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Can We Tweet This?

In today's era of advertising through social media, it is tempting to assume that, because a tweet or post is so fleeting, it is not necessary to jump through the typical legal hoops to clear such content. But what appears to be a harmless transitory post may have a lasting impact in a false advertising or right of publicity legal action. It is imperative that in-house legal departments properly educate their marketing teams to avoid the embarrassment and cost of false advertising and right of publicity snafus. This piece provides a brief overview of each cause of action and offers tips to ensure that your company maintains good advertising practices.

False Advertising

Plaintiffs commonly bring false advertising claims under the federal trademark statute known as the Lanham Act.[1] The Lanham Act prohibits false or misleading statements or representations made in commercial advertising or promotion that are likely to deceive consumers and likely to injure the plaintiff.[2] Most courts also require that the false or misleading statements be "material" (i.e., impact purchasing decisions) to be actionable.[3] Remedies available to a false advertising plaintiff include injunctive relief, corrective advertising, monetary damages, and attorneys' fees. And of course, the negative publicity that often accompanies such lawsuits may adversely impact the advertiser's market share and reputation.

Right of Publicity

The right of publicity protects against the unauthorized use of an individual's name, likeness, or voice and gives individuals the exclusive right to control the commercial exploitation of their identities. Because there is no federal right of publicity statute, many states have enacted statutes or rely on the common law to protect their residents' publicity rights. While such laws vary from state to state, to make a *prima facie* case, a plaintiff (living, and in some states, deceased) typically must show that (1) the plaintiff has standing to bring the suit (i.e., he or she possesses an enforceable right), (2) the defendant actually used the plaintiff's identity without authorization, and (3) the defendant's use was commercial in nature and harms the plaintiff's right of publicity interests. Remedies available to a right of publicity plaintiff include injunctive relief and monetary damages.

A Few Tips to Help Your Company Maintain Good Advertising Practices

When in doubt, puff.

Broad statements of opinion and superiority (often referred to as "puffery") are typically not actionable in the false advertising context. Statements of opinion are beliefs, views, or judgments, and puffery is exaggerated or boastful statements that are often vague or highly subjective. Examples of such statements include:

- "Our soothing lavender hair products are the best!"
- "The world's best fresh-squeezed juice."
- "The ultimate in luxury relaxation."
- "America's favorite sliced almonds."

Not surprisingly, the line between non-actionable puffery and actionable misleading statements is a blurry one. At one end of the spectrum, claims that are highly subjective and obviously exaggerated are non-actionable puffery; at the other end of the spectrum, claims that are objective and may be proven true or false through testing may be actionable. If your statements cross the line from puffery into specific, measurable claims (e.g., "most accurate baby thermometer"), you must ensure that your team has well-founded data substantiating the statements. Further, when creating advertisements, it is also important to separate exaggerated boasting-type phrases from other objective measurable-type phrases. For example, ad copy that presents the claim "Highest Rated Whitening Toothpaste" directly above the claim "Best-Tasting Toothpaste" suggests that the "Highest Rated" portion of the claim was scientifically tested and proven and may render the entire advertisement false and misleading if there is no data to support the claim.

Don't mislead.

It seems simple enough. But even relying on a technicality to substantiate an advertising claim can quickly turn what seemed like an innocent statement into a false advertising fiasco. For example, your company may have test results showing that professional tennis players who used your company's tennis racquets served the ball 10 miles per hour faster

than when the same players used your competitor's tennis racquets. Now, your marketing team wants to post the following statement on your website: "Do yourself a favor—take the extra 10 mph." Although it may be "technically" true that serves hit with your racquets move 10 miles per hour faster than do serves hit with your competitor's racquets, your evidence shows only that professional players can hit the ball 10 miles per hour faster—not the average tennis players to whom your advertisement is directed. Although the most conservative approach would be to avoid such statements altogether, at a minimum your company should use conspicuous, easy-to-understand disclaimers that explain to your consumers what your statements really mean.

Be careful with names and photographs.

Your marketing team is thrilled. They discovered a photograph of Taylor Swift window-shopping in SoHo with your company's latest leather handbag slung over her shoulder. Of course, they want to post the picture on Facebook and include a pithy caption regarding Swift's love of your brand. They also want to tweet that Swift was just spotted on the streets of Manhattan with your handbag and include the hashtag "#TaylorLovesUs." It can be tempting to believe that, because social media posts are temporary (and not as "permanent," as, for example, a billboard or printed magazine advertisement), traditional rules do not apply. If you can educate your teams early in the process to understand that right of publicity issues apply as equally to social media posts as they do to more traditional advertising, you can likely avoid the uncomfortable situation of condemning the advertisement after your marketing team has already invested valuable development time, effort, and resources.

Understand that it's more than just a name.

Even if your marketing team is aware that it may not post celebrity names or photographs on your company's social media pages without permission, it may come up with other ideas. For example, the team may want to post Charlie Sheen's well-known catchphrase "Duh, Winning!" on Facebook as a caption beneath a photograph of your company's running shoes crossing a finish line. The problem? The right of publicity protects almost anything that evokes a celebrity's identity, including well-known catchphrases, voices, mannerisms, and nicknames. It is important to communicate to your marketing team that a celebrity's identity may be commercially exploited, even absent use of the celebrity's name or photograph.

Communicate potential costs.

If all else fails, nothing speaks to a business team quite like the statement "This could cost you millions." The following examples show that damage awards in the false advertising and right of publicity contexts can be huge and may have a lasting negative impact on your business:

- $8 million awarded to Alpo Petfoods after Ralston Purina portrayed its Purina Puppy Chow as a superior product, claiming that Puppy Chow was formulated to improve hip health in puppies[4]
- $5 million awarded to Wildlife Research Center after Robinson Outdoors made false statements in advertising its hunting products (e.g., that its product is "15 times more effective than the leading scent eliminators"), involving numerous products over several years[5]
- $5.6 million awarded to the Beatles after a company produced three years of near-constant live stage shows imitating the band's likenesses and sound[6]
- $5 million awarded to Woody Allen as a settlement after American Apparel used a photograph of him on two billboards[7]
- $2.4 million awarded to Tom Waits after a radio commercial for snack chips featured a singer imitating the sound of his voice[8]

"When in doubt, puff."

No organization wants to be on the receiving end of a false advertising or right of publicity complaint. While there may be no practical way to completely eliminate the risk, educating your business teams about false advertising and right of publicity is an excellent first line of defense.

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1 Lanham Act, Section 43(a).
2 *Id.*
3 5 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 27:24 (4th ed. 2012).
4 *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 997 F. 2d 949 (D.C. Cir. 1993).
5 *Wildlife Research Center, Inc. v. Robinson Outdoors, Inc.*, 409 F. Supp. 2d 1131 (D. Minn. 2005).
6 *Apple Corps, Ltd. v. Leber*, 229 U.S.P.Q. 1015, 1018 (Cal. Sup. Ct. 1986).
7 *Woody Allen v. American Apparel, Inc.*, No. 08 Civ. 3179 (TPG) (KNF) 2009 WL 1344743 (S.D.N.Y. 2009).
8 *Waits v. Frito-Lay, Inc.*, 978 F. 2d 1093 (9th Cir. 1992).