Challenging a Competitor's Advertising Claims

John E. Villafranco

You are an in-house attorney or outside counsel and your client identifies a competitor's advertising claim that your client is convinced cannot be substantiated. You are asked to take action to prevent further damage to your client's market position. What are your options and what factors will influence your recommended course of action?

Assuming some action is warranted, there are five principal options that can be pursued: (1) send a letter demanding that your competitor cease and desist, (2) initiate a proceeding before the National Advertising Division (NAD), (3) alert state and/or federal regulators, (4) notify the networks (if the issue involves broadcast advertising), or (5) litigate. These options are not exclusive and often more than one can be pursued simultaneously. Failure to obtain the desired result while pursuing one option may require a company to proceed with a second option.

In response to a recent campaign by a competitor, BellSouth Telecommunications, Inc. attempted nearly all of these options with a mixture of success and frustration, culminating in a decision by Judge Marvin Shoob of the U.S. District Court for the Northern District of Georgia preliminarily enjoining Hawk Communications, LLC from making certain claims about its Joi Internet dial-up service. Specifically, the court enjoined Hawk from claiming that Joi Internet provides "Dial-Up at DSL Speed." *BellSouth Telecommunications, Inc. v. Hawk Communications, LLC*, No. 1:04-CV-280-MHS, 2004 U.S. Dist. LEXIS 9413, at *40 (N.D. Ga. Apr. 12, 2004). The order successfully stopped Joi Internet from making a claim that BellSouth asserted was false. BellSouth's experience is instructive for the practitioner who is called upon to chart a course of action to protect an advertiser's market position from a competitor's false or deceptive campaign.

John Villafranco is a member of the law firm of Collier Shannon Scott, PLLC and a principal in the firm's Advertising and Marketing Practices group. Mr. Villafranco is the Current Chair of the ABA Section on Antitrust Law Consumer Protection Committee and is Co-Editor-in-Chief of the Section's forthcoming treatise, Consumer Protection Law Developments. *He was counsel of record to BellSouth Telecommunications, Inc. in* BellSouth Telecommunications, Inc. v. Hawk Communications, LLC*, discussed in this article.*

Demand Letter

The *BellSouth* case started with a simple demand—cease and desist—and an understandable degree of optimism. The legal argument, presented in a short letter to Hawk's CEO, was straightforward: consumers understand the claim "Dial-Up at DSL Speed" to mean that Joi Internet delivers DSL speed for all online functions, which it does not; Hawk should modify or discontinue the claim or suffer the consequences.

Under similar circumstances, the demand letter makes a lot of sense. It is inexpensive because it does not usually require a great deal of lead time. It can be prepared and transmitted quickly, the sender can determine when a reply will be required, and it does not carry with it any obligation to respond to counter-complaints. In addition, there is no bar to publicizing the dispute, although any such publicity is likely to reduce the chances of a quick resolution.

There are, however, attendant costs. You can almost always expect your competitor to reply that your client's (or your company's) advertising is false and deceptive, which will require some back-and-forth letters disputing such points. You also will require internal assistance (i.e., time and effort) to help marshal facts relating to product testing and documents.

In addition, the demand letter is not likely to cause a competitor to admit any wrongdoing. The best outcome is usually a statement that the campaign has "run its course and will be discontinued" or will be modified "for other reasons." Even if the demand is unsuccessful in eliciting such statements, the letter sends a signal to your competitor that your company is monitoring claims. This could cause your competitor to exercise moderation in future advertising.

Demand letters also are useful because they often establish a dialogue with an established competitor that you respect. It may foster a relationship with your competitor's counsel and increase the likelihood that you will be contacted first—before resorting to litigation—if your competitor takes issue with a claim that your company might make in the future.

The [demand] letter sends a signal to your competitor that your company is monitoring claims.

In response to the BellSouth demand, Hawk disputed the claim and continued on its course with one important modification of its practices. Television advertising that featured the claim stopped, suggesting that the demand letter partially achieved its objective. BellSouth next turned to industry self-regulation and the National Advertising Division (NAD) to address the print and other forms of advertising that continued.

The National Advertising Division

The NAD, a division of the Council of Better Business Bureaus, Inc., is a self-regulatory body that commands the respect of national advertisers, advertising attorneys, federal and state regulators, and the judiciary. Advertising issues brought to the NAD's attention will receive thorough review by highly competent attorneys who will apply relevant precedent in reaching a determination of whether an advertising claim is truthful, non-misleading, and substantiated.

The process provides for briefing and (if desired) meetings. A well-reasoned decision is issued, usually within 60 to 75 days of a challenge, and it is accompanied by a press release. Advertisers are asked to provide a statement that will indicate whether it intends to comply with the NAD decision. The decision can be appealed to the National Advertising Review Board.

NAD rules do not permit counterclaims, but, in practice, challengers are sometimes the target of retaliatory counter-challenges. To the extent the NAD accepts the counter-challenge, the NAD assigns a different case review specialist to ensure the proceedings do not bleed into each other.

Significantly, no discovery is permitted at the NAD. This results in cost savings and relieves the challenger of having to produce documents to a competitor. Costs vary according to the nature of the complaint, but a challenger should expect to spend more for an NAD resolution than it would if it were pursuing a remedy through a demand letter but less than if it were forced to litigate. There is an NAD filing fee of $2,500 for members of the Council of Better Business Bureaus, Inc., and $6,000 for non-members.

Participants must sign a statement at the outset of the case that confirms that the proceedings are not to be used for publicity during or after the case. Crowing after a victory at the NAD is considered bad form and can work against a successful party in future cases.

There often is a fear that an NAD proceeding is simply a fishing expedition by the challenger. The NAD has rules concerning the treatment of confidential materials so that proprietary information is protected. With regard to preparation, internal assistance will likely be required to marshal facts and gather testing documents. Extrinsic evidence (e.g., consumer surveys) is not required but highly recommended when challenging implied claims.

At the NAD, BellSouth pressed its claim, noting that Joi Internet does not offer "Dial up at DSL speed" because, among other things, it does not accelerate downloads, streaming media, secure Web sites, virtual private networks, or Web-based applications, and that these were material limitations that should have been clearly and conspicuously disclosed to consumers. In January

2004, the NAD issued its decision in favor of BellSouth, recommending that Hawk "discontinue its 'Dial-Up at DSL Speed' [claim] or modify its advertising to provide clear qualification in order to avoid conveying the misleading message that Joi Express performs as fast as DSL overall and with regard to all online activities." *Hawk Communications, LLC*, NAD Case Report No. 4131 (Jan. 8, 2004).

At this juncture, BellSouth had reason to be optimistic. NAD has an excellent compliance record. Advertisers of reputation honor NAD decisions even if they do not always agree with them. When an advertiser indicates that it will not comply—a rarity (less than 5 percent of decided cases)—the NAD forwards the case decision to the Federal Trade Commission or to a state regulator for action. Hawk was one of those rare advertisers that did not abide by the NAD decision. The advertising continued and BellSouth was required to consider its remaining options.

Complaints to State/Federal Regulators

Issues with advertising can always be brought to the attention of regulators in the hope that the FTC or state officials will use their statutory authority to end an offending practice. There are advantages to this course of action. Complaints to federal and state regulators can be made at virtually no cost, and there are many government attorneys who have the skills that will enable them to understand the implications of your complaint and accurately assess the potential for consumer harm.

There are, however, significant disadvantages to proceeding solely in this fashion. Once the complaint is made, you have no control over how (or if) the investigation will proceed. Indeed, an investigation can carry on for years without your knowledge that it is even underway. Statutes and regulations regarding maintenance of confidentiality during investigations prohibit regulators from sharing information about progress. And if publicity is important to your company's challenge, this is not the correct forum.

Further, while there is no risk of a counterclaim here, there is always the risk that arises when you grab the tiger by the tail. Educating the government about an industry concern poses risk of increased scrutiny of the entire industry. In other words, your company's advertising (and related documents) should be clean before you alert a regulator to your competitor's advertising practices.

In terms of preparation, you likely would want to present a white paper outlining your position. This may require internal assistance with facts and testing. Meetings with regulators also may be to your advantage.

Whether a regulator will proceed depends on a variety of factors, with consumer harm the most critical. Last year's FTC action against Kentucky Fried Chicken Corp., FTC File No. 042 3033 (filed Sept. 17, 2004), *available at* http://www.ftc.gov/os/caselist/0423033/0423033.htm, is a good example of the type of case that will capture a regulator's attention. In that case, the FTC charged KFC with making false claims in a national television advertising campaign about the relative nutritional value and healthiness of its fried chicken. The Commission also charged the company with making false claims that its fried chicken is compatible with certain popular weight-loss programs. Because the public health was implicated, the FTC was quick to jump in.

Conversely, if the dispute is perceived as a matter between competitors only, regulators are less likely to commit limited resources to investigation and resolution. Instead, they will expect the parties to resolve the issue through other means (i.e., negotiation, self-regulation, litigation, etc.).

Earlier in the process, BellSouth had concluded that the FTC and state regulators would likely consider this to be a matter resolved best between competitors. With Hawk's snub of the NAD

decision, however, the self-regulatory process—which the FTC consistently champions as an effective tool of consumer protection—had been disregarded. Thus, the chances of FTC involvement improved markedly and, after the NAD decision was forwarded to the FTC and Georgia state authorities, BellSouth submitted materials on its own, hoping to initiate an investigation into the conduct at issue.

Complaint to Networks

When the issue involves claims made in broadcast advertising, an advertiser should consider going directly to the networks. A network challenge involves relatively little cost, is fast, and can be publicized.

The principal networks have advertising standards and procedures that apply to challenges. A well-constructed argument with relevant documentary or other extrinsic evidence can lead to a temporary cessation of an advertising campaign while the network decides the challenge.

Often, what your client wants most is to "make it stop." A network challenge can end a campaign—even if it is only temporarily. In this regard, it has the same effect as a temporary restraining order but at a fraction of the cost.

Much like a demand letter, a network challenge often leads to a counter-complaint. It also may require internal assistance from your client in collecting facts and conducting testing. Finally, some would argue that success at the networks is more difficult due to the network's financial interest in running national advertisements. While this has not been my experience, it is a common perception.

. . . the Lanham Act litigant should proceed only with the strongest of claims and with full expectation that counterclaims will follow.

As previously noted, the discontinuance of the Joi Internet television advertising made a network challenge moot. The only option that remained that could end the Joi Internet national advertising campaign was litigation under the Lanham Act.

Lawsuits Under the Lanham Act

The Lanham Act permits an advertiser to recover for injury sustained as a result of false and/or misleading claims made by competitors. 15 U.S.C. § 1125(a). Under the Lanham Act, liability arises if the commercial message or statement is either (1) literally false or (2) literally true, or ambiguous, but has the tendency to deceive consumers because of an implied message. *See Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer Pharms., Inc.*, 19 F.3d 125, 129–30 (3d Cir. 1994). If a claim is literally or expressly false, courts may enjoin the claim without reference to its impact on the buying public. Otherwise, the plaintiff bears the burden of proving, usually through the use of a consumer survey, that consumers are actually receiving the challenged implied claim and that the claim is false. *Id.*

While Lanham Act litigation will lead to resolution, it will take 10–12 months on average, if not longer, to resolve. It also will lead to reflexive counterclaims and the attendant discovery, which could substantially disrupt a company's business operations and lead to disclosure of potentially damaging documents. Money damages are rare. Finally, like all litigation, it is expensive. For these reasons, the Lanham Act litigant should proceed only with the strongest of claims and with full expectation that counterclaims will follow.

When your competitor's false advertising threatens to cause irreparable injury, you can move for a preliminary injunction (PI), which, if granted, would end the campaign immediately. To prevail on a PI motion, a plaintiff must show, among other things, likelihood of success on the merits. This showing will require the plaintiff to argue the entire case, supported by relevant evidence, in a very tight time frame—usually about thirty days.

The filing of a PI motion sends a very clear signal to the marketplace and to the court: (a) the challenged advertising is false and/or misleading, (b) we are prepared to prove this allegation through testimony, documents, and extrinsic evidence, (c) irreparable injury will result if the claims continue, and (d) we are prepared to incur the associated costs of bringing this case.

The costs can be substantial. Most importantly, there will be substantial disruption in the company's business, as both parties prepare to present their respective cases. This will include depositions, document discovery (including e-mails), interviews, development of expert testimony, etc. In addition, counterclaims are a near certainty, which requires a careful plaintiff to identify potential vulnerabilities and weigh the associated costs of opening up these areas of inquiry.

Having failed to achieve its purpose through a demand letter, an NAD proceeding, or by complaints to regulators, BellSouth had little choice but to turn to litigation. Its perseverance paid off: not only was BellSouth successful in enjoining the challenged conduct in court, it made new law in the Eleventh Circuit.

Under past advertising doctrine, an advertiser may have felt reasonably secure from a Lanham Act challenge demanding substantiation for an advertising claim. The traditional rule had been that the plaintiff has the burden to prove the falsity of advertising claims. In the past, an advertiser may have believed, for example, that a claim did not require substantiation if it was a vague statement of general superiority and therefore was not actionable as "puffing." Or, an advertiser may have some substantiation for what it believes or intends its claims to mean, but not for other possible implied meanings. Judge Shoob rejected this view of the law and instead held as per se false Joi Internet's claim that its dial-up service was as fast as DSL-based Internet service. The print and billboard advertising were ordered to be taken down immediately.

Conclusion

While an impartial observer would correctly catalogue the advertiser's frustrations in pursuing its objective in the *Hawk Communications* case, the overall effort is properly measured by the result—the challenged advertisements were discontinued—and by the company's restraint in resorting to litigation only as a last resort. All available options were considered in sequence and a cost-effective strategy was devised. Lack of success early on was impossible to predict and only after less costly and disruptive options were ruled out did it turn its attention and resources to a litigation. ●