

A Research Plan to Update the Marketing Literature on Legal Regulation of Firms Using Direct or Indirect Comparative Advertising in the United States

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ABSTRACT

The Federal Trade Commission (FTC) has encouraged competitors to name one another in advertisements since the very early 1970s (Wilkie and Farris 1975), primarily because it believes that direct comparisons between brands will provide consumers with better information for use in their purchase decisions. This contention is predicated on the belief that consumers are rational, information-processing problem solvers when purchasing products and services. It is also based on the premise that the comparisons will be direct ones in which the sponsoring brand identifies a specific competitor by its brand name and explains how it is superior to that named competitor on one or more objectively measurable brand attributes. Many advertisers and advertising agencies were against this FTC initiative early on because they believed it would lead to increased litigation by named brands, which it quickly did (Bixby and Lincoln 1989; Muehling, Stem and Raven 1989). Nonetheless, the FTC's official policy statement regarding comparative advertising was issued on August 13, 1979 (Federal Register, 47328-9).

Two additional problems have materialized since the Federal Trade Commission issued its comparative advertising policy statement. First, implied superiority claims (a.k.a. indirect comparative advertising) have regularly been used in lieu of direct comparisons, and this alternative format also quickly resulted in increased litigation (Wyckham 1987). Indirect comparative advertising generally compares the sponsoring brand in a favorable way to a group or class of competitors without mentioning any specific brand name(s). The second problem that has arisen since the FTC's policy statement is the fact that attributes mentioned in comparative advertisements are often not objectively measurable, being more akin to puffery than a legitimate competitive claim. This is a problem because respondent "acceptance and belief of puffs and puffery-implied claims were very similar to acceptance and belief of claims based on facts" (Rotfeld and Rotzoll 1981).

Legal Regulation of Comparative Advertising

In addition to filing a complaint about comparative advertising directly with the Federal Trade Commission, aggrieved parties can complain to the industry self-regulatory organization National Advertising Division (NAD) and its appellate division the National Advertising Review Board (NARB), or they can file a lawsuit under Section 43(a) of the Lanham Trademark Act (Petty and Kopp 1995). Complainants may also seek relief under the common law for a variety of torts such as trademark infringement, brand disparagement, and defamation of character (Beck-Dudley and Williams 1989). Petty and Kopp (1995) present the most thorough analysis identified in this literature review of all the legal-regulatory dimensions comparative advertising is subject to, and even this study is not completely comprehensive. For example, of all possible sources of governmental regulation, Petty and Kopp analyze Federal Trade Commission cases but not those by State Attorneys General, the United States Postal Service, or other industry-specific government regulators such as the Food and Drug Administration. They focus on NAD decisions instead of media reviews, and on Lanham Act litigation instead of state mini-FTC regulations, common law fraud, or breach of warranties.

Many articles were published between 1980 and 1990 that did an excellent job of identifying and describing the various dimensions of comparative advertising that were significant in their case reviews of comparative advertising legal complaints. For example, Armstrong and Ozanne (1983) analyzed 139 NAD/NARB cases from January 1973 through September 1981. They reported frequency of repeat complaints by a single company, product categories, related media of the complaints, changes in complaint sources over time, initial responses by advertisers to the complaints, types of substantiation they submitted in defense, subsequent agreements reached between the NAD and advertisers, and the disposition of reported NAD cases. Zanut (1980) focused specifically on NARB casework, and identified the standard of truth and accuracy, the proportion of the audience deceived, dangling comparatives, semantics, puffery, omission of information, testimonials, misuse of research, and the increasing use of comparative advertising as problem areas. Unfortunately, these results are decades old in a dynamic marketplace where firms are constantly seeking an advantage over one-another.

Focus for Our Proposed Research

Many changes have occurred over the past 25-30 years that could influence the legal-regulatory dynamic surrounding comparative advertising. We believe the issues identified as problematic during the 1980s and 1990s are still relevant, but new problems have likely arisen. For example, what impact has the Lanham Trademark Revision Act of 1988 had on complaints and defenses to perceived wrongs perpetuated through comparative advertising in the 21st Century? Which version of comparative advertising is *currently* more likely to result in formal legal complaints, how, and why? We found no study that has thoroughly investigated these questions in the past 20 years. We seek to update the research literature by analyzing recent case law under the Lanham Trademark Revision Act of 1988 as well as common law torts, and we intend to update the NAD-NARB rulings related to comparative advertising that were most

recently scrutinized over two decades ago. The FTC decreased regulatory activity over advertising during the 1980s (Beck-Dudley and Williams 1989). We seek to document what long-term impact (if any) that deregulation has had on the FTC's pursuit of comparative advertising violators since the turn of the century. We expect NAD-NARB rulings to have increased exponentially over the past 30 years, while FTC rulings simultaneously decreased. Has the nature of the FTC's regulatory activity related to comparative advertising changed in scope since the year 2000, or had any such trend already begun during the 1980s and 1990s?

We anticipate our most significant findings will be in the area of media platforms used in contemporary marketing communications. According to Balough (2012, p. 297):

“As the Internet plays a more important role in marketing, false advertising claims that target companies’ use of Web sites and social media continue to grow. Key cases from mid-2011 through mid-2012 evidence this phenomenon and introduce some new variations to false advertising claims. These cases include claims related to blog posts, pseudonymous online reviews, cybersquatting, and mobile applications.”

For example, the Federal Trade Commission recently charged Sony Computer Entertainment America and its advertising agency Deutsch Los Angeles with deceptive advertising on social media, specifically Twitter posts. According to Morrison (2014), Sony agreed to settle this FTC charge and admitted that it deceived consumers using false advertising claims delivered through a social media campaign in 2011 and 2012. Using words such as “game changing” and “revolutionize” gaming mobility, Sony's tweets can be classified as implied superiority claims.

Conclusion

Social media spending is projected to increase from \$10.5 billion in 2015 to an estimated \$28.5 billion in 2020 (PR Newswire 2016). Based on recent examples like the Sony case described above, there is no reason to suspect that false and/or deceptive comparative advertising will not correspondingly increase as well. Building on the baseline of knowledge developed by expert researchers in the 1980s and 1990s, legal-regulatory problems associated with contemporary comparative advertising delivered through social media must be documented, analyzed, and categorized to update the marketing literature for academics and practitioners alike. This is the primary focus of our proposed future research.

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Relevance to Marketing Educators, Researchers, and Practitioners:

Having access to accurate up-to-date information that summarizes the major legal issues and concerns regarding the use of comparative advertising in the United States is crucial for

marketers. Practitioners need it to avoid making costly mistakes running promotional campaigns; researchers need to have a launching point for future studies, and educators need to have state-of-the-art knowledge for their courses. This advertising strategy is widely used today, and many changes (e.g. the growth of social media campaigns using brand comparisons) have occurred over the past three decades that are *not* reflected in the existing literature. Based on the above discussion, we plan to conduct an analysis of more recent and relevant legal rulings that are currently outdated in the marketing literature.

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