

Outside Counsel

"As Read in Prisoners of Advertising"

by Roy Gordet

In November, a New York federal court held that it was false advertising for a company to claim that a can opener that had never been advertised on television was "As Seen on TV". Who would sue on this issue? The FTC? The State Attorney General? No, it was the direct competitor who manufactured a very similar can opener that actually had been advertised on television.

In this case, the plaintiff had expended over \$3 million in advertising its can openers on television. The court granted a preliminary injunction against the continued false statements by the defendant bad guys. The court believed the plaintiff would suffer irreparable harm because the designation "As Seen on TV" was a material false statement that was likely to influence customers' purchasing decisions since that false designation would allow the bad guys to "piggy-back" onto a market created by the plaintiff, since the defendant's can opener offers the same unique features as the plaintiff's can opener, and since the bad guys' false designation was likely to divert potential sales from the plaintiff. It also was significant that there were very few competitors in this niche market.

From the more technical legal standpoint,

what was significant in this case was that the court found that the "As Seen on TV" designation identified a product and differentiated the product from others of a similar type, and thus was found to meet the test that the designation pertains to an "inherent quality or characteristic" of the product as required under the applicable law, which is found in Section 43(a) of the Lanham Act, a federal statute.

It appears that in this case the judge was swayed by what must have been perceived as evil intent. It was too obvious that the bad guys were trying to make consumers believe that their can opener was the competitor's can opener "as seen on TV". Otherwise, why would the bad guys say that? Although their attorneys could argue (not very convincingly) that they wanted to merely puff up their product as such a great product that the owners would be willing to spend hard advertising bucks to promote it "on TV".

I wonder if the bad guys would have lost if they had only claimed "Just like the other one that you see on TV"? I think that would have been OK under accepted principles of comparative advertising and puffing, even if the can openers were not identical.

Compete or Not to Compete

California law favors competition and the right of a person to earn a livelihood. If an employee wants to change jobs, there is a strong presumption that she may do so, although she may NOT take "trade secrets". The dynamic between these two principles is intense, and leads to loads of litigation, especially in Silicon Valley. In California most courts do NOT enforce so-called "non-compete" agreements unless they are reasonable, or relate to the sale of an entire business. In New York last month, in a case involving DoubleClick, an Internet advertising company, a judge ordered that two executive marketing people could not work at all for a competitor (who had hired them) for six months. These two execs basically can't work in their profession. That can really hurt your savings account. Let's delve into this case (and subject) next month.

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