automobile. Its advertising agency created six print advertisements targeting Atona's competitors in the midsize automobile market, including particularly rival Bianca Motors. All of the advertisements show the ATONA being driven on a highway. Each advertisement makes a different claim:

- The new ATONA gets better highway mileage than the BIANCA.
- ATONA or BIANCA? You'll drive more highway miles on a gallon of gas in the new ATONA.
- Tests prove that the new ATONA gets better highway mileage than the BIANCA.
- The new ATONA gets better mileage than the BIANCA.
- The new ATONA is the best midsize car money can buy.
- The new ATONA is the best midsize car money can buy. Here's why: best highway mileage in the business.

Before running the advertisements, Atona conducted a highway mileage test. In that test the new ATONA got better mileage than the BIANCA. Atona did not test the two cars' mileage in city driving. Bianca's own tests show that the BIANCA gets better mileage in city driving than the ATONA. However, Bianca has not tested the two cars on a highway.

Bianca finds all of Atona's advertisements troubling. What, if anything, can Bianca do? The answer depends on the advertisement Bianca wants to challenge, the facts Bianca and Atona can prove and the type of action Bianca is prepared to take.

Litigating a Lanham Act case

Bianca can challenge Atona's advertising in federal court litigation. Section 43(a) of the United States Trademark Act, which is commonly referred to as the Lanham Act, permits such cases. Section 43(a) allows a party to challenge an advertisement without involving a government agency or other third party and thus guarantees a party its day in court.

Relief in a Lanham Act case can be effective. A court may grant a preliminary injunction prohibiting the advertiser from running its advertisements until the case goes to trial. A preliminary injunction, which should be sought quickly, can sometimes end a dispute promptly. That is because the defendant might not want to resume use of the advertisement once it has been enjoined, even if it believes it would ultimately prevail in the litigation following a full trial on the merits. In an appropriate case, a motion for summary judgment can lead to a final decision before a trial would otherwise take place.

In addition to preliminary injunctions, remedies in Lanham Act cases can include permanent injunctions, the recovery of money damages, including the defendant's profits, and an order requiring the defendant to run corrective advertising or to pay the plaintiff the cost of running corrective advertising. It is usually more difficult to obtain a monetary award than injunctive relief. However, some courts have awarded plaintiffs millions of dollars in Lanham Act false advertising cases.

Section 43(a) litigation can be expensive. If a case is not settled or disposed of promptly following entry of a preliminary injunction, the parties to a Lanham Act

litigation will engage in pre-trial discovery of the facts and expert witnesses' opinions, trial preparation, a trial before a judge or a jury and potentially an appeal by the losing party. In addition to attorneys' fees, costs may well include the expense of conducting consumer surveys and other tests. However, a party can incur at least some of these fees and costs in other types of proceedings that can provide less effective forms of relief.

Section 43(a) prohibits making in commercial advertising or promotion false or misleading descriptions or representations of fact that misrepresent the nature, characteristics or qualities of one's own or another's products or services. Courts have interpreted "commercial advertising or promotion" to mean a variety of marketing techniques, including print and television advertising, brochures, catalogues, packaging and, in some instances, presentations to prospective customers.

Because the statute concerns descriptions and representations of fact, it does not prohibit the expression of merely subjective opinions. Moreover, not every factual statement about a product or service violates of Section 43(a). Typically, the statement must be material, meaning the statement will probably influence a purchasing decision. Atona's claims about better gas mileage are material statements because gas mileage is important to many car buyers.

In deciding whether an advertising statement is likely to be regarded as false or misleading, it is important to consider the entire advertisement in which the statement appears. That is the test the courts apply, and it can affect the outcome of a case. For example, more people might believe the statement "the new ATONA gets better mileage than the BIANCA" refers to highway mileage because the ATONA is shown on a highway in Atona's advertisement, than would believe the statement refers to highway mileage if the ATONA were shown in bumper-to-bumper city traffic.

Proving a Lanham Act claim

Whether Bianca can show that any of Atona's six advertisements violates Section 43(a) depends on the advertisement and the facts that Bianca and Atona can prove.

The new ATONA gets better highway mileage than the BIANCA

This advertising statement is either literally true or literally false. A literally false statement is often called a statement that is false on its face because the meaning of the statement is clear and not subject to several interpretations, one of which is true. To prevail in litigation, Bianca must prove that the ATONA does not get better highway mileage than the BIANCA.

To do this, Bianca will have to conduct appropriate tests that prove that the BIANCA's highway mileage is as good as or better than the ATONA's. Because Atona has already conducted highway tests, Bianca should also be prepared to challenge Atona's tests and to show why its tests are entitled to more weight than Atona's tests.

ATONA or BIANCA? You'll drive more highway miles on a gallon of gas in the new ATONA

Some courts say that a statement is literally false if the message it necessarily implies is false. Atona's second advertising statement necessarily implies that the ATONA gets better highway mileage than the BIANCA. Therefore, as with the first advertisement, Bianca must prove that the ATONA does not get better highway mileage than the BIANCA.

Tests prove that the new ATONA gets better highway mileage than the BIANCA

Bianca can challenge this advertisement in the same way it challenges Atona's first two advertisements. However, it need not do so because Atona has claimed in the third advertisement that tests prove the truth of the statement that the ATONA gets better highway mileage than the BIANCA. Bianca can therefore prevail by showing that Atona's tests do not prove the ATONA gets better highway mileage than the BIANCA. One way to do this is to prove that Atona's tests are not sufficiently reliable to support its advertising claim.

The new ATONA gets better mileage than the BIANCA

This advertising statement is not literally false because it is not clear on the face of the advertisement exactly what the statement means. Readers of the advertisement could understand the statement to mean, for example:

- The ATONA gets better highway mileage than the BIANCA.
- The ATONA gets better mileage than the BIANCA in city driving.
- The ATONA gets better mileage than the BIANCA in both highway and city driving.

Although the advertisement is not false on its face, it may be misleading. To challenge this advertisement, Bianca would have to prove that a substantial number of prospective midsize car buyers are likely to be misled by the advertisement.

As a first step, Bianca would have to establish what the advertisement means to a substantial number of prospective buyers of midsize automobiles. To do this, Bianca would typically have to retain an expert to conduct an appropriate consumer survey and testify about it in court. To be considered appropriate for litigation, a survey must follow guidelines that go beyond what might be done in a typical market research survey.

Different survey techniques may be called for in different situations. For example, advertising claims involving personal care products such as shampoo can probably be conducted in shopping malls where prospective buyers of those types of products can be found. A survey of doctors regarding prescription pharmaceutical advertising claims would have to be conducted in a different way.

If the survey establishes that a sufficient number of respondents receive a particular message from the advertisement, Bianca would have to prove that this perceived message is not true. The percentage of respondents who must receive a deceptive message varies from case to case. In some cases, as little as 15% to 20% has been considered enough. Often the number is higher.

If, for example, Bianca's survey showed that 30% of respondents believe the advertisement means "the ATONA gets better mileage than the BIANCA in city driving" or "the ATONA gets better mileage than the BIANCA in both highway and city driving", Bianca could prove that the advertisements are misleading by proving that the BIANCA's mileage in city driving is as good as or better than the ATONA's mileage. Bianca already has conducted tests that it says establish this.

Faced with this situation, Atona would need to consider how to respond. Steps it can consider taking include challenging Bianca's consumer survey; commissioning a rival survey; challenging Bianca's city driving mileage tests; and conducting its own city driving mileage tests.

The situation would be different if Bianca's survey results were different. If, for example, only 5% of respondents believe the advertisement refers to city driving (perhaps because the ATONA is shown on a highway), the advertisement would not be considered misleading even if the BIANCA gets better mileage in city driving than the ATONA.

If, in the same example, 45% of respondents believe the advertisement means "the ATONA gets better highway mileage than the BIANCA", Bianca could prove that the advertisement is misleading by proving that the BIANCA's highway mileage is as good as or better than the ATONA's highway mileage. Because Bianca has not tested the two cars on highways, it would need to do so. Bianca should also be prepared to challenge Atona's highway mileage tests.

The new ATONA is the best midsize car money can buy

Unlike Atona's specific claims of superior mileage, Atona's fifth advertisement would be considered mere puffery. Puffery, an exaggerated claim of general superiority such as "best midsize car money can buy", is not a false or misleading statement of fact prohibited by the Lanham Act.

The new ATONA is the best midsize car money can buy. Here's why: best highway mileage in the business

By adding a specific claim of "best highway mileage" to what would otherwise be considered puffery, Atona has exposed its advertisement to challenge. If Bianca can prove that the ATONA does not get the best highway mileage because, for example, the BIANCA gets better highway mileage, Bianca can ask the court to prohibit Atona from running the advertisement. Atona could, however, run a new advertisement that makes only the original claim of general superiority without violating the Lanham Act.

Other possible approaches

As an alternative to a Lanham Act case, Bianca can bring Atona's advertising to the attention of the Federal Trade Commission (FTC). The FTC is empowered by federal law to challenge methods of unfair competition including deceptive advertising. The FTC can issue injunctions and fines for failure to comply with its orders.

There is no guarantee that the FTC will take any action with respect to Atona's advertisements. Although Atona's advertising plainly troubles Bianca, the FTC might not regard such a commercial dispute that does not involve the health and safety of the public as a matter on which it will expend its resources.

Another forum available to Bianca is the National Advertising Division (NAD) of the Better Business Bureau. If the NAD is persuaded that any of Atona's advertisements violate NAD guidelines, it can request that Atona stop making the offending claims. However, the NAD is not authorised to award money damages or to issue an injunction. If Atona were unwilling to comply with an NAD decision, the dispute might be referred to a state or federal agency. However, Bianca could not be certain that that authority would take up its objections.

Each of the television networks has its own

advertising guidelines. Because Atona has produced only print advertising, Bianca cannot complain to the television networks that Atona's advertising violates their guidelines. Some print media organisations also have advertising guidelines, on which Bianca might be able to rely. However, Bianca should bear in mind that these organisations, which are paid to run advertisements, may be reluctant to refuse Atona's advertisements without a strong showing that they should be discontinued.

Many state laws prohibit false advertising. Some of these statutes apply generally to false advertising, whereas others focus on practices in particular industries. In situations where enforcement of these laws is delegated to state governmental agencies, Bianca's claims against Atona might not rise to the level of false advertising the agencies would be likely to pursue.

Complaints to the FTC, NAD or the other organisations differ procedurally from each other and from Lanham Act litigation. For example, if the NAD decided to take action with respect to one or more of Atona's advertisements, it would ask Atona to document its claims within a relatively short period of time. These types of proceedings may differ substantively as well. Therefore, consideration should be given to the standards that each forum applies in deciding whether an advertisement is likely to be considered deceptive.

Conclusion

As the above examples illustrate, advertisers may reduce the likelihood that their advertisements will be successfully challenged in federal court by observing certain guidelines, including:

- In determining whether an advertisement is likely to be regarded as false or misleading, the advertisement as a whole must be considered. An advertising claim made in one context may be accurate but misleading if it is made in another context.
- It is often easier to challenge a literally false advertisement than an advertisement that is literally true but misleading.
- It may be easier, or at least less expensive, to challenge an advertisement when the advertisement claims that tests prove the accuracy of a statement in the advertisement, than when the advertisement makes the statement without reference to tests.
- Puffery does not violate Section 43(a) of the Lanham Act.
- An advertisement that contains puffery may be subject to challenge if it also includes specific claims.

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