

Through the Rabbit Hole: Image-Based Comparative Advertising

By Katherine Hendricks

Hendricks & Lewis PLLC
901 Fifth Avenue, Suite 4100
Seattle, Washington 98164
(206) 624-1933

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Comparative advertising—when truthful and non-deceptive—can be a source of important information to consumers and assist them in making rational purchase decisions, and can foster healthy competition, encourage product innovation and lead to lower prices. When false and deceptive it leaves an unhappy competitor and potential plaintiff.

A plaintiff can challenge a comparative advertisement under Section 43(a) of the Lanham Act as: (1) literally false; or (2) if not literally false, as unrealistic and misleading.

Disagreements about the meaning of advertising content are determined in an overall context, not a vacuum. In this realm, the interpretive rules take on an *Alice in Wonderland* quality. An advertisement can be literally false even though no “combination of words between two punctuation signals” is untrue, if the clear meaning of the statement, considered in context, is false. At the other end of the spectrum, an advertisement can be so grossly exaggerated that no reasonable consumer would rely on it. The advertisement may be factually inaccurate, but nevertheless *not* false or misleading because it is mere “puffery”; or in other words, a general claim of superiority over comparable products that is so vague that it can be understood only as an expression of opinion.

Within this framework, it is difficult to assess whether a given advertising spot is permissible. This is particularly true in image-based internet advertising where there are few judicial decisions.

In *Time Warner Cable, Inc. v. DIRECTV, Inc.*, the Second Circuit Court of Appeals recently offered some guidance while evaluating DIRECTV’s multimedia advertising campaign on the theme “SOURCE MATTERS.” The concept was to educate consumers that to obtain HD-standard picture quality, it is not enough to buy an HD television set; consumers must also receive HD programming from the “source” or signal provider.

DIRECTV placed website banner ads to promote its message. The ads opened by showing an image so highly pixilated that it was impossible to discern what is being depicted. Across the top of this indistinct image was superimposed the slogan “SOURCE MATTERS.” After about a second, a vertical line split the screen into two parts, one labeled “OTHER TV” and the other “DIRECTV.” The picture on the OTHER TV side was extremely pixilated and distorted, like a patchwork of colored blocks. By contrast, the picture on the DIRECTV side was exceptionally sharp, revealing a clear image of quarterback Eli Manning or two snorkelers in tropical waters.

The federal district court held that this ad unfairly depicted Time-Warner's cable TV. The Second Circuit reversed, holding that the comparison was so obviously hyperbolic that no reasonable buyer would be justified in relying on it. If the advertisement had intended to depict a cable pixelization problem, this was a gross exaggeration of one, and mere puffery.

What is the takeaway lesson? Comparative advertising should be evaluated for its literal meaning. Evaluate both the text and the images and their interaction to assess whether the ad is literally false. However, the right side of the looking glass may depend on not reading too literally.

Katherine Hendricks is a partner at the law firm of Hendricks & Lewis, a law firm that focuses on arts & entertainment, intellectual property, media and technology; additional information can be found at www.hllaw.com.