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SMALL BUSINESSES AND COMPARISON ADVERTISING STRATEGIES: IS IT WORTH THE RISK?

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ABSTRACT

Research shows that comparison ads can be particularly effective for businesses with relatively small market shares. However, there are legal risks associated with such strategies. Therefore, in this article we overview constitutional law, common law, and statutory law as they relate to claims made about competitors in comparative advertising. We carefully explore First Amendment rights and then examine the various causes of action in deception suits and Section 43a of the Lanham Act. We conclude with suggestions for the small business owner using comparison advertising to gain market share.

INTRODUCTION

The small business owner must determine how to best communicate products and services to the buyer. Research suggests that firms with small market share benefit from using comparison advertising to improve customer attitudes and sales (Gnepa, 1993; Pechmann & Stewart, 1991; Shimp & Dyer, 1978). A direct comparison advertisement is one in which the advertiser directly names the competition and states the advantages of the product/service over that offered by the competition. Comparison ads are encouraged by government regulators, notably the FTC, because they provide an informative environment for the consumer and foster product/service improvement (Beck-Dudley & Williams, 1989; Muehling & Kangun, 1985; Petty, 1991; Wilkie & Farris, 1975).

Unfortunately, advertisers can run into trouble with the judicial branch of the government when using comparison advertisements (Bixby & Lincoln, 1989). First Amendment rights regarding protected speech are being eroded in the commercial speech arena (Boedecker, Morgan, & Wright, 1995), thereby increasing the consequences of making an inaccurate advertising claim. Additionally, plaintiff companies are more likely to seek legal redress against competitors making false or misleading claims about the plaintiff's product or service (Beck-Dudley & Williams, 1989; Buchanan, 1985). The purpose of this article is to provide small business owners with information needed to make an informed decision regarding comparison advertising. We begin by overviewing the literature on comparison ads, their execution and effectiveness. We then explore the legal environment regarding comparative advertising in which small business owners work. The conditions under which the

full force of First Amendment rights take effect, including issues on the nature of the speech (commercial or noncommercial) and the status of the subject of discussion (private or public), are discussed. We then review the various types of deception suits and provide a brief analysis of Section 43a of the Lanham Act as they relate to comparative advertising. Finally, we provide guidelines for small business owners interested in using comparison advertising.

WHY SMALL BUSINESSES MAY WISH TO USE COMPARISON ADVERTISING

Comparison advertising is one of the most researched advertisement-execution styles in the areas of marketing and advertising (Pechmann & Stewart, 1991). While many different types of comparison advertisements exist, we will focus on the *direct comparison ad* in which one or more competitors are actively named in the advertising copy. A recent example of such an advertising strategy is Hardee's ad comparing its fried chicken to KFC's. Two specific attributes of the chicken, piece size and taste, are tackled head-on in Hardee's print and broadcast advertisements. Another example is seen in an ad for a local "park n' shuttle." The ad states, "Why pay $38.50/week at the airport? Park at *BRAND X*[1] for just 24.99/week."

Many researchers have concluded that comparison ads primarily benefit small market share holders (c.f., Gnepa, 1993; Shimp & Dyer, 1978). For small market share holders, comparison ads have been shown to positively affect attitudes (Donthu, 1992) and to have had an impact on sales and market shares (Hayes, 1994; Pechmann & Stewart, 1991). Recently, Donthu (1992) found that a moderately intense comparison ad had the strongest positive impact on attitudes while very intense comparison ads had the most positive effect on advertisement recall. In other words, comparison ads were found to be more effective than advertisements which made no comparison to competing brands.

Comparison ads may create positive attitudes for one of several reasons. A small market share holder may benefit from being associated with market leaders because of favorable positioning effects (Muehling, Stem, & Raven, 1989). For instance, Coor's Cutter, a non-alcoholic brew, should benefit by comparing itself with Samuel Adams beer, a popular premium beer. Additionally, a direct comparison ad can cause the consumer to rethink a purchase--i.e., the ad may "disrupt" purchase behavior so that the small market-share brand is considered by the buyer (Muehling, Stem, & Raven, 1989). Finally, Pechmann and Stewart (1991) found that direct comparison ads attract more attention since they are perceived to be novel and often contain the name of a well-known brand. This greater attention, in turn, increases persuasion.

While increasing the persuasiveness of advertisements is a noble goal, small businesses need to use techniques which actually impact sales. After analyzing field data, Pechmann and Stewart (1991) concluded that consumers were more likely to choose the advertised brand over the competing brands when the advertised brand used direct comparative advertisements. According to Advertising Age (Advertising Age, 1980; Advertising Age, 1982) direct comparison ads are responsible for market share gains made by Burger King, Pepsi-Cola, Suave Shampoos, and Schick electric shavers. More recently, Mrs. Winner's Chicken & Biscuits and Hardee's have been successful using this technique (Hayes, 1994).

Jartran experienced $70 million-plus sales increase from 1979-1980 after running direct comparison advertisements suggesting that Jartran trucks had better gas mileage, were newer, and were less expensive to rent than U-Haul's trucks (Beck-Dudley & Williams, 1989).

The Jartran advertisements are of particular interest since the ads were deemed deceptive by the U.S. courts. Jartran was required to pay $40 million in damages and $2.5 million in attorney fees to U-Haul due to the deception. Such cases are likely to become more common since firms are more inclined to institute litigation as a means of vindicating their reputation or economic interests when false or misleading statements have been made about their products (Buchanan & Goldman, 1989). Thus, we now examine the regulatory environment in which small businesses operate.

REGULATORY ENVIRONMENT FOR COMPARISON ADVERTISEMENTS

Despite the advantages of using comparison advertising, such a strategy may open the door to litigation brought by the competitor. For instance, in July 1986, Blue Cross/Blue Shield launched what it called a deliberately "aggressive and provocative" comparative advertising campaign designed to "introduce and increase the attractiveness of its products" at the expense of U.S. Healthcare's products, a competing HMO (U.S. Healthcare Inc. v. Blue Cross of Greater Philadelphia, 1990). The campaign consisted of several print, television, and radio advertisements, and a direct mail brochure. Many of the ads claimed that with an HMO, the subscriber selects a primary care physician who, in turn, must give permission before the HMO will cover examination by a specialist. The print ads and the brochure stated the following:

> You should also know that through a series of financial incentives, an HMO encourages this doctor to handle as many patients as possible without referring to a specialist. When an HMO doctor does make a specialist referral, it could take money directly out of his pocket. Make too many referrals, and he could find himself in trouble with HMO (U.S. Healthcare Inc. v. Blue Cross of Greater Philadelphia, 1990.)

Two Blue Cross/Blue Shield advertisements featured a senior citizen under the banner heading "Your money or your life," juxtaposed with Blue Cross/Blue Shield's description of "The high cost of HMO Medicare." U.S. Healthcare responded immediately to the attacks by filing suit against Blue Cross/Blue Shield. In addition, U.S. Healthcare embarked on its own aggressive comparative ad campaign -- to which Blue Cross/Blue Shield countersued.

Plaintiffs in these suits have traditionally sought relief under common law doctrines such as injurious falsehood (e.g., Bose Corp. v. Consumers Union of United States, Inc., 1981; 1982; 1984; Cumberland Farms, Inc. v. Everett, 1991) and defamation (e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 1985; U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia 1990). More recently, however, plaintiffs are turning to state or federal statutory provisions such as Section 43(a) of the Lanham Act (e.g. Castrol Inc. v. Pennzoil Co., 1993; Coors Brewing Company v. Anheuser-Busch Companies, Inc., 1992; Johnson & Johnson * Merck v. Smithkline Beecham, 1992), and similar state statutes to seek liability for those who

make false or misleading claims about their products or services. However, before discussing these legal remedies, it is useful to understand the constitutional right to freedom of speech and how this right is likely to be applied to comparison ads.

The First Amendment--Freedom of Speech vs. Deceptive Claims Regarding Competitors

The Supreme Court has recognized that in order to further First Amendment rights to engage in truthful expression, it may be necessary to allow defendants to escape liability for certain false statements. Both common law and statutory law are at odds with this principle since both provide for payment of damages when false claims are made. Thus, we must examine when First Amendment rights are enforced fully in the U.S. court system.

In the 1964 landmark case, New York Times v. Sullivan, the U.S. Supreme Court did not allow damages to the plaintiff even though claims made in the defendant's political advertisement were literally false. The case revolved around a one-page "editorial" advertisement entitled "Heed Their Rising Voices" which solicited financial support for a Black student movement and furthered the campaign for Black Americans' right to vote. The advertisement stated that truckloads of police ringed the Alabama State College Campus after a peaceful demonstration on the State Capitol steps and that "they" (the police) had arrested Dr. Martin Luther King seven times. In actuality, the police had not ringed the campus, nor had police been deployed as a response to the peaceful demonstration. Additionally, Dr. King had been arrested only four times, not seven. Even given the falsity of these statements, the Supreme Court ruled that this speech was fully protected by the First Amendment and that false statements are protected by the First Amendment as long as there is no *actual malice* (New York Times v. Sullivan, 1964). Actual malice occurs when one makes statements known to the speaker to be false or makes the statement with reckless disregard to the statement's truthfulness.

The rationale behind this landmark decision is that freedom of speech is paramount to the democratic form of government in the United States in which issues of public concern must be debated. According to the Supreme Court, all speech, even inaccurate speech, can contribute to the discussion of important public issues by sparking greater interest and greater participation in such debates. Enforcing monetary damages for such speech could decrease debate and reduce the number of viewpoints expressed.

If blatantly false statements may be protected by the First Amendment, why then are inaccurate claims made in comparative advertisements subject to liability? First, while the Constitution protects speech, the Supreme Court has "long recognized that not all speech is of equal First Amendment importance" (Dun & Bradstreet v. Greenmoss Builders, 1985). For example, speech involving *commercial speech* receives less First Amendment protection than noncommercial speech, while speech involving *public figures* receives heightened protection. Each of these criteria is considered independently. For instance, even if the speech is determined to be commercial, but involves public figures, the full effect of First Amendment defenses are available and the plaintiff must prove actual malice. We discuss each of these criterion and their rationale below.

Commercial versus Noncommercial Speech

One of the most prominent examples of reduced protection for certain kinds of speech concerns *commercial* speech. The Supreme Court has noted that commercial speech occupies a "subordinate position in the scale of First Amendment values" (Dun & Bradstreet v. Greenmoss Builders, 1985, 158) and has held that commercial speech merits an intermediate level of First Amendment protection (Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 1976).

The Supreme Court has defined commercial speech in a variety of ways. Sometimes the Court has defined commercial speech as expression that is solely in the economic interest of the speaker and his or her audience (Central Hudson Gas & Electric Corporation v. Public Service Commission, 1980), or as expression that does no more than propose a commercial transaction (Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc., 1976 quoting Pittsburgh Press Co. v. Human Relations Commission, 1973). More recently, the Third Circuit defined commercial speech as an "expression related to the economic interests of the speaker and its audience, generally in the form of a commercial advertisement for the sale of goods and services" (U.S. Healthcare v. Blue Cross of Greater Philadelphia, 1990 citing Bolger v. Young Drug Products Corp., 1983, 66-67). In 1983, the Supreme Court declared three factors to be considered in determining if speech is commercial:

"(1) is the speech an advertisement;
(2) does the speech refer to a specific product or service; and
(3) does the speaker have an economic motivation for the speech" (Bolger v. Young Drugs Product Corp.,1983).

Why should commercial speech receive less protection? First, commercial speech is made solely for the monetary interest of the speaker or to promote the speaker's own goals (Central Hudson Gas & Electric Corp. v. Public Service Commission, 1980). This differs significantly from political speech which, perhaps, has more noble goals. Second, advertisements and other forms of commercial speech are durable. Additionally, commercial speakers are knowledgeable regarding their products/services and the market in which they operate; therefore, commercial speakers should be able to evaluate the truthfulness of their claims (e.g., Central Hudson Gas & Elec. Corp. v. Public Service Commission, 1980; Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 1976).

Note that in the New York Times v. Sullivan (1964) case, the speech at issue was an advertisement, but the courts determined that even though the defendants paid for the media space, the speech was not commercial since the subject matter dealt with a burning social issue of the time--civil rights. Thus, the fact that media space was paid for by the advertiser does not necessarily deem speech to be commercial.

Today, it appears that the definition of commercial speech is expanding, and with this expansion, firms' First Amendment rights are contracting (Boedecker, Morgan, & Wright, 1995). For example, in the U.S. Healthcare v. Blue Cross of Greater Philadelphia (1990), the two parties argued that they were providing information about health care--an issue of public

concern. The court, however found that "although some of the advertisements touch on matters of public concern, their central thrust is commercial. Thus the parities have acted primarily to generate revenue by influencing customers, not to resolve 'the issues involved'." (Central Hudson Gas and Electric Corp. v. Public Service Commission, 1980, 939). In another case, the courts classified information pamphlets describing appropriate use of condoms to help slow the spread of illness as commercial speech even though the pamphlet was developed as a public service (Bolger v. Youngs Drug Product Corp., 1983). Given the above, the prudent small business owner should assume that any comparative advertisement will be viewed as commercial speech, even if the speech deals with an important public issue such as healthcare, environmental concerns, crime prevention, or other "prominent" issue.

Status of the Plaintiff: Private, General-Purpose and Limited-Purpose Public Figures

First Amendment protection also depends on whether the plaintiff is deemed to be a public or private figure. The Court has recognized two types of public figures. General-purpose public figures are individuals "who by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention" have put themselves in the public eye (Gertz v. Robert Welch, Inc., 1974, 342). The second type, limited-purpose public figures, are individuals who have "voluntarily inject[ed] [themselves] or [have been] drawn into a particular public controversy and thereby become public figure[s] for a limited range of issues" (Gertz v. Robert Welch, Inc., 1974, 342). Both types of public figures must prove actual malice.

Speech regarding public figures is subject to full First Amendment protection since actions of public figures should be subject to debate. This allows open criticism of government officials which is critical to maintaining the American style of government. Additionally, public figures have placed themselves in a position of public scrutiny and thereby invite attention and comment. Finally, public figures "usually enjoy greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy" (Gertz v. Robert Welch, Inc., 1974, 344).

Determining whether a plaintiff is a private or public figure is guided by the Gertz v. Robert Welch, Inc. (1974) case. In Gertz, lible was brought against a magazine publisher for describing the plaintiff (Elmer Gertz, a prominent attorney) as a "Communist-fronter," "Leninist," and participant in various "Marxist" and "Red" activities. The Supreme Court held that a newspaper or broadcaster publishing defamatory falsehoods about a private individual (i.e., one who is neither a public official nor a public figure) may not claim a constitutional privilege against liability, for injury inflicted, simply because an issue of public concern is addressed. The Court held that the status of the defamed person also must be considered.

Unfortunately, the fact-specific nature about the public figure inquiry makes it difficult to generalize about which parties will be deemed public figures (Langvardt, 1993). For instance, the Supreme Court has determined the classification of public figures includes persons such as political candidates, retired military generals, and well-known former football coaches (e.g., Harte-Hanks Communications, Inc. v. Connaughton, 1989; Associated Press v. Walker, 1967; Curtis Publishing Co. v. Butts, 1967). However, a prominent private attorney,

a wealthy socialite, an alleged spy, and a recipient of government research grants were found to be private figures (e.g., Gertz v. Welch Inc.,1974; Time, Inc. v. Firestone, 1976).

Cases brought by commercial plaintiffs further complicate the private versus public figure determination. The Supreme Court has not engaged in a substantive public/private figure analysis in a suit involving a commercial plaintiff, however, the lower courts have had to decide cases brought by commercial plaintiffs (e.g., Bose Corp. v. Consumer Union of United States, Inc., 1981; 1982; 1984; National Life Ins. Co. v. Phillips Publishing, Inc., 1992). The lower courts have found that the standards established in Gertz to be ill-suited to corporate plaintiff cases (Langvardt, 1993). Although Gertz's general purpose public figure classification would seemingly encompass corporations whose names are immediately recognizable (e.g., IBM, McDonald's), it is unclear whether a given corporation possesses the notoriety necessary to warrant public figure status. The corporation's size may not be a helpful predictor since the public may be equally or more familiar with relatively small corporations than many larger corporations whose names and business are generally unknown (Langvardt, 1993). In the recent U.S. Healthcare v. Blue Cross of Greater Philadelphia (1990) case, the court found neither of the parties involved to be limited-purpose public figures. In making this determination, the court looked at three factors. First, they determined whether the entities had media access; then they determined whether the parties had voluntarily placed themselves in a public forum; and, finally, they determined whether the content of the speech was self-motivated or was of public concern. While both parties had media access and had voluntarily opened themselves to criticism, neither was deemed a limited-purpose public figure since the issue was motivated by economic rather than public interest.

Given the above discussion, it is clear that a corporate plaintiff will argue that it is a private figure so that the actual malice standards do not have to be met for the plaintiff to receive compensation.

Common and Statutory Law Resolutions to Deceptive Claims in Comparative Advertising

Common law doctrines and general statutory provisions come into play once the speech is considered to be commercial and the plaintiff is deemed a private figure. The focus of each cause of action is the imposition of liability for the consequences caused by false or misleading *expressions*. Most often, direct comparison advertisements are not permitted to invoke the First Amendment protection as in New York Times v. Sullivan (1964). Indeed, "Far more often, however, ads generate litigation over pejorative comments about products and services, comments which may damage corporate profits and reputations" (Milton, Wall, Herbert, Rubins, & Strickland, 1994). Several causes of action may be alleged in such cases, including: injurious falsehood, defamation, and violations of §43(a) of the Lanham Act. Each of these causes of action is discussed below along with whether and to what extent the First Amendment protection developed in New York Times v. Sullivan (1964) have applied.

Injurious Falsehood

Injurious falsehood is the publication, with fault, of a false statement about a company's business, business practices, product, service, property, or property rights, which

results in harm, measured by proven special damages to the company's economic interest (Keeton, Dobbs, Keeton, & Owen, 1984). Thus, when an advertisement makes false statements that directly disparage or demean the quality of that company's products or services, causing financial damage to the company, a specific form of injurious falsehood, known as *product liability* or *trade libel*, may be invoked (Keeton, et al., 1984). The common law establishes the following elements for injurious falsehood liability:

(1) publication of a harmful false statement disparaging the quality of another's product or property;
(2) intent to harm another's interest, awareness of the likelihood of such harm, or reasonable basis for such awareness;
(3) knowledge or reckless disregard of falsity ("actual malice"); and
(4) proof of special damages.

Under common law, a firm may compare its own goods or services to those of a competitor provided that it does not include any false statements of fact (Hogue, 1993). This privilege is qualified however, and does not apply to statements made with malice or bad faith.[2] The heightened standard of proof required under the First Amendment fully applies (see New York Times v. Sullivan, 1964). This heightened standard of proof requires that the plaintiff prove "actual malice" by clear and convincing evidence that the disparaging statement was false and that it was made with either knowledge of its falsehood, or with reckless disregard of its truth or falsity (New York Times v. Sullivan, 1964).

The leading case applying First Amendment defenses in a noncommercial product disparagement case is Bose Corporation v. Consumers Union (1984) in which an article appearing in *Consumer Reports* magazine described the plaintiff's stereo speakers in disparaging terms. Specifically, the article asserted that "individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room... With orchestral music, such effects seemed inconsequential. But we think they might become annoying when listening to soloists" (Bose Corporation v. Consumers Union, 1984, 488). The First Circuit, reviewing the district court's decision focused on the plaintiff's failure to prove actual malice. The Supreme Court, in upholding the circuit court's opinion, made it evident that when a disparaging statement is made in the context of *noncommercial* speech (such as a newspaper article or review), all First Amendment defenses apply. This is not so, however, when the speech is classified as commercial.

The Supreme Court has repeatedly held that while truthful commercial speech is entitled to some First Amendment protection, the First Amendment will not prevent the restraint -- or even complete prohibition -- of false or misleading commercial speech (e.g., Bolger v. Youngs Drugs Products Corp., 1983; Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 1980). Until recently, all cases in which the Supreme Court addressed the protection due to commercial speech involved government regulation of advertising or other forms of commercial speech rather than product disparagement. The question of whether the New York Times actual malice standard of proof applies to disparaging statements made in product advertisements or whether such commercial speech is entitled to less First Amendment protection was finally addressed by the Third Circuit in U.S. Healthcare,

Inc. v. Blue Cross of Greater Philadelphia (1990). The Third Circuit concluded that the actual malice standard does not apply to false commercial speech such as that contained in comparative advertisements of competing companies. In other words, a company asserting any false statement may be held liable, regardless of whether the company believed the statement to be true. While actual malice has traditionally been required in injurious falsehood suits, cases involving commercial speech are clearly different.

However, cases addressing this issue in other jurisdictions suggest that the answer is far from well-settled. In National Life Insurance Co. v. Phillips Publishing, Inc. (1992), the Maryland District Court distinguished and implicitly criticized the Third Circuit's decision in U.S. Healthcare, holding that the actual malice standard was applicable in this case involving defamatory statements made in the defendant's marketing materials. Although the National Life Insurance court found that the statements in question were not "commercial speech," the court held that even if the statements were commercial speech, the actual malice standard set forth in Gertz would still apply. In the National Life Insurance court's view, the appropriate standard depends upon the particular "reputation interest" of each plaintiff rather than an automatic application of a negligence standard for all false commercial speech. If the status of the plaintiff, rather than the nature of the speech, proves to be the key First Amendment inquiry, then the outcome of future injurious falsehood cases involving advertising may depend on whether the plaintiff is found to be a public figure.

Defamation

Defamation is said to have occurred when the false statements reflect not only on a competitor's product or service, but actually affect the reputation of the company's officers or employees. The common law defines defamation as the publication of a false and defamatory statement about the plaintiff.[3] A statement is regarded to be defamatory if it "tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.[4] It is this focus on reputation which separates defamation from injurious falsehood.[5]

Prior to 1964, plaintiff's defamation suits were virtually unconstrained by the defendant's First Amendment right to free speech. The United States Supreme Court's holding in New York Times Co. v. Sullivan in 1964 redefined defamation's constitutional contours by attempting to strike a balance between the plaintiff's reputational interest and the defendant's competing interest in free speech. The plaintiff in New York Times was an Alabama police commissioner who claimed that false statements made in a political advertisement in the *New York Times* defamed him. The Supreme Court concluded that the advertisement was political speech, rather than a commercial advertisement, because of its commentary on the civil rights struggle, a major public issue of the time. The Supreme Court focused on the potential constitutional deficiency of defamation's *strict liability standard*, which the Court thought likely to chill the exercise of First Amendment freedoms (Langvardt, 1993). Because the Court believed that "erroneous statement is inevitable in free debate" (New York Times v. Sullivan, 1964, 271) it devised a rule that would provide the essential "breathing space" necessary for free expression to flourish:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not (New York Times v. Sullivan, 1964, 279-280).

The Court provided further First Amendment protection by raising the standard of proof by which plaintiffs needed to show actual malice, requiring clear and convincing evidence rather that merely a preponderance of the evidence.

The common law takes a strict liability approach in defamation actions; thus, a plaintiff is not required to prove the defendant's knowledge of falsity or lack of reasonable attempts to ascertain the truth (Keeton, et al., 1984). Rather, if the advertisement is proven false, the defendant is liable even if he or she possessed a well-founded belief in its truth.

Three years after New York Times v. Sullivan (1964), the actual malice requirement was extended to suits brought by public figure plaintiffs, because, as Chief Justice Warren reasoned in his concurrence, public figures resemble public officials as objects of intense public interest and potentially influential participants in public debate (Curtis Publishing Co. v. Butts and Associated Press v. Walker, 1967, 142). However, when the Court addressed the issue of the First Amendment's role in defamation suits brought by private figure plaintiffs, the Court initially focused on the degree of public interest or concern present in the speech rather than the plaintiff's status, but later refocused on the plaintiff's status as determinative of the appropriate extent of First Amendment accommodation (e.g., Rosenbloom v. Metromedia, Inc., 1971; Gertz v. Welch, Inc., 1974). The actual malice requirement, together with the heightened standard of proof necessary, has made it extremely difficult for public figure plaintiffs to win defamation suits. Therefore, plaintiffs seek to avoid being classified as a public figure whenever any ambiguity exists.

Lanham Act

Since its enactment in 1946, §43(a) of the Lanham Act[6] prohibited false advertising about one's *own* products or services. Because the original section 43(a) had a strict liability regime, containing no knowledge component or fault requirement such as those required in defamation actions, the Lanham Act cause of action was widely used in false advertising actions. In other words, defendants who made false statements about their products were liable under §43(a) regardless of their good faith belief that the representations were true. Section 43(a) was significantly expanded in 1988 (effective 1989)[7] to extend the prohibition against false and misleading advertising to false statements made by a defendant about the plaintiff's products or services. The new version of §43(a) provides:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin,

false or misleading description of fact, or false or misleading representation of fact, which-

(1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.[8]

Thus, since a section 43(a) claim is in order when an advertiser makes false or misleading statements regarding another firm's goods, services or commercial activities, the amended section 43(a) departs significantly from the prior version which focussed solely on the claims made about one's own products or services.

Section 43(a) is completely outcome-driven rather than intention-driven meaning that the firm does not need to prove malice on the part of the competing advertiser. Rather, the courts focus on how consumers interpret the advertisement and whether such an advertisement would have a detrimental financial impact on the plaintiff.

Using §43(a) of the Lanham Act is beneficial to the offended firm because it allows the firm to obtain an injunction against the company making false claims so that the firm can stop the decline in sales caused by the misleading ad (Bixby & Lincoln, 1989). Section 43(a) also allows a firm to be financially compensated for any monetary damages caused by the misleading comparison (Bixby & Lincoln, 1989).

The constitutionality of the new version of §43(a) is questioned. Langvardt (1993) stated:

> A fundamental issue thus arises: whether plaintiffs who would be subject to First Amendment-mandated proof requirements in a suit brought on defamation or injurious falsehood grounds, may evade those same strictures by bringing the same claim under section 43(a). When viewed in this manner, the issue must be answered in the negative even when the attempted evasion apparently conforms with the language Congress used-or did not use. Federal Statutes are no less subject to the Constitution than is the common law...
>
> Thus, Congress erred when it enacted the "commercial defamation" component of section 43(a), by not adequately accounting for the First Amendment interests at stake for speakers and their audience. Courts should

not repeat the mistake when they decide "defamation" and "injurious falsehood" cases brought under section 43(a). (pp. 331-333)

Langvardt (1993) noted, however, that the courts have, in fact, avoided or ignored the First Amendment implications of the amended section 43(a) or have dealt with them unsatisfactorily (American Express Travel Related Services Co. v. Mastercard Int's, Inc., 1991; U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 1990; Weight Watchers Int's, Inc. v. Stouffer Corp., 1990). Given the questionable constitutionality of the revised act, it is too early to tell its long-term effect.

SUMMARY AND IMPLICATIONS FOR THE SMALL BUSINESS MANAGER

Comparison advertising is likely to become more common in the future as businesses become more aggressive due to strong competition. Indeed, there are many reasons for the small business owner with a superior product or service to use this type of advertising format. These reasons include creating positive consumer attitudes, increasing sales and market share, swaying competitors' customers to try the products/services offered by the small business, and positioning the small business's offering more closely to the market leader. However, as comparison advertising increases, litigation such as the U-Haul v. Jartran and U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia may also increase. This type of litigation can be quite costly in both a time and a monetary sense. Thus, we provide some suggestions for the small business strategist regarding how to avoid such litigation.

Several authors have suggested that a comparative advertising strategy is more frequently used by small firms compared to larger competitors (c.f., Petty, 1991). Given this, common and statutory law and Section 43a of the Lanham Act provides an opportunity for these larger competitors to bring suit against smaller competitors. As Petty (1991) explains, the smaller firms would have to bear the cost of defending the suit. Additionally, if a cease and desist order is given, the small firm would also have to bear the costs of designing a new ad campaign. Given that the resources of major competitors are likely to be greater than those of the small business owner, litigation is a greater threat to small businesses. Clearly, as detailed below, the small business practitioner will want to do everything in his or her power to ensure that a legal suit is unlikely to occur.

Common law and the Section 43a of the Lanham Act could also be used by larger firms to harass smaller businesses. Such suits could be used to curtail legal competitive actions taken by the small business and to increase the costs of operating the small business. However, it should be noted that any litigation which lacks a legitimate basis can be challenged by the small business under antitrust laws as "sham" litigation (Hurwitz, 1985; Petty, 1991) since it threatens a competitive environment (Petty, 1991).

From an advertising strategy viewpoint it is important to restate that often marketers' communications are subject to strict liability standards rather than full protection of the First Amendment. This means that the outcome of the comparison advertisement is important. The intent of the ad (i.e., whether the advertiser knowingly made false or misleading claims) is

irrelevant. Petty (1991) asserts that the most important consideration in comparative advertising is "*what the audience actually perceived*" when exposed to such an ad. This being the case, small business owners/strategistsneed to use caution when making claims. All claims must be backed by supporting research (Castrol Inc v. Pennzoil Co., 1993). Thus, it is critical that the small business owner have demonstrated consistency between the intended and received messages. S/he may want to possess evidence of how consumers perceive a particular ad *before* actually running the ad. This does not imply that the small business owner must do extensive research or hire an outside agency to do this research. A simple survey of individuals in the relevant target market regarding their perception of the advertisement would suffice.

Increasingly, surveys are accepted as evidence in law-suits and hearings involving advertisement perceptions (Blum, 1995). Blum goes so far as to state that surveys are "so established in commercial suits that judges sometimes draw a negative inference if a case doesn't include one" (1995, p. A1). Since the target customer's perception of the advertisement is at issue, it makes intuitive sense to ask the customer rather than relying on the "experts." Additionally, surveys may be a more efficient means to present evidence than using costly expert witnesses (Blum, 1995).

Recall the airport parking ad cited earlier in which the advertiser claimed, "Why pay $38.50/week at the airport? Park at *BRAND X* for just 24.99/week." A small disclaimer in this ad indicates that the reduced price is valid only with the advertisement and only for the first week. Given that the outcome of the ad, rather than its intent, is the critical issue, this advertiser has possibly placed itself in a precarious position by using small disclaimers that the consumer is unlikely to see. Recent research shows that consumers who are not highly interested in an ad and are unmotivated to pay close attention to the ad are likely to be deceived by such disclaimers (Johar, 1995).

All claims that are made need to be substantiated by some amount of factual evidence or scientific research. We found that many small businesses make the claim that they offer "the best prices anywhere." Data regarding competitors' prices, models and services on which these prices are available, and time periods or conditions that apply to obtain the price should be in the small business's files before running the ad.

For instance, a local printer-cartridge/ribbon recycler makes the claim that "You will save up to 70% of your ribbon budget" by using the recycled ribbon as opposed to a new one. This business further states that "The only real difference between new and reloaded ribbons is the price." To make these claims, however, this business should possess not only the listings of the competitors' prices on comparable products, but also, quality evidence such as defect rate, breakage, and product life expectancy for new versus recycled ribbons.

Additionally, advertising claims must not go beyond the research. One of the longest series of suits and countersuits arising from comparison advertising concerns is American Home Products, the manufacturer of Advil and Johnson & Johnson, the manufacturer of Tylenol (see Bixby & Lincoln, 1989). Johnson & Johnson made the claim, "There is no more potent pain reliever than Extra-Strength Tylenol." While this claim is true for mild and moderate pain, ibuprofen is more effective for severe pain. Thus, Johnson & Johnson had

made a claim that went well beyond the medical evidence and that claim fostered false beliefs in the eyes of the consumer. Along these same lines, the local printer ribbon and cartridge ribbon recycler described above may get into trouble by stating that "our substantial investment in technology pays off for you in every cartridge. We use state-of-the-art equipment and methods... Again many others just can't make that claim; and it shows in their products. We know... we've been there!" The claim that the pay-off occurs with every cartridge may exceed any quality evidence since that claim suggests a zero defect rate.

Small businesses should also be aware that litigation can arise from general superiority claims even when the competitor is not actually named in the comparison advertisement. This type of comparative advertisement is called an *indirect comparison ad* (i.e., comparative ads in which the competitor is not explicitly named). As example, Castrol Inc., a major oil manufacturer and distributer, sued Pennzoil Company and Pennzoil Products Company for deceptive advertising when Pennzoil asserted that its motor oil "outperforms any leading motor oil against viscosity breakdown," and provides "longer engine life and better engine protection" (Castrol Inc. v. Pennzoil Co., 1993, 941). Interestingly, Castrol was not mentioned by name in the Pennzoil ad; Pennzoil merely implied superiority over *all* other engine oils. The United States District Court for New Jersey found that Pennzoil's advertisements contained claims of superiority which were "literally false" since both Castrol and Pennzoil products past standards adopted by the Society of Automotive Engineers, The Common Market Automobile Constructors, General Motors, Chrysler, and Ford. Again, care must be taken to have substantiation of claims prior to making comparison.

We found this type of ad to be a common strategy used by small businesses. For example, numerous ads were viewed in the local papers in which small business owners claim to be "simply the best," and to offer the "best service," or to be "distinctively better." One indirect comparison ad by a local chicken wings restaurant reads, "You've tried the rest, Now try the best!" Like the Hardee's advertisements comparing its chicken to KFC's, this small business has put itself at risk unless it has consumer data indicating that its chicken wings are preferred over the competition.

Additionally, comparisons should be made on characteristics that are important to the consumer in making their decisions to buy or not buy the product. Research by Rogers and Williams (Rogers and Williams, 1989) concluded that comparison ads work best when the advertised product or service has an important functional characteristic that outperforms competitors' offerings. Advertisers may run into legal trouble should the ad compare irrelevant factors since such comparisons may inflate importance of the attribute leading to poor consumer choices.

Is comparison advertising worth the risk for small businesses? We think so. A small business should benefit by using comparison ads which stick to the facts on important issues. Such ads are attention-getting, effective in changing attitudes and can create dramatic sales increases. The small business manager, however, must be sure that all claims can be substantiated *prior* to running the ad. It is our hope that this paper helps the small business decision-maker determine when comparison advertising will be beneficial to his/her firm.

NOTES

1.We have used Brand X to obscure the true brand name of the park and shuttle.

2. RESTATEMENT (SECOND) OF TORTS §§ 647-649 (1977).

3. RESTATEMENT (SECOND) OF TORTS §558 (1977). There are two types of defamation: libel, which is defamation by written or printed word, and slander which is defamation by oral statement. Id. §568.

4. Id. at 559.

5. The distinction between defamation and injurious falsehood can be crucial in cases in the statue of limitations is an issue. Trade libel is governed by a two-year statute of limitations applicable to infringement of property rights whereas, defamation (libel or slander) is subject to a one-year limitations period. See e.g. Guess, Inc. v. Superior Court (Jeff Hamilton, Inc.), 176 Cal. App. 3d 473, 222 Cal. Rptr. 79 (Cal. App. 2 Dist. 1986).

6. The Lanham Act, 15 U.S.C. §1125(a).

7. The Trademark Law Revision Act of 1988 (TLRA), Pub.L.No. 100-667, Sec. 136, 102 Stat. 3935, 3948 (15 U.S.C.§ 1051) effective November 16, 1989.

8. 15 U.S.C. §1125(a) (1988).

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