

NEGATIVE PRODUCT PLACEMENT: AN EVOLVING THEORY OF PRODUCT DISPARAGEMENT AND UNFAIR COMPETITION

by

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Abstract

Product placement is an alternative strategy of marketing communications for firms wishing to inform, remind and pursue consumers concerning product offerings. Many consumers view advertising with suspicion. In an attempt to overcome this suspicion and communicate to consumers, firms have increasingly resorted to product placement to overcome resistance to traditional commercial communication.

While many researchers have examined marketing communication in terms of hype and puffery, few have examined negative product placement using the legal and ethical frameworks of disparagement, unfair competition, and trademark tarnishment. This paper examines the practice of attempting to influence consumers' perception toward a competitors' product through the use of product placement and examines the ethical and legal ramifications of such practices.

Introduction

Here's the deal: Remember how Snooki, drunk or sober, was never seen without that Coach bag dangling from the crook of her arm? Snooki and her Coach were as synonymous as The Situation and his six-pack. But then the winds of change started blowing on Jersey Shore. Every photograph of Guido-huntin' Snooki showed her toting a new designer purse. Why the sudden disloyalty? Was she trading up? Was she vomiting into her purses and then randomly replacing them? The answer is much more intriguing.

Allegedly, the anxious folks at these various luxury houses are all aggressively gifting our gal Snookums with free bags. No surprise, right? But here's the shocker: They are not sending her their own bags. They are sending her each other's bags! Competitors' bags!¹

The quoted celebrity news refers to negative product placement. Instead of a company seeking to create a positive image of their products in consumer's minds, negative product placement seeks to have consumers disassociate from a competitor's products, by associating competitors' products with negative reference group members.

Before delving into negative product placement, the reader should have some understanding of product placement. Then we will examine negative product placement. Finally we examine the legal and ethical implications of utilizing negative product placement.

Product Placement

The process of embedding products within media for the purpose of informing, reminding or persuading viewers -- product placement -- is a component of the promotional mix. As a component of the promotional mix, product placement is intended to influence purchases made by consumers. Product placement is a standard part of making movies and television programs. The Complete Film Production Handbook² provides boilerplate for product placement agreements.

Companies through experience know that product placement works. Matt Wisk, a former vice president of customer marketing for Nokia, considers product placement an important element of promotion. According to Matt Wisk,³ "by placing our product in the hands of highly visible people, we really created a buzz."

In the age of TIVO and other digital recording devices, advertisers find it difficult to reach their target markets. To counteract digital recording devices, firms resort to imbedding their products within television shows and movies. As a result of consumers by-passing commercials, companies are spending a great deal of money on product placement. Spending associated with product placement is increasing⁴ -- product placement spending in motion pictures and television grew approximately 14.5 percent in 2007 to a record high of \$2.9 billion annually. Some industry analysts anticipate that firms will spend more than \$40 billion annually on product placement by 2012.⁵

Product placement started receiving higher levels of scrutiny in the 1980s. It is common knowledge that Steven Spielberg switched from M&M's to Hershey's Reese's pieces, when the people at Mars Candies refused to enter into a co-promotion deal with Spielberg over the movie E.T.⁶ The movie E.T. was not only a commercial success, but it is significant for bringing the process of product placement to the attention of the general public. The sales of Hersey's Reece's Pieces

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increased greatly after the extraterrestrial alien featured in the movie E.T. followed a trail of Hershey's Reese's Pieces to his new home. This new found interest in product placement does not mean the process stated in the 1980's. Other authors consider the origins of product placement to be much older.⁷ Wasko⁸ places the origins of product placement in the movies to the 1940's, while Eckert⁹ claims that product placement began in the 1930's. A few authors have claimed that product placement was an unstructured haphazard process until movies such as E.T. integrated artistic and commercial activities.¹⁰

Although the term product placement did not come into common use until the 1980's,¹¹ there is nothing new about product placement. The first documented instance of product placement occurs in Girel's 1896 film, *Défilé du 8e Battalion*—a wheelbarrow proudly displays the name Sunlight Soap.

Thomas Edison incorporated more blatant promotions than Girel. Some of Edison films included advertising messages that were more borderline commercials. There is a 50 second scene of men smoking in front of an Admiral Cigarettes billboard in one of Edison's movies.¹² According to Newell,¹³ the early Edison travel films were the prototypes for product placements deals. The production costs of these travel films were subsidized in part by the transportation companies. While filming the Lehigh Valley Railroad's fast passenger trains, *The Black Diamond Express*, the film crew was transported in a private railcar provided by the railroad.¹⁴ Likewise, a later film, "A Romance of the Rail" -- a love story of a couple who meet on a train, coincided with the Erie-Lackawanna's promotional campaign for cleaner-burning anthracite coal.¹⁵ In "A Romance of the Rail," the future bride's clothes unsullied by smoke.

Product placement is not limited to movies. Santo Kyoden, an 18th century Japanese author, embedded information about the 578 products available for purchase at his tobacco shop as well as promotions for his other publications within his comic novelettes.¹⁶ Carlyon claims that Dan Rice, a pre-Civil War entertainer, could be heard "singing for his supper" when he included the names of a local hotel and restaurants in his opening number.¹⁷ Even literature is not immune from product placement. Newell, Salmon and Chang claim that Charles Dickens' *The Pickwick Papers* could be considered an early form of product placement, direct-mail marketing, and entertainment-based merchandising. According to Fitzgerald, the name Pickwick stems from a London-to-Bath carriage line of Dickens' time.¹⁸ The Pickwick carriage line even makes an appearance in the story, when the title character rides in a carriage with his name painted on the outside and this is the center of one of the stories. Supposedly, a furor erupted when the illustrator, Phiz, included a partly seen logo for Guinness Dublin Stout in a pub scene. Further, other manufacturers approached Phiz to include their products in future drawings.¹⁹ Currently, video games include embedded products and images.²⁰ Some video games are created solely for the purpose of promotion.²¹

The practice of product placement has had many different names, such as, exploitation, tie-ups and tie-ins. Exploitation is a generic term that refers to the right to use a product in a media, whether or not there is some type of formal promotional activities. Tie-ins and tie-ups imply some type of formal promotional activities. Eckert suggested that tie-ups had been a part of the movie publicity machine since the 1930s.²²

Earlier investigation of product placement, in the late 1980s, considered product placement as the inclusion of trademarked merchandise, brand-name products, or signage in a motion picture.²³ As this definition would allow a brand appearing solely from a director's attempt at mimicking reality, it is more consistent with the earlier term exploitation. Subsequent definitions added the requirement for a product placement to be in return for a fee or reciprocal promotional exposure.²⁴

How and why Product Placement works

Product placement can be equated with celebrity endorsement. McCracken defined a celebrity endorser as "any individual who enjoys public recognition and who uses this recognition on behalf of a consumer good by appearing with it in an advertisement."²⁵ Product placement is specifically a co-present mode of endorsement—the celebrity merely appearing with the product. Research has shown that celebrity endorsement is effective since it promotes product sales, increases awareness and favorable attitudes of the product, as well as purchase likelihood.²⁶

Celebrity endorsements embody symbolic meanings. These meanings are evoked by a person, place or thing and go far beyond the words or actions of the endorser. Celebrity endorsers serve as a conduit for these symbolic meanings. Over time, products associated with these symbolic meanings become uniquely differentiated and their perceived value becomes greatly enhanced.²⁷ Langmeyer and Walker found that symbolic meanings embodied in a celebrity can indeed be identified, as well as classified and categorized.²⁸

Two social psychological processes explain the effectiveness of celebrity endorsements. These two processes, source credibility and source attractiveness—source models, as McCracken labels them²⁹ -- stem from studies by Hovland and Weiss³⁰ and studies on source attractiveness reported by McGuire.³¹ Both of these models contend that the effectiveness of a message depends on certain characteristics of the message source. Specifically, such characteristics as physical attractiveness and credibility of the source tend to increase the persuasiveness of the message. Refinements of the models indicate that not only does physical attractiveness play a role, but the likeability and attitude toward the endorser has a significant effect. The symbolic meaning embodied by the endorser has a greater effect than a celebrity's physical attractiveness. In fact, Kamins found that "physical attractiveness of the sources does not always enhance measures of attitudes change toward issues, products, and ad-based evaluations."³² Silvera and Austad found that by measuring attitudes

toward the advertisement, the endorser and the product that consumers' attitudes toward a specific product were predicted by inferences about the endorser's liking for the product and by attitudes toward the endorser.³³

It is not hard to imagine that endorsers with a negative image can have an adverse effect on consumers' attitudes toward a product or brand. In an experiment, Till and Shrimp found that negative information about a celebrity can cause consumers to lower their evaluations of a product or brand through an associative link between the brand and the celebrity.³⁴

Symbolic meaning is also connected to the association of an endorser to the product image and the associative reference group. White and Dahl claimed that "[t]here are many examples of consumers avoiding products associated with particular groups: the teenager who doesn't want to wear his dad's aftershave, the baby boomer who won't use products associated with being 'elderly', the college student who avoids dressing 'geeky', etc..." They found that dissociative effects are often stronger than associative effect.³⁵

Negative Product Placement

Although most accounts of product placement tout the benefits of products, sometimes firms use product placement as a tool to disparage competitors' products. Just before the holiday season in 2005, a Denver news station, KWGN-Channel 2, aired a story about potentially unsafe toys just before the Christmas season. The news story was actually a video news release funded by Panasonic, Namco and Techno Source. All of the toys that were reported as being safe were manufactured by Panasonic, Namco and Techno Source; while all of the toys reported as "unsafe" were manufactured by rival companies.³⁶

Negative product placement is not limited to America. Chao reports that one Chinese company gave away free clothing made with their competitor's Poppy fabric to the homeless and derelicts. The company's competitor had intended for this fabric to be used in high-end clothing. Instead of being associated with wealth, prestige, and luxury, the fabric is associated with poverty and homelessness.³⁷ In a critique of media and advertising in the United Kingdom, Benrik commented "Now product placement is legal, brands could pay for competitors to be featured in awkward situations."³⁸

Sometimes celebrities mention or endorse a product without being connected to the product. Marketing practitioners refer to this as unauthorized or unsolicited celebrity endorsement.³⁹ Unsolicited endorsements can be positive or negative. The question becomes whether an endorsement from a negative reference group member is the action of a competitor.

Incidents and examples of negative product placement are very difficult to find. Companies engaging in the practice naturally wish to keep their activities quiet. It is a well-known industry practice to engage outside firms in stealth marketing campaigns. In response to a question about which companies use stealth marketing, David Elias—CEO of a marketing company called Soulkool – said, "...some of the clients that I can't speak about because of the contracts that we have with them...they talk about the fact that this type of marketing needs to stay undercover, and they pay us a lot of money to keep it that way."⁴⁰

Stealth marketing is phenomena gaining in popularity. In a blog, marketer Julian Gratton boasted of a stealth marketing campaign he engineered for Rolls Royce called Whispers. The Whispers campaign consisted of a handsome middle aged gentleman driving around a younger attractive woman in a Rolls Royce. According to Gratton "The whole purpose of our 'whispers' campaign was to ensure that people attending the party would be envious of this couple. They would talk about them. Men would be envious of this guy in a Rolls Royce Phantom with a gorgeous wife... and the women would be green with envy at the gorgeous girl with the handsome older man... who had a very expensive car!"⁴¹

Popular marketing author Martin Lindstrom compared negative product placement with negative political campaigns. According to Lindstrom "The experience of the press and mainstream media tells us that bad news sells 10 times better than good news. And so it follows that bad news about a competitor promises more sales for the communicator. Is the trend here to stay? Are we seeing product-oriented advertising being usurped by the negative promotional habits demonstrated so capably by U.S. political campaigns? Or will the trend evaporate from the brand-builder's repertoire as quickly as it arrived?"⁴² Since more evidence of negative product placement is beginning to surface, Lindstrom's worst fears are being realized.

Marketing Ethics

Ethics, not to be confused with morality, are simply rules of conducts. Beauchamp distinguishes ethics from morality by dividing ethics into two categories, a deontological approach and a utilitarian approach.⁴³ Under a deontological approach, based on the moral philosophies of Emmanuel Kant, the motive behind an action is most important. Kant insisted that every action should have pure intention behind it; otherwise the action was either meaningless or immoral. Further, Kant asserted that a person's motives and adherences to duty was the most important aspect of an action, not the final results. Simply put, the ends do not justify the means. This contrasts to the utilitarian approach, which relates to the consequences of an action. Under a utilitarian approach, a group attempts form rules of behavior that produce the greatest possible positive results with the least amount of negative consequences. Professional cannons of ethics relate most closely to the utilitarian approach.

According to Nantel & Weeks, "of all the management fields, the field of marketing is undoubtedly that which raises the most controversy when it comes to the question of ethics."⁴⁴ Stories abound about deceptive advertising and high

pressure sales tactics. Some cultural observers consider marketing's promotion of consumption unethical. According to Daniel Bell, the incessant need for personal gratification among the successful, deteriorates the work ethic necessary for the success in capitalistic societies.⁴⁵ Further, Michael Weiss contends that marketing segmentation is one of the causes of societal fragmentation.⁴⁶ It is not that marketers are less ethical than other management professionals; marketing is one of the few portions of a company that touches the consumer. In this way, marketing is reflective of ethics within capitalistic societies.

Unlike the professions of law, engineering, or medicine, there are no statutory or corporate canons of ethics in marketing. Marketing is not alone. With the exception of accountant associations, none of management practices are governed by a set of ethics that if violated could result in the loss of the ability to practice in that profession.⁴⁷ Even though there are no statutory or corporate canons of ethics, several organizations have created codes of ethics concerning marketing activities. The American Marketing Association (AMA) Code of Ethics⁴⁸ covers general ethical norms and values associated with marketing activities; while the Word of Mouth Marketing Association (WOMMA) Code of Ethics⁴⁹ and the Public Relations Society of America (PRSA) Code of Ethics⁵⁰ are more specific and deal directly with activities associated with product placement. All of three of the codes of ethics, AMA, WOMMA, and PRSA, consider honesty to be core ethical value. Both the WOMMA and the PRSA codes of ethics specifically state that members must reveal sponsors for represented causes and interests. This would call into question whether omitting the identity of the initiator of the negative product placement is an ethical act. There is also some question of whether it is ethical for one firm to disparage another firm's products solely based on negative association through contrived means. Beyond the ethical issues, is the practice of negative product placement legal?

Disparagement and Injurious Falsehood

While ethical frameworks address how one ought to act under societal rules, common law tort and statutory laws set recognizable standards of conduct that require a particular course of action. There currently exists a variety of tort laws and statutory schemes that could or should address the issue at hand. Eventually, it may be determined that a new tort be created to remedy potential customer confusion and injuries to corporate competitors. The remainder of this article will address the current existing array of torts and the applicable statutory and regulatory schemes addressing the issue at hand.

The earliest known cases of disparagement are two English decisions from the late 1500's. Neither case dealt with the nature and reputation of a company's products, but instead dealt solely with false accusations with regard to ownership of real property.⁵¹ It was much later, in 1874, that the court expanded the concept of an action for disparagement to include the denigration of goods and products.⁵² "It seems to me that where a plaintiff says you have without lawful excuse made a false statement about my goods to their comparative disparagement, which false statement has caused me to lose customers, an action is maintainable."⁵³

In the United States, the first Restatement of Torts defined disparagement as:

One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as a purchaser or lessee thereof, might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused.⁵⁴

Soon afterward, William Prosser wrote that the tort of disparagement consisted of false communications which damage or tend to damage the reputation as to the quality of goods or services. He further wrote that the terms disparagement, trade libel and slander of goods were largely synonymous.⁵⁵

As the tort evolved, disparagement, as defined in the original Restatement of Torts, has been largely subsumed "within the broader confines of injurious falsehood":

One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if

- (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that is likely to do so, and
- (b) he knows that the statement is false or act in reckless disregard of its truth or falsity.⁵⁶

Disparagement does, however, continue in Restatement (Second) of Torts §629.⁵⁷ Courts have certainly adopted the Restatement (Second) view, melding together the previous array of torts. "In the modern law, the tort of 'injurious falsehood' is the general umbrella term for a collection of torts such as ... 'product disparagement' or 'trade libel'.."⁵⁸ In *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense B.* the court opined that:

there is a tort which passes by many names. Sometimes it is called slander of title, sometimes slander of goods, or disparagement of goods, or trade libel, or unfair competition, or interference with prospective advantage. Under whatever the name, the essentials of the tort appear to be the same. It consists of the publication, or communication to a third person, of false statements concerning the plaintiff, his property, or his business.⁵⁹

In *Fillmore v. Maricopa Water Processing Sys.*, the court quoted the Restatement (Second) of Torts §623A, saying that, “[t]he theories of injurious falsehood and defamation tend to overlap particularly in cases of disparagement of the plaintiff’s business or product.”⁶⁰ In *David E Seitz and Microtherm, Inc v. Rheem Manufacturing Company, Water Heater Innovations, Inc. d/b/a Marathon Water Heaters*, the Federal District Court agreed saying, that, “[t]he tort of product disparagement falls within the broader actions of defamation and injurious falsehood.”⁶¹

Nevertheless, courts have been careful to distinguish between defamation dealing with reputation and feelings of an individual and reputation dealing with corporations and its products. "Since a corporation has no character to be affected by libel and no feelings to be injured, an article to be libelous as to a corporation must have a tendency to directly affect its credit or property or cause it pecuniary injury".⁶² "The action for defamation is to protect the personal reputation of the injured party as distinguished from an action for disparagement which is to protect the economic interest of the injured party against pecuniary loss."⁶³

It has long been established that a corporation has the legal status of a “person” under Fourteenth Amendment protections.⁶⁴ The courts have clouded the issue by looking to corporations as the equivalent of public figures, applying the *New York Times Co. v. Sullivan*⁶⁵ requirement of requiring actual malice to exist. The *New York Times* actual malice standard applies to both product disparagement claims and defamation claims in cases where the plaintiff is a public figure.⁶⁶

In *Bose v. Consumers Union of United States*,⁶⁷ Bose, an electronics manufacturer, sued following publication of an article by the defendant in which the sound of a particular Bose system was described as having sound that tended to wander "about the room." When respondent refused to publish a retraction, petitioner filed a product disparagement action in Federal District Court. The court ruled that petitioner was a "public figure," and therefore, pursuant to the First Amendment as interpreted in *New York Times Co. v. Sullivan*, to recover, petitioner must prove by clear and convincing evidence that respondent made a false disparaging statement with "actual malice." The District Court found actual malice to exist, however the Court of Appeals overturned the decision. The Court of Appeals decision was then affirmed by the Supreme Court.⁶⁸

While this standard may be applicable to false statements made with regard to scienter and intent, the *New York Times* standard should not apply with regard to actions affirmatively made by a corporation when competing with another corporation. Actions result from a conscious intent, while oral or written statements may cause allegations of disparagement due to offhand comments not intended for publication or from pure misinterpretation. It has long been established that disparagement, and by implication, injurious falsehood, could be evidenced through not only statements, but through courses of conduct.⁶⁹ In the Snooki opening scenario, hand bag manufacturers and designers made no oral or written statements regarding Snooki’s use of other companys' bags, but instead allowed published pictures, taken by independent third parties but sure to occur, to communicate the message they desired. This course of conduct cannot be considered anything other than calculated and intentional evidencing actual malice thus satisfying the *New York Times* standard. Further note that the Restatement (Second) of Torts § 623A includes a caveat which appears to negate the *New York Times* actual malice requirement with regard to injurious falsehood.⁷⁰ While one might argue that no false communications were directly made, courts have determined that even when the statements made by a defendant are not literally false, they rationalized that actual deception and confusion caused to the general public could be the basis of a successful cause of action.⁷¹

Disparagement and resulting injurious falsehood, similar to defamation, require communication or publication of the false statement or allegation.⁷² Written or oral statements can easily form the basis for communication simply by their public publication or utterance. Conduct can be much more subtle. In the “Snooki” scenario, one must ask why a designer would purchase competitors' products to send to Snooki, or those like her. The answer seems obvious. Their hope is to discredit and defame the quality of the competitor’s trade name and aura of respectability by associating the competitor’s products with unsavory, sleazy and unpleasant users whom they hope the general public would feel uncomfortable emulating.

Communication results from giving competitor’s products to Snooki, knowing that her every move is chronicled by competing paparazzi. Companies know that her use of the competitor’s products will be widely broadcast on both television and in print media. Even without an oral or written statement, the distinct design of a designer hand bag is easily recognizable to those with an interest. Such conduct, pursuant to the Restatement (Second) of Torts § 631⁷³ certainly qualifies as communication and certainly satisfies § 631 (c).

The most difficult hurdle that a plaintiff in a disparagement case must overcome is evidencing damages. Generally, special damages must be proven.⁷⁴ The Delaware Chancery Court, in *Pharmaceutical Product Development, Inc. v. Tvm Life Science Ventures Vi, L.P., Lux Ventures Ii, L.P.*⁷⁵, stated that “special damages in a tort action, refers to actual damages suffered as a result of a defendant’s wrongdoing. Special damages are similar to consequential damages in that special damages are those “which are the actual, but not the necessary, result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case, that is, by reason of special circumstances or conditions.”⁷⁶ The parties and the authorities seem to agree that consequential and special damages are in large part synonymous.⁷⁷

Therefore, in a disparagement scenario, a plaintiff would need to prove a loss in terms of sales or somehow evidence a loss of reputation or good will. In either case a plaintiff alleging loss of sales would need to prove a direct causal connection between the alleged disparagement and the damages suffered.⁷⁸

*Diamond Triumph Auto Glass, Inc. v. Safelite Glass Corporation*⁷⁹ involved a claim of false advertising causing disparagement of the plaintiff. When examining the issue of damages, the court determined that since a plaintiff “cannot obtain relief by arguing how consumers could react, it must show how consumers actually do react.”⁸⁰ Citing *Johnson & Johnson-Merck Consumer Pharm. Co. v. Rhone-Poulenc Rorer Pharm., Inc.*,⁸¹ the court stated that “the success of the claim usually turns on the persuasiveness of a consumer survey.”⁸²

Marketing practitioners agree that companies need to be able to protect their brand and brand equity. In the past, a brand played a relatively limited role in marketing; it served to merely identify and distinguish a certain product. Today, however, the corporate branding strategy has both magnified and amplified these functions by reversing the function of a trademark. In other words, instead of serving as a product identifier, branding strategies today make the trademark -- and the cultural identities associated with the mark -- the product itself.⁸³ “Today, branding strategies make up a significant portion of general corporate strategy; financial analysts claim that brand equity makes up a tremendous amount of company value.”⁸⁴

Lanham Act § 43(a) - (15 U.S.C.A. § 1125)⁸⁵

Unfair Competition

There are a number of statutes, both federal and state, which prohibit “unfair competition.” The Lanham Act and the FTC Guidelines Concerning Use of Endorsements and Testimonials in Advertising have specific provisions regarding deceptive practices in advertising and promotion.

The Lanham Act creates a cause of action for misrepresentation in commercial advertising or promotion so that trademark owners are able to protect the value of their marks and to prevent others’ use of these marks “in ways likely to confuse consumers into believing falsely that the markholder...approves of...or is otherwise affiliated with an unauthorized use of the mark.”⁸⁶ Owners of fashion trademarks spend resources developing a brand identity and establishing a reputation for producing high quality goods. Trademark law, therefore, protects not only the mark itself, but also “against confusion as to the markholder sponsorship or approval of a product or service.”⁸⁷

In order to establish a *prima facie* case of misrepresentation under the Lanham Act, the plaintiff must show that:

- (1) The defendant made a misrepresentation in commercial advertising or promotion concerning goods, services, or commercial activities;
- (2) The misrepresentation actually deceived or tended to deceive its recipients;
- (3) The misrepresentation was likely to influence purchasing decisions;
- (4) The misrepresentation injured or was likely to injure the plaintiff; and
- (5) Misrepresentation was made in commerce.⁸⁸

Could the practice of providing a competitor’s product to a negative endorser be interpreted as unfair competition? How could these elements met by the example given in the opening scenario?

Misrepresentation

Black’s Law Dictionary defines misrepresentation as “[a]ny manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts.”⁸⁹ The practice of sending a competitor’s product to a negative endorser gives the false impression that the person seen using the product has actually purchased the item and, by extension, is promoting its use. The practice at issue, creates an impression, or assertion, that is “not in accordance with the facts,” which can be interpreted as misrepresentation for purposes of the Lanham Act.

Promotion

Promotion is part of the classic “marketing mix” which consists of product, price, place, and promotion – the 4 P’s of marketing.⁹⁰ The promotional mix includes such elements as advertising, public relations, personal selling, and sales promotions. Product placement falls under the category of public relations. As one author notes, “Product placements are on a meteoric rise in the United States. Greater numbers of advertisers are looking for alternatives to traditional advertising avenues, in search of more effective ways to reach an ever-elusive audience.”⁹¹ The opening scenario presents an example of a negative form of product placement, giving the impression that the user of the pictured designer purse is endorsing it.

Likely to deceive

Turning again to Black’s Law Dictionary, the definition of deceit is “[a] fraudulent and cheating misrepresentation, artifice, or device, used by one or more persons to deceive and trick another, who is ignorant of the true facts, to the prejudice and damage of the party imposed upon.”⁹²

If the misrepresentation is established, the remaining requirement of this element would be that the recipient of the communication is or is likely to be deceived by the implicit message, i.e., that the person using the competitor’s product is, in fact, endorsing it. Product placement is subtle and sophisticated, and consumers are not always aware that they are being subjected to an advertisement or promotion. As one author notes, “Obliviousness to the act of advertising carries with it a number of negative consequences. Consumers may be compelled to buy products based on incomplete information.”⁹³ In other words, they are “ignorant of the true facts” and therefore deceived or likely to be deceived.

Likely to influence purchasing decision

Courts have interpreted the statutory language “likely to be damaged”⁹⁴ to mean “likely to influence a purchasing decision.”⁹⁵ This requirement has been met if a statement is found to be literally false. As one court stated, “It is not easy to

establish actual consumer deception through direct evidence. The expenditure by a competitor of substantial funds in an effort to deceive consumers and influence their purchasing decisions justifies the existence of a presumption that consumers are, in fact, being deceived.”⁹⁶ Unlike the tort of disparagement or injurious falsehood, there is no requirement under the Lanham Act to prove “special damages.”

Trademark Tarnishment - Trademark Dilution Revision Act (TDRA) of 2006⁹⁷

The TDRA replaced the earlier Federal Trademark Dilution Act of 1995 (FTDA), which required the claimant to produce actual evidence of dilution, as interpreted in the U. S. Supreme Court decision in *Moseley v. V. Secret Catalogue, Inc.*, 537 U.S. 418 (2003). The TDRA amends Section 43(c) of the Lanham Act to permit a trademark owner of a famous mark to file for an injunction against a person who “commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or *tarnishment* of the famous mark, regardless of the presence or absence of actual or likely confusion...” (emphasis added). The TDRA further provides that “dilution by tarnishment is association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.”⁹⁸

In addition to changing the dilution standard, the TDRA created additional fair use exceptions beyond the prior exceptions for news reporting and commentary. New fair uses include comparative advertising and “identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner.”⁹⁹ Any “noncommercial use of a mark”¹⁰⁰ is also specifically excluded from coverage.

Under the FTDA, courts interpreted tarnishment as a use by junior user “in a manner that could hurt the reputation of the senior user’s mark, i.e., it [was] the use of a trademark in a manner ‘totally dissonant with the image projected by the mark.’”¹⁰¹ A “junior” business, for example, could portray a trademarked product of a competitor “senior” markholder being used by a person with whom the senior markholder would not want its items to be associated.

It is unclear at this time whether tarnishment would be interpreted the same way under the Trademark Dilution Reduction Act. In one author’s opinion, “TDRA tarnishment focuses on the defendant’s use of the *defendant’s own mark*... It is not enough that a defendant use the famous mark in a distasteful way.”¹⁰² This view would require a plaintiff to show that the defendant used the plaintiff’s famous senior mark in relation to the defendant’s own goods, rather than merely reflecting the plaintiff’s product or mark in a disreputable manner that would tarnish the mark.¹⁰³ If courts adopt this viewpoint, then the cause of action for tarnishment would be significantly more difficult for senior trademark owners to prove for cases in which a competitor shows plaintiff’s product being used in a distasteful or disreputable manner but without claiming that the junior markholder has an association with the given product.

FTC Guidelines Concerning Use of Endorsements and Testimonials in Advertising

The FTC defines “endorsement” as “any advertising message (including... likeness or other identifying personal characteristics of an individual...) that consumers are likely to believe reflect the opinions of a party other than the sponsoring advertiser...”¹⁰⁴ If a marketing campaign uses a celebrity endorsement as a part of its promotional mix, the endorsement “must reflect the honest... experience of the endorser.”¹⁰⁵ Furthermore, advertisers may be liable for “false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers.”¹⁰⁶

There seem to be no specific prohibitions for the type of negative endorsement or “negative product placement” that is described in the opening scenario. In this type of situation, what company would be considered the sponsors of the “marketing campaign” in which a competitor’s product is sent to a negative role model? Could the company contributing the product be liable for “false or unsubstantiated” statements made by giving the impression that the end user of the product is endorsing the product through its use or placement?

Furthermore, § 255.1 provides that “an endorsement may not convey any express or implied representation that would be deceptive if made directly by the advertiser.” In the case of negative product placement, the implied representation would be that the celebrity who is depicted using the competitor’s product endorses that product and that the seller of that product agreed to have this celebrity make the endorsement. If the “advertiser” is, in fact, a competitor who places a product in the hands of a negative endorser, this placement violates § 255.1, since a direct express statement such as “Snooki uses Brand X and is a celebrity endorser” would be deceptive.

The FTC is empowered to administer the FTCA. Its powers were further extended by the Wheeler-Lea Act of 1938.¹⁰⁷ Elements of deceptive trade practices have been interpreted as: “(1) there was a representation; (2) the representation was likely to mislead customers acting reasonable under the circumstances; and (3) the representation was material.”¹⁰⁸ “[M]ateriality requires neither reliance on the misrepresentation nor an injury. When a fact is misrepresented intentionally, the FTC can infer that the misrepresentation is material.”¹⁰⁹ Moreover, if the FTC has reason to believe that a party has violated a part of the FTCA, it may request an injunction to stop the practice, pending the outcome of an administrative hearing.

Conclusion

How much does “celebrity” affect consumer behavior? “They have come to embody abstract issues or points of view, and are shorthand forms for ideals or expertise.”¹⁰ Positive role models are good business for sellers, negative role models, by implication, could easily harm a business and its brand. Companies abandoned Tiger Woods when his marital problems surfaced. Gilbert Gottfried recently lost a huge contract as the voice of Aflac Insurance after tweeting tasteless jokes following the earthquake and tsunami disasters in Japan. Companies choose not to associate with those who could tarnish their image and harm their brand. It should be an actionable tort to nefariously deceive the public by engaging in conduct that leads the public to believe that a “celebrity” with a negative image is in any way affiliated with a competitor.

These types of deceptive advertising practices should also be regulated under the Lanham Act, the Trademark Dilution Revision Act, and FTC Guidelines Concerning Endorsements. While ethical standards promoted by such groups as the American Marketing Association, the Word of Mouth Marketing Association, and the Public Relations Society of America either implicitly or explicitly require their members to reveal sponsors of promotional campaigns, they have done little to curb stealthier methods of endorsement and product placement. Persons who are injured by deceptive advertising practices should be able to rely on the legal system to enjoin these deceptive practices and to grant monetary relief for damages incurred through the use of negative product placement.

Footnotes

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⁵⁷ Disparagement defined:

A statement is disparaging if it is understood to cast doubt upon the quality of another's land, chattels or intangible things, or upon the existence or extent of his property in them, and

(a) the publisher intends the statement to cast doubt, or

(b) the recipient's understanding of it as casting the doubt was reasonable.

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⁶⁴ *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886).

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⁶⁷ 466 U.S. 485 (1984).

⁶⁸ *Id.*

⁶⁹ *Coronado Development Corp. v. Milliken*, 175 Misc. 1, 22 NYS2d 670 (1940).

⁷⁰ The Institute takes no position (emphasis added) on the question of:

(1) Whether, instead of showing the publisher's knowledge or reckless disregard of the falsity of the statement, in clause (b), the other may recover by showing that the publisher had either (a) a motive of ill will toward him, or (b) an intent to interfere in an unprivileged manner with his interests: or

(2) Whether either of these alternate bases, if not alone sufficient, would be sufficient by being combined with a showing of negligence regarding the truth or falsity of the statement.

⁷¹ *Id.*, citing *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 171 (3d Cir. 2001).

⁷² 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:102 (4th ed. 2003). "A cause of action for commercial disparagement requires that the disparaging statement about another's product be published."

⁷³ One who publishes an injurious falsehood is subject to liability for harm resulting from its repetition by a third person, if, but only if,

(a) the repetition was authorized or intended by the original publisher, or

(b) the third party was privileged to repeat it, or,

(c) the repetition was reasonably expected.

⁷⁴ Fred T. Magaziner, *Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation*, 75 COLUM. LAW REV. 963 (1975).

⁷⁵ (Del. Ch. Feb. 16, 2011) not yet reported.

⁷⁶ *Id.*, citing: BLACK'S LAW DICTIONARY 354 (5th ed. 1979) (citing *Twin Coach Co. v. Chance Vought Aircraft Inc.*, 163 A.2d 278, 286 (Del. Super. 1960)).

⁷⁷ *Id.*, citing: CORBIN ON CONTRACTS § 56.6 at 105-06 (2005); 24 WILLISTON ON CONTRACTS § 64:12 (4th ed. 2010).

⁷⁸ *Waste Distillation Technology, Inc. v. Blasland & Bouck Engineers, P.C.*, 136 A.D.2d 633, 633, 523 N.Y.S.2d 875, 876 (2d Dep't 1988).

⁷⁹ 441 F. Supp. 2d 695 (2006).

⁸⁰ *Castrol v. Pennzoil*, 987 F. 2d. 939, 943 (3d Cir. 1993). Quoting *Sandoz Pharm. Corp. v. Richardson-Vicks, Inc.* 902 F.2d. 222, 226 (3d Cir. 1990).

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⁸⁵ § 1125. False designations of origin, false descriptions, and dilution forbidden

(a) 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 –

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- (A) 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
- (B) 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.

⁸⁶ Elizabeth L. Rosenblatt, *Rethinking the Parameters of Trademark Use in Entertainment*, 61 FLA. L. REV. 1011 at 1018 (December, 2009).

⁸⁷ *Id.*, at 1019.

⁸⁸ See Robert Michael Ey, *Cause of Action Under § 43(a) of Lanham Act [15 U.S.C. § 1125] for Misrepresentation in Commercial Advertising or Promotion*, 22 CAUSES OF ACTION 365 (updated 2010).

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⁹⁸ 15 U.S.C.S. § 1125(c)(2)(C).

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¹⁰³ *Id.*

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¹⁰⁵ 16 C.F.R. § 255.1(a).

¹⁰⁶ 16 C.F.R. § 255.1(d).

¹⁰⁷ 15 U.S.C. § 45(a)(1). "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."

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