

How Not to Get Burned by “First” Claims

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When a company comes up with a new product or feature, it will usually want to advertise the benefits of that product or feature. If the company believes that it is also the first or only company to have that product or feature, it may also want to tout its status as an innovator. For example, the company may advertise that it is the “first” company to introduce something, that it is the “only company” to offer it, or that it is “exclusive” to them. As with all objective claims, these claims require substantiation. In other words, the company must take steps to ensure that they are true. Sometimes, this can become a difficult exercise of trying to prove a negative, but there are good places to start.

SnappyScreen sells an automatic sunscreen application vending machine into which a person can walk in pale, and walk out nicely-bronzed ten seconds later. The



company touted this benefit to prospective customers, and it advertised that its machine was “the World’s First Touchless Sunscreen Application System.” All is not sunny in the world of sunscreen machines, though, and SnappyScreen was sued by a competitor who argues that this claim is false. Sunscreen Mist Holdings argues that it has sold and promoted similar products since 2006, and that those products are protected by a patent. The company is suing for patent infringement and false advertising.

It’s too early to predict how this case will turn out, but it’s not too early to identify a key lesson here. If you want to advertise that you are the first or only company to have a product or feature, it’s often a good idea to commission a search by a patent attorney. A good patent attorney will look for issued patents and other pre-existing products and public disclosures that can help you identify whether you are, in fact, the “first and only.” The results can help you figure out whether you can support the claim you want to make or, if not, whether there are ways to narrow it down. For example, if you can’t claim that your company was the first to come up with a certain type of product, maybe you

can focus on the uniqueness of a certain feature.

Aside from providing advertising guidance, the search can also be used for other purposes, such as determining whether there are patents your product might be infringing (and how to design around them), and whether it makes sense to explore patent protection for your product or any of its unique features.

The analysis may require additional steps, but if you skip this first one, you might find yourself getting burned later.