Competitors' Comparative Advertising:
Challenging False or Misleading Marketing

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Today’s faculty features:

Barry M. Benjamin, Partner, Kilpatrick Townsend & Stockton, New York
John C. Knapp, Kilpatrick Townsend & Stockton, New York

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Challenging Competitors' Comparative Advertising

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Barry M. Benjamin, Esq.
bbenjamin@kilpatricktownsend.com
(212) 775-8783

John C. Knapp, Esq.
jcknapp@kilpatricktownsend.com
(212) 775-8746
Introduction

You just received a challenge to your advertising.

OR

You are deciding whether to challenge a competitor’s advertising.

What should you be thinking about?
Introduction

What are the **business** considerations?

What are the **forum** considerations?

What are the **calendar** considerations?

What are the **financial** considerations?
Background

• **Lanham Act**
  – Plaintiff must show the advertising is false or misleading
  – Claim in federal court, relief is binding
  – Injunction, damages, corrective advertising, other relief available

• **NAD**
  – Advertiser must substantiate all claims
  – Competitor or NAD itself can challenge (“monitoring action”)
  – NAD’s recommendation is not binding
STEP 1
GET YOUR FACTS STRAIGHT
Step 1 – Get Your Facts Straight

**Where** is the advertising running?

Is it **national**?

Required for NAD

Is it connected with **interstate commerce**?

Required for Lanham Act

Is it only on **network television**?

Can bring a Network Challenge
Step 1 – Get Your Facts Straight

How long has the advertising been running?

Is a preliminary injunction possible?

- *Citibank, N.A. v. Citytrust*, 756 F. 2d 273, 277 (2d Cir.1985) (in trademark case, 10 weeks delay too much)

- **Why** was there delay? Sitting on hands, or conducting a survey or other test to support claim?

- *Schick Mfg., Inc. v. Gillette Co.*, 372 F. Supp. 2d 273, 283 (D. Conn. 2005) (delay of 3 months excused where plaintiff was running tests to substantiate challenge to claim) (also collecting similar advertising delay cases)
Step 1 – Get Your Facts Straight

How long will the advertising be running?

For Advertiser: can you pull the advertising? At what cost? Will it run again? Will the claim be repeated?

For Challenger: does it seem like an ongoing campaign or a one-off? Will it go away on its own?
Step 1 – Get Your Facts Straight

Does the claim mention the competitor?

- If yes, injury to competitor is *presumed*.

*McNeilab, Inc. v American Home Products Corp.*, 848 F.2d 34 (2d Cir. 1988)

- If no, must establish causation *and* actual injury.
What claims are being made?

• Express Claims?
  – Is there scientific, reliable support for the claim? Confidential?
  – If challenging, have you run tests to disprove? Reliable?
Step 1 – Get Your Facts Straight

What claims are being made?

• Are any implied claims made?
  – What is your evidence yes or no?
  – Do you need a survey?
Step 1 – Get Your Facts Straight

Do you need a survey?

For a Lanham Act PI, can get away with declarations, etc.


Declaration presenting customer complaints and statistical evidence demonstrating effect of implied claim was sufficient.
Step 1 – Get Your Facts Straight

Do you need a survey?

Do you have evidence of *intentional deceit*?
May not need survey:

*Cashmere & Camel Hair Mfrs. Institute. v. Saks Fifth Ave.*, 284 F.3d 302, 316 (1st Cir. 2002)

“It is well established that if there is proof that a defendant *intentionally* set out to deceive or mislead consumers, a *presumption* arises that consumers in fact *have been deceived*.”
Do you need a survey?

For merits of Lanham Act implied claim, almost always require a survey.

For NAD:

“When no extrinsic evidence is submitted to establish the meaning of the claims at issue, NAD will use its own experienced judgment to determine the reasonable interpretations of the claims.”

Cox Communications, Inc. (Fiber Optic Telecommunications), Report #5168, NAD Case Reports (April 2010)
What does your survey demonstrate?

- Must show a “not insubstantial number of consumers” hold the false belief allegedly communicated in the advertisement.

Step 1 – Get Your Facts Straight

Is your survey **reliable**?

- **Sampling/Screening** - Relevant population of prospective customers to whom the advertisement is directed?
- **Unbiased** - Non-leading questions?
- **Blind** - Concealed the purpose of survey?
- **Open Questions** – Give a “no message” or “I don’t know” option?
Do you have **standing**?

In 2d. Circuit, for Lanham Act standing there must be an interest that *likely will be damaged* by the false advertising, usually requiring the plaintiff to be a competitor.

*Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 113 (2d Cir. 2010)

Everyone has standing before the NAD: “Any person or legal entity…may submit to NAD/CARU any complaint regarding national advertising…”

*ASRC Policies and Procedures, ¶ 2.2.A*
Step 1 – Get Your Facts Straight

Are the Claims (Explicit or Implied) Actionable?

**Lanham Act** sets burden for **plaintiff** to demonstrate:

1) the defendant has made a **false or misleading** statement;
2) the false or misleading statement has **actually deceived** or has the **capacity to deceive** a **substantial portion** of the intended audience;
3) the deception is **material** in that it is likely to **influence purchasing decisions**;
4) there is a **likelihood of injury** to plaintiff, such as declining sales or loss of goodwill; and
5) the goods traveled in **interstate commerce**.

NAD sets burden on defendant (advertiser) to prove a “reasonable basis” for each claim. Must substantiate all “reasonable interpretations” of the claim, including any unintended messages the consumer may take away. Burden then shifts to plaintiff (challenger) to show that defendant’s substantiation is flawed or that its own evidence disproves the claim.

Colgate Palmolive Company (Colgate Optic White Toothpaste), Report #5490, NAD/CARU Case Reports (July 2012);
STEP 2
CHOOSING YOUR FORUM
Step 2 – Choosing Your Forum

• First, consider a letter or phone call.
  – Challenger may learn the ad is about to be pulled, won’t ever run again.
  – Advertiser may explain they have substantiation challenger was not considering.
  – BUT, you open yourself up to a declaratory judgment action in forum you don’t want to be in.
Lanham Act – Disadvantages:

- Difficult to budget
- Expensive – surveys, experts
- Fast pace
- Counterclaims certain
- Disruption – depositions, discovery, interviews
- Class action lawyers follow
- Media attention and publicity
Lanham Act – Advantages:

– Complete relief: injunction, potentially damages, corrective advertising
– If a PI is possible, fastest way to remove the claim
– Sends message to other would-be false advertisers
– Sets a precedent: valuable if claim will be made again
Step 2 – Choosing Your Forum

NAD - A Unique Forum and Process

Confidentiality

The parties may designate any materials (except consumer perception studies) as confidential trade secrets so they are not shared with the other party or included or cited in the NAD’s decision.

*ASRC Policies and Procedures*, ¶ 2.1.E and 2.3.D
Step 2 – Choosing Your Forum

NAD - A Unique Forum and Process

Confidentiality

But, anything done in preparation of the NAD proceeding is potentially discoverable in subsequent disputes.
NAD - A Unique Forum and Process

Confidentiality
For example:

You conduct three consumer perception studies.
You submit only the one good one to the NAD.
NAD finds there is no implied claim.
Subsequent class action claim is brought, plaintiff seeks discovery of all consumer perceptions studies.
You must disclose the other two.
NAD - A Unique Forum and Process

What does an NAD decision mean?

- Not binding or even persuasive in federal court
- But failure to comply can lead to referral to FTC or refusal by NAD to use the forum in the future
NAD - A Unique Forum and Process

What does an NAD decision mean?

- Class action “consumer rights” lawyers watch NAD decisions closely
- But does a “loss” at the NAD spell doom in federal court?
NAD - A Unique Forum and Process

- **What does an NAD decision mean?**

  - Bayer: one dose of its vitamin supplement is equivalent to two of its competitors
  - NAD: Bayer study is unreliable, claim not substantiated
  - Class action plaintiff: NAD decision carried its burden under the Lanham Act to show falsity
Step 2 – Choosing Your Forum

NAD - A Unique Forum and Process

• What does an NAD decision mean?


• NJ District Court disagreed:
  – “The allegations about the NAD Report support the inference that Bayer’s study should not be relied on. But that does not mean it is wrong or false. What Plaintiffs have tried to do is to shift the burden of proof onto Bayer. The law, however, requires that Plaintiffs prove, inter alia, that the labeling claims are false.”

  Id. at *7.
NAD - A Unique Forum and Process

Implied Claims before the NAD

- Initial burden is on advertiser: substantiate all claims
- What if dispute is whether the claim is made at all?
- Advertiser and challenger may submit consumer perception survey evidence as to implied claim.
- But if no survey, NAD will use its “own experienced judgment to determine the reasonable interpretations of the claims.”
NAD - A Unique Forum and Process

• **Implied Claims before the NAD**

• What about in NAD monitoring action?
• Implies the NAD has decided, or at least there is a presumption, that the implied claim is being made.
• Without survey evidence, how do you overcome presumption?
• NAD precedent; close reading of the advertisement.
NAD - A Unique Forum and Process

• **Implied Claims before the CARU**

• What about CARU (Children’s Advertising Review Unit) initiating monitoring action?

• CARU focuses on advertising targeting children under 12

• How does the advertiser dispute an implied is made to children under 12?
NAD - A Unique Forum and Process

• **Implied Claims before the CARU**

  • No advertiser has ever submitted survey evidence to the CARU.
  • One case where advertiser submitted focus group evidence, but CARU rejected because it did not test the specific claim.
  • LEGO SYSTEMS, INC. (LEGO® City, Heavy Lift Helicopter and LEGO® City, Forest Police Station), #5487 CARU Case Report (July 13, 2012).
NAD - A Unique Forum and Process

- **Implied Claims before the CARU**

Without consumer survey evidence, CARU “steps into the shoes of the child targeted audience and uses its experienced judgment to determine the reasonable messages conveyed” and “takes into account the special vulnerabilities of children including their limited knowledge, sophistication, and their lack of cognitive skills needed to evaluate the credibility of advertising.”

- **Jakks Pacific, Inc./Girl Gourmet Cupcake Maker, #4995**
  CARU Case Report (Apr. 10, 2009)
Step 2 – Choosing Your Forum

NAD - A Unique Forum and Process

• **Implied Claims before the CARU**
  
  • This is remarkable – what is the relevant standard?
  
  • What in CARU’s “experienced judgment” allows them to make this determination?
  
  • What if the advertisement is misleading to a six year old but not an eleven year old?
Step 2 – Choosing Your Forum

NAD - A Unique Forum and Process

• What if you don’t want to be at NAD?
• File a DJ in the court you want to be in.
• *The EverCareCompany/Lint Rollers*, NAD Case Report 4724 (Sept. 2007)
• 3M challenges Evercare at NAD, Evercare files declaratory judgment action against 3M in N.D. Ga, 3M counterclaims for false advertising, NAD agrees to administratively close the matter.
NAD - A Unique Forum and Process

• What if you don’t want to be at NAD?

• But don’t wait too long:


  • NAD dispute was fully briefed except sur-reply, plaintiff ran into court.

  • SDNY found it would be more efficient to allow the NAD to issue its decision and stayed the proceedings until then.
Deciding Between Lanham Act & NAD

<table>
<thead>
<tr>
<th>NAD</th>
<th>LANHAM ACT</th>
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</thead>
<tbody>
<tr>
<td>Concerned about costs</td>
<td>Challenging implied claims without consumer perception surveys</td>
</tr>
<tr>
<td>Can’t get a PI, but want a speedy resolution</td>
<td>Challenger or advertiser wants discovery from other side</td>
</tr>
<tr>
<td>Don’t want to submit to discovery</td>
<td>Advertiser has counterclaims</td>
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<tr>
<td>Not interested in damages</td>
<td>Claims are based on FDA regulations (possible preemption)</td>
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STEP 3
CARRYING YOUR BURDEN
What evidence is needed to substantiate a claim or show that it is not false?

It will depend on the type of claim:

- Establishment Claim?
- Comparative or Monadic?
- Performance Claim?
Step 3 – Carrying Your Burden

• Establishment v. Non-establishment
  – Establishment - “Tests prove” “proven formula” “medical study” “scientific report”
    • “clinically proven to help regrow hair”

Germ Farm – Non-establishment – general claim of superiority, effectiveness or quality, or competitor’s inferiority, ineffectiveness, or lack of quality

  » “kills germs best”
Step 3 – Carrying Your Burden

• Establishment v. Non-establishment

  – NAD: need “reliable and well-controlled clinical studies” (but depends on subject)

  – Lanham Act: establishment claim – show advertiser’s evidence doesn’t establish the claim;
    • non-establishment claim – provide evidence affirmatively demonstrating falsity of the claim
Comparative v. Monadic claims

- **Comparative**
  Compares advertised product to another
  - “Proven to increase vertical leap by twice as much as [competitor product].”

- **Monadic**
  Refers only to the advertised product
  - “Proven to increase vertical leap by 40%”
Comparative v. Monadic claims

- **Federal Court:**
  - Advertiser must substantiate any comparison made with reliable, statistically significant data
  - Higher burden with comparison claims
  - "easy to use" – monadic, internal studies
  - "easier to use" – implies comparison, need data comparing product to competitors’ products
Step 3 – Carrying Your Burden

• “Doctor Recommended”
  – Doctors carry great weight with consumers
  – Substantiation requirements much higher, closely scrutinized
Step 3 – Carrying Your Burden

• Performance Claims
  – Must show that the product performs or causes the result advertised
  – Must be true when the product is used under normal conditions
SOME HOT BUTTON ISSUES TODAY
Hot Button Issues Today

1. Claim Substantiation

*POM Wonderful Litigation*

FTC: POM's claims must be backed by two randomized, controlled clinical trials, the same type of evidence the Food and Drug Administration seeks when approving new drugs.

Creates a standard akin to drugs for health claims
2. Consumer Relevance

- Claims must be true for product as the consumer actually uses them
  - *Sera-Pharma Labs, Inc.*, NAD Case No. 4731 (Sept. 21.2007).
  - Studies establishing benefits of individual ingredients do not support claim that the final product provides those benefits
  - “It is well-established that when there is substantiation only for the efficacy of ingredients in a product, but not the product itself, any claims must be clearly expressed as ingredient claims.”
2. Consumer Relevance

– Query how this rule may apply to other products:
– Clothes made of fabric tested for certain qualities without testing done to the final article of clothing
– Computers advertising they feature components tested independently
– Warrantees for products based on tests of life of constituent parts, not when used together
3. Retailer nutritional content standards

- Wal-Mart “great for you” icons on foods that adhere to its specific fat, sugar and sodium content requirements.

- Disney no longer sells food items in its Disney theme parks or advertises on its networks or during Disney programming if they exceed certain maximum meal sizes or calorie, fat, sugar and sodium content limits.

- Similar programs at Whole Foods, others.
THANK YOU

Questions?